



U.S. Commission on Civil Rights

The Supreme Court Revisits Affirmative Action: Will *Grutter* and *Gratz* Mean the End of *Bakke*?

(Staff Analysis)

April 2003

“[T]he Nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”

[1]

Introduction

In the three decades since the Supreme Court’s seminal affirmative action decision in *Regents of the University of California v. Bakke*, [2] virtually all of this country’s selective colleges and universities have embraced the educational value of a broadly diverse student body, and have relied on *Bakke* in crafting admissions policies designed to obtain that diversity. In the last few years, lower courts have considered these affirmative action admissions policies and issued conflicting rulings. On April 1, 2003, the Supreme Court will readdress the issue of affirmative action when it hears the companion cases of *Grutter v. Bollinger* [3] and *Gratz v. Bollinger*. [4] In *Grutter*, the Sixth Circuit held that the University of Michigan’s law school policy, which used race as a factor, met the well-established strict scrutiny constitutional requirements; and in *Gratz*, the District Court for the Eastern District of Michigan upheld the University of Michigan’s current undergraduate policy, which similarly used race as one factor in its admissions, as constitutionally permissible.

The Supreme Court has set the stage for a potentially dramatic decision that could either undermine the use of affirmative action as a tool to promote diversity in higher education, or reaffirm *Bakke* and sanction the continued use of narrowly tailored race-conscious affirmative admissions. [5] The Supreme Court will decide (1) whether it will reaffirm *Bakke*, which held that a diverse student body and the benefits that flow from it are sufficiently compelling to permit the schools to consider race and ethnicity as one of many factors in its admissions policies; and (2) whether the plans are properly devised and narrowly tailored to meet that goal. The Court’s decision could force fundamental changes in the admissions policies of all postsecondary schools and change forever the composition of our nation’s educational institutions. The Court must “decide whether, consistent with *Bakke*, the finest . . . schools throughout the country may continue to train the Nation’s leaders in integrated classrooms” as they have done so effectively for the past three decades “or whether they now must choose between maintaining academic distinction and avoiding very substantial resegregation.” [6]

The U.S. Commission on Civil Rights and Affirmative Action

The U.S. Commission on Civil Rights has had a long history of seeking to ensure that all members of society are provided equal access to higher education. In 1978, the year the Court issued its landmark opinion in *Bakke*, the Commission lauded the decision as enabling “both the public and private institutions to move voluntarily toward the goal of true diversity in a realistic and effective manner.” [7]

The Commission continued to show support for affirmative action when it published a report titled *Toward Equal Educational Opportunity: Affirmative Action Programs at Law and Medical Schools*, which traced the history of discrimination that keeps minorities critically underrepresented in the legal and medical professions. The report concluded that “[g]iven the long and lamentable history of discrimination against minorities in higher education, consideration of race or minority status in the admissions process of law and medical schools is certainly justified and appropriate.”^[8] Moreover, in 1991, the Commission stressed this message in a letter to the President, in which the Commission stated that addressing the overwhelming educational needs of minority youth is essential to strengthening the country’s education system.^[9]

Regents of the University of California v. Bakke

Twenty-five years ago, the Supreme Court attempted to resolve a national debate over the constitutionality of race-conscious school admissions policies in its landmark decision in *Bakke*. The *Bakke* case was brought by a white student challenging the Medical School of the University of California at Davis’ (Davis’) admissions policy, which set aside seats to be filled by minority applicants. Davis operated a dual-track admissions system featuring a separate admissions committee and separate review process for minority applicants.^[10] Davis also established a quota for minority students, for example, reserving 16 spots for minority applicants.^[11]

Although different justices articulated a range of views about the permissibility of a race-conscious admissions process in *Bakke*, Justice Powell articulated a middle ground that constituted, and has been relied upon, as the holding of the case. Joining Justice Powell, a majority of the Court agreed on several propositions essential to the outcome. Five justices reversed the California Supreme Court’s mandate prohibiting Davis from considering race in admissions decisions,^[12] instead agreeing that consideration of race and ethnicity in a “properly devised admissions program” would be constitutional.^[13] Five justices agreed that Davis could constitutionally devise such a program, even though it was conceded that the school had no history of discrimination, nor did it articulate a remedial justification for considering race.^[14] And all five agreed that, as discussed further below, an alternative type of admissions plan utilized by Harvard, which was uniquely tailored toward, and justified by, Harvard’s goal of admitting a diverse student body, was constitutional.^[15] Because Harvard’s plan was explicitly designed to secure the educational benefits of diversity as its sole justification, it follows that a majority of justices agreed that diversity was a constitutionally permissible justification.^[16]

In concluding that diversity is a compelling interest in the context of a university’s admissions program,^[17] Justice Powell emphasized that there is a direct link between positive education outcomes and a broadly diverse student body: “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.”^[18] Thus, the Court rejected the admissions program that set aside a specified number of spots for minority applicants, but held that race-conscious selection in a university admissions program designed to promote diversity in a student body was constitutional. According to Justice Powell, the critical flaw in Davis’ programs was that nonminority students were “totally excluded from a specific percentage of seats in an entering class.”^[19]

As an example of a constitutionally permissible and narrowly tailored admissions plan, Justice Powell advanced the one used by Harvard in which race or ethnicity was deemed a “plus” factor, but did not insulate a minority applicant from comparison with nonminority applicants.^[20] Powell explained that the program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”^[21]

Justice Powell's opinion, therefore, sets forth two guidelines for designing a race-conscious admissions policy: (1) segregated, dual-track admissions systems using quotas for minorities are impermissible; and (2) a policy modeled on the Harvard plan, where race and ethnicity are used as a "plus" factor, does not offend the equal protection clause.

Grutter v. Bollinger

Seeking the benefits of a diverse student body, the University of Michigan Law School ("Law School") designed its admissions policy after the Harvard plan approved of in *Bakke*. The Law School's admissions policy was adopted in 1992, and states that the Law School's 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."^[22] Furthermore, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other."^[23]

In evaluating an applicant pool, the Law School examines a combination of the applicants' LSAT scores and undergraduate GPAs. The combination may be viewed as a grid with LSAT scores on the horizontal axis and GPA on the vertical axis. In this way, every combination creates a "cell" on the grid that indicates the number of applicants with that particular combination of qualifications.^[24] Thus, the applicant's chance of being admitted increases as the applicant moves higher up in the grid's combination of scores.^[25] The Law School does not have any "cut-off" above which admission is guaranteed, or below which rejection is guaranteed.^[26]

In addition to LSAT scores and GPA, the Law School looks at a variety of other variables when examining an applicant. These other factors, or "soft" variables, include "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, residency, leadership and work experience, unique talents or interests, and the areas and difficulty of undergraduate course selection."^[27] After all these factors have been considered, the policy permits an applicant who does not have a high index score to be admitted, but for whom the Law School may believe that the index score is not an accurate predictor, or for whom the Law School believes has the potential to enrich everyone's education.^[28] This policy recognizes that many qualities not captured in grades and test scores factor into the evaluation of an application. The policy does not limit the types of diversity eligible for weight in the admissions process, and the school considers each applicant's unique intellectual and personal achievements, experiences, and background.^[29]

The policy also explains that the Law School's educational goals are greatly advanced through the presence of a "critical mass" of "students from groups which have been historically discriminated against, like African-Americans, Hispanics, and Native Americans."^[30] The Law School's pursuit of a critical mass of minority students mirrors Harvard's goal of enrolling meaningful numbers of minority students. The Law School's experience has been that a critical mass of minority students provides opportunities for students with a wide variety of racial backgrounds and life experiences to meaningfully interact.^[31] Importantly, the policy does not set aside or reserve any slots or seek a fixed percentage of minority students.^[32] As a matter of definition, critical mass is not a quota, because unlike Davis' reservation of 16 seats for minority candidates, the Law School has no fixed goal or target.^[33] Critical mass cannot be fixed in terms of numbers or a percentage; rather, the school seeks to attain its goal of racial diversity by admitting qualified, yet underrepresented minority students such that they can contribute to classroom dialogue without feeling isolated or having to act as spokespersons for their race.^[34] Therefore, the school's policy, like the Harvard plan, uses race as a "plus" factor while still ensuring that each candidate competes with all qualified applicants.

In *Grutter*, the plaintiff alleged that she was rejected because the Law School used race as a factor in the admissions policy that gave the minority candidates a much greater chance to be selected than

nonminority candidates with the same credentials. The district court concluded that no majority of the justices in *Bakke* endorsed diversity as a compelling interest, and thus the Law School's use of race as a substantial factor in its admissions process was unconstitutional.[35]

On appeal, however, the Sixth Circuit reversed and vacated the district court's judgment prohibiting the Law School from using race in its admissions process. The Sixth Circuit concluded that the Law School met strict scrutiny by narrowly tailoring its policy to serve the compelling government interest of student body diversity.[36] Applying *Marks*,[37] the court determined that the diversity rationale was a compelling interest because it was included in the narrowest grounds upon which five of the justices agreed in *Bakke*. [38] Furthermore, the Supreme Court's subsequent characterization of *Bakke* and acknowledgement of the diversity interest further support the determination that Justice Powell's conclusion is controlling. [39] For example, in *Metro Broadcasting, Inc. v. FCC*, Justice Brennan, joined by Justices White, Blackmun, Marshall, and Stevens, cited *Bakke* for the proposition that diversity in the educational context contributes to broad exchange of ideas and is a constitutionally permissible goal. [40]

After concluding that diversity was a compelling government interest, the Sixth Circuit also held that the Law School's plan satisfied the second prong of the strict scrutiny test—the policy was narrowly tailored to the goal of achieving a diverse student body. The policy requires an individualized review of how each applicant might contribute to the school and the legal profession. In examining the policy, the court found that the Law School's plan, and its use of race as a "plus" factor without the use of quotas, was "virtually identical to the Harvard Plan." [41] To be permissible, the "plus" factor must be narrow and effective enough to attain the diversity sought in the student body. And as in *Bakke*, a plan is narrowly tailored when it is flexible enough to consider all relevant elements of diversity, proceeds on an individualized basis, and does not isolate candidates from competition with nonminority students. [42]

Finally, while not required by *Bakke*, subsequent Supreme Court decisions suggest consideration of race-neutral means is necessary to satisfy the narrowly tailored component of strict scrutiny. [43] The record indicates that the Law School considered and rejected multiple race-neutral alternatives to the consideration of race and ethnicity in its admissions policy. [44] The Law School found, and the Sixth Circuit agreed, that underrepresented minorities would not be enrolled in significant numbers unless their race were explicitly considered in the admissions process. [45] The Court held that the Law School adequately considered race-neutral alternatives, but that since none would have reached a critical mass of minority students, they would not have produced the desired goal, and the school would not have to adopt them over a race-conscious method. [46]

What would be the effect of overturning *Bakke* and reversing *Grutter*? Nationwide, if race is eliminated as a factor in admissions, African American enrollment, for example, at the 89 most selective law schools would fall from approximately 7 percent to less than 1 percent. [47] Seventy-five percent of African American students currently admitted to accredited law schools would not be accepted at any law school, and of those granted admission, 40 percent would be admitted to only predominately minority schools. [48] According to the Law School's statistical expert, eliminating race as a factor in the school's own admissions process would also drastically lower minority admission. [49] For example, for students selected under the current system in the entering class of 2000, minority enrollment was at 14.5 percent. [50] He predicted that if the Law School could not have considered race, underrepresented minority students would have only accounted for 4 percent of that class. [51] Such a result would be tragic where the minority students accepted to the Law School "graduate, pass the bar exam, obtain judicial clerkships, and succeed in the practice of law at rates essentially indistinguishable from their white and Asian American classmates." [52]

Gratz v. Bollinger

The second case against the University of Michigan, *Gratz v. Bollinger*, and the companion case to *Grutter* before the Supreme Court, involves its undergraduate school's policy of using race as a factor in its admissions process.^[53]

Jennifer Gratz and Patrick Hamacher applied for admission to the University of Michigan's undergraduate program, the College of Literature, Science, and the Arts (LS&A) in 1995 and 1997, respectively. After being wait-listed for several months, they were both rejected. In October 1997, they filed a class action lawsuit in the Eastern District of Michigan alleging that LS&A's use of race in its admissions policies from 1995 to the present violated Title VI as well as the equal protection clause.^[54] LS&A implemented its current admissions policy in 1999. The policies in place between 1995 and 1998 included race-conscious measures that were discontinued by the school. As will be discussed further below, the district court found the current plan constitutional, but also held the combination of practices in the former plans impermissible.^[55] The case is currently on appeal before judgment before the Supreme Court. Because the university did not cross-petition to seek review of the district court's determination regarding its former admissions practices, however, those practices are not on appeal and not properly before the Supreme Court.^[56]

As in *Grutter*, the current LS&A policy at issue takes race into consideration as a "plus" factor in its admissions decisions. The plan works in the following manner: Admissions counselors assess a variety of academic and nonacademic factors that the school believes are important for an incoming class. For consistency, the counselors use a "selection index" of 150 points and assign points to various factors.^[57] Of the potential total of 150 points, 110 are available for academic factors and 40 for other factors.^[58] Eighty points are available for high school GPA and 12 points for ACT or SAT scores. Applicants may receive up to 10 points for the academic strength of their high school, and an additional 8 points for selecting a more challenging curriculum. Counselors subtract up to 4 points for an applicant who chooses an easier curriculum when a more difficult one is available.^[59]

In addition to the 110 points available for these academic factors, 40 points are available for nonacademic factors that the university believes indicate an applicant's unique ability to contribute to the campus.^[60] This category includes a vast array of factors, with race being only one. For example, 10 points are awarded to all Michigan resident applicants to ensure that the public university is serving its own population, 6 points are granted to applicants from underrepresented Michigan counties, and 2 points for applicants from underrepresented states.^[61] If an applicant has a parent who is an alumnus of the university he or she receives 4 points and 1 point if another is a close relative. In addition, counselors may award up to 5 points for leadership and service, based on the student's application, essay, school activities, employment experience, and awards.^[62] Applicants may also receive up to 5 points for personal achievements such as strong character, persistence, and commitment to high ideals. Counselors may also give up to 3 points for the originality, subject matter, and quality of the essay.^[63]

Finally, an applicant may receive 20 points for *only one* of the following factors: "socioeconomic disadvantage, membership in an underrepresented minority group, attendance at a predominately minority or predominately socioeconomically disadvantaged high school, recruitment for athletics, or at the Provost's discretion."^[64] These 20 points are used to ensure LS&A's goal of providing students with the opportunity to interact with students of different races and ethnicities, while also ensuring that the selection index does not insulate applicants from comparison with all other candidates.

As part of the current system, counselors have broad discretion to determine whether an applicant, including, but not limited to, underrepresented minority applicants, warrants an additional in-depth review by the Admissions Review Committee (ARC).^[65] The counselor may "flag" an applicant for review if (1) the applicant is academically prepared for LS&A, (2) has at least a selection index of 80 for residents, and 75 for nonresidents, and (3) has a quality the school deems important to the incoming

class, including underrepresented minority status.[66] These candidates are sent to the ARC for review and a final decision. Unlike Davis' dual admissions process found unconstitutional in *Bakke*, the ARC does not serve as a separate review committee for minority applications. Given that applicants of any color may be 'flagged' for numerous reasons under the ARC process, the system does not protect minority candidates or remove them from competition with white applicants.[67]

As in *Grutter*, the district court applied strict scrutiny in its analysis of the racial classification at issue: does LS&A assert a compelling interest to support its use of race, and is the admissions program narrowly tailored to support that interest. In assessing the compelling interest at issue, however, unlike the Sixth Circuit in *Grutter*, the district court found that no five justices in *Bakke* expressly held that diversity was a compelling interest.[68] Instead, the court asserted that the most that could be gleaned from the splintered decision was that a majority of the justices expressly agreed that the Supreme Court of California erred by enjoining Davis from considering race in its admissions program. In other words, the district court in *Gratz* held that, in *Bakke*, five justices reached the same conclusion, i.e., that LS&A may take race into account in admissions for separate reasons.[69] Nonetheless, the district court held that, even though no Supreme Court decision has explicitly adopted the diversity rationale under strict scrutiny, the court 'did not agree that . . . the diversity interest can never constitute a compelling state interest, especially in context of higher education.'[70] Accordingly, the court was satisfied that if presented with sufficient evidence regarding the educational benefits that flow from a diverse student body, nothing bars the court from determining that these benefits are compelling under strict scrutiny analysis.[71]

Having determined that the educational benefits that flow from a diverse student body are sufficiently compelling to survive strict scrutiny, the district court had to determine if the policy was narrowly tailored to achieving that interest. LS&A's program, like that in *Grutter*, tracks closely the system approved of in *Bakke*, where race and ethnicity are a 'plus' factor considered in combination with other factors relevant to an applicant's overall contribution to the school. The court was satisfied that the operation of the current admissions program did not insulate minorities from competition with nonminorities, nor did it set quotas or seek a predetermined number of minority students for admission.

Furthermore, the court acknowledged that LS&A was unable to achieve sufficient racial and ethnic diversity through outreach and recruiting methods. It also acknowledged that other race-neutral alternatives failed to achieve the racial and ethnic diversity needed to make possible the opportunities for interactions that facilitate the educational benefits of diversity.[72] The Supreme Court has held that a race-neutral approach is viable for purposes of the narrow tailoring factor only if that approach would be 'comparably consistent' with, or better satisfy, the goals at stake.[73] Here, the school demonstrated that this is not the case. LS&A is not required to adopt a race-neutral approach that would be ineffective in creating a racially diverse student body[74] and would undermine the school's selective admissions standards by depriving it of the ability to individually assess how applicants can contribute a variety of talents and backgrounds to the student body.

Conclusion

Consistent with *Bakke*, in both Michigan's undergraduate and law school admissions policies, race operates as nothing more than a 'plus' factor, among many factors, for the applicant. Neither admissions policy establishes a quota system or sets aside a predetermined number of slots for minority students. Both the Sixth Circuit, in *Grutter*, and the district court in *Gratz*, analyzed these programs and found that the consideration of race and ethnicity was virtually indistinguishable from the plan approved of in *Bakke*. The Supreme Court, therefore, is faced with deciding whether the educational benefits that flow from a diverse student body to the school community remain sufficiently compelling to justify the school's use of race and ethnicity as a factor in a properly devised admissions program.

[1] *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J.) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

[2] 438 U.S. 265 (1978).

[3] *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (Dec. 2, 2002) (No. 02-241).

[4] *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *cert. granted*, 123 S. Ct. 602 (Dec. 2, 2002) (No. 02-516).

[5] By the February 19, 2003, deadline, 66 amicus curiae briefs by about 300 organizations had been filed in support of the University of Michigan's admissions policies. See Frank F. Murray, "Friend? Briefs Set Record in Michigan Case," *Washington Times*, Mar. 3, 2000.

[6] Brief for Respondents at 1, *Grutter v. Bollinger* (No. 02-241) (hereinafter "Grutter Br. for Respondents").

[7] U.S. Commission on Civil Rights ("USCCR"), *Statement on Affirmative Action*, 1978; see also USCCR, *Toward an Understanding of Bakke*, 1979.

[8] USCCR, *Toward Equal Educational Opportunity: Affirmative Action Programs at Law and Medical Schools*, 1978.

[9] USCCR, Letter from Chairperson Arthur A. Fletcher to the President, Jan. 23, 1991.

[10] *Bakke*, 438 U.S. at 319-20. Davis' admissions program consisted of two admissions programs: a regular admissions program where applicants with a GPA below 2.5 were rejected, and a special admissions system for minorities. *Id.* at 273-75. The special admissions system, operated with a separate committee, rated applicants in a manner similar to the regular admissions applicants, except they did not have to meet the 2.5 minimum GPA applied to nonminority applicants. *Id.* at 275.

The special admissions committee would continue to recommend minority applicants to the general admissions committee until a specified number, determined by faculty vote, was filled. *Id.* While the candidates in the special program who were referred to the general admissions committee were not ranked against candidates in the general admissions process, the admissions committee could reject special admissions candidates for "failure to meet course requirements or other specific deficiencies." *Id.* The special committee continued forwarding the applicants to the general admissions committee until a specific number of minority candidates were admitted. *Id.* Under this program, the minority applicants were never compared against the nonminority applicants. In 1973 and 1974, there were 16 special admissions slots reserved for minority candidates out of 100 total admission slots. *Id.*

[11] *Bakke*, 438 U.S. at 275.

[12] *Id.* at 270 n. **, 271.

[13] *Id.* at 320.

[14] *Id.* at 296 n.36.

[15] *Id.* at 320, 326 n.1 (Brennan, J., concurring in part).

[16] *Id.* at 316-18, 322-23, 326 n.1. A majority of the Court joined in Part V-C of Justice Powell's opinion, which states *Bakke's* core holding and judgment, reversing the California Supreme Court's injunction barring consideration of race in admissions because "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320.

Another rationale that explains the majority view of *Bakke* is that Justice Powell's reasoning can be considered the "narrowest ground" articulated by any of the justices supporting reversal, and, therefore under the theory articulated in Marks

v. United States, 430 U.S. 188, 193 (1977), is binding precedent of the Supreme Court. The other justices forming that majority believed that it was constitutionally permissible to use a more extensive and varied consideration of race in admissions; in fact, they voted to affirm the quota employed by Davis. In other words, those justices reversed the California Supreme Court because they believed it improperly foreclosed a wider array of legal conduct than Justice Powell did. Thus, under the theory articulated in *Marks*, Justice Powell's analysis provides the most narrow and common basis for the Court's judgment.

[17] *Id.* at 314.

[18] *Id.* at 312 (quoting *Swezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). The Supreme Court has repeatedly acknowledged the educational benefits of a diverse student body. *See, e.g.*, *Brown v. Bd. of Educ.* 347 U.S. 483, 493-95 & n.11 (1954); *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 (1982).

[19] *Id.* at 319.

[20] *Id.* at 317.

[21] *Id.*?

[22] *Grutter*, 288 F.3d at 735-36.

[23] *Id.* at 736.

[24] *Id.* The cell also reports the number of offers of admission made to the applicants in that cell. *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* The admissions policy cites different examples of diversity admissions, including giving 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. *Id.*

[29] *Grutter* Br. for Respondents at 4.

[30] *Id.* at 4, 13.?

[31] *Id.* at 13.

[32] *Grutter*, 288 F.3d at 737. ?

[33] *Id.* at 747-48. Paying some attention to the racial makeup of the students ensures that a plan is narrowly tailored to achieve its stated goal of student body diversity. But paying attention to numbers does not transform a flexible admissions system into a quota. Between 1993 and 1998, the Law School's underrepresented minority enrollment ranged from 13.5 percent to 20.1 percent. *Id.* at 748. The fact that a range exists does not convert the policy into a quota system. The "statistical law of large numbers" guarantees that there will always be a range over time, with an identifiable bottom percentage, for any characteristic, regardless of whether it is a factor in the admissions policy or not. *Grutter* Br. for Respondents at 41; *see also Grutter*, 288 F.3d at 748. Even a race-blind system would produce a percentage range of admitted minority students; thus, demonstrating that a range should not be mistaken for a quota. *Grutter* Br. for Respondents at 41.

[34] *Grutter*, 288 F.3d at 737.

[35] *See Grutter v. Bollinger*, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002).

[36] *Grutter*, 288 F.3d at 739, 752.

[37] For a discussion of *Marks*, see footnote 16 above.

[38] *Grutter*, 288 F.3d at 739?42.

[39] See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990) (citing *Bakke*, 438 U.S. at 311?13), *overruled on other grounds*, *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 227 (1995); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part) (acknowledging that the pursuit of racial diversity has been found compelling in the context of higher education).

[40] What distinguishes *Bakke* and other cases in the educational context from cases where affirmative action has been limited or eliminated is that one could argue that racial diversity may be more relevant to the core goals of a university than to other governmental endeavors. For example, in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the Supreme Court held that the city could use an all-white workforce, and in *Adarand*, 515 U.S. at 227, the Court held that race is often irrelevant to governmental action, but in *Bakke* and *Sweatt*, the Court recognized that one cannot provide the finest education in an all-white context. See *Bakke*, 438 U.S. at 312?14; *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

[41] *Grutter*, 288 F.3d at 749.

[42] *Grutter* Br. for Respondents at 45 (citing *Bakke*, 438 U.S. at 315, 317, 319 n. 53).

[43] *Grutter*, 288 F.3d at 749 (citing *Croson*, 488 U.S. at 507).

[44] *Id.* at 750. For example, the school engaged in pre- and post-admission recruiting activities, which have not yielded a critical mass of minority students. *Id.* The school also considered a lottery in which the law school would lower its admissions standards, establish a cut-off for qualified students, and randomly pick among these applicants. *Id.* The school determined this would not yield meaningful racial diversity. *Id.*?

In addition, in its brief before the Supreme Court, the United States advocates the use of percentage plans as a more narrowly tailored, race-neutral alternative. These plans, adopted by California, Texas, and Florida, guarantee admission to college to all high school students graduating above a certain threshold. There are well-documented problems with this approach, not the least of which is that it has not demonstrated that it can ensure any critical mass of racial diversity. See *Grutter* Br. for Respondents at 35.?

The use of percentage plans as an alternative measure is more relevant to the undergraduate school case in *Gratz v. Bollinger*, and is discussed in greater detail below in footnote 72. Furthermore, it is not clear how percentage plans would be implemented in place of affirmative action programs in law school programs, like those at issue in *Grutter*, since currently, percentage plans are not applied to law schools, nor any other graduate or professional program. The United States also suggests, as an alternative measure, that the law school ease admissions requirements. *Id.* at 35?36. The Sixth Circuit, however, explained that while an educational institution must consider race-neutral alternatives, there is no requirement that it choose between racial diversity and academic selectivity in order to achieve the government?s compelling interest. See *Grutter*, 288 F.3d at 750. ?

[45] *Grutter*, 288 F.3d at 750.?

[46] *Id.*

[47] *Grutter* Br. for Respondents at 20.

[48] *Id.* (citing Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 27?28 (1997)). In the year after the Fifth Circuit prohibited the use of race in admissions, admissions for Hispanic students at the University of Texas Law School fell by 33 percent and admissions for African American students fell by 86 percent. *Id.* (citing, e.g., Br. for American Law Deans Association as *Amicus Curiae*). In real numbers, that was four African American students in a class of 500. *Id.*

[49] *Grutter*, 288 F.3d at 737.

[50] *Id.*

[51] *Id.* It is important to note that it is uncontested that previously admitted minority students are equally qualified for admission as the nonminority students. The district court in *Grutter* (which even held the plan unconstitutional) never questioned, and the plaintiff stipulated, that all the minority applicants admitted under the school's policy were qualified. *Grutter* Br. for Respondents at 9. While underrepresented minority groups have had slightly lower GPAs and LSATs than the white and Asian American admittees, their scores have still been superior to most applicants nationwide. *Id.*

[52] *Grutter* Br. for Respondents at 9.

[53] Both *Grutter* and *Gratz* were appealed to the Sixth Circuit, and in May 2002, the Sixth Circuit issued its opinion in *Grutter*. The court left review of *Gratz* for a later date. *See Grutter*, 288 F.3d at 735 n.2. *Gratz* is now on appeal before judgment to the Supreme Court. *See Gratz v. Bollinger*, 123 S. Ct. 602 (2002).

As will be discussed below, the district court in *Gratz* interpreted *Bakke* differently from the Sixth Circuit in *Grutter*. That is, while both courts held that diversity is a compelling government interest, only *Grutter* found that a majority of justices in *Bakke* so held. Thus, while the decision in *Grutter* is binding Sixth Circuit law, the Supreme Court could also adopt the reasoning set forth in *Gratz* to uphold affirmative action programs, and therefore, *Gratz*'s rationale is discussed herein.

[54] *Gratz* and Hamacher brought this action on their own behalf and Hamacher also brought it on behalf of a certified class of similarly situated persons affected by the admissions processes from 1995 to the present. *See Gratz v. Bollinger*, Br. for Petitioners at ii. It should be noted that in this suit plaintiffs did not dispute the qualifications of the minority admittees. The district court stated that it agreed "with the University Defendants' assertion that all who are ultimately admitted to the LSA are "qualified" academically. . . ." *Gratz*, 122 F. Supp. 2d at 832. Indeed, it is "undisputed that LS&A admits only qualified applicants." Brief for Respondents at 1, *Gratz v. Bollinger* (No. 02-516) (hereinafter "*Gratz* Br. for Respondents").

[55] *Gratz*, 122 F. Supp. 2d at 833.

[56] *Gratz* Br. for Respondents at 5 n.7. In their brief before the Supreme Court, petitioners continue to attack these discontinued practices. *Id.* It has been established, however, that in order to alter the judgment below, a party must cross-petition those issues. *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). LS&A has not done so with regard to the policies in place between 1995 and 1998.

[57] *Gratz* Br. for Respondents at 7.

[58] *Id.*

[59] *Id.* at 8.

[60] And while, as discussed below, there is a total of 53 available points for nonacademic factors, a candidate may receive no more than 40 points for any combination of factors.

[61] *Gratz* Br. for Respondents at 8.

[62] *Id.* at 9.

[63] *Id.* As LS&A notes in its brief before the Supreme Court, applicants may receive a variety of points through the combination of these factors. "For example, a white student from Michigan's Upper Peninsula who had demonstrated outstanding leadership and service could receive 21 points (10 for Michigan residency, six points for residency in an underrepresented Michigan county, and five points for leadership); a white student from rural North Carolina whose family is on public assistance and who wrote an outstanding essay could receive 25 points (two points for residency in an underrepresented state, 20 points for socioeconomic status, and three points for the essay). . . ." *Id.* at 36 n.47. These hypothetical white applicants will continue to receive this special consideration regardless of whether the Supreme Court prohibits the use of race as a similar "plus" factor.

[64] *Id.* at 9 (internal footnote omitted). LS&A considers African Americans, Hispanics, and Native Americans to be

underrepresented minorities for purposes of considering race or ethnicity in admission. *Id.* at 9 n.13.

[65] *Gratz* Br. for Respondents at 9.

[66] *Gratz*, 122 F. Supp. 2d at 829.

[67] *Id.* at 830.?

[68] *Id.* at 819.

[69] *Id.*

[70] *Id.* at 820?21. The plaintiffs in *Gratz* argued that the Fifth Circuit's decision in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996) and *Johnson v. Bd. of Regents of Univ. Sys. of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000) held, as a matter of law, that diversity is not a compelling government interest. *Gratz*, 122 F. Supp. 2d at 820. The Fifth Circuit in *Hopwood*, interpreted Justice Brennan's "silence" in *Bakke*, regarding the diversity rationale, to mean he "implicitly rejected" that position. *Id.* (quoting *Hopwood*, 78 F.3d at 944). The district court in *Gratz* disagreed with that interpretation. *Id.* In fact, the court found that Justice Brennan's silence could just as easily be interpreted as "implicit approval" of diversity constituting a compelling government interest. *Id.* And moreover, that Justice Brennan's opinion in *Metro*, where he specifically described *Bakke* as recognizing "a diverse student body" as a "constitutionally permissible goal," supports a conclusion that his silence in *Bakke* was not an implicit rejection, but rather an implicit approval of the diversity interest. *Id.* (citing *Metro*, 497 U.S. at 568).?

[71] The district court stated that LS&A presented "solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body." *Gratz*, 122 F. Supp. 2d at 822. For example, the interim dean of LS&A testified that data show that "students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." *Id.* Moreover, members of heterogeneous groups offer more creative solutions to problems, exhibit a greater likelihood for creative thinking, and show a decreased likelihood of exhibiting the problem of "group think," a situation in which group members mindlessly conform. *Id.* at 823.

[72] *Gratz* Br. for Respondents at 32?33. For example, in its brief before the Supreme Court, the United States suggests LS&A adopt a percentage based admissions program, such as those currently in place in Texas, Florida, and California. U.S. Br. at 13?14. These "percentage plan" programs, however, which guarantee admission to a fixed percentage of the graduates from each high school in the state, are neither race-neutral, nor effective. *Gratz*, 122 F. Supp. 2d at 830; *Gratz* Br. for Respondents at 42?43. While percentage plans are facially "race-blind" they are knowingly premised on the racial segregation in these states' public school systems. In Texas, for example, guaranteeing admission to the top 10 percent of high schools' graduating classes was supposed to guarantee a pool of minority students because racial segregation in Texas has resulted in enough majority-minority schools to guarantee that the top 10 percent in many schools would be minorities. *Gratz* Br. for Respondents at 44?45 (citing Marta Tienda *et al.*, *Closing the Gap? Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action*, 2003, p. 7, available at <<http://www.texastop10.princeton.edu/publications/tienda012103.pdf>>). Further, because any success of these plans is based on segregated schools, the plans could create perverse incentives for minority parents to keep their high-performing children in low-performing, segregated schools to maximize their chances of college admission. *Id.* at 46. Clearly, the program was designed as a form of race consciousness, and will not produce any significant results where racial segregation is not already ingrained. And in Michigan, the number of statewide "majority-minority schools is dwarfed by the far greater number of Michigan schools that are virtually all white." *Id.* at 48. Data show that percentage plans have not been as successful as proponents claim, especially at selective institutions. *Id.* at 45 n.61 (citing, e.g., USCCR, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, 2002, pp. 19?24, 57?60, 65?66, 116).

[73] *Id.* at 49 (citing *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)).?

[74] For example, in 1996, under a race-blind system, the number of minority students admitted would have dropped from 1,335 to 269 out of 10,363 total admitted students. *Gratz* Br. for Respondents at 4 n.5.