

The Evolving Language of Diversity and Integration in Discussions of Affirmative Action from *Bakke* to *Grutter*

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In December 1997, Barbara Grutter brought a lawsuit challenging the constitutionality of the University of Michigan Law School's admissions policy. In June 2003 the United States Supreme Court issued its opinion in *Grutter v. Bollinger*, definitively rejecting that challenge. I served as dean of the Law School throughout the five-and-one-half-year litigation, and my role gave me many opportunities to reflect on the different factors that have made affirmative action such a difficult issue.

As one of the university's public representatives throughout the litigation, I was often called upon to speak and write about the case. It was important to me that I be able to speak consistently—describing the issues in the same terms, regardless of whether my immediate audience was supportive or critical of our admissions policy. It was important that I be able to speak consistently with our published admissions policy. It was important that I be able to speak consistently with our court submissions. And it was important that I be able to speak in a way that I felt authentically captured the complexities of the issues.

As I returned to the topic again and again, I found this to be an exceptionally challenging exercise. What made the topic so difficult

was the way in which Justice Powell’s opinion in *Bakke* had restricted the terrain on which university officials could address affirmative action. A language that speaks only about the “educational benefits of diversity” offers an incomplete vocabulary for talking and thinking about race and higher education. Over the duration of the lawsuit, therefore, I heard my own voice evolve.

Most Americans resonate with the ideal of color blindness—that public and private institutions, and even individuals, should not allow their conduct toward a person to be influenced by that person’s race or ethnicity. That ideal has found expression in many corners of our society, most notably in the legal doctrine that has interpreted the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Under that doctrine, departures from color blindness are not necessarily unlawful, but (to use the legal terms of art) they are always “suspect”; they demand justification in the form of a “compelling interest.”

As I worked alongside many others to explain why, in the context of university admissions, carefully crafted departures from the ideal of color blindness can be both lawful and appropriate, I found myself referring more and more to an ideal that seems today to carry more resonance with most Americans than the pedagogic notion of diversity. More and more, I invoked the vocabulary of integration. The word *diversity* can feel somewhat one-dimensional, connoting only a property of racial heterogeneity that may or may not exist in a particular place at a particular moment in time. At least today, the word *integration* does a better job of capturing the special importance to our country of undoing the damaging legacy of laws and norms that artificially separated citizens from one another on the basis of race. The enduring scars left by that history pose the greatest practical challenge to our nation’s prosperity and, for many, to its democratic legitimacy.¹

A close reading of the Supreme Court’s opinion upholding our admissions policy reveals that, over the span of twenty-five years

from *Bakke* to *Grutter*, the Court underwent a similar evolution. Justice Powell's opinion in *Bakke* was succeeded by an opinion for the Court that drew on a more satisfying, weightier justification for universities' departure from color blindness. The "compelling interest" is about more than just pedagogy. It is about the fundamental legitimacy of America's approach to distributing educational opportunity.

In this essay, I will trace the parallel evolutions of the vocabulary of Supreme Court doctrine and my own discussions of affirmative action in my role as a law school dean. I will begin with Justice Powell's opinion in *Bakke* and end with Justice O'Connor's opinion in *Grutter*. In between, I will discuss the admissions policy adopted by the University of Michigan Law School in 1992 that became the subject of the litigation and then reflect on several of my own public statements over the course of the litigation. I will suggest that the overall movement in vocabulary over the course of the litigation—from diversity to integration, pedagogy to democratic legitimacy—is a healthy movement for constitutional doctrine, higher education, and public discussions of race and ethnicity.



Justice Powell's opinion in *Bakke* defined the legal background for university admissions policies after 1978. In his opinion, Justice Powell endorsed one particular understanding of why universities have a compelling interest in enrolling a racially diverse student body. He recognized that diversity has *pedagogic* benefits. His opinion describes an environmental condition that enhances students' opportunities to learn.

Justice Powell began with a general observation, "The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body" (*Regents of the University of California v.*

Bakke, 438 U.S. 265, 312–15 (1978)). For this proposition, he relied upon the trenchant comments of the then-president of Princeton University, William Bowen:

[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, “People do not learn very much when they are surrounded only by the likes of themselves.” . . .

In the nature of things, it is hard to know how, and when, and even if, this informal “learning through diversity” actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth. (*Bakke*, 312–13 n. 48, quoting Bowen, “Admissions and the Relevance of Race,” *Princeton Alumni Weekly*, Sept. 26, 1977)

Justice Powell declared that a university’s desire to nourish such an atmosphere of speculation implicates the values of the First Amendment, values that respect a university’s interests in defining itself as an institution and in becoming the kind of school it aspires to be:

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the “robust exchange of ideas,” petitioner invokes a countervailing

constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission. (*Bakke*, 312–13)

He went on to endorse the idea that the existence of a diverse student body offers pedagogic benefits for professional schools as well as undergraduate colleges (*Bakke*, 313–14):

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In *Sweatt v. Painter*, 339 U.S., at 634, the Court made a similar point with specific reference to legal education: “The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.”

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

After recognizing that this pedagogic interest in diversity can be compelling, Justice Powell went on to note that such an interest nevertheless cannot justify any and all admissions policies that promote it. A policy that categorizes students on the basis of race must

do so in a manner (to use another legal term of art) that is “narrowly tailored” to the pursuit of that interest. It must honestly recognize that racial and ethnic diversity is not the only kind of diversity that has such pedagogic value. “The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element” (*Bakke*, 315). The university must employ a capacious understanding of what constitutes “beneficial educational pluralism,” consider “all pertinent elements of diversity,” and “place them on the same footing for consideration, though not necessarily according them the same weight” (*Bakke*, 317). Such a policy must not insulate any applicant from comparison with all other applicants; rather, it must attempt to “treat[] each applicant as an individual” and evaluate that individual’s “combined qualifications” for admission (*Bakke*, 318).



During the academic year 1991–92, I served as one of the junior members of a faculty committee charged with revising the Law School’s admissions policy. Part of our mandate was to produce a policy that was lawful under the guidelines established by Justice Powell. We sought to develop a policy that would incorporate this pedagogic vision of diversity into a general philosophy of admissions that accurately captured our own definition of ourselves as an institution and linked our admissions process to our more general efforts to become the kind of law school we aspired to be. And we attempted to devise a system that would carry that philosophy forward into the daily work of an admissions office.

The policy begins with a paragraph that expresses complex and multiple aspirations:

Our goal is to admit a group of students who individually and collectively are among the most capable students applying to

American law schools in a given year. As individuals we expect our admittees not only to have substantial promise for success in law school but also to have a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others. Michigan has many alumni who are esteemed legal practitioners, leaders of the American bar, significant contributors to legal scholarship and/or selfless contributors to the public interest. Those we admit should have the potential to follow in those traditions.

The paragraph does three important things. First, it associates Michigan with the twin ideals of “success” and “contribution.” Second, it recognizes that success and contribution are to be found in widely diverse domains of endeavor. And third, it endorses the view that the admissions process entails an assessment of an individual’s “promise” or “potential” to succeed and contribute.

The next paragraph of the policy relates the goals for the admissions process to the mechanisms through which law students learn—mechanisms that move far beyond the classroom and that reflect both the individual qualities of students and their dynamics as a group.

Collectively, we seek a mix of students with varying backgrounds and experiences who will respect and learn from each other. We hope our students will find in their peers both rich resources for learning and the kind of sustaining friendships that help in getting over hard times and make the good times yet more pleasant. We hope professors will see in their students one of the rewards of teaching at this school. In the classroom setting the educational experience depends in large measure upon the quality of student performance. Many law school classes depend on prepared and articulate students to advance the discussion, and in all classes perceptive, original observations can teach both faculty and students alike. We also recognize that much that is educationally valuable occurs not in the

classroom but in informal conversations and in the more formal activities of numerous student organizations such as Michigan's many law journals, various ethnic-, religious-, and gender-focused groups, numerous practice-oriented and law-specialty societies and diverse political groups of the left, right and in between. As a group our students have the responsibility for maintaining and changing this vibrant extra-curricular life in ways that respond to their own needs and concerns. At the admissions stage we value people who have shown the capacity to be self-educating and to contribute to the learning of those around them.

Having framed its goals in this general manner, the admissions policy then proceeds to provide more specific guidance to the admissions office. Reflecting the individual and collective nature of the education offered by the school, it establishes two preliminary principles for admissions that consider candidates both as individuals and as members of a group. The first (individual-focused) principle is that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems." The second (group-focused) principle is that "a reasonable proportion of our places should go to Michigan residents, even if some have qualifications lower than those of some [rejected] applicants from outside Michigan."

The minimal principles—individual academic qualification and representation of Michigan residents—define somewhat rigid boundaries for the evaluative work of the admissions office. The remainder of the policy (which accounts for thirteen of the sixteen pages) discusses what the admissions office should do within those boundaries. That discussion unfolds in three stages, carefully tracking the vision of Justice Powell. They discuss in general terms the weight to be given the various qualities of an individual candidate. They relate those considerations to the pedagogic interest in having a class that is diverse in every sense of the word. And they situate

the Law School's interest in having a racially diverse class within the frame of that broad pedagogic interest.

The first stage of the discussion of how judgment should be exercised within the boundaries of individual academic qualification and representation of Michigan residents concerns the individual student's potential to excel academically:

We begin with the individual and the goal of maximizing competence. Our most general measure . . . of the likelihood of a distinguished legal career is success in law school as operationalized by graded law school performance. [And our] most general measure predicting graded law school performance is a composite of an applicant's LSAT score and undergraduate grade point average [known as the "index"]. . . .

[T]he higher one's index score, the greater should be one's chances of being admitted. . . . Still, even the highest possible score ought not guarantee admission: imagine an applicant whose undergraduate course selection seems relentlessly dull, whose personal statements and LSAT essay are thin or incoherent, and whose letters of recommendation damn with faint praise. And even a quite low score ought not automatically deny a candidate admission: for again one can imagine dramatically offsetting considerations.

When the differences in index scores are small, we believe it is important to weigh as best we can not just the index but also such file characteristics 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. . . . [S]ome students will qualify for admission despite index scores that place them relatively far from the upper right corner of [a grid that plots students' undergraduate grades and test scores]. . . . [T]here are students for whom we have good reason to be skeptical of an index score based prediction.

The second stage of the discussion of how judgment should be exercised within the boundaries of individual academic qualifi-

cation and representation of Michigan residents concerns the collective diversity of the class, with diversity understood in its broadest sense.

Other information in an applicant's file may add nothing about the applicant's likely LGPA beyond what may be discerned from the index, but it may suggest that that applicant has a perspective or experiences that will contribute to the diverse student body that we hope to assemble. The applicant may for example be a member of a minority group whose experiences are likely to be different from those of most students, may be likely to make a unique contribution to the bar, or may have had a successful career as a concert pianist or may speak five languages. . . .

[A]dmitting students with indices relatively far from the upper right corner . . . may help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts. In particular we seek to admit students with distinctive perspectives and experiences as well as students who are particularly likely to assume the kinds of leadership roles in the bar and make the kinds of contributions to society discussed in the introduction to this report. (We reiterate, however, that no student should be admitted unless his or her file as a whole leads us to expect him or her to do well enough to graduate without serious academic problems.)

There are many possible bases for diversity admissions. During the past year for example the Admissions Committee, influenced by diversity considerations, has recommended the admission of students like the following. . . .

Other bases for such admissions decisions will also come readily to mind, although different faculty members will, no doubt, think of different achievements or characteristics they would value. One might, for example, give substantial weight to an Olympic gold medal, a Ph.D. in physics, the attainment of age 50 in a class that otherwise lacked anyone over 30, or the experience of having been a Vietnamese boat person.

The third and final stage of the discussion of how judgment should be exercised within the boundaries of individual academic qualification and representation of Michigan residents concerns the importance of racial and ethnic diversity within the context of diversity understood in its broadest sense:

There is, however, a commitment to one particular type of diversity that the school has long had and which should continue. This is a commitment to 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. These students are particularly likely to have experiences and perspectives of special importance to our mission.

Over the past two decades, the law school has made special efforts to increase the numbers of such 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.

While one of our goals is to have substantial and meaningful racial and ethnic diversity, we do not, as we have already indicated, mean to define diversity solely in terms of racial and ethnic status. Nor are we insensitive to the competition among all students for admission to this law school.

During the litigation, much attention was paid to the term “critical mass,” and whether it might somehow have been intended to smuggle a quota-based system into the policy. (It wasn’t, and the Supreme Court’s opinion held as much.) For purposes of this essay, however, I would like to concentrate on the first paragraph

and its reference to groups that have been discriminated against. It provides a clear example of the way in which the legal framework established by Justice Powell's opinion in *Bakke* channeled the way we thought and spoke about university admissions.

The sentence in question identifies African Americans, Hispanics, and Native Americans as three groups that share two properties: (a) they were historically discriminated against, and (b) today they would not be present at the Law School in meaningful numbers without some conscious attention in the admissions process. It is important to appreciate that, under the logic of the admissions policy, those two properties were not thought sufficient, in and of themselves, to establish a basis for the use of affirmative action. Affirmative action was not predicated upon a desire to make up for historic discrimination, nor by a desire to maintain a numerical balance among the races of attending students. Rather, the fact of historic discrimination was significant only because it is part of what makes racial diversity a pedagogically meaningful kind of diversity within a law school (unlike, for example, diversity of middle initials). That is why the last sentence of the paragraph identifies students from these groups as being "particularly likely to have experiences and perspectives of special importance to our mission." Similarly, the fact that meaningful numbers of minority students could not be enrolled without affirmative action was not significant for its own sake, nor did it matter whether historic discrimination was the cause of any group's current underrepresentation. Under the policy, all that mattered was that without affirmative action pedagogically meaningful diversity could not be achieved.



Our admissions policy was adopted by the full faculty in 1992. In 1997, the Center for Individual Rights (CIR) filed a lawsuit on behalf of Barbara Grutter, challenging the constitutionality of that policy.

The day after the lawsuit was filed, I wrote a letter to many of

our most important and loyal graduates, setting out the position we intended to follow in the litigation. In the portion of the letter discussing the merits of our position, I wrote:

As to CIR's legal argument, I am confident that our admissions policy is constitutional. Justice Powell's opinion in *Regents of the University of California v. Bakke* affirms that the Fourteenth Amendment does not bar universities from choosing, in the exercise of their sound educational discretion, to adopt admissions policies like ours. I believe that the Supreme Court should not, and will not, use this lawsuit to change the law and eliminate universities' authority to decide whether to make appropriate use of racial diversity as one of many factors in admissions.

As to how that authority is exercised, I believe that our admissions policy . . . helps us to offer the best possible educational environment. *The Law School strives to cultivate in our students the ability to understand an issue from many perspectives.* Students develop this ability through their interactions with the faculty and with one another, inside and outside the classroom.

Race matters in American society, but it is not all that matters. Americans of different races have different experiences that predictably lead them to bring different insights to the study of legal issues as diverse as property law, contract law, criminal justice, social welfare policy, civil rights law, voting rights law, and the First Amendment. At the same time, racial background does not preordain one's views. *A diverse student body allows students to appreciate this complex but important social reality.*

Racial diversity is one of many forms of diversity that we value, and one of many factors in our admissions decisions. Our admissions office does not use quotas; the percentage of students of different races varies noticeably from year to year. And we consider diversity within the larger context of admitting only students whom we expect to become outstanding lawyers.

We believe that the judgment we exercise in admissions is affirmed by the quality of the intellectual experience that our students enjoy, and by the achievements and contributions that

our graduates have made to our society after leaving Ann Arbor. Law School graduates of all races have distinguished themselves as partners in major law firms, holders of federal and state elective office, judges and justices, and senior business executives.

We expect to prevail in this litigation. If we were not to prevail, the lesson from Texas and California is that we would witness a dramatic reduction in the number of African American and Latino students, well qualified for the study and practice of law, who are enrolled in the nation's top law schools. *Such an outcome would be significantly detrimental to the quality of education that we provide.* (Emphasis added)

In hindsight, I find this letter interesting both for what it did and for what it did not do. It tracked closely the terms of the admissions policy itself. It explained the educational goal of legal education (helping students to see problems from multiple perspectives) and the way diversity within the student body promoted that goal. But the letter did not acknowledge the societal cost that follows from any departure from strict color blindness. It did not use the general vocabulary of integration to describe the value that justifies that departure in this case. And it did not explain why a rigidly color-blind admissions policy could not produce a meaningfully integrated entering class.

During the following eighteen months, I was constantly working on the case. The process of discovery was lengthy, involving the production of documents pertaining to our admissions process as well as depositions. I met with newspaper editors to discuss our position. And I had countless conversations with concerned alumni-graduates who loved the Law School but who needed reassurance that we were doing the right thing.

Throughout those conversations, I was impressed with the powerful feelings of ambivalence that many people feel about affirmative action. Not surprisingly, it sometimes triggered very personal fears that they or their children might not be able to enjoy as many

life opportunities as they would like. But even when the issue was not felt as a personal issue, many of the people I spoke with felt deeply torn. Using race as a category felt problematic and dangerous. But failing to do so in these circumstances felt just as bad, or worse. I came to believe that it was important for us to speak directly of the conflict between the two attractive ideals of color blindness and integration.

In April 1999, I began to try out such an approach in a speech at a gathering about racial unity where I knew most of the audience supported our position in the litigation. As I prepared to address that audience, I recognized clearly that Justice Powell's academic discussion of diversity provided only a partial explanation for why affirmative action remains necessary. I therefore decided to invoke affirmative action's role in a larger project of integration:

In the end, we will prevail only if we persuade our adversaries of a fundamental but painful fact about America. And that is, in this country, racial integration does not happen by accident. . . .

[O]ur adversaries say that if the Law School ran a colorblind admissions process, most of those 25 seats [occupied by African Americans within a total class of 339] might have gone to white people. That might not have made a difference for 1000 disappointed applicants. But maybe it would have for 15.

And that is precisely my point.

300 years of chattel slavery and 100 years of *de jure* segregation left our country enfeebled. The changes in our legal order that were brought about in 1954 and 1964 were not enough to make that history irrelevant. Not in five years, not in twenty-five years, not in forty-five years.

At the end of the millennium, racial integration in America still does not happen by accident.

Housing in America is hypersegregated by race. According to historian Thomas Sugrue, who is going to testify as an expert in our lawsuit, Detroit is more segregated in 1990 than it was in 1960.

Wealth, opportunity, education, and preparation for law school are not distributed colorblind in America in 1999.

And so we have seen in Texas and California that if a school like ours is prohibited from placing a positive value on having a racially integrated student body, it will not be integrated.

Interestingly, I did not feel comfortable stopping there. After making points that were not part of the “script” furnished by Justice Powell’s opinion in *Bakke*, I returned to that script to explain exactly how our admissions process operated:

The CIR lawyers argue that we should not worry about that. That we should fill in our class according to students’ “numbers”: their undergraduate grade point average and their LSAT test score.

We rely on undergraduate grade point averages and test scores. They do a respectable job of predicting how well someone will do in law school.

But that is not all we rely on.

We look at whether applicants took hard or easy courses. We look at whether they took more demanding or less demanding subjects. We look at whether they attended more competitive or less competitive schools.

We look at how well they write essays. We look at what their professors say about them in letters of recommendation.

And we think about what they will add to the class. We think about what they will add to the profession. We think about what they will add to society.

Because we don’t have enough seats for everyone who might be able to do the work. We have to allocate them.

And part of how we allocate them is to promote diversity within our school. Because it’s easier to learn how to be a good lawyer if you are interacting with people who are different from yourself. Everyone who attends our law school is better off if we are diverse.

And so we look for diversity of talents. Diversity of experiences. Diversity of undergraduate majors. Diversity of state and city and urban/rural background. And we look for diversity of race.

Then, by way of conclusion, I attempted to draw the two aspects of the speech—the discussion of integration and the discussion of diversity—together into a unified whole. In so doing, I wanted to remind my audience that, in using affirmative action, we were compromising an ideal of color blindness that was important to us as well:

If we did not consider race, we would not be an integrated and diverse school. Racial integration does not happen by accident.

Our adversaries say that it is OK for us to seek diversity in these other dimensions. It is OK for us to consider these features of the individuals who apply for admission. They just want us to slice off one attribute. They want us to try to slice off people's race, and consider them as raceless beings.

And our adversaries are surely right to remind us that, in the long sweep of history, race has been used in pernicious ways. And there is a cost to relying on that category, even though we are doing so for positive reasons. If racial integration could happen by accident, we would prefer not to rely on racial categories in our admissions process. If there were another path to diversity, we would take it.

Maybe some day there will be. Maybe some day white children and black children will really grow up together, in the same neighborhoods, on the same blocks, at the same schools. I hope that our adversaries will work with us to hasten that day.

But that day is not yet here. And pretending that it has arrived will not make it so. Racial integration does not happen by accident. It only happens when people act, affirmatively, to bring it about.



The trial in our case took place in the winter of 2001. That summer, I was asked to write an op-ed as part of a pro-and-con exchange in a journal of higher education called *Matrix*. By that time I had grown accustomed to highlighting the attractions of both color blindness and integration. In that particular op-ed piece, I chose to do so at the very beginning, using the vocabulary of cognitive dissonance.

The psychological literature on cognitive dissonance is familiar and occasionally startling. Experimental subjects who discover an inconsistency between two beliefs will feel tension. They will sometimes alter those beliefs, disregarding evidence if necessary, to relieve that tension.

The debate about affirmative action triggers cognitive dissonance for many people, forcing them to confront an inconsistency between the following beliefs:

- The very finest institutions of higher education should have more than token levels of racial integration.
- The very finest institutions of higher education should make admissions decisions in a rigidly colorblind manner.

Tension arises because today, at the start of the twenty-first century in the United States of America, it is not possible to achieve more than token levels of racial integration at the very finest institutions of higher education by making admissions decisions in a rigidly color-blind manner.

Why is that? One among the many important reasons is that people of different races still tend to grow up in separate worlds. For hundreds of years, American culture and often American law required children of different races to live separately; only during the past forty years has integration been legally permissible everywhere. Moreover, during the past four decades behav-

ioral change has been slow. Ours is not yet a society where integration happens accidentally.

Nor can we yet say that opportunity is distributed in a colorblind manner. It is not yet true that newborns of all races can be expected to receive equal investments in their preschool, elementary, and secondary education. It therefore should not surprise us that the applicant pool at the highest levels of academic competition is not as diverse as the census shows our nation to be.

It is natural to wish that things were different. To wish that we could be colorblind and integrated, if only universities would try harder, or be more creative, or . . . But if it were possible, we would have done those things long ago. In truth teachers and admissions officers and regents do not like the choices that reality imposes any more than ordinary citizens or judges do.

And so we must choose: Integration or Colorblindness.

In the middle portion of the article, I returned to a defense of the manner in which our policy pursued integration, using the parameters established by Justice Powell's opinion in *Bakke*. I tried to be more explicit than I had been before about the precise link between *legal* education and classroom diversity:

By studying law in an integrated environment, our students are better prepared to practice law, to enact laws, and to interpret laws in an integrated society. An outstanding lawyer has an exceptionally well-tuned capacity to engage sympathetically with arguments that are opposed to his or her own beliefs. At the very best law schools, we nurture that capacity. Each day we require students to interact with one another, and to come to understand why—even though they are all extraordinarily bright and articulate—they do not all see the world in the same way. Over the course of three years, they begin to internalize each other's perspectives, so that they become accustomed to holding several inconsistent perspectives on an issue in their minds at the same time.

At this point in the public debate about the lawsuit, our critics had begun to emphasize one seeming paradox about a defense of affirmative action that stressed the pedagogic benefits of diversity. How could we be confident that affirmative action would promote more varied perspectives in the classroom without assuming that a person's race dictated his or her beliefs? Were we not relying on the very stereotypes that we were hoping to break down? At the end of the *Matrix* article, I addressed that concern directly:

In America today, an individual's race has an important impact on his or her life experiences. It does not necessarily determine that person's ideology or ultimate position on any given policy question. But it is likely to inform the distinctive voice that each of us uses to describe the world we observe. For that reason, a racially diverse classroom tends to offer distinctive benefits for the study of law that are much less likely to be experienced in a more homogeneous classroom.

My experience as a teacher tells me that those benefits are invaluable. And yet I do not mean to suggest that there are no costs to choosing integration over colorblindness. I believe we should all hope for the day when we no longer need to make that choice. But until that day dawns, I also believe we must continue to act, affirmatively, to promote the kind of integrated educational environments through which students are prepared to become sophisticated actors in a diverse, complex society.



As the litigation wound its way through the courts, it came to acquire ever greater symbolic significance in the public eye. At each stage—during the trial in the district court, after the district court ruled against us, and especially after the court of appeals ruled in our favor—it became more and more evident that this would be the case in which the Supreme Court revisited *Bakke*. Along with

that progression came an escalation of the rhetoric about the importance of the case.

Perhaps not surprisingly, critics of our policy took to describing it (and us) in exaggerated terms. They mischaracterized it as a “quota” system, and we were called everything from “nuts” to “racists.” Just as distressingly, however, *supporters* of our policy also began to exaggerate its significance in the history of racial progress in America.

When, in April 2003, the Mexican American Legal Defense and Educational Fund invited me to be the keynote speaker at its annual awards dinner in Chicago, I had the opportunity to incorporate all of the themes that we had developed over five years of litigation into a single address. I thought it important to begin by warning against the dangers of being excessively grandiose about the case and casting affirmative action in higher education as a significant element in the struggle to right past wrongs. Affirmative action as it is practiced in higher education is not an effort to redress history’s injustices. It is at most a pragmatic effort by today’s universities to reflect contemporary values and commitments. Integration is a motivating ideal, but it is limited by and balanced against other ideals:

It has been suggested that I helped to draft a policy that constitutes an important step in the fight for racial justice in America. And in all humility and in all gratitude to those who have said such things, I want to say that such praise is not appropriate and is potentially dangerous. . . . [O]ur admissions policy is not about corrective action, either in its design or in its effect. It is not about racial justice in that sense. . . . No. Our admissions policy resonates with a very different mix of values. It is individualistic. It is meritocratic. It is self-interested. It is, at its core, pragmatic.

Our admissions policy demands that no applicant, of any race, be offered admission unless he or she has the ability to suc-

ceed in an intellectual endeavor that is as demanding as one can find anywhere in higher education. It doesn't matter how much injustice an applicant has experienced in the course of a lifetime. If she can't cut it in our classroom—not just some hypothetical classroom, but our classroom—then she will not be admitted.

I reviewed the by-now-familiar structure of our admissions policy, and discussed the limited role that a concern for racial integration plays within it.

[O]ur interest in having a critical mass of students from different minority groups can be, and has been, attacked as a timid one. For it is considered in context. It is balanced in the case of individual applicant files against other candidates' potential contributions to the collective competence of the class. And so we have never in fact had a critical mass of Native Americans in our class. Even though we reject a majority of Native American applicants every year, just as we reject a majority of applicants of all races every year. And the number of African Americans and Latinos in any given class has swung wildly up and down from year to year, depending on the applicant pool.

Only then did I turn directly to the strongest arguments that were being leveled by our critics. I tried to frame those concerns forcefully and sympathetically, and to ground our responses in a set of widely shared ideals.

So why is CIR so angry with us? Why is it OK for us to take into account whether someone is the child of an alumnus, but not whether the class has a meaningful degree of racial integration? Why is it OK for us to consider the contribution that an applicant's experience traveling the world might make to collective competence, but not for us to consider the contribution racial diversity might make to collective competence?

To our critics, the point is that race is different. To our crit-

ics, the fundamental evil of American history has been race-consciousness as opposed to colorblindness. To our critics, the society as a whole is entirely too race-conscious, and it is our special duty as a public institution to set the right example. If the University of Michigan Law School leads the way to rigid, unflinching colorblindness, say our critics, then the rest of the world will follow. If we fail to set a good example, then our society will continue to wallow in racism.

Now I understand this argument. I get the point. I respect the legitimacy of a colorblind ideal.

Having framed this argument and having conceded its force, I then offered two responses. The first questioned the extent to which university admissions policies affect the overall degree of race consciousness in our society:

[T]he unflinching colorblindness argument reflects a kind of utopian wishful thinking that has no connection with the real world. Would rigid colorblindness in admissions to the University of Michigan Law School really hasten the arrival of a general, society-wide colorblindness? Does the society as a whole really care that much about how we run our admissions process?

We're really not that influential. If tomorrow all the universities in America were to announce, with tremendous fanfare, that we will henceforth be rigidly colorblind, I venture to say that we would inspire no change in the level of race consciousness in society. Affirmative action did not create race consciousness and it is not the linchpin that sustains it. It merely responds to a phenomenon that is much larger than we are.

My second response was to invoke the need to balance our commitment to color blindness with our commitment to integration:

[T]he unflinching colorblindness argument . . . depends upon a naïve and simple vision of the world, in which we have only one

goal. But that is not true. Our world is difficult and complex. We have many goals. One of them may be colorblindness. But surely a second goal is integration.

How many newspaper stories have we seen over the past decade, expressing a sense of despair at how slow the progress towards integration has been? How many books have been written lamenting the continuing levels of residential segregation in this country, the hesitancy of people to reach out and form friendships across the color line?

Of course, the reason for the tone of despair is that this really is an ideal that we treasure. We really do know that our nation must continue to integrate if we are to prosper in a global economy. And even though progress has been slow, it has also been steady. We are a more integrated society today than we were in 1964. Indeed, even our harshest critics, people like Stephan and Abigail Thernstrom, and Ward Connerly, have praised the ideal of integration.

At this point in my talk, I felt it necessary to address an argument that our critics had begun to advance aggressively in 2002 and 2003. When people experience cognitive dissonance, it is normal for them to try to find ways to resolve the tension without abandoning either of their competing allegiances. In the affirmative action debate, that meant trying to find a way to believe that one could have both color blindness and integration. If that were so, one could oppose affirmative action without opposing integration.

The mechanism that was suggested at the end of the litigation was the so-called percentage plan, under which a university would commit to admit all applicants whose high school grades put them within the top 10 percent of their own high school class. No such mechanism had ever been attempted at the level of graduate or professional schools. And in the undergraduate programs where it had been attempted (most notably Texas and Florida), the schools had used race-conscious mechanisms to design supplementary programs in order to pursue integration. CIR itself had been critical of

those programs, and several scholarly analyses had shown them to be ineffectual. Nonetheless, the desire to find a way around choosing between color blindness and integration was so powerful that the solicitor general had filed an amicus brief suggesting that percentage plans made affirmative action unnecessary.

I therefore spent several minutes trying to suggest that this really is an issue without easy answers, and that progress is not to be found by attempting to assign blame for the predicament in which we find ourselves:

[H]ere is the simple, unvarnished truth. Today, in the year 2003, in the United States of America, one cannot have a colorblind admissions policy at the most selective American law schools and also have integration. To insist on rigid, unflinching colorblindness is to insist on the absence of any meaningful degree of integration at these schools.

Let me be entirely clear about this. This is not the fault of the law schools. It's not as though law schools could have both colorblindness and integration by trying harder, by tweaking their admissions policies this way or that way to place more weight on socioeconomic disadvantage, or by doing a little more recruiting and outreach.

Remember where we live today. We live in a country with a terrible history of racial oppression. Where the disparities in wealth by race are enormous. Where children of all races do not sit side by side in school together. Where the differences in quality of K–12 education are well documented.

How can it be a surprise that, at the end of 16 years of education, rigid and unflinching colorblindness by a graduate school fails to produce integration?

At the University of Michigan Law School, we choose to recognize the pedagogic value of integration. We choose a policy that is grounded in the pragmatic realities of American society today. We recognize that if we are to continue to enjoy the societal benefits that come when the nation's most talented future lawyers study in racially integrated law schools, we must act

affirmatively to acknowledge those benefits. We understand that if we foster integration today, we are more likely to reach a colorblind society in the future. But if we insist on rigid, unflinching colorblindness today, our society will become less integrated, not more.

Our approach has been pragmatic, grounded in the desire to graduate a class of students that has the highest degree of collective competence, given the world we actually live in today. If we could produce a class with the same level of collective competence using a colorblind admissions policy, we would do it today. We can't, and so we engage in affirmative action.



The Supreme Court's decision in *Grutter v. Bollinger* completes an important chapter in public discussion of affirmative action. In many ways, it is appropriately perceived as a direct heir to Justice Powell's opinion in *Bakke*, a reaffirmation of the principles already laid down. But in important ways *Grutter* was a stunning contrast to its predecessor.

To begin with, the Court showed none of the fracturing that had plagued the *Bakke* precedent. A five-justice majority of the Court signed a single opinion. Quasi-metaphysical debates about what constituted the "narrowest" opinion in a case could (thankfully) be diverted to other areas of the law from affirmative action in university admissions.

The consensus extended beyond the majority opinion as well. In a separate opinion, Justice Kennedy seemed to agree that the pursuit of racial diversity could constitute a compelling interest in a university admissions process; his dissent was limited to expressing his belief that the Law School's policy was not "narrowly tailored" to promote that interest. And Chief Justice Rehnquist was silent on the compelling interest question, limiting his dissent to whether the Law School's admissions process was narrowly tailored to promote that interest.

The most important elements of *Grutter*, however, are to be found in the majority opinion by Justice O'Connor. I will emphasize two of those elements.

The first concerns Justice O'Connor's crisp, lucid discussion of what it means to say that under our Constitution, the use of race as a category triggers "strict scrutiny." She wrote:

We are a "free people whose institutions are founded upon the doctrine of equality." It follows from that principle that "government may treat people differently because of their race only for the most compelling reasons."

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." We apply strict scrutiny to all racial classifications to "smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."

Strict scrutiny is not "strict in theory, but fatal in fact." Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. *As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." But that observation "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny."* When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

Context matters when reviewing race-based governmental

action under the Equal Protection Clause. In *Adarand Constructors, Inc. v. Pea*, we made clear that strict scrutiny must take “‘relevant differences’ into account.” Indeed, as we explained, that is its “fundamental purpose.” Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide *a framework for carefully examining the importance and the sincerity of the reasons advanced* by the governmental decisionmaker for the use of race in that particular context. (*Grutter v. Bollinger*, 123 S.Ct. 2325, 2337–38; emphasis added and citations to prior cases omitted)

The elements in this passage that I have emphasized are significant for their sensitivity to the close balance of competing values implicated in the case. Before entering into the close analysis of compelling interests and narrow tailoring that the Fourteenth Amendment requires, the opinion lays two important items of groundwork. First, it acknowledges that all uses of race are injurious. Rather than leaping directly to an explanation of why the policy in question is legally valid, the opinion does the important work of saying that the policy employs a tool that causes real collateral damage, but is, *nevertheless*, lawful. Second, in framing the type of judicial review that such an injurious tool requires, the opinion affirms that a court must evaluate not only the importance of the justification proffered for a government’s use of race as a category, but also its *sincerity*. The difficult emotional context that underlies contemporary American discussions of race can tempt policymakers as well as private citizens toward expedient but insincere overstatement. Justice O’Connor’s opinion for the majority reminds us that, where government action is concerned, such overstatement is not constitutionally acceptable.

The majority opinion then turns to a discussion of whether the Law School’s pedagogic interest in having a racially diverse student body is constitutionally “compelling.” The bulk of that discussion consisted of three points. First, the Court reaffirms the constitu-

tional basis for showing some (but by no means absolute) deference to the academic judgment of universities. “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition” (*Grutter*, 2339). Quoting Justice Powell’s opinion in *Bakke*, the majority reaffirms that

by claiming “the right to select those students who will contribute the most to the ‘robust exchange of ideas,’” a university “seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.” Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.” (*Grutter*, 2339; citations omitted)

Second, the majority speaks approvingly, in its own voice, of the broad array of evidence that had been presented in support of that educational judgment:

These benefits are substantial. As the District Court emphasized, the 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.”

The Law School’s claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes,

and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” Brief for American Educational Research Association et al. as Amici Curiae 3; see, e.g., W. Bowen & D. Bok, *The Shape of the River* (1998); *Diversity Challenged: Evidence on the Impact of Affirmative Action* (G. Orfield & M. Kurlaender eds. 2001); *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* (M. Chang, D. Witt, J. Jones, & K. Hakuta eds. 2003).

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. Brief for 3M et al. as Amici Curiae 5; Brief for General Motors Corp. as Amicus Curiae 3–4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased 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. The primary sources for the Nation’s officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. *Id.*, at 5. 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.” *Ibid.* (emphasis in original). To fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.” *Id.*, at 29 (emphasis in original). We agree that “[i]t requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.” *Ibid.* (*Grutter*, 2339–40)

These first two points in the majority's discussion of a university's interest in diversity are well crafted but unsurprising. They closely track Justice Powell's discussion in *Bakke*, broadening and deepening it to reflect the substantial body of experience that universities accumulated between 1978 and 2003. The third point, however, is surprising. Borrowing language from a government brief that had asked the Court to strike down the Law School's policy, the majority instead used the government's argument to extend the constitutional understanding of diversity to incorporate not only a *pedagogic* interest but also an interest in *democratic legitimacy*:

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. This Court has long recognized that "education . . . is the very foundation of good citizenship." For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be *accessible* to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms 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." Brief for United States as *Amicus Curiae* 13. And, "[n]owhere is the importance of such openness more acute than in the context of higher education." *Ibid.* *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.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. See Brief for Association of American Law

Schools as Amicus Curiae 5–6. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. *Id.*, at 6.

In order 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. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.” 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. (*Grutter*, 2340–41; emphasis added, citations to prior cases omitted)

Notice the significance of this discussion. The Court is not speaking about the way in which students of all races become better educated by studying in diverse environments. That was the second point. Rather, the Court is speaking here about the importance to our society of having elite educational institutions be *visibly integrated*.

Throughout this essay, I have stressed the importance of acknowledging that affirmative action is a pragmatic compromise between an appropriate preference for color blindness and an appropriate preference for integration. The majority opinion in *Grutter* resituates our understanding of why a preference for integration is appropriate in the context of higher education. Under *Bakke*, universities were authorized to think about racial integration only to the extent it has immediate implications for professors’ teaching and students’ learning. Under *Grutter*, universities may

consider the fact that, if they lack meaningful levels of integration, others may lack “confidence in the[ir] openness and integrity.” Universities, especially public universities, may consider their own missions as entailing more than simply the nourishment of student brains and character. They may understand themselves as important institutional actors in the sustenance of an American society that is open to all, in which any young child may find reason to hope that he or she might have access to the opportunities that this nation offers, regardless of his or her parents’ race, religion, or wealth.²



There might seem to be an element of paradox in the fact that Justice Powell’s narrower vision of diversity did not appear to command the same breadth of support on the Court in 1978 as Justice O’Connor’s broader vision did in 2003. After all, no other justice joined the portion of Justice Powell’s opinion in which he found universities’ interest in pedagogic diversity to be “compelling.” In contrast, four other justices joined the portion of Justice O’Connor’s opinion in which she found universities’ interest in diversity to be compelling both for pedagogic reasons and for reasons of democratic legitimacy. Yet during the intervening quarter century, most Americans seem to have become less supportive of affirmative action rather than more.

One way to resolve that paradox would be to say that it is illusory. In *Bakke* four other justices had joined Justice Brennan’s opinion, and Justice Brennan’s analysis had been equally supportive of affirmative action. In a footnote he had seemed to endorse the same Harvard undergraduate admissions policy that Justice Powell had endorsed. Indeed, Justice Brennan had been willing to uphold the Davis quota policy that Justice Powell had not been able to tolerate.

Yet while this approach to resolving the paradox will satisfy many, it will not be satisfactory to all. During the years between

Bakke and *Grutter*, some commentators and some courts were not willing to infer that the four justices who joined the Brennan opinion had implicitly accepted Justice Powell's diversity analysis. They argued that the Brennan group had found a path to accepting affirmative action that was not broader than Justice Powell's, only different.

And whether or not one accepts this approach, it might still remain a matter of curiosity why, in a case that seemed to cry out for a decision on the narrowest grounds possible, even a single justice would have been interested in moving from an endorsement of affirmative action based on a narrow understanding of diversity to an endorsement of affirmative action that is based upon a broader understanding of diversity. I believe that the key here is to appreciate that, by relying on a *broader* conception of diversity, the *Grutter* analysis allowed the Court to invoke a *narrower* category of exceptions to color blindness than Justice Powell deployed in *Bakke*.

Under Justice Powell's analysis, the Fourteenth Amendment's presumptive requirement of color blindness could be deemed satisfied whenever a public university could show that a departure from color blindness was necessary to achieve a pedagogic goal. That was a conclusion that many had long found troublesome. No feature of our national history had led to more strife than its centuries of oppression and exclusion on the basis of race. How could something so parochial as a desire to provide better instruction for students be sufficient to warrant the use of a category so fraught with danger? After all, hadn't some of our most shameful historic practices been undertaken under the pretense that they would promote better learning for impressionable young minds?

This concern might be overstated. Pedagogic justifications for Jim Crow exclusion were often pretextual rather than sincere. And even if sincerely held, they often lacked a credible scientific justification. But even with those caveats, it remains true that Justice Powell's understanding of what might make an interest

sufficiently “compelling” to warrant resort to racial classifications has always felt unsatisfying. Racial classifications are the nitroglycerine of American history, volatile and dangerous. Something more than better teaching feels required if they are to be allowed. In order to depart from color blindness, our nation’s public institutions should be pursuing the larger national project of integration, a project that is at the core of twenty-first-century America’s understanding of itself as democratically legitimate.

Justice Powell’s opinion in *Bakke* seemed to say that color blindness may be sacrificed to a university’s exercise of autonomy, protected under the First Amendment, that promotes better teaching. Justice O’Connor’s opinion in *Grutter* does not go so far. It says only that color blindness may be sacrificed to an exercise of university autonomy that promotes *both* better teaching and a better integrated system of preparing young people for life as adults in a meaningfully integrated working environment.³



In their book *Tragic Choices*, Guido Calabresi and Philip Bobbitt considered the problems societies face when they wish to show respect for two incommensurable and inconsistent ideals but are forced to choose between them. They noted some of the strategies that are used, including a seemingly inconsistent pattern of favoring one ideal at one time and the conflicting ideal later. Poignantly, the majority opinion in *Grutter* concludes its analysis with a sentence that signals the Court’s hope that such a strategy will be available in this context as well: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

Whether or not we are able to realize that hope, it is clear that the end of the litigation has meant that the national conversation about affirmative action will enter yet another phase. That phase will be shaped in fundamental ways by the Supreme Court’s deci-

sion to recognize universities' interest in assessing how their admissions policies affect their own legitimacy within our society. The public discussions of the affirmative action litigation brought attention to many features of university admissions that can inspire resentment within the larger society—from early decision processes to preferences for so-called legacies to high tuition rates to reliance on test scores. The interest in ensuring that our important societal institutions hold a measure of democratic legitimacy will likely promote an ongoing discussion of how and whether those features serve universities' institutional missions and meet the needs of our society as a whole.

The litigation about the University of Michigan's admissions policies was ultimately important because it implicated values that shape our national identity. Over the course of the litigation we learned how to speak with greater clarity about those values, and about the tension between them. Whether or not the tension is ever fully resolved, understanding its structure will surely help us to more intelligently confront the challenges ahead.