LEAVING *BAKKE*

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The twenty-fifth anniversary of the Supreme Court's decision in *Regents of University of California v. Bakke*,[1] can best be observed by celebrating the likely prospect that it will soon acquire a far less important, and hence less problematic, status in our constitutional jurisprudence. This prophecy should not be taken as a prediction of how substantively the Supreme Court will resolve the issues now before it in *Grutter v. Bollinger*[2] and *Gratz v. Bollinger*,[3] the two cases challenging the use of race in the admissions process at the University of Michigan undergraduate college and law school. It does seem reasonable to expect, however, that the decisions to be rendered this term in the challenges to the race-based admissions policies of the University Michigan will be different from *Bakke* in at least two important respects. First, it is probable that the decisions will produce an opinion for the Court, rather than a fractured series of opinions based on different rationales, as was the case in *Bakke*. Second, because the test of time has shown (if it was not already apparent from the face of the opinions) that *Bakke* left some very important questions unresolved, one could expect that the Court will make an effort to fill the voids.

To be sure, *Bakke* did bring clarity to some issues. The "special admissions program" of the medical school of the University of California at Davis was held by a majority of the Court to be illegal. Justice Powell's opinion is rightly considered controlling in explaining the features that made the Davis system illegal.[4] Although

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1. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

2. Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2000) (en banc), *cert. granted*, 123 S. Ct. 617 (2002).

3. Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *cert. granted*, 123 S. Ct. 602 (2002). While the Sixth Circuit heard oral arguments in *Gratz* on the same day as the argument in *Grutter*, it did not issue a decision in *Gratz* when it issued the *Grutter* decision. Accordingly, plaintiffs in *Gratz* filed a petition for certiorari before judgment with the Supreme Court, pursuant to Rule 11. The Court granted that petition on the same day that it granted the petition in *Grutter*.

4. Four Justices voted to strike down the Davis program's consideration of race in the admissions process on the ground that any consideration of race violated 42 U.S.C. § 2000(d) (2000) (Title VI). *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. at 412 (Stevens, J., joined by Burger, C.J., Stewart, and Rehnquist, JJ., concurring in part). Those Justices did not reach the constitutional question. *See id.* Because Justice Powell's rationale permitted some use of race in the admissions

Davis operated a formal "quota" system, Justice Powell's opinion makes clear that the decision should not be read as one confined to its facts. Rather, in Justice Powell's analysis, an admissions system that "operated as the functional equivalent"[5] of a quota would be as illegal as the Davis program. Accordingly, the courts have invalidated a number of admissions programs on the ground that they violated strictures laid down by Justice Powell in *Bakke*.[6]

It is what the opinions in *Bakke* did not resolve, however, that has kept alive such a swirl of controversy and disputation about the case and the larger issues related to race and ethnicity that it presents. While it is not always hard to ascertain whether an educational institution has engaged in what is *prohibited* by *Bakke* in the consideration of race, the opinions in the case offer little authoritative guidance on what is constitutionally *permitted* in the use of race as a factor in the admissions process. This deficiency exists even if one believes, as I do not, that Justice Powell's articulation of the "diversity" interest in *Bakke* states a rationale for the Court.[7]

The touchstones of Justice Powell's framework for the constitutional consideration of race are that race and ethnicity may be considered as a "single though important" factor (a "plus") to achieve a "diverse" student body, with race and ethnicity to be "weighed fairly and competitively" along with other qualifications, such that applicants of different racial and ethnic groups compete on the "same footing."[8] It should be self-evident that standards such as these are elastic

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process, what his rationale prohibited in the consideration of race was prohibited by a majority of the Court in *Bakke*.

5. *Id.* at 318.

6. *See, e.g.*, Johnson v. Board of Regents of Univ. of Ga., 263 F.3d 1234, 125-61 (11th Cir. 2001); Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123, 131-34 (4th Cir. 1999); Wessman v. Gittens, 160 F.3d 790, 796-808 (1st Cir. 1998).

7. Given that the Supreme Court will soon have an opportunity to address the issue, there is little point in further extended discussion about why Justice Powell's articulation of the diversity interest in *Bakke* did not amount to a holding for the Court on that issue. It should suffice to point out that no other Justice joined any part of Justice Powell's opinion discussing the diversity interest. The four Justices who voted to uphold the Davis program did so on grounds distinct from the diversity rationale. They believed the preferences could be justified as a remedy for the effects of societal discrimination against minorities. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. at 325 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in part). In *Marks v. United States*, 430 U.S. 188 (1977), the Court established a framework for divining a rationale for a holding of the Court when no single opinion speaks for the Court. The *Marks* analysis can be applied when a common denominator can be found among multiple opinions. As the Court itself has noted, however, the *Marks* analysis is of little use in some cases. *See* Nichols v. United States, 511 U.S. 738, 745-46 (1994). The statement is true of the fractured *Bakke* opinions. The diversity rationale of Justice Powell and the remedial rationale articulated in Justice Brennan's opinion are simply different; they do not share a common denominator. *See also* Grutter v. Bollinger, 288 F.3d 732, 778-87 (6th Cir. 2002) (Boggs, J., dissenting) (discussing why the *Marks* analysis does not yield a conclusion that Justice Powell's diversity rationale states a holding for the Court in *Bakke*).

8. Regents of Univ. Cal. v. Bakke, 438 U.S. at 317.

and inherently susceptible to multiple interpretations. It was of little additional help that Justice Powell appended to his opinion—and referred approvingly to—the so-called "Harvard program" described in one of the *amicus curiae* briefs submitted in the case.[9] What the test of time has proven is that colleges and universities have latched onto the indefiniteness of Justice Powell's standard to defend all manner of racial preferences, often as rigid or large, or both, as what was struck down in *Bakke*.

The problems of applying Justice Powell's standards for the proper consideration of race and ethnicity are easily grasped. First, it means (and prohibits) little to impose a rule that race and ethnicity can only be *one* factor among others that an admissions officer considers in making admissions decisions. There are *always* other factors relevant to the decision. That was true even of the illegal Davis program, in which a variety of factors in addition to race and ethnicity were weighed in the admissions process for the favored minority students.[10] Second, what does it mean for race and ethnicity to be "weighed fairly and competitively," and who gets to decide whether this standard has been met? Not surprisingly, educational institutions invariably insist that the manner in which they consider race in admissions is "fair."[11] If each institution is to be the judge in its own case it should be obvious that we are left only with the illusion of a standard. Justice Powell's insistence that applicants compete on the "same footing" is of some help, but he also wrote that the weight of various factors could differ from year-to-year.[12] At what point do differences in assigned weights for various factors mean that applicants of different races are no longer competing on the same footing? It would be insensible to suggest that race could be a factor of any size in the process and still be one that is weighed "fairly and competitively" with other factors. Yet the pliable nature of Justice Powell's formulation has led some to assert this implausible position.[13]

What one yearns for then from the Supreme Court's forthcoming decisions is the articulation of a rule of law which contains ascertainable standards that mean the

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9. *Id.* at 316-17, 321-24. The Harvard plan was not before the Court in *Bakke*, and the record contains no indication of how it actually worked.

10. *Id.* at 274-75.

11. It is no more likely today that a college or university will admit to "unfair" consideration of race and ethnicity in admissions than it was decades ago for intentionally segregated schools to admit that they provided separate and "unequal" educational opportunities to African American children.

12. Regents of Univ. of Cal. v. Bakke, 438 U.S. at 317-18.

13. This is essentially the position of the University of Michigan in the two cases it is defending. It is the view accepted by the majority in the Sixth Circuit's opinion upholding the lawfulness of the University of Michigan Law School's race-based admissions policies. *See* Grutter v. Bollinger, 288 F.3d 732, 747-48 (6th Cir. 2002). In his dissenting opinion, Judge Boggs drew critical attention to this aspect of the majority's reasoning. *See id.* at 800-03 (Boggs, J., dissenting).

same thing for all individuals and all educational institutions. The expectation seems reasonable because the shortcomings of the opinions in *Bakke* are in plain view, and it would seem pointless for the Court to have taken up the University of Michigan cases only to then decide them in a way that leaves things in the same uncertain state that they are in now.

The truly important question, of course, is where we go from here. My view on the matter is represented in the briefs submitted on behalf of the petitioners/plaintiffs in the University of Michigan cases.[14] I cannot make here all of the points made in the briefs. Instead, my purpose is to develop a few of the arguments demonstrating why diversity-justified racial preferences pose a serious danger to the equality principle that is a "core" value of our Constitution.[15]

It is a settled feature of equal-protection analysis that government has the burden of justifying any racial and ethnic classifications under the "strict-scrutiny" standard, meaning that it must prove that the classifications are supported by a "compelling" interest and that they are narrowly tailored to achieve that interest.[16] The one interest that the Supreme Court has recognized as sufficiently compelling under strict scrutiny is remedying the effects of past or present identified discrimination.[17] The Court has, on the other hand, refused to recognize interests in remedying the lingering effects of societal discrimination or providing role model teachers to minority students as compelling justifications for state-sponsored racial preferences.[18] What can be gleaned from these cases are standards for determining whether an interest is sufficiently compelling to support racial classifications. What also emerges from the logic of the cases is that the "diversity" rationale cannot possibly be squared with the requirements of strict scrutiny.

While it might be sufficient simply to demonstrate that an interest in diversity suffers from the same defects as interests based on remedying societal discrimination or providing role models, it is more illuminating to consider first *why* the nature of these interests ill suits them to be compelling justifications for racial preferences. The defenders of racial preferences in admissions reflexively point to

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14. The briefs of the parties and the *amicus curiae* are available at http://www.cir-usa.org and http://www.umich.edu/~urel/admissions/.

15. Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

16. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

17. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 483 (1989); *id.* at 524 (Scalia, J., concurring).

18. *See id.* at 498-99; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275-76 (1986) (plurality opinion). While there was no majority opinion in *Wygant*, the three-Justice plurality opinion and the separate opinion of Justice O'Connor firmly rejected the role model theory. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. at 476; *id.* at 288 (O'Connor, J., concurring). In *J.A. Croson Co.*, a majority of the Court cited approvingly to the *Wygant* plurality's explanation for the reasons that the role model theory, like one based on remedying the effects of societal discrimination, could not constitute a compelling interest. *See* City of Richmond v. J.A. Croson Co., 488 U.S. at 497-98.

the supposed educational benefits of enrolling a racially and ethnically diverse student body as justifications for preferences in admissions.[19] They equate the existence of a benefit with proof of a compelling interest. It is easy to demonstrate, however, that proof of some benefit is not nearly enough—and should not be enough—to pass muster under strict scrutiny. Few would dispute that remedying the lingering effects of societal discrimination against minorities would produce positive benefits. So too would providing role models to school children. Indeed, the rejected role model theory for teacher layoffs is one premised, like the diversity rationale, on the *educational* benefits believed to accrue to students from the employment of role models.[20] Yet the Court has made clear that these purposes do not qualify as "compelling" interests justifying state-imposed racial preferences.

The reason why these interests, although laudable and worthy, are not *compelling* justifications for racial preferences can be found in the paramount importance that the principle of equality has under our Constitution. The command of nondiscrimination contained in the Equal Protection Clause cannot be countermanded simply on a showing that some social benefit will accrue from the breach. It is precisely the purpose of the guarantee to thwart such government calculation as a basis for imposing racial classifications. Remedying identified violations of the command of equality, on the other hand, has been recognized as a compelling interest because it is one that seeks to repair injury to the principle of equality enshrined in the Constitution. It is also an interest in which the injury can be measured with objectivity and a remedy fashioned accordingly in scope. Moreover, once the injury has been remedied, the justification for the racial preferences comes to an end.

As the Court has explained, however, interests like those of remedying the lingering effects of societal discrimination or providing role models to school children are simply too "indefinite" and "ill-defined" to accommodate narrowly tailored uses of race. The problem is one of the absence of objective standards. It is in this respect that it should be plain that an interest in "diversity" is not capable of being a compelling interest justifying racial preferences. An interest in diversity is at least as amorphous, ill-defined, and indefinite as interests based on remedying the

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19. The issue has spawned much controversy and will not be discussed in detail here. The University of Michigan has relied largely upon a report generated for purposes of the litigation by one of its own professors, Patricia Gurin, for its assertions of the educational benefits of diversity. For one critique of the Gurin analysis, see *Grutter v. Bollinger*, 288 F.3d 732, 803-05 (6th Cir. 2002) (Boggs, J., dissenting).

20. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. at 315 (Stevens, J., dissenting) ("In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty.").

effects of societal discrimination or providing role models to minority school children. This is true in several senses, and it is so primarily because the concept of diversity is not self-defining; it can mean different things to different people. There is certainly no standard in the Constitution from which to measure and judge whether an interest in diversity has been achieved. Hence, for example, deciding which racial and ethnic groups to include and exclude from the preferences becomes an entirely arbitrary and discretionary exercise by those wielding the preferences. Some educational institutions have chosen to define diversity with reference to inclusion of racial and ethnic groups that have suffered from a history of discrimination.[21] In such cases, the diversity rationale is shown to be a transparent substitute for an impermissible one based on remedying the effects of societal discrimination. It then possesses the same fatal flaws as the broad remedial rationale decisively rejected by the Court. As the Court has explained, accepting a claim "that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial' relief for every disadvantaged group."[22] In the case of the diversity interest, the prospect for a patchwork of different preferences is even greater than when the goal is remedying societal discrimination. This is because there is nothing inherent in the nature of the diversity rationale, particularly as it was articulated by Justice Powell in *Bakke*, that confines it to remedying past discrimination. When racial and ethnic diversity is the goal, preferences can be fashioned in at least as many different ways as there are racial and ethnic groups in our nation. The preferences can also shift with the fashion, so that groups favored at one time are disfavored at another. The point can be illustrated by noting that *Bakke*, a case involving quotas and preferences that operated in *favor* of Asian-Americans,[23] among others, is today widely invoked to justify quotas and preferences that discriminate *against* Asian Americans, among others.

The indefinite and arbitrary quality of the diversity interest extends to the manner in which racial or ethnic identity is defined. Some institutions might adopt the so-called "one drop" rule, in which any genetic trace of membership in a favored

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21. This is what the University of Michigan has done. *See, e.g.*, Grutter v. Bollinger, 137 F. Supp. 2d 821, 827-28 (E.D. Mich. 2001).

22. City of Richmond v. J.A. Croson Co., 488 U.S. at 505. Justice Powell made the same point in *Bakke*: "To hold [that societal discrimination could justify racial preferences] would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. at 506 ("'Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications . . . .'") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. at 296-97).

23. Regents of Univ. of Cal. v. Bakke, 438 U.S. at 274.

racial group entitles one to a preference. Alternatively, admissions officers might determine that a certain amount of racial "purity" is required to receive a preference.[24] The question of how to apply the preferences in the case of individuals of mixed race or ethnicity is one that is likely to increase in importance over time as the nation's racial diversity and the rate of interracial marriage increase. The form for the 2000 Census listed six basic racial or ethnic categories from which respondents could select in identifying themselves.[25] Individuals could also identify themselves as multi-racial, with sixty-three different combinations possible from the categories provided, or exercised the option of writing in a race or ethnicity not listed on the form. Whether someone of mixed race or ethnicity received a preference could depend entirely on the fortuity of a person's self-identification. At the University of Michigan, for example, a student who is half Mexican American and half Asian American would receive a substantial preference if he or she identified as a Mexican American, but none at all if identifying as an Asian American.

Another way in which the diversity rationale lacks standards or limits is in the manner of deciding what number of the preferred groups (however selected) constitutes the achievement of "diversity." This is a very uncomfortable subject for the defenders of racial preferences because we have all dutifully learned by now to denounce "quotas"; even the stoutest defender of race-based double standards is today careful to explain why whatever preferences are being defended do not amount to a quota. The problem is that the way in which institutions of higher education define diversity makes the concept of a quota indispensable. These institutions describe the compelling importance of diversity with reference to what a college or university would look like without it, and the absence of diversity is invariably defined by the lower *numbers* of enrolled students from the preferred racial or ethnic groups. Hence, the racial preferences are designed to ensure enrollment of the number of students from the desired groups deemed sufficient to attain "diversity." One cannot very well defend a concept, however, without a way of talking about it. So to defend the objectives of diversity while deflecting the charge that they are achieved through the use of quotas, admissions officers have learned to define the pejorative term narrowly and to invoke a different vocabulary to describe the objectives of their preferences. Accordingly, a quota system is

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24. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) ("If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, pp. 8-9 (1946).").

25. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, U.S. CENSUS 2000, *available at* www.census.gov/dmd/www/pdf/d02p.pdf (last visited Apr. 28, 2003).

sometimes said to be limited to systems that set aside a "fixed" number of seats in the class for the preferred minority groups, as opposed to a "flexible" admissions system in which diversity is defined by a range of numbers or, better yet, in which numbers are not articulated at all, just achieved, consistently and inexorably, year after year.

The language of the diversity rationale and the concept of diversity itself are what the defenders of racial preferences have found to be the most effective weapons in deflecting the charge that they are operating quota systems. Quotas are out, while achieving a "critical mass"[26] or alleviating "underrepresentation" are in. The extent that practitioners of discrimination have been successful in packaging their preferences under the diversity label is due in large part to the soothing language that they employ. Quotas are generally thought of as a way of keeping people out, while diversity invokes the language of inclusion. But preferences work the same harm in either case. On the basis of racial and ethnic characteristics, they assure inclusion of some individuals by ensuring the exclusion of others. If one group of students is deemed to be "underrepresented" on the campus, it can only be because other groups are "overrepresented." It should be obvious that policies designed to remedy "underrepresentation" also correct for "overrepresentation." The terminology also necessarily implies that there is some proper proportion of representation for a racial or ethnic group.[27] To the extent that the racial and ethnic preferences are designed to achieve that level of representation, they perform the same function as a quota.

The indefiniteness of the diversity rationale is also found in its timelessness. The Supreme Court has always emphasized the importance of the *temporary* nature of racial classifications designed to remedy past instances of discrimination.[28] A remedy for past, identified discrimination is inherently a temporary one; its scope in time can be defined with reference to repairing the injury done by the past discrimination. There is nothing temporary, however, about preferences that value diversity as an end in itself. This was acknowledged by the district court in *Gratz v. Bollinger*, which defended an interest in diversity as one that "by its very nature, is a

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26. This is the term employed by the University of Michigan. Both the undergraduate and law schools proclaim the importance of enrolling a "critical mass" of students from specified racial minority groups.

27. *See, e.g.*, Wessman v. Gittens, 160 F.3d 790, 799 (1st Cir. 1998) ("Underrepresentation is merely racial balancing in disguise—another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions."); Lutheran Church—Mo. Synod v. FCC, 141 F.3d 344, 352 (D.C. Cir. 1998) ("The very term 'underrepresentation' necessarily implies that if such a situation exists, the station is behaving in a manner that falls short of the desired outcome.").

28. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989) (noting the importance of assuring "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").

permanent and ongoing interest."[29] If diversity is a compelling justification for racial preferences today, what would make it less so fifty or one hundred years from now? This indefiniteness of the rationale is another embarrassment for those who must defend diversity-justified discrimination in court. Their response has been to change the terms of the debate by suggesting that when disparities in test scores and academic achievement between racial groups, allegedly caused by past discrimination, have been eliminated, then the preferences too can be eliminated. It should be obvious at this point that the diversity justification is nothing more than a thinly disguised (or undisguised) argument for using racial preferences to address the perceived lingering effects of societal discrimination, the same rationale decisively rejected by Justice Powell in *Bakke* and by the Court in subsequent cases.[30]

It is characteristic of the defense of racial preferences to minimize or ignore the injury done by the preferences. This is done first by trivializing the injury to those against whom the preferences work. The injury is said not to be great because many white and Asian students still get into selective educational institutions even with the use of preferences that discriminate against them. It is contended, on the other hand, that ending the regime of racial preferences would have a devastating impact on the numbers of African Americans and Hispanics admitted to these institutions. The argument reveals how the defense of racial preferences ultimately depends on the conception of our nation as one in which rights are to allocated not to individuals, but to racial and ethnic blocs. The role of government under this view is to act as a broker among racial and ethnic groups, making sure that benefits and burdens are distributed so as to achieve some desired measure of proportionality. It is a view fundamentally at odds with, and destructive of, the principle that all men are created equal. Indeed, the guiding principle of a creed that excuses racial discrimination to assure preferred levels of group representation is that we are *not* all "created equal"; it is instead quite the opposite—that we are all members of a racial group, and that to each according to his race. For the most part, the Court's modern precedents have rejected this conception of group rights in favor of the doctrine that the Constitution protects the rights of *individuals*.[31] The Court has the opportunity to confirm and vindicate this important principle in the University of Michigan admissions cases now pending before it.

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29. Gratz v. Bollinger, 122 F. Supp. 2d 811, 823-24 (E.D. Mich. 2000).

30. *See supra* note 22 and accompanying text.

31. City of Richmond v. J.A. Croson Co., 488 U.S. at 493 ("As this Court has noted in the past, the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.'") (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)).

[The following is the complete text of the questions posed to Mr. Kolbo and his responses thereto after he delivered his remarks during the Constitutional Law Symposium at Drake University Law School on April 12, 2003.]

QUESTION: Professor Russell Lovell. Making a distinction between targeted, race-conscious recruiting and using race as a factor at the point of competition, I thought that was a distinction that was a key part of your argument. Would you want to explain that or comment on that?

RESPONSE: Sure. We've taken the position that not all racial considerations are forbidden by the Constitution, but racial discrimination is, particularly when two individuals are competing in the university context for a seat in a class. The standards applied at that point ought to be the same regardless of race. That shouldn't prevent, and we've never suggested that a university is precluded from taking steps to expand the applicant pool, to sort of cast a wider net so that it has a larger pool of students from which to choose, and perhaps a larger pool of students from what is often referred to as underrepresented minority groups. Once you assemble that pool, then it seems to us that the Constitution commands that everyone be treated equally without regard to their race and that is the distinction that we found important.

QUESTION: Randall Wilson. I am the legal director for the Iowa Civil Liberties Union. In your presentation you indicated a wish or an expectation that perhaps the University of Michigan cases will result in more clarity in what is going to happen in this area. Then later you spoke of the difference between racism and the goal of diversity, and drawing, apparently, some legal distinction between the two in terms of what result might apply when you start to look at compelling state interest type of argument and so forth. But you also noted, I think just kind of passed over very quickly, that racism itself is still a fuzzy concept in how it is defined in the law, and when we have racism and when we don't. I am wondering whether institutions that are trying to deal with this, if they are forced to only use affirmative action to deal with racism, whether they will still have some leeway under federal law to define what racism is or what it means to them. I am also thinking that often the courts apply a great deal of deference to the administrative judgments of institutions and to the legislative judgments that are made as to whether things like racism exist as a matter of fact in a situation, and they have indicated that often courts are ill prepared to make those sorts of judgments in lieu of the legislature or administrators that are much more in contact with the day-to-day affairs in making these types of complicated assessments. And so I am wondering, really, aren't we left with a situation where the battle just will continue to remain a semantic battle over what exists out there, a philosophical battle, and whether or not the University of Michigan cases will bring us any closer to any real end to this debate.

RESPONSE: I think it remains to be seen, of course. How much closer we are to the end of the debate depends in large part on how the Court rules and how decisively. It seems to me that the problem, and you referred to it as the problem of racism, is simply not one that can be addressed by individual institutions employing racial preferences in the admissions context. If a university has its own problem with racist incidents, a racist climate on campus, it needs to deal with those issues directly by punishing the offenders. There is no closeness of fit, it seems to me, between a broader social problem with respect to continuing the effects of racism in the country, and the use of double standards, race-based standards in the admissions process. There is just a disconnect there, it seems to me. At the same time it needs to be kept in mind that when these preferences are being used, they injure innocent people. Oftentimes, I think, the use of preferences is used in a way that only has a beneficiary, that is, that those who receive the benefit of the preference, a lot of them have a fine education, which many of them do. But there is a negative side to this. Someone got into an institution because of their race. It is also the case that someone was kept out of an institution because of their race. That is what we have to get away from.

QUESTION: Professor David Walker. I wanted you to develop that last point, which was that part of the trouble was that our educational institutions were defining merit. I think that we are broadly assessing what our educational purposes are, and certainly our mission would include not only the education of those who are able to attend our schools, but their preparation to function in a world that we know is involved and characterized by difference. Not just on race. We focus on race today, but there is race, religion, nationality, all manner of backgrounds. We have more applying than we can accept and so we are making some presumptions about what the differences will bring to the educational climate, to the classrooms, what we can fairly well presume has been an experience of one different from another. As an educational institution we are consciously preparing our students to deal in and live successfully within, and be leaders contributing to, a world shrinking and characterized by difference everywhere we look. We are obviously making choices. We are indulging in some presumptions about what may truly reflect differences of experience that will advantageously affect the climate, the discussions, the milieu, and the perspectives that are brought. It seems to me this is a highly legitimate judgment that educational institutions are making. You are defining merit, it seems to me, in a narrow way. I think what Dean Brest said was not that the Court leave this judgment to the legislature, but that the Court leave it to the educational institutions. Not just a narrowly based merit criteria, but thinking in terms of a university's mission over the long life of this country.

RESPONSE: I would like to respond to that. I would like to be clear about this. We have never suggested that there is a particular set of criteria or a particular way to define merit that universities ought to apply in the admissions context, or if it

ought to be required to be applied by the courts in the admissions context. Universities like Michigan have chosen to be highly selective on things like grades and test scores, and they are free to do that. They are also free to not be as selective on those criteria. They have chosen, like Michigan, to give points to alumni. They are free to do that. They are not required to. We don't suggest that they should or they should not. There are all kinds of criteria that a university could chose in selecting its students. What we are contending is that there is one criteria, because there is a constitutional command of equality, that is out of bounds and that is the use of race, because race itself is an irrelevant qualification in judging someone's worth. It is unfair in choosing between two people, whether they are comparably qualified or not, to say that one person's race is what wins the battle in the admissions process over another. There are all kinds of other things that could be looked at and a university is free to reevaluate its admissions criteria, but because the Constitution commands equality, and because we think it is fundamentally wrong to treat people differently because of their race, that needs to be eliminated from the equation. At least when it is used as it is used here to simply assemble a diverse student body. Again, if it is being used to remedy some instance of discrimination, then that is a different matter. When it is simply being used to sort of racially balance the class, it is argued that that is beyond the bounds. It is not a matter of educational judgments. When you have a constitutional command that says you may not discriminate on the basis of race it is not, in our judgment, good enough to come forward and say well, educators in their knowledge and experience have reached different conclusions. It has to be remembered that was the argument that was made back in the 1950s by the school boards. They said, look, we know what is best for educating our children. We have decided that racially separate schools, so long as they are equal, is the better route to go. Whether that was true or not, whether they had any empirical evidence for that was really beside the point. The Constitution prohibited it, and I think the same answer should apply when it is being practiced in a different direction as it is in places like Michigan.

QUESTION: Associate Dean David McCord. I am a member of the law faculty here. Obviously, the University of Michigan is a public law school and we are a private law school. However the case comes out, I wonder if you could comment on how it might apply, the same or differently, to private institutions as compared to public institutions.

RESPONSE: We sued in these cases under Title VI, which prohibits the discrimination by an institution that receives federal funds. Although the Fourteenth Amendment itself only applies to state actors, Title VI, because of the way it has been interpreted as reaching the scope of the Fourteenth Amendment, and because Title VI applies to any recipient of federal funds, if the Court rules that the use of race by the University of Michigan is impermissible for one reason or another, either because it is a quota based system or because diversity is not a compelling interest

justifying the use of race, it is likely we can infer that the same rule will apply to private institutions because of the scope of Title VI.

QUESTION: Adisson Parker. This is my second route and I'm still Adisson Parker. I got the impression, perhaps wrongly, that you felt somehow that blacks as a group are less qualified to go to elite institutions. It is my impression that although they may have lower test scores, and benefits are given them to offset that, that once they are in elite schools they do as well as the average there, if not better. Does that have any bearing at all on the argument against favoritism, if you call it that, for blacks, or for that matter any other disadvantaged population such as Appalachian whites?

RESPONSE: We have never in this case challenged the notion, and the University has repeatedly made the claim, that all of the students who attend their institution are qualified to be there. We have not suggested that the black students or Hispanic students are unqualified, unable to attend that school, or to be successful. Our only point has been the University has a set of criteria for making admissions decisions. The University of Michigan has decided that the use of the LSAT will be used very heavily in the admissions process. That may not be a wise thing for them to do, because perhaps the LSAT is not a good predictor of ultimate success as a lawyer. The University has chosen to use those criteria in making these distinctions at the admissions level. Our view simply is whatever criteria they have chosen, they should apply the same criteria across racial lines. We are not suggesting that blacks or Hispanics are unqualified. What we are suggesting is the criteria applied to them is applied at a different standard, at a different level, than it is applied to other students. That is what is prohibited by the Constitution, and that is what we believe is wrong.

QUESTION: Andrew Bracken. I am with the Ahlers and Cooney law firm here in Des Moines. We represent the Des Moines Public Schools and many K-12 school districts across the state. I hear you say that you don't believe that diversity itself may be a compelling state interest to justify using it by a public institution. Does your answer change when we talk about K-12 schools as opposed to higher education?

RESPONSE: No, it is the same. I think that if you have educational problems at the K-12 level one needs to address those. They are not addressed, and they should not be addressed, it seems to me, by racial preferences that are a mechanism for racially balancing the schools. I think the same answer should apply there.

QUESTION: Andrew Bracken. Then just one step further. Even in the simple decisions like drawing boundaries between schools, school districts will make decisions regarding a neighborhood that is dominated by one ethnic or racial

group versus others. Do you think that even those decisions, then, should be completely race and ethnic neutral?

RESPONSE: That raises a little different issue. It is very similar to the voting rights cases which are—you don't have many in this part of the country, but down south you've got the Voting Rights Act and decisions are made each election year, each census, each ten year period, on what to do with the voting district lines. The court has developed a frame of analysis that suggested as long as the drawing of a line, a school district line or a voting district line, is itself a race-neutral act, you are not conferring a benefit or disadvantaging an individual on the basis of race in doing that. It is a race-neutral activity. The courts have said that you can certainly be conscious of race. It is impossible to not be conscious of race. As long as race is not the predominant factor that is used in drawing lines it is acceptable, and I would suspect that that will be the same rules that apply in drawing school district lines. It is a little different issue.

QUESTION: Millard Southern. I am a student here at Drake. First, I would like to thank you for coming to the cornfields of Iowa to engage our minds with this controversial topic. I wanted to know if it is safe and just to address those noncolored women who have benefited from affirmative action, and also what are the implications of affirmative action when we distinguish those blacks of a higher economic status than those blacks with a lower economic status?

RESPONSE: I'm not sure I understood your first question. What was it again?

QUESTION: Millard Southern. I have been doing some reading on this material, and the issue that seems to be evaded most of the time is white women who benefited—should we assume that? Is that an issue that needs clarification when you talk about affirmative action?

RESPONSE: Well, I can only speak on behalf of my clients, and they have never indicated that they thought that they should be a beneficiary because of their gender. They felt that as strongly as they felt that they shouldn't have their race count against them just because they are white. The courts have developed somewhat different rules when it comes to gender issues from race. Race has always been held to a higher standard of scrutiny, whereas with respect to gender, there have been somewhat lower standards. At least in our case, the clients I can speak on behalf of, they have not suggested that they should be the beneficiaries of a preference because of their gender. What is the second question?

QUESTION: Millard Southern. My second question is when we talk about affirmative action, shall we make a distinction between those blacks of a higher economic status than those blacks of a lower economic status? Is there some kind of hierarchy of class when we talk about admitting blacks into universities and college settings?

RESPONSE: In my judgment one of the problems with racial preferences is, again, race is simply used as a proxy. Everyone is sort of assumed to be in the same boat so that the University of Michigan will give the same plus factor for race to someone who is, say, the son or daughter of a middle class or upper-middle class parent as it will give to someone who has had a history of disadvantage. It seems to me that that is wrong. One should not be looking at race in those circumstances, one should be looking at the individual circumstances. If someone is disadvantaged, whether it is educationally or socio-economically, that is certainly a legitimate factor to look at, but it should be looked at in a way that doesn't consider the person's race. It seems to me that is what the Constitution requires, and that is what the University should be doing.

QUESTION: Dennis Barnum. I am from Gallery. I guess this is a reaction to your remarks. This is not a polished legal statement, of course. I'm not an attorney. I find your position, whether it is your personal one or not, I don't know. I think that affirmative action is a justifiable program to counter racism which is insidious and society-wide, and I think that it will be with us for a long, long time because by its very nature it is largely unconscious. Unawareness, insensitivity, and blindness to other folks. It is just a personal point of view. I think affirmative action is a justified program because you have to counter it some way, in addition to the individual cases you are suggesting we deal with it.

RESPONSE: Well, my only reaction is, and people feel strongly about this, I understand it. I think that we are actually all for the most part looking to get to the same goal, but we have a disagreement about how to get there. Our judgment is that one does not get beyond racism and race discrimination by practicing race discrimination in a different direction. That is the fundamental problem with this policy.


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