GRATZ V. BOLLINGER AND GRUTTER V. BOLLINGER: A CASE STUDY

JEFFREY M. GRILLIOT

A Dissertation
Submitted to the Graduate College of Bowling Green
State University in partial fulfillment of
the requirements for the degree of

DOCTOR OF EDUCATION

May 2007

Committee:

Patrick D. Pauken, Advisor
Leigh Ann Wheeler
Graduate Faculty Representative
Judith Jackson May
Winifred O. Stone
The purpose of this study was to understand why the affirmative action university admissions legal cases of *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003) took place at the University of Michigan and to analyze the cases to understand the legal implications for the University of Michigan and the nation. The study provides insight and understanding in the rationale of the University of Michigan’s unique history with race and its historical desire and need to defend diversity. This study chronicles the historical events and legal precedents that led to, and coincided with, the major events at the University of Michigan and at the Supreme Court. This study reviews and analyzes the Supreme Court cases of *Gratz v. Bollinger* and *Grutter v. Bollinger* and their importance to policy making and implementation at colleges and universities.

This study begins by outlining the relevant historical events that shaped the perception of race and affirmative action in the United States. It provides the reader with various federal policies and social movements that shaped civil rights legislation and provides an historical context of race, education and the law. It is intended as a primer to better understand the law “behind” *Gratz* and *Grutter* and to introduce the reader to the history of affirmative action in university admissions. In order to provide the reader with the rationale for the motivation of the University of Michigan to become involved in the case, a brief history of three events at the University of Michigan—the admission of women, the Black Action Movements, and the Michigan Mandate—and the resulting policy decisions are examined. The study moves on to describe the events leading to the litigation and will examine both *Grutter* and *Gratz*. This
research does more than retrace the history of race and affirmative action; it explores the link between past events and contemporary public policy.
ACKNOWLEDGMENTS

The Road goes ever on and on
Down from the door where it began.
Now far ahead the Road has gone,
And I must follow, if I can,
Pursuing it with eager feet,
Until it joins some larger way
Where many paths and errands meet.
And whither then? I cannot say.

Sung by: Bilbo Baggins in the Fellowship of the Ring

Like Bilbo’s song, my work with the dissertation has gone “ever on and on” and could only have been completed with the support and assistance of many people. First, I appreciate the patience and support of my family, Kim, Karly, Katie, and Kris. They have been very understanding during the long doctoral process and have forfeited many evenings and weekends together so I could spend time with class-work, research, and writing.

Without the mentoring and direction of Dr. Pauken, my advisor, I could not have completed the dissertation. He has been a true mentor, an adviser, and teacher. He has been a source of inspiration and information. I will always be grateful for his time, attention to detail, and dedication.

Thanks also are due to my committee members, Leigh Ann Wheeler, Judy Jackson May, and Win Stone. Thanks to Bruce Edwards for his patience and support during the writing process, to Joyce Koch for her assistance with typing and references, to Laura Hertzfeld for her assistance with the publication of the handouts for the oral defense, and for all others that provided continued support during the doctoral process.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER I. INTRODUCTION</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>3</td>
</tr>
<tr>
<td>Research Questions</td>
<td>5</td>
</tr>
<tr>
<td>Researcher Perspectives and Interest</td>
<td>6</td>
</tr>
<tr>
<td>Outline</td>
<td>9</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER II. METHODOLOGY</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Historical Case Study</td>
<td>11</td>
</tr>
<tr>
<td>Legal Research</td>
<td>13</td>
</tr>
<tr>
<td>Data Collection and Analysis</td>
<td>14</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER III. CIVIL RIGHTS, A PRELUDE TO AFFIRMATIVE ACTION</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Education and Professional Opportunities</td>
<td>16</td>
</tr>
<tr>
<td>Laws</td>
<td>17</td>
</tr>
<tr>
<td>Politics and Protests</td>
<td>20</td>
</tr>
<tr>
<td>Conclusion</td>
<td>30</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER IV. EDUCATION, RACE, AND THE LAW</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>32</td>
</tr>
<tr>
<td>Morrill Act</td>
<td>34</td>
</tr>
<tr>
<td>Affirmative Action in Higher Education</td>
<td>37</td>
</tr>
<tr>
<td>Summary and Analysis</td>
<td>64</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER V. DIVERSITY AT THE UNIVERSITY OF MICHIGAN</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>67</td>
</tr>
</tbody>
</table>
Early Years and the Admission of Women and Minorities ........................................... 68
Student Activism and the Black Action Movements (BAM) ........................................ 74
Michigan Mandate and the Duderstadt Era ............................................................... 80

CHAPTER VI. GRATZ AND GRUTTER................................................................. 84
Introduction .............................................................................................................. 84
The Center for Individual Rights, Political Climate, and Media ............................... 85
Amicus Briefs .......................................................................................................... 90
A Case Analysis: *Grutter* and *Gratz* ................................................................ 91
Summary and Analysis ............................................................................................. 108

CHAPTER VII. DISCUSSION AND CONCLUSION.................................................. 113
Suggestions for Leadership and Practice .................................................................. 128

PRIMARY REFERENCES ........................................................................................... 134
SECONDARY REFERENCES ....................................................................................... 137
CHAPTER I. INTRODUCTION

The Committee on Admission of the college, after consideration of your application, regrets to inform you that it cannot offer you a place in our entering class next fall.

This year the number of qualified applicants far exceeded the number of places available in the Freshman Class, and it was inevitable that many students who were qualified for admission could not be accepted. (The Qualified Student, p. 3)

Each year, thousands of applicants to colleges and universities all across the United States receive a rejection letter, like the one produced above, from a college or university.

Jennifer Gratz, a white female, seemed to be the kind of student any college or university would want to admit. She is a policeman’s daughter who attended public school in a working-class Detroit suburb. Gratz had a 3.76 grade point average in high school and scored a 25 on the ACT college admission test. She was a math tutor, blood-drive organizer, a volunteer at her school’s “senior citizen’s prom”, she was a cheerleader and the homecoming queen. Her goal was to become a doctor, to help people and to give back to her community. She received a rejection letter from the University of Michigan. Her rejection at the University of Michigan forced her to attend a less selective university and she gave up her dream to become a doctor.

Barbara Grutter, a white female, was a mother of two that put herself through college while maintaining a 4.00 grade point average. In addition, she ran her own health-care consulting company for thirteen years. She had always wanted to be a lawyer and applied to the University of Michigan’s Law School. She applied and was rejected.

Some applicants may be so discouraged by a rejection letter to their first-choice university that they may decide not to attend any institution of higher education. Others may
apply to the same institution again, but choose instead to pursue a different major and
subsequent alternative career choice. A rejected candidate may decide to keep the same major
and career path, but may opt to apply to a different, less competitive college/university.
Students receiving letters of rejection usually accept the rejection letter, do not question the
reasons, and move on to another university that will accept them. Moving on to a “second-
choice” university happens quite frequently.

However, some rejected students do not want to go to their “second choice” university;
they want to go to their first-choice university. Even if this is not possible, they want to know:
“Why was I rejected?” or “What criteria were used to reject me?” Occasionally, when hearing
the answers to the questions, some students disagree with the reasons for rejection and choose
to alter the decision via litigation. Many such lawsuits have been filed, but few have captured
the attention of a nation. Barbara Grutter and Jennifer Gratz decided to challenge their
rejections to the University of Michigan. Their challenges led to a long series of court
proceedings at all levels of the judicial system, created an institutional reflection on its
commitment to diversity, initiated an in-depth review of the university’s admission policies,
started a national dialogue and debate on affirmative action (which was intensely chronicled
by television, newspapers, magazines, and the Internet), and generated a set of politically
charged and nationally discussed legal cases that were ultimately decided by the U.S. Supreme

In Bowen and Bok’s The Shape of the River, the authors use the imagery of a river to
describe the flow of talent that runs through the system of higher education and into the
mainstream of the larger society. The flow begins with keeping young people moving from
elementary school to high school, to college and graduate school, and into jobs and family and
civic responsibilities (Bowen & Bok, 1998, p. xxi). In The Shape of the River, Bowen and Bok examine how race-sensitive admissions policies at selective institutions actually work and what effects they have on students of different races. The study reveals the relationships between race-sensitive admissions policies and the likelihood of admission to selective institutions, the performance of admitted minority students after admission, the effect on careers, the relationship in civic and community participation, and the effect of a diverse student body on the entire student population. The heart of the book is the wisdom of race-sensitive admissions. Bowen and Bok end their book with a reflection on the concept of merit and whether it is compatible with the effort to achieve a racially diverse student body and whether it matters. Who is admitted? What criteria are used to admit? Why are certain students admitted and others are not? What role does race play in the admission process? These same questions are at the center of both Grutter and Gratz. The cases are focused on who “merits” or “deserves” a place in the incoming class of undergraduates or the incoming law class, and why.

Purpose

In Tradition and Transition: Achieving Diversity at Harvard and Radcliffe, Jennifer Carey (1995) investigated the historical events, issues, and trends that contributed to the philosophical position on the inclusion of diversity and race as a factor in the admission process at Harvard and Radcliffe. In this historical, qualitative study she examined historical data, archival collections, media sources, and examined documents located at Harvard and Radcliffe to understand the factors that contributed to the position taken at these institutions concerning race as a factor in admissions. This study examined a thirty year period at Harvard/Radcliffe and began with a broad overview of race in the early years at these institutions and proceeded
through 1990. In her conclusion she stated that much had been written about minority recruitment, admissions, and enrollment. She determined that little effort has been made to chronicle the history of individual institutions and their work and struggles to increase the diversity of their student bodies. She indicated that little research has been focused on an individual institution of higher education involved in affirmative action litigation. There is a gap in the research that focuses on asking why this type of litigation “settles” or takes place at a particular institution. She suggested that additional studies be conducted of individual institutions that have struggled to increase the diversity of their student body, especially one that has been involved in affirmative action legislation. She suggested that it would be very significant to include an investigation of a public institution as well as a private institution.

Since the study at Harvard/Radcliffe was conducted, there have been several major lawsuits concerning affirmative action, race, and admissions at universities since the research conducted by Carey in 1995 (Hopwood v. State of Texas, 1996; Johnson v. Board of Regents of the University System of Georgia, 2001; Smith v. University of Washington Law School, 2000) but only Gratz and Grutter at the University of Michigan have attained the highest level of national exposure and have reached the Supreme Court of the United States.

The purpose of this study is to understand why the legal cases of Gratz v. Bollinger and Grutter v. Bollinger took place at the University of Michigan and to analyze the cases to understand the legal implications for the University of Michigan and the nation. The study will provide insight and understanding in the rationale of the University of Michigan’s unique history with race and its historical desire and need to defend diversity. This study will briefly chronicle the historical events and legal precedents that led to, and coincided with, the major events at the University of Michigan and at the Supreme Court. This study will review and analyze the
Supreme Court cases of *Gratz v. Bollinger* and *Grutter v. Bollinger* and their importance to policy making and implementation at colleges and universities.

This study will begin by outlining the relevant historical events that shaped the perception of race and affirmative action in the United States. It will provide the reader with various federal policies and social movements that shaped civil rights legislation and provide an historical context of race, education and the law. This is intended as a primer to better understand the law “behind” *Gratz* and *Grutter* and to introduce the reader to the history of affirmative action in university admissions. In order to provide the reader with the rationale for the motivation of the University of Michigan to become involved in the case, a brief history of three events at the University of Michigan—the admission of women, the Black Action Movements, and the Michigan Mandate—and the resulting policy decisions are examined. The study moves on to describe the events leading to the litigation and will examine both *Grutter* and *Gratz*. This research will do more than retrace the history of race and affirmative action; it will explore the link between past events and contemporary public policy.

Research Questions

Initially, I became intrigued with the various ethical and practical questions posed by the rejected candidates, Ms. Gratz and Ms. Grutter. “Were their rejections fair?” “Were the rejected candidates’ rights violated”. “What criteria were used to support the rejection?” This led to additional questions. “Why did the University of Michigan support the concept of diversity to such a level to commit to a lengthy and expensive court battle?” “Why did the court case happen at the University of Michigan?” In following the arguments by both the attorneys for the plaintiffs (Gratz and Grutter) and the attorneys for the defendant (University of Michigan) I became more intrigued with the institutional stance on diversity taken by the
University of Michigan and the effects of the litigation of the plaintiffs. Being a student of leadership, policy analysis, ethics, and diversity, I began to ask myself questions about the pro-diversity position being taken by the parties involved in the cases, and the leadership decisions by the administration of the University of Michigan. These general questions evolved into three categories that form the basis of this dissertation and the following research questions:

1. How did federal policies and social movements shape civil rights prior to the Civil Rights Act of 1964?
2. What is the history of affirmative action in university admissions?
3. How did historical events, student activism and university policies contribute to the University of Michigan’s experience with *Gratz v. Bollinger* and *Grutter v. Bollinger*?
4. What are the legal implications of *Gratz* and *Grutter*?

Researcher Perspective and Interest

My initial interest in the *Gratz* and *Grutter* cases began with my professional interest in diversity. I have been involved in international education in higher education for over 25 years and have seen, first-hand, the importance of diversity in an educational setting. I had been promoting diversity and multiculturalism on the campuses of Bowling Green State University and the University of Findlay, and continue to do so as the current Director of Global Initiatives at Bowling Green State University. I have had the opportunity to travel the globe to witness, first-hand, the diversity of people and cultures and have seen the strength and power of diverse perspectives. I have worked directly with over 10,000 international students from over 100 different countries. Their different cultures, languages, religions, and ethnic heritages have provided unique contributions in the classrooms and laboratories. Their diversity has truly made the educational milieu richer and fuller. Learning and participating in
a diverse environment enables students to consider their own values in light of the cultural beliefs and values of others.

I began to learn about the Grutter and Gratz cases at the University of Michigan while being enrolled in classes in the Leadership Studies doctoral program in the College of Education and Human Development at Bowling Green State University. Grutter and Gratz gained national prominence as early as 2000, when they first appeared in popular magazines and professional journals. The debates and discussions included the significance of university admissions in the struggle for affirmative action and diversity and I took notice, as did many others in higher education. At that time, I was enrolled in an ethics class in my doctoral program and happened to view a segment of 60 Minutes which aired on October 29, 2000 (The original transcript is located at: http://www.cir-usa.org/articles/64.html). In this episode, the white women who were suing the University of Michigan, Barbara Grutter and Jennifer Gratz, expressed their displeasure of being rejected. They both were persistent in trying to identify and understand the reasons for their rejections. Both believed that they were rejected unfairly. Both believed that their rejections were based, in part, on their race. In the interview Ed Bradley, of 60 Minutes asked Ms. Gratz if she could recall the day she received her rejection letter. Gratz said:

I remember the day like—like it was yesterday. I came home from practice, cheerleading practice, and grabbed the mail. And it was a thin envelope. And then I opened it and I read probably the first three lines at that point and started crying. I was mad and I didn't understand why and I didn’t want to tell anyone. But right away, I definitely knew that there was something wrong.
Bradley asked her why and Gratz responded, “Well, it is common knowledge. They make it known that they use race and that there is a double standard.” Similarly, Bradley asked Grutter, the rejected Law School applicant, if she thought her rejection was fair and what made her most angry about the decision not to admit her. She responded, “I have two children, and we have always taught them that discrimination was wrong, that people have a right to equal treatment. Our beliefs about equal treatment and equal protection, are those platitudes or are those real?” What made her most angry was “the fact that someone has the arrogance to think that they have the right to treat me differently, to take away my rights.” In the interview, Grutter spoke about the lack of fairness in the admission process and about being discriminated against because she was white. She believed that the policy needed to be changed and that she had the moral obligation to take the University of Michigan to court over this matter so others would not receive the same unfair treatment. Both Grutter and Gratz wanted to end, what they believed, was the use of racially preferential admission systems in colleges and universities. In the interview, they both expressed the belief that the University of Michigan used a separate, lower admissions standard for preferred racial groups in order to boost the number of such students.

In their view, treating applicants differently solely on account of their race violated the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, which prohibits states from denying “to any person…the equal protection of the laws.” At issue in Gratz and Grutter were first, whether racial diversity is a compelling state interest that justifies an exception to the 14th Amendment and, second, whether dual admissions standards are the only practical means to achieving racial diversity while maintaining high academic standards.
The 60 Minutes segment served as an introduction to the court cases and generated many questions in my own mind concerning race and affirmative action, the ethics of university admission policies, the institutional priorities of universities, the educational benefits of diversity in the classroom, and other related issues.

In addition to these issues, I had the opportunity to meet with Dr. James Duderstadt, the former President of the University of Michigan, while the cases were gaining national attention, and asked him about the genesis of the legal cases and discussed my research ideas with him. His moral convictions and practical concerns about the importance of introducing diversity to students in higher education for the 21st century was very inspirational and contributed to the motivation to begin the study. I also spoke to Dr. Patricia Gurin, one of the principal researchers concerning the value of diversity at universities. Examination of her research was also a motivating factor to begin focusing on these cases as a topic for this research. Dr. Gurin’s expert testimony in the Gratz and Grutter cases proved to be pivotal in the University of Michigan’s defense strategy.

Outline

This legal/historical case study investigates the historical background both in the United States and at the University of Michigan, the legal cases concerning affirmative action in higher education preceding Gratz and Grutter, and the litigation between the University of Michigan and Gratz and Grutter. Specifically, the study, in Chapter 1, provides an introduction to the study, the purpose of the study, research questions, examine the researcher perspectives and interest in the study, and provides an outline of the study. In Chapter 2, the historical/legal case study methodology is presented. In Chapter 3, the reader is introduced to the historical development of social movements and federal policies that shaped the national
landscape which eventually led to a national paradigm shift concerning civil rights. In Chapter 4, significant court cases in the United States that focused on affirmative action and diversity in higher education is outlined and analyzed to provide background for greater understanding of *Gratz* and *Grutter*. In Chapter 5, the history of striving to achieve diversity at the University of Michigan is described. This chapter includes a description of the “dangerous experiment” of admitting women at the University and the Michigan Agenda for Women; student activism at the University of Michigan, especially the Black Action Movements (BAM I, BAM II, and BAM III); the “Michigan Mandate” and the Duderstadt Era. In Chapter 6, a specific analysis of *Gratz* and *Grutter* cases and the amicus support from business, industry, and institutions, are described and analyzed. In Chapter 7, the ramifications and new initiatives generated by the legal outcomes of the court case are reported and conclusions are offered.
CHAPTER II. METHODOLOGY

Historical Case Study

In order to investigate the research questions posed in this study, a mixed methodology was required. This study blends historical case study methodology with legal case study research. Historians generally begin their research with a question of why or how did a set of experiences occur. Historians do not address questions of methodology the same way that other qualitative or quantitative researchers do. Their main concerns have to do with sources and the various types of historical data available to them. Historical research in education can “help to clarify the complex political dynamics of educational leadership and educational policy making. History is the study of change, and as educators we are committed to understanding and interpreting change…” (Rousmaniere, 2004, p. 50).

A historical case study methodology was selected because “case studies are the preferred strategy of investigation, when “how” or “why” questions are being posed, when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context (Yin, 1994, p. 1). According to Yin (1994) case studies have the following characteristics:

1. Complex social phenomena are studied (p. 14)
2. Relevant behaviors cannot be manipulated (p. 19)
3. A contemporary phenomenon is investigated with its real life context (p. 23)
4. Boundaries between phenomenon and context are not clearly evident (p. 23)
5. Multiple sources of evidence are used (p. 23)

Case studies and historical research, in trying to determine “how” and “why” questions, are more explanatory in nature. This is because these types of questions deal with things that need
to be traced over time, rather than by mere frequencies or incidences that can be quantified (Yin, 1994, p. 6).

This research will focus on the University of Michigan’s history and legal cases surrounding affirmative action, admissions, and diversity. The decision to focus on one institution, as opposed to researching a variety of similar institutions with similar legal proceedings (e.g., University of Texas, University of Washington, University of California, etc.) and comparing them was made for several reasons. The rationale for conducting a single case study is when the subject represents a critical case, an extreme or unique case, or a revelatory case (Yin, 1994, pp. 38-41).

In this case study, the phenomenon at the University of Michigan fits all three rationales for using a single case study. The court cases at the University of Michigan were, at the time of their litigation, and still at this time of this writing, were both critical and unique. They are critical for the interpretation and application of the Supreme Court decisions on the use of race as an admissions criterion at universities and colleges across the United States. They are unique because *Gratz* and *Grutter* were only the second race-in-admissions cases to be heard at the U.S. Supreme Court, the first being *The Regents of the University of California v. Bakke* (1978). The environment and the historical events (the early history, the BAM movements, and the Michigan Mandate) leading to the case at the University of Michigan were unique to that particular campus and presented an opportunity to study a case that was “in progress”.

A variety of data collection methods were used in this study including document and artifact analysis, and traditional legal research methods.
Legal Research

Much of this research concerns the formation of law and an examination of legal cases. Chapter 3 outlines and explains federal laws, executive orders, and statutes that contribute to the formation of legal cases that follow. In Chapter 4 significant cases (e.g., Regents of the University of California v. Bakke, 1978; Hopwood v. State of Texas, 1996; Smith v. University of Washington, 1998; Johnson v. Board of Regents of the University System of Georgia, 2002) involving affirmative action litigation in higher education are analyzed. In Chapter 6, Gratz v. Bollinger (2003) and Grutter v. Bollinger (2003) are analyzed in detail.

Legal research and historical study are complementary methodologies. Legal research serves a critical role in determining the potential impact that past decisions, and past legal history has on future actions (Cohen & Olsen, 1996). Examination of legal cases is critical to understanding the genesis of the law. In examining legal cases it is important for the researcher to (1) examine the legal facts and the opinions expressed in the case, (2) look for similarities and differences between cases, and (3) determine the similar, but different patterns of law presented and adopted by the courts (Wolfe, Dow, Dobson, & Nesteruk, 1995).

In conducting legal research, the three categories of information that need to be considered are primary sources, secondary sources, and research finding tools such as electronic databases (Russo, 1996). Primary sources in this study are actual court cases, statutes, regulations, and executive orders. Secondary sources in this research are “writings about the law rather than the law itself” (Russo, 1996, p. 41). These are the books, legal critiques, scholarly publications that comment and explain the primary sources. Also, electronic databases such as FINDLAW, Lexis-Nexis Academic Universe, the Web site of the United States Supreme Court,
the on-line University of Michigan Trials Page were accessed to secure data relevant to the legal analysis.

Legal case analysis is “a recursive process” (Dernbach, et al., 1994, p. 20) building understanding by looking backward into previous cases that were necessary precedents to form the foundation of the case being examined. It is an exhaustive process requiring constant referencing to previous cases.

Data Collection and Analysis

The data collection for this study can be defined in two groups: primary sources and secondary sources. Primary sources are those either generated at the time of the event. These would include letters, speeches, contemporary newspapers, policies, law cases, and other contemporary materials. Secondary sources are removed from the historical event in time and place and are often interpret the primary source. The most common secondary source is a history of a topic that a previous historian has written (deMarrais & Lapan, p. 46).

In this study the main sources of data collected are primary in nature. For Chapter 4, original lawsuits, case law, and court decisions in the cases analyzed. The various Executive Orders and Civil Rights citations were located in FINDLAW, LEXIS-NEXIS, University of Toledo Law Library and were analyzed and examined. Also secondary sources such as Bowen and Bok (1998), Graham (1990), Matusow (1984), etc. were reviewed.

In Chapter 5, original primary historical documents concerning the early years at the University of Michigan were found in transcripts of board meetings and presidential papers. The Michigan Mandate, the Michigan Agenda for Women, and other documents attributed to the Duderstadt Era were located at the Bentley Historical Library on the campus of the University of Michigan. Primary documentation reviewed for the BAM I, BAM II, and BAM III movements
as well as other Black Student Movements were located at the Center for African American and African Studies at the University of Michigan. Documentation analysis for the information concerning the Black Action Movements was greatly aided by The Center for African American and African Studies at the University of Michigan. The Center has established and constantly updates a special archive entitled: “Black Student Activism at the University of Michigan.” This archive is a collection of newspaper and journal articles by and about African American student political and social activism at the University of Michigan, Ann Arbor. Secondary sources for this chapter came from media and newspaper accounts, books, and articles.

In Chapter 6, primary sources were used including original lawsuits, case law, and court decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*, as well as the Amicus briefs, all which were located at FINDLAW, LEXIS-NEXIS, or the University of Michigan web site. Secondary sources include legal reviews, media and newspaper accounts, books and articles.

Legal analysis will follow the traditional legal format for case briefs by presenting the facts, describing the issues of the case, presenting the ruling, providing analysis of the brief, and the ending with a conclusion.
CHAPTER III. CIVIL RIGHTS: A PRELUDE TO AFFIRMATIVE ACTION

To better understand the issues presented in *Gratz* and *Grutter*, it is necessary to understand the major civil rights events as a prelude to the legislative and judicial activity relative to affirmative action in higher education which will be discussed in Chapter 4.

**Education and Professional Opportunities**

Prior to World War II, most black Americans lived in the rural south, out of sight and out of mind of most white Americans. About 90% of Blacks lived in poverty, as measured by early 21st century standards, with annual earnings at about half those of Whites (Bowen & Bok, p. 1). Most of the Blacks living in poverty lived a life separate from whites. This separateness was not only a factor of the culture of the time; it was a product of the law of the United States of America. In 1896, the United States Supreme Court approved *de jure* segregation and the principle of “separate but equal,” as handed down in *Plessy v. Ferguson* (1896). This principle and the outlawing of racial segregation are explored in the analysis of *Brown v. Board of Education* (1954) later in Chapter 4.

During the first half of the 20th century, the segregated schools that African-American children attended in southern states had an average pupil-teacher ratio of 25% more than in southern white schools. Their school terms were 10% shorter, and their teachers earned one-half of the salaries earned by white teachers. The median education for black adults in 1940 was seven years; only about 12% of blacks had earned a high school diploma, and less than 4%, a college degree. This lack of access beyond the most basic education also meant that there were few black Americans in higher-paid and professional occupations. Only 1.8% of all male professionals were black. They comprised 2.8% of physicians, .5% of attorneys, and .5% of engineers. Very few African-Americans were elected to office; although one black man sat in
Congress, there were no black mayors, governors, or senators (Bowen & Bok, p. 1). The Civil War was fought, primarily about slavery but the idea of true equality had not been realized. Blacks were free but, by law, they were supposed to have separate but equal opportunities. Much debate and many court cases were held concerning the definition and attainment of these two concepts. Economic and social factors contributed to the evolution of the law.

World War II and the economic growth of the 1950s, with its demand for factory labor in northern states, helped bolster the economic situation of black Americans. Black migration to northern states improved educational levels, both in the north and in the south, where some improvement of southern schools took place as authorities attempted to slow the exodus of cheap labor (Bowen & Bok, p. 1). Today, the changing complexion of demographics and economic factors were important to the “diversity rationale” used in the *Gratz and Grutter* (2003) cases. The laws that led to these outcomes were incremental and dealt with a variety of definitions and situations that preceded cases decades later.

**Laws**

Prior to 1950, there were several acts and rules that indicated a willingness to reduce discrimination. In 1933, Congress passed the Unemployment Relief Act, which prohibited discrimination by “race, color or creed.” In the same year, the National Industrial Recovery Act banned discrimination by race or religion in housing programs. A 1940 Civil Service rule also prohibited such discrimination in federal hiring and discontinued the requiring of application photographs (Graham, p. 10). Although these acts and rules were passed, there were no real “teeth” in the law that allowed them to be enforced.

The 1940 Selective Service Act contained the same new nondiscrimination language, but a 1940 War department policy statement that announced the drafting of African-Americans in
the proportion of their representation in the general population (about 10%) also provided for the maintenance of segregated regiments. African-Americans were drafted in WWII and were expected to serve for their tour of duty, but were, for all practical purposes, still excluded from the economic boom of the wartime causing a march on Washington by African-Americans in 1941 (Dalfiume, pp. 25-63). As a result, on June 25, 1941, President Roosevelt issued Executive Order 8802, which created the Committee on Fair Employment Practice (FEPC). The order was justified by the President’s wartime powers and was designed to stop discrimination by race, creed, color or national origin in both federal employment and in defense contracts. For enforcement, the order authorized a five-man committee to receive, investigate, and take “appropriate steps” to redress grievances. The committee was responsible to the President himself and appeared to represent a new commitment to victimized minorities. However, this Executive Order and the ensuing committee lacked any real authority to enforce the directive. A little more than a year after it was created, the first committee was disbanded (Graham, 1990, p. 11). This would be the first of many attempts to create fair employment opportunities for minorities.

On May 27, 1943, yet another Executive Order (9346) was issued that formally abolished the already defunct first committee and created a second FEPC under the President’s emergency wartime powers (Executive Order No. 9346, 8 Fed. Reg. 7183 (1943)). The new order also authorized the second FEPC to conduct hearings, issue findings, and take “appropriate steps” to prohibit discrimination. The difference between the first and the second FEPC is that the latter was given a full-time chairman and a budget that eventually provided for 120 personnel and 15 field offices. The new FEPC, from 1941 to 1946, successfully resolved about 1/3 of the 14,000
complaints that it received; however, it still lacked the enforcement authority needed to resolve more cases (Graham, 1990, p. 12).

The second FEPC was eliminated in 1946. The elimination of FEPC was symbolic of the “affirmative action” stances by the government from the end of WWII to the Civil Rights era of the 1960s. There was a public and governmental interest in creating a fair workplace environment, equitable hiring practices, and access to housing; however, there were enough detractors and enough historical “inertia” to either slow down the implementation of these programs or to kill them.

Between 1942 and 1964 (when the Civil Rights Act was passed) various bills were introduced that tried to establish fair employment practices. There was a national divide on the importance and the value of these bills. They were either passed, with inadequate authority or financing, or defeated, creating the expiration of previously passed bills. Most of the bills were brought into being through an executive order which was used as part of wartime authority provided to the president.

During Truman’s presidency, there was a continual battle to have various provisions included or excluded in bills that were being formed for fair employment practices. This came to symbolize an ideological line between the liberal and conservative factions of both political parties. Truman repeatedly advocated fair employment legislation in radio speeches, his State of the Union addresses, and reports to Congress, and on July 26, 1948, issued his own executive order on fair employment. Executive Order No. 9980 established a Fair Employment Board within the Civil Service Commission. The Order did not cover all federal employees and did not have a significant impact on private employment (Executive Order No. 9980, 13 Fed. Reg. 4311
Again, an executive order was issued, but it did not have much practical or lasting effect on hiring practices.

During Truman’s presidency various civil rights groups were beginning to form. Various groups, especially the NAACP and the new Leadership Conference for Civil Rights, lobbied for a permanent FEPC. These groups, however, were not entirely successful in their efforts because of the conservative forces in the Senate and House. The responsibility to generate any inertia in initiating fair hiring practices seemed to rest with the president. Even the president could not generate enough inertia, unless he had wartime powers that gave him the ability to enact legislation unencumbered by Congress. Following the outbreak of the Korean War, and justified by the War Powers Act of 1941, President Truman issued seven defense-related executive orders that contained the nondiscrimination hiring policies. These lacked enforcement provisions and the oversight of committees. Again, by executive order on December 3, 1951, Truman created an interagency Government Contract Compliance Committee to continue the nondiscrimination clause in government contracts (Executive Order No. 10308, 16 Fed. Reg. 112302 (1951)).

Politics and Protests

Graham (1990) has observed that the several fair employment committees that straggled through the Truman and Eisenhower administrations were lacking in “moral grandeur” (p. 16), but were offered to give minimal offense to a conservative Congress. In 1951 Truman formed an interagency committee to study fair employment, but this committee had no enforcement powers, and hence, no threat of Congressional or judicial challenge. The committee could hold hearings and advise agencies, but could not even subpoena witnesses. In fact, in its single year of existence, it was only able to conduct a survey that clearly affirmed the need for more oversight in discrimination. Yet Truman had exercised his presidential authority to reestablish at least a
semblance of the FEPC. These modest attempts, although not entirely successful, kept the “concept” of fair hiring practices in the legislative mindset. Even though many attempts were made to try to introduce fair hiring and housing regulations, the real force that provided important and significant inertia to non-discriminatory practices was the increasing attention that America’s race problems were receiving abroad. As will be seen in the next paragraphs, the aftermath of WWII, our criticism of the Soviet/Communist human rights violations, and the cold war inspired considerable criticism of American race relations in the United States and abroad.

After World War II, and no doubt at least partly because the war had been waged against “demonic racism” abroad and the ethnic cleansing and extermination of Jews, civil rights in the United States began to emerge as an important liberal issue. For the first time since Reconstruction, a significant number of Americans appeared to be unwilling to continue tolerating a southern legal system that drew distinctions based upon race and imposed segregation, unfair hiring practices, and unequal educational opportunities for black Americans. In 1947 a powerful critique of American racism was brought before the United Nations in the form of a petition by the NAACP. Titled *An Appeal to the World*, and written by W. E. B. DuBois, the petition denounced U.S. race discrimination as “not only indefensible but barbaric,” and inspired the Soviet Union to call for an investigation (Delgado & Stefancic, p. 115). As a result, the outcomes of desegregation cases such as *Shelley v. Kramer* (1948), *Sweatt v. Painter* (1950), *McLaurin v. Oklahoma State Regents for Higher Education* (1950), and *Brown v. Board of Education of Topeka* (1954) were good for U.S. cold war politics. The State Department had been claiming that racism and discrimination were southern (as opposed to national) problems, that democracy was working, and that it would prove victorious over the “anachronistic practices” of a regional and backward few. Had the Supreme Court voted to uphold segregation
in these cases, embassy personnel abroad would have had a much more difficult task countering Soviet claims that communism was more responsive to the interests of nonwhites (Delgado & Stefancic, p. 115).

Still, even though the courts were beginning to address the discrimination issues, Eisenhower’s presidency marked an even more conservative attitude toward fair employment policy. Eisenhower had neither previous experience in matters related to civil rights, nor much interest in them. He defended the lack of equal opportunity legislation in his first term by pointing out that his predecessors had put forth wasted effort in proposals that eventually met defeat, and felt that that such sensitive matters were better left to volunteer efforts (Graham, 1990, p. 16). After the Republican victory in November of 1952, Truman’s ten-man lame-duck contract compliance committee disintegrated, and Eisenhower appointed his own committee in August, 1953. The committee’s chairman was Vice-President Richard M. Nixon, who had acquired quite a progressive reputation on civil rights in California.

A year later, at the committee’s request, Eisenhower issued an executive order that mandated all contracting officers to require every contractor to publicly post notice of the nondiscrimination policy in hiring as well as in recruitment, upgrading, demotion, and transfer. However, as was the case with its predecessors, this new federal committee worked by way of educational meetings, conferences, and a series of self-disclaimers; that is, it did not possess jurisdiction over labor unions, federal grants-in-aid, or federal housing construction programs. By 1961, in its final report, the committee claimed that during its six years of existence, only 225 of 1,000 complaints actually warranted full investigation, and only 33 of those had required any sort of corrective action. In a comparison of 1956 with 1960, the report found only modest gains in black hiring, particularly in lower-level jobs, with the major exception being in southern post
offices, where, in keeping with certain mores of segregation, a number of clerical jobs were reserved for Blacks (Graham, 1990, p. 18).

Meanwhile, the Washington-based Leadership Conference for Civil Rights, which had grown from 20 organizations in 1949 to 52 in 1952, and more than 70 in 1960, was demanding an FEPC law to create a national agency with judicial “cease and desist” enforcement authority (Graham, 1990, p. 18). Although the civil rights coalition cited a number of state and municipal FEPC laws that had been adopted during the 1940s and 1950s and did not seem to inspire heavy-handed enforcement at the state level, conservative members of congress succeeded annually at invoking the fear of abuse, and hence kept a federal FEPC statute at bay. A related piece of federal legislation that did pass during the 1950s, however, was a voting rights law, the Civil Rights Act of 1957. It was a political triumph for Senator Lyndon B. Johnson, who, was probably having presidential aspirations, and seeing the political writing on the wall better than did many of his southern colleagues, was beginning to distance himself from southern resistance to civil rights legislation. Eventually another act, the Civil Rights Act of 1960, was hastily passed through Congress just before the election. Thurgood Marshall of the NAACP, in commented that “The Civil Rights Act of 1960 isn’t worth the paper it’s written on” (Berman, 1962, p. 135).

During the 1950s several watershed events occurred in the area of race relations. In 1954, in Brown, the Supreme Court ruled unconstitutional the enforced segregation of schools. Two years later, Martin Luther King, preaching a philosophy of Christian nonviolence, led a successful boycott of Montgomery, Alabama’s segregated bus system. In 1957 President Eisenhower enforced the court-ordered desegregation of Little Rock High School by sending the U.S. Army to Little Rock, and Congress passed the first civil rights act since Reconstruction. And by the time John F. Kennedy was elected in November of 1960, black students had been
leading sit-ins throughout the year that had enlisted 50,000 people and desegregated public facilities in 140 municipalities, mostly in the upper south (Matusow, 1984, p. 62).

Sit-ins against racial segregation had begun spontaneously in Greensboro, North Carolina, on January 31, 1960, and had spread quickly throughout the South. Although, as a Presidential candidate, Kennedy had endorsed the sit-ins and had reached out to the constituency of Martin Luther King, as President he had had little to say about civil rights, even in his post-inaugural priority messages to Congress. Needing the endorsements of both white and black southern voters, which he had initially received in the form of votes, Kennedy tried to keep these disparate constituencies in balance after the election. Executive Order 10925 was a manifestation of the president’s unwillingness to introduce civil rights legislation that might upset the fragile equilibrium. Although the order was far from the sweeping edict requested by NAACP President Roy Wilkins, it was intended to help facilitate better access to jobs for black Americans (Matusow, 1984, pp. 63-64). The order created yet another committee, the President’s committee on Equal Employment Opportunity. Vice-President Lyndon B. Johnson was appointed to chair the committee, which had a charge to eliminate job discrimination in the civil service and among government contractors. “Affirmative actions,” although not defined in Kennedy’s order, were apparently intended to be measures that promoted procedural fairness, and seeking out qualified applicants from sources where they might be found. Although armed with the ability to cancel government contracts to businesses that did not adhere to the nondiscrimination clause, Johnson preferred the voluntary solution of a program called “Plans for Progress,” that relied upon private contractors taking voluntary pledges to implement actions that would reduce job discrimination. These voluntary programs, although enacted with good intentions, did little to reduce discrimination.
On August 29, 1961, on behalf of thirty-five organizations that belonged to the Leadership Conference on Civil Rights, Roy Wilkins presented the White House with a 60 page paper called *Federally Supported Discrimination* that documented the use of federal money to support programs that fostered segregation. During the same year, Martin Luther King accused the government of being “the nation’s highest investor in segregation” (Matusow, 1984, p. 67).

Between 1961 and 1963, the race crisis intensified across the South. Provocations included confrontations such as those resulting from the Congress of Racial Equality’s (CORE) Freedom Rides, the Student Nonviolent Coordinating Committee’s (SNCC) dispatching of civil rights workers to the south to educate and register black voters, and James Meredith’s attempt to be the first black student to enroll at the University of Mississippi. Despite the fact that 400 federal marshals were dispatched to restore order in the aftermath of violence perpetrated against the Freedom Riders, despite the civil rights workers having to endure terror and violence as a daily fact of life, and despite several hundred federal marshals having to help ensconce Meredith in a dormitory in Oxford, Mississippi on the night before registration for the 1962 fall semester, the real showdown occurred in Birmingham in the spring of 1963 (Graham, 1990, p. 36).

By early 1963 the civil rights movement was able to deliver thousands of black protestors to the streets with the moral support of millions of white northerners. At the beginning of the new congressional session, eighty-nine members of the House had introduced civil rights bills (“Civil Rights,” Committee on the Judiciary, House hearings (1963), in Matusow, 1984, p. 85). A news photo published across the country showed a police dog lunging at a demonstrator and helped to galvanize a mass constituency for the civil rights movement for the first time since Reconstruction (Matusow, 1984, p. 87).
On May 11, two bombs exploded in Birmingham, one at the home of King’s brother, and one at a motel used by black leaders. The explosions inspired residents of Birmingham’s black ghettos, who never had been particularly enamored of Dr. King’s philosophy of nonviolence, to initiate perhaps the first American urban riot of the 1960s (Matusow, 1984, p. 88). The Birmingham violence marked a major turning point in the Kennedy administration’s civil rights policy. Kennedy had apparently been concerned about the influence of the Black Muslims and the possibility of a black revolution. The nine-block decimation of downtown Birmingham that was the aftermath of the riot appears to have been the catalyst for Kennedy’s decision to finally honor his 1960 campaign pledge to initiate major civil rights legislation.

On June 11, two black students carried to the University of Alabama campus a federal court order requiring their admission. Governor George Wallace initially blocked the entrance himself, but shortly after he heard that the president had nationalized the Alabama National Guard, the governor yielded. Anticipating problems at the University earlier in the day, Kennedy had planned to address the nation that night, and went on to give the speech despite the speedy and peaceful resolution earlier in the day. The June 11 speech on the moral imperatives of equality had been long awaited by the civil rights community and inspired historian Carl Brauer to optimistically proclaim “the beginning of what can truly be called the Second Reconstruction, a coherent effort by all three branches of the government to secure Blacks their full rights” (Brauer, 1977, pp. 259-60). Kennedy eloquently spoke of a moral issue “…as old as the scripture and…as clear as the American Constitution” (Matusow, 1984, p. 90). He referred to the painful events in Birmingham, described the bill that he intended to send to Congress, called upon individuals to make a difference in race relations in their own homes and communities, and fervently asked for help in making equality of opportunity a reality for black Americans.
The president did not want the resolution of the civil rights crisis to be regarded as a sectional or partisan issue, but rather a bipartisan coalition that would resolve the problems. With fire hoses turned on protesters having so recently been a symbol of the crisis on national television in the riots in Alabama, civil rights were conceptualized emotionally and politically as a southern problem. Federal remedies for discrimination included more assistance in the areas of voting rights and school desegregation, but focused upon the radical proposal that Congress outlaw segregation “in facilities which are open to the public; hotels, restaurants, theaters, retail stores, and similar establishments” (Graham, p. 75). But there was no mention of job discrimination, which remained a pervasive, national problem.

Civil rights spokesmen also demanded a ban on job discrimination. However, it was not until after the August 28 March on Washington that Kennedy held several meetings with Democratic liberals and House Republican leaders for the purpose of revising the administration’s original bill to include a section outlawing discrimination in employment (Matusow, 1984, p. 92).

After Kennedy was assassinated in Dallas in November, Johnson meet with civil rights leaders on a number of occasions and pledged to stand by the bill as it was written. Quoting Victor Hugo’s *Histoire d’un crime* toward the end of the process, Dirksen in an article in the Times stated, “No army can withstand the strength of an idea whose time has come” (*New York Times*, May 20, 1964, p. 1). This quote taken from Hugo begs the question, of whether the idea of reversing decades of discrimination had finally reached the level where it could not be ignored. Was it really time for laws banning discrimination to become implemented in such a way that “no army could withstand” them? The Civil Rights Act of 1964 was a monumental “idea whose time had come”.
The Civil Rights Act of 1964 is routinely described as a spectacular achievement, and by Allen Matusow, as the “great liberal achievement of the decade” (Matusow, 1984, p. 95). It contained a Title I that prohibited the use of literacy tests in federal elections, Title II that prohibited discrimination in public accommodations but excluded personal service establishments such as barbershops, and Title III that empowered the attorney general to enforce equal protection of the laws “on account of race, color, religion, or national origin” (Graham, p. 133). An education title addressed the slow pace of school desegregation in the south since the *Brown* decision, but left northern segregation alone. Title VI allowed for the cut-off of federal funds to entities that were found to be discriminatory. Title VI is used as a basis for most affirmative action cases and states that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programs or activity receiving Federal financial assistance” (Title VI of the Civil Rights Act of 1964 (42 U.S.C. sec. 2000d)). Title VI provisions apply to all operations at the institution that accepts federal funds. At universities these funds include federal financial aid and federal research funds. The “teeth” to enforcing affirmative action violations is present here because the penalty for failure to comply with such mandates will result in the possible withdrawal of all federal funds granted to the institution receiving those funds.

Title VII (Title VII of the Civil Rights Act (42 U.S.C. sec. 2000e-2)), which made it unlawful for an employer, union, or employment bureau to discriminate based on race, color, religion, sex, or national origin. In addition, this title also banned racial-quota hiring schemes (a major cause for concern in Congress at the time), required that discrimination be intentional, protected bona fide seniority and merit systems, and created an Equal Employment Opportunity
Commission (EEOC). “The Act’s main intent, limited but indispensable, was the accomplishment of legal equality in a region where it did not exist” (Matusow, 1984, p. 95).

The year 1964 marked the beginning of a four-year period of anti-discrimination reform legislation that has come to be known as the 1964-68 Liberal Accord and included the passage of the Civil Rights Act as well as the 1965 Voting Rights Act and the 1968 Open Housing Act. According to Graham (1990), the Accord was as a triumph of classical liberalism, governed by six principles: first, individualism, whereby rights inhered in individuals rather than in groups such as an aristocracy, a labor union, or a particular ethnic group; second, universalism, in which certain fundamental rights extended to all citizens; third, timelessness, because such rights were inherent in the human condition and not temporary or variable, except perhaps during wartime. Fourth, such rights were best protected negatively, through prohibitions against violations such as discrimination; they were procedural, guaranteeing equal treatment, but not equal results, and they were centralized in the federal government, because the states-rights tradition had too often bowed to white supremacy (Graham, pp. 14-15).

The core policies of nondiscrimination included the Civil Rights Act’s prohibitions against discrimination in public accommodations and employment, as well as its upholding of the Supreme Court’s ruling against school segregation. The Voting Rights Act prohibited discrimination in voter registration and the casting of ballots, and the Open Housing Act specified nondiscrimination in the sale and rental of private housing.

The 1965 summer of unrest in Los Angeles, Detroit, and other cities inspired a search for a faster and more effective way of achieving employment opportunities for black Americans, who had twice the unemployment rate of whites, even in northern industrial states. President Johnson’s 1965 Executive order required federal agencies to “take affirmative action to insure
that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin” (Rainwater, 1967).

Conclusion

On June 4, 1965, President Johnson gave his often quoted commencement speech at Howard University that is an impassioned defense of results-oriented affirmative action. In one section he argued that opportunity is not enough:

You do not wipe away the scars of centuries by saying: ‘Now you are free to go where you want, and do as you desire, and choose the leaders as you please.’ You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe you have been completely fair. Thus it is not enough just to open the gates of opportunity. (Johnson, 1965, reprinted in Beckwith & Jones, 1997, p. 57)

Only a few sentences later, Johnson moved from the lack of opportunity alone to a demand for equal results. “We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory, but equality as a fact and equality as a result” (Johnson, 1965, reprinted in Beckwith & Jones, 1997, p. 58).

Johnson was seeking to both remove the “chains” of past oppression and to take those oppressed in the past to the starting line. In other words, he not only wanted to right past wrongs but to provide opportunities to those previously oppressed. By its very definition, affirmative action implies movement and direction, not just rhetoric.

In the final analysis, it appears that the government had tried to address the racial issues confronting the nation through a long series and history of addresses, acts, commissions, court cases, speeches, and executive orders. It was not until the 1964 Civil Rights Act, which
contained legal “teeth,” did governmental rhetoric have a chance to take those oppressed to the starting line.

Affirmative action in higher education, as we shall see, has been hotly debated and has generated many legal proceedings in the United States. From *Plessy v. Ferguson* in 1896 to *Sweatt v. Painter* in 1950, *Brown v. Board of Education* in 1954, *Sweezy v. New Hampshire* in 1957, to *Bakke v. Regents of the University of California* in 1978, and *Gratz v. Bollinger* in 2003 and *Grutter v. Bollinger* in 2003, race and its importance to higher education have been discussed and litigated in the court system.

This chapter served as an introduction to the historical development of social movements and federal policies that shaped the national landscape, which eventually led to a national paradigm shift concerning civil rights. In Chapter 4, significant court cases in the United States that focused on affirmative action and diversity in higher education will be outlined to provide background for greater understanding of *Gratz* and *Grutter* which will be analyzed in Chapter 6.
CHAPTER IV. EDUCATION, RACE, AND THE LAW

Introduction

To better understand the issues presented in *Gratz* and *Grutter* cases it is necessary to understand the progression of affirmative action in the United States, the major civil rights events, and the legislative activity relative to affirmative action especially those activities that impact higher education.

As early as 1835, Oberlin College’s Board of Trustees had declared, “the education of people of color is a matter of great interest and should be encouraged and sustained in this institution” (Duffy & Goldberg, 1998, p. 137). Similarly, Antioch College’s Trustees in 1863 declared, “Antioch College cannot according to Charter reject persons on account of their color” (Duffy & Goldberg, p. 137). Such encouraging statements notwithstanding, a total of 28 black Americans graduated from American colleges before the Civil War (Duffy & Goldberg, p. 137). The low numbers of graduates of black Americans should not be surprising for several reasons. At this time in history, few blacks had the opportunity to attend secondary schools and those that did may not have had access to progressive colleges such as Oberlin or Antioch. Outreach programs did not yet exist and little was being done anywhere in the nation to increase the numbers of blacks in secondary schools and or to encourage enrollment in colleges and universities. The historical origins of most colleges and universities did not yet include the concept of inclusion.

American higher education had been founded in the 17th and 18th centuries in the image of the English model that had been established at Oxford and Cambridge during the Elizabethan Renaissance. The Puritans who founded many of the colonial colleges viewed the advancement and preservation of learning as an important component necessary to train ministers. The
knowledge of the arts and sciences was also deemed useful. The curriculum in the colonial colleges consisted of the liberal arts much as they had been taught in England. For the most part, the colonial colleges were elitist and aristocratic and intended to serve the needs of a select few who would assume religious and other leadership roles. With few exceptions, these institutions were not inclined to address societal needs.

Late in the 18th century, Thomas Jefferson had emphasized the need to develop an aristocracy of talent to replace the old aristocracy of inherited wealth and power. However, by the middle of the nineteenth century, the old aristocracy still held the power, causing certain sectors of the population to become disenchanted with the overall elitist orientation. The emerging Jacksonian democracy was inconsistent with the unresponsive set of mostly private colleges that were providing a classical education for a wealthy minority of less than 1% of the population. There was a growing need for highly trained professionals to address the requirements of an industrialized society in areas such as forestry, engineering, public health, agriculture, and nursing. This need was creating a middle class concern that the “American dream” of unlimited opportunity was being threatened by industrialization. Great wealth had been created for a few by the industrial revolution, while a large, relatively disadvantaged working class population of poor farmers and industrial workers had no prospect of improving their lot either through enhanced skills or practical education. Similarly today, even though programs do exist to encourage disadvantaged youth to participate in university education, many do not qualify to enter based on traditional admission policies. Standardized tests, grade point averages, and class rank are still very important factors in the admission process today. Using these quantitative criteria may not provide a university with enough qualitative evidence needed to “craft” the type of incoming class needed to achieve the desired educational outcomes.
Selecting these factors, as we shall see later in the analysis of the *Gratz* and *Grutter* cases, will be important. Changing the traditional admission practices to include disadvantaged students did not begin with the University of Michigan, but rather was part of a long process of educational access that started with the Morrill Act in the 1860s and continues today.

**Morrill Act**

The Morrill Land-Grant Acts allowed for the creation of “land grant colleges”. The Morrill Act was first proposed by Representative Justin Smith Morrill of Vermont, in 1857, was passed by Congress, but eventually vetoed by President Buchanan. In 1861, Morrill resubmitted the Act with the amendment that the proposed institutions would teach engineering and agriculture. This reconfigured Morrill Act was signed into law by President Lincoln on July 2, 1862. Beginning with the Morrill Act of 1862, the concept of who should have access to American higher education began to change dramatically. Justin Morrill, the congressman who sponsored the Act that enabled the land grant system, was concerned that broader, more democratic access to higher education be accessible to a broader range of the population. In the original Act, the purpose is stated as follows:

…the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life. (Morrill Act of 1862, 4)

Under the Act, each eligible state received a total of 30,000 acres of federal land which could be used as a site to build a college/university or to sell to establish/support a college/university.
The major impetus for black public education came in 1890 with the passage of the second Morrill Land Grant Act. The Act mandated that blacks were either to be admitted to white colleges or to otherwise be provided with equitable facilities. Southern and border states chose to establish separate institutions for blacks, but these public facilities were never equal. Most of the “1890s” schools, or historically black colleges and universities (HBCUs), as they came to be known, were at first teacher-training institutions for black women, and like the private black colleges founded earlier, were white-controlled, and came about as a means for states to avoid having black students enroll in white colleges (Fleming, 1984, p. 5).

It is clear that the land grant idea was not about a particular institutional arrangement, but is instead a set of beliefs about the social role of the university. Many believe that the Land Grant was sponsored by farmers. It was not. It came from members of the middle class who were concerned that the industrial revolution was pushing agricultural and urban workers into a disadvantaged underclass. The reformers who championed the movement saw a small powerful elite such as Mellon, Rockefeller, Carnegie, Gould, Fisk and others as amassing large fortunes while ordinary workers were reduced to the status of laborers and peasants. The land grant idea was above all else, a profoundly democratic phenomenon and its advocates feared the concentration of industrial and political power that they believed might destroy democratic institutions and the middle class (Bonnen, 1996).

By the middle of the 20th century there had evolved a societal expectation that universities exist to help solve social problems. Bonnen (1996) refers to outreach to society as a primary role of the 21st century university. He cites Derek Bok, former President of Harvard, as telling his peers in private universities that not only must they must become more responsive to
society’s problems, but that the immense scale of public funding of private universities carries with it an obligation to serve the wider society (Bonnen, 1996).

Although the passage of the Morrill Act of 1862 certainly facilitated access to higher education for a much broader segment of society, it was in the twentieth century that the idea of a college degree as a vehicle for opportunity really came into its own. In fact, during the last 100 years American higher education can be described as a study in increased access. Policy makers, legislators and members of the public during the past century have consistently been far more concerned with how access might be increased to as broad a population as possible, and far less frequently upon how to define the merit of those who “deserve” to attend. This concept of merit and access becomes very important when these issues are more fully explored in the Gratz and Grutter cases in Chapter 6.

It is important to note here that the Morrill Act provided the nation with an opportunity for a “paradigm shift” in thinking of educational access. The elitist focus of many educational institutions continued after the Morrill Acts, but the stage was being set for a second set of alternatives. These alternatives included broader, more democratic access, and as specifically stated in the second Morrill Act, opportunities for African Americans. In the Bakke case in 1978 and the Gratz and Grutter cases in 2003, the definitions of merit, the concepts of access, and the educational value of racial diversity converged. Broader access to a greater number of students was a primary goal of the Land Grant Universities as a result of the Morrill Acts. However, even though there was greater opportunity for a greater number of potential students, the question of greater access for whom and how these decisions could be made fairly and how they could co-exist with the law, were still not clear.
Besides the two Morrill Acts passed in the late nineteenth century, the Serviceman’s Readjustment Act of 1944, commonly known as the G. I. Bill, had a very big effect on university access by putting a college education within reach of any veteran returning from World War II who could take advantage of the offer of a virtually free higher education. Public Law 550, passed in 1952, extended the same privileges to Korean War veterans. The two programs resulted in billions of federal dollars being spent on millions of returning veterans and the number of degrees awarded jumped to nearly 500,000 for the 1949-1950 academic year as compared to only 29,000 in the 1899-1900 academic year (Fleming, p. 6).

Another example of a policy concerned with access was the passage of the Higher Education Act of 1965. This Act became the first federal program to provide a broad-based, permanent system of financial aid to both public and private higher-education institutions as well as to individual students. Its emphasis was on helping to facilitate access for students, including those who were nontraditional and low-income, and for helping colleges and universities better serve such individuals. The Higher Education Act was designed to “level the playing field” by offering greater access to higher education. The lengthy and tedious evolution of due process rights and the rights of individuals affected by these new opportunities in higher education needed to be resolved in the judicial system. The same issues and debates concerning access rights were occurring in the primary and secondary schools and with fair hiring practices in the employment area. The next section, however, will focus only on cases in higher education pertaining to issues germane to the *Gratz* and *Grutter* cases.

**Affirmative Action in Higher Education**

This section serves to provide a chronological history of significant court cases in the United States that focused on affirmative action and diversity in higher education. These cases
will be outlined and analyzed to provide background for greater understanding of *Gratz* and *Grutter*. As outlined in Chapter 3, the term “affirmative action” was not coined until the mid-1960s. To understand the genesis of this term, many concepts and terms needed to come first.

As previously stated in the methodology section, legal case analysis is “a recursive process” (Dernbach, et al., 1994, p. 20) that builds understanding by looking backward into previous cases that were necessary precedents to form the foundation of the case being examined. It is a process requiring constant referencing to previous cases.

*Scott v. Sandford (1857)*

One of the first important cases before the Supreme Court in reference to race was the *Dred Scott* case (*Scott v. Sandford*, 1857). This was a lawsuit decided by the U.S. Supreme Court in 1857 that ruled that people of African descent, whether they were slaves or not, could never be citizens of the United States. In this case, Dred Scott, a black man and a slave sued unsuccessfully for his freedom. His case was based on the fact that he and his wife Harriet had lived, while slaves, in states and territories where slavery was illegal and legal. When his owner died Scott tried to buy his freedom from his owner’s wife, and she refused. The lower court ruled against Scott, finding that he was property. Because of the shifting nature of what was a state, what was a territory, and who had jurisdiction over these areas, the case eventually was decided at the U.S. Supreme Court. While the case seemed to be very clear on the issue of whether slaves could be citizens of the U.S. (they could not), the decision served as a rallying point for those opposed to slavery. The debate surrounding this case was one of the major factors leading to the American Civil War. After the Civil War in 1865 the Thirteenth Amendment and, in 1868, the Fourteenth Amendment to the U.S. Constitution were ratified. The Thirteenth Amendment officially abolished slavery in the United States.
The Fourteenth Amendment overturned the findings of the Dred Scott case, provided a formal definition of citizenship, and required states to provide civil rights to all. The Fourteenth Amendment shifted the focus of the Constitution. The Bill of Rights, which insured personal freedoms of individuals from invasion by the federal government, also protected individuals from invasion by state governments. States could not deprive people of the equal protection of the laws. Importantly for our discussions later, it included the Due Process and Equal Protection Clauses. Due Process is the principle that the government respects all of a person’s legal rights instead of just some or most of those rights. It ensures the person’s legal rights to pursue actions when they are deprived of life, liberty, or property. Due process is a fundamental fairness that insures that individuals are notified of the charges against him/her and for individuals to have the opportunity to be heard at the proceedings.

The Equal Protection Clause of the Fourteenth Amendment provides that “no state shall deny to any person within its jurisdiction the equal protection of the law”. The Fourteenth Amendment to the Constitution states, in part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or Immunities of citizens of the United States; nor shall any State deprive any Person of life, liberty, or property, without due process of law; nor deny to any Person within its jurisdiction the equal protection of the laws. (U.S. Constitution, Amendment XIV)

The framers and ratifiers of the Fourteenth Amendment apparently distinguished among “civil,” “political,” and “social” types of equality. Civil equality appears to have been concerned with
such economic rights as those of suing and being sued, testifying and making wills and contracts, owning property, and choosing one’s religion, and seems to have been the type of equality embraced by the largest number of framers of the Fourteenth Amendment (Balkin, 2001). Civil equality was the primary intent of the Fourteenth Amendment.

The Fourteenth Amendment and its interpretation were the fundamental legal underpinnings of many of the court cases dealing with civil rights and racial discrimination. This discussion surfaced in many different landmark cases including *Plessy v. Ferguson* (1896), *Brown v. Board of Education* (1954), *Sweatt v. Painter* (1950), *McLaurin v. Oklahoma State of Regents* (1950), and later *University of California v. Bakke* (1978) *Gratz v. Bollinger* (2003), and *Grutter v. Bollinger* (2003). Understanding of the concepts of these cases and their genesis are important in understanding the outcome and impact of the *Gratz* and *Grutter* cases.

*Plessy v. Ferguson* (1896)

On June 7, 1892, a 30-year-old African-American, Homer Plessy was jailed for sitting in the “White” car of the East Louisiana Railroad. Plessy was one-eighth black and seven-eighths white, but under Louisiana law, he was considered black and, therefore, required to sit in the “Colored” car. Plessy went to court and argued that the Separate Car Act violated the Thirteenth and Fourteenth Amendments to the Constitution. In this case, Plessy was found guilty of refusing to leave the white car. Plessy appealed to the Supreme Court of Louisiana, which upheld the decision. In 1896, the Supreme Court of the United States heard Plessy’s case and his conviction was upheld once again. Speaking for a seven-person majority, Justice Henry Brown wrote:

That [the Separate Car Act] does not conflict with the Thirteenth Amendment, which abolished slavery...is too clear for argument....A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the
color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races....The object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. (*Plessy v. Ferguson*, 1896, pp. 543-544)

Justice John Harlan, dissented and wrote:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law....In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case....The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficient purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution. (*Plessy v. Ferguson*, 1896, p. 559-560)

The “separate but equal” doctrine established in *Plessy* established that separate facilities were constitutionally permissible as long as they were substantially equal. In fact, the Court felt that the *Plessy* decision was necessary to enforce a state action that would prevent “excessive commingling” of the races. The decision actually held that state segregation laws were necessary to preserve the right of private decision concerning social association. As a result of
the *Plessy* decision, segregation came to be enforced by the power of the state and resulted in inequality as a result not of private decision, but of state mandate. During the decades that followed the decision, Southern states passed segregation laws that extended to virtually all public and private arenas, including churches, schools, housing, public transportation and accommodation, hospitals, sports facilities, etc. By the early 20th century, equal protection had come to be relatively narrowly conceived and defined by the *Plessy* doctrine of “separate but equal.”

Although *Plessy v Fergusson* upheld the “separate but equal” doctrine, Justice John Harlan’s dissent would prove to be very insightful in future court cases. It wasn’t until the *Brown v. Board of Education* decision, over 50 years later, that the “separate but equal” doctrine would be struck down. An analysis of *Brown v. Board of Education* will occur later in this chapter.

*Korematsu v. United States (1944)*

*Korematsu v. United States* (1944) marked a turning point in equal protection analysis. In a six-to-three vote, the Court upheld the temporary detention of persons of Japanese ancestry. During WWII Japanese Americans were forced to move into relocation camps by Presidential Executive Order 9066. Fred Korematsu, a U.S. born Japanese American man refused to go to the camp. After lower court cases, the case eventually made it to the U.S. Supreme Court. The opinion written by Justice Black said that the need to protect against espionage outweighed Korematsu’s personal rights. The opinion deferred in large measure to the combined war powers of the president and Congress. The majority of the Justices agreed with the general unconstitutionality of the burdens based upon race, but believed them to be a wartime necessity. Most importantly, however, the majority opinion by Justice Black established a new constitutional standard of review of race classifications:
It should be noted, to begin with, that all legal restrictions which curtail the Civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. (p. 216)

Rotunda and Nowak (1992) wrote that the *Korematsu* opinion established three important points for future analysis of race classifications: (1) the fact that the classifications were “suspect,” which meant that they were likely based upon an impermissible purpose; (2) such classifications were to be subject to “strict scrutiny;” and (3) they were invalid if based on racial antagonism and only permissible if based upon “public necessity.” The particular importance of the *Korematsu* opinion for equal protection analysis is that it established the concepts of strict judicial scrutiny and compelling or overriding interest.

The concept of “strict scrutiny” will play an important part in the *Gratz* and *Grutter* discussions later. Strict scrutiny is part of a hierarchy of standards courts employ to weigh a government interest against a constitutional right or policy that conflicts with a fundamental constitutional right particularly those protected by the Bill of Rights or when the government action involves the use of a classification such as race or national origin that may render it void under the Equal Protection Clause.

To pass strict scrutiny, the law or policy must pass two tests. First, it must be justified by a compelling governmental interest. While the Courts have never determined, exactly, how to define a compelling interest, the concept generally refers to something necessary or crucial, as opposed to something merely preferred. Second, the law or policy must be narrowly tailored to achieve that goal or interest. This means that to use race or ethnicity in student admissions,
universities must include an individualized and a full-file review of each applicant so that each applicant’s diversity experiences could be compared with other applicants. The debate over what is a compelling interest and what is narrowly tailored were at the legal heart of many cases that were to come, including *Gratz* and *Grutter*.

**Missouri ex rel. Gaines v. Canada (1938)**

In *Missouri ex rel. Gaines v. Canada* (1938) a black man, Lloyd Gaines, a 1935 graduate of Missouri’s state-supported black college, Lincoln University, tried to enroll at the University of Missouri’s law school. He was denied admission based solely on grounds of his race. The state of Missouri offered to provide a separate “law school” for him at Lincoln University, or to pay any of Gaines’ tuition that exceeded the Missouri charges, at a law school in a neighboring state, such as Nebraska, Kansas, Iowa, or Illinois, where blacks were allowed to enroll. Gaines refused both of these arrangements and brought suit. At the end of a time-consuming and frustrating process, during which lower courts ruled in Missouri’s favor, the Supreme Court in 1938 decided in Gaines’ favor, stating that “a privilege has been created for white students which is denied to Negroes by reason of their race” (*Missouri ex rel. Gaines v. Canada*, 1938, p. 349).

In the end, the issue was not whether Gaines could acquire a legal education in another state that was equivalent to that available in Missouri. The Court found that the state of Missouri had not properly discharged its duty to provide an education for Blacks that was equivalent to that available to Whites.

**Sweatt v. Painter (1950) and McLaurin v. Oklahoma (1950)**

In *Sweatt v. Painter* (1950), Herman Sweatt, a black male, had been denied admission in 1946 to the University of Texas’ all-white law school. The University of Texas Law School said that it did not need to admit him, because there was an equivalent law school available for
blacks. But, there was not a law school in Texas for blacks. The state created a law school for blacks. However this law school was poorly equipped. Sweatt brought suit against his only in-state option, the poorly equipped black “law school.” In June 1950 the U.S. Supreme Court held unanimously that it could not find “substantial equality in the educational opportunities offered white and Negro law students by the state” (*Sweatt v. Painter*, 1950, p. 633). Because of the inequity, Sweatt was ordered admitted to the University of Texas Law School, a landmark ruling because it marked the first time that the Court had ordered a state to admit a black person to an all-white institution.

On the same day that *Sweatt v. Painter* was decided, the Court decided unanimously in favor of George McLaurin, a 68-year-old black teacher who had sought admission in 1948 to the doctoral program in education at the University of Oklahoma (*McLaurin v. Oklahoma State Regents for Higher Education*, 1950). McLaurin was allowed to attend the University, but had to sit in an anteroom off the regular classrooms, was required to occupy a segregated desk in the library, and could not eat in the cafeteria at the same time or in the same place as other students. McLaurin testified that it was “quite strange and humiliating to be placed out in that position, and it handicaps me in doing effective work.” The unanimous decision agreed that the state of Oklahoma’s actions “impair and inhibit [McLaurin’s] ability to study, to engage in discussion and exchange views with other students, and, in general, to learn his profession” (p. 641).

In both *Sweatt* and in *McLaurin*, the integrity of the *Plessy* doctrine itself was not at issue, but in both cases the focus was upon whether the educational opportunities offered to blacks were substantially equal to those offered to whites. Although the Court in *Plessy* had felt obligated to impose the doctrine of separate but equal in order to prevent involuntary commingling, the Court in *Sweatt* and *McLaurin* was obligated to note the differences in
qualitative differences in facilities and the separation from the other students (in Sweatt, future lawyers) with whom the black students would interact. It should be noted that the Court understood that this interaction was important to the educational process. The idea of commingling with a “critical mass” of diverse students in order to enhance the educational outcomes of the overall population of students was important in the University of Michigan’s “defense of diversity” in Gratz and Grutter.

Brown v. Board of Education of Topeka, Kansas (1954, 1955)

On May 17, 1954, the Supreme Court issued its decision in Brown v. Board of Education of Topeka, Kansas (Brown I). Arguably the most important Supreme Court case decided in the 20th century, the Brown decision marked the Court’s first real examination of the validity of the Plessy (separate but equal) doctrine. This case was a consolidation of three other cases from other states. This case involved a class action suit filed against the Board of Education of the City of Topeka, Kansas by thirteen parents on behalf of their students. The suit called for the reversal of its policy of racial segregation. Oliver Brown, one of the thirteen plaintiffs, was upset because his daughter had to walk six blocks to a bus stop and then take a bus to her segregated school which was over a mile away. A white school was only seven blocks from her house. Oliver Brown’s story was very similar to the other plaintiffs who complained about the distance and the quality of the segregated black schools. The Supreme Court handed down a unanimous decision stating that “separate educational facilities are inherently unequal” (p. 495).

This case explicitly outlawed racial segregation of educational facilities based on the principle that blacks would never have facilities on the same standards as whites. Prior to Brown, race relations in the U.S. were dominated by segregation. In the end, the Court did not explicitly overrule Plessy or completely strike down the doctrine of separate but equal. However, the
decision held that state-enforced racial segregation of school children violated the Equal Protection clause of the 14th Amendment. The actual scope of the opinion was limited to the conclusion that “in the field of public education the doctrine of ‘separate but equal’ has no place” (p. 495). Even though tangible items such as buildings, curricula, and the qualifications of teachers might be made equal in segregated schools, intangible differences such as segregation itself could cause inequality. The segregation of black children “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone” (p. 494). This language moved the concept of equality beyond just making sure that the number of books in the library or the conditions of the buildings were similar for whites and blacks, but moved the discussion to the quality of the educational experience.

During the course of the 1950s the Court made a few rulings on racial equality but had little to say about implementation. In 1955, the Brown II ruling (Brown v. Board of Education, 1955) avoided real confrontation concerning implementation ruling that the implementation of Brown I should go forth with “with all deliberate speed” (p. 301). This term was very ambiguous, with no legal teeth, and even though the law was explicit, its implementation was not. It was not until the Civil Rights Act of 1964 that an implementation strategy was employed. The Civil Rights Act of 1964

The Civil Rights Act of 1964 was landmark legislation in the United States that outlawed, under certain circumstances, discrimination based on race, color, religion, sex, or national origin. Originally conceived to protect the rights of Black people, the bill was amended prior to passage to protect the civil rights of everyone, and explicitly included women for the first time. The 1964 Civil Rights Act made racial discrimination in public places, such as theaters, restaurants and
hotels, illegal. It also required employers to provide equal employment opportunities. Projects involving federal funds could now be cut off if there was evidence of discrimination based on color, race or national origin. The Civil Rights Act also attempted to deal with the problem of African Americans being denied the vote in the Deep South. The legislation stated that uniform standards must prevail for establishing the right to vote. Schooling to sixth grade constituted legal proof of literacy and the attorney general was given power to initiate legal action in any area where he found a pattern of resistance to the law.

Title VI of the Civil Rights Act prohibited the denial of benefits or to be discriminated based on race, color or national origin. Title VII is similar except that it focuses on discrimination in hiring and in all aspects of employment and adds sex and religion as protected classes. While Title VII dealt primarily with employment issues, Title VI prevents discrimination by government agencies that receive federal funding. If found in violation of Title VI, that agency can lose its federal funding. The point of tying compliance to Title VI and Title VII to the receipt of federal monies is a very important point. Most major universities receive federal funding in the form of student financial aid and research grants and not just public universities. Many private universities, although they may not receive “direct” public funding so usually receive a considerable amount of monies from federal student financial aid, work study funding, and from federal research grants. The possible loss of federal monies from these areas would be a serious loss of income to most colleges and universities. Universities were keen to follow the anti-discrimination laws for this reason.

*Defunis v. Odegard (1974)*

The *Defunis* case was brought forward by a white male plaintiff Marco Defunis. In 1971 the petitioner Marco Defunis, Jr., applied for admission as a first year student at the University of
Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the law school received some 1,600 applications for these 150 places. Defunis was eventually notified that he had been denied admission. Then he brought forward a suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Defunis case was eventually dismissed by the Supreme Court as moot, since the case was heard only a few weeks before he was to graduate from another law school. So even though he was ordered to be admitted to the University of Washington’s Law School, the point was moot. In a case very similar to Defunis, the court heard The Regents of the University of California v. Bakke (1978) a few years later.

Regents of the University of California v. Bakke (1978)

The Bakke case was a landmark decision of the Supreme Court on affirmative action and is an important case to fully understand before analyzing the Gratz and Grutter cases in the next chapter. This case bars a quota system in college admissions but, at the same time, recognized the constitutionality of affirmative action programs that gave an advantage to minority applicants.

Allan Bakke was thirty-three years old in 1973, during the first of two consecutive, unsuccessful years of application to the University of California at Davis’ Medical School. Although he was well past the age of most first-year medical students and knew that to be a factor that worked against him, he suspected that a special admissions program that admitted minority and other disadvantaged students was a larger cause for his rejection. At issue was the fact that 16 of the 100 places in the entering class were reserved for applicants who checked a
box that indicated that they wished to be considered for admission under this program. Although each of the 16 candidates, all of whom were members of minority racial groups, was allegedly fully qualified for admission, their academic credentials were, on the whole, lower than those of the larger group. Bakke’s grade point average and test scores were considerably higher than the average for the 16. Although subjective measures such as interviews, personal statements, and letters of recommendation were also a part of the process, the university gave the impression through its numerical ranking of applicants, that the process was for the most part objective.

Other problems with the admissions program included the fact that the university did not articulate a goal for the special admissions program and that it maintained a two-track admissions system. Under the dual system, the credentials of individuals considered for special admission status were never compared with those of individuals in the regular track. This lowered the admissions threshold for the special admission applicants such that only minority candidates were admitted for those spots.

Bakke brought suit alleging that the special admissions program violated the California Constitution, Title VI of the 1964 Civil Rights Act, and the equal protection clause of the Fourteenth Amendment. The state trial court found violations of all three provisions, but did not issue a judgment in Bakke’s favor because he could not demonstrate that he would have been admitted but for the special admissions program.

When the case was heard by the California Supreme Court, the special admissions program was found to be in violation of the equal protection clause because the majority of justices believed that the state could not use race classifications as a means of distributing government benefits. No rulings were issued on the other two provisions. The California Supreme Court also found that the lower court had erred in requiring Bakke to demonstrate that
he would have been admitted had the special program not existed, and he was ordered admitted to the Medical School. The U. S. Supreme Court upheld the decision of the California court but ruled only that the Davis program violated Title VI. There was no holding of violation of the equal protection clause, but the final decision was issued, in the words of Justice Powell, “with a notable lack of unanimity.” The nine Justices wrote six separate opinions, and no more than four justices agreed in their reasoning regarding any one area. Five members of the court found that a public university could in fact have an interest that could legitimately be served by a properly devised admissions program that considered race and ethnic origin. A different group of five found that the University had failed to establish that its particular approach was “necessary to promote a substantial state interest.” Justice Powell’s opinion was the common link to both groups.

Therefore, along with the “Stevens group,” Justices Stevens, Burger, Stewart and Rehnquist, Powell found that Davis’ particular program, which reserved places in the class for which all students could not compete, constituted a quota system that violated Title VI (opinion of Stevens, J.). But voting with the “Brennan group,” Justices Brennan, White, Marshall and Blackmun, Powell agreed that a university should be permitted to “take into account” an applicant’s membership in a racial or ethnic minority as part of the admissions process. Justice Powell also voted to reverse the portion of the California decision that required state governments to avoid all consideration of race in affirmative action programs. Powell in effect, found for both sides: Allan Bakke was ordered admitted to Medical School, and the University, although forbidden to continue its “quota” program, could take race into account as a kind of admissions “plus” factor, though it could not be the decisive factor.
Justices Brennan, Marshall, White and Blackmun argued that whites, as a class, did not possess any of the usual factors that would warrant strict review: they were not the special beneficiaries of the Fourteenth Amendment; as a group they had not historically experienced pervasive discrimination; they were not politically insular; and most importantly, they were not as a group viewed as being inferior by virtue of their rejection from the program. These four Justices conceded that whites might be disadvantaged under a program such as that under review, but they also believed that there was no justification for judicially protecting the majority with a test so strict that it would bar virtually all remedial programs.

For two reasons, Justice Brennan concluded that benign race classifications warranted intermediate review: (1) Laws that burden the majority population are not truly benign for minorities, as they might “stereotype and stigmatize” a small, powerless group of individuals; (2) like gender and illegitimacy classifications that were also subject to intermediate review, race classifications are also based upon “immutable characteristics which its possessors are powerless to escape or set aside” (p. 360, J. Brennan, dissenting). He concluded that a valid benign program must (1) be justified by a stated purpose that was demonstrably important enough to justify burdening members of the racial majority; and (2) be substantially related to that purpose to avoid singling out or stigmatizing relatively powerless minority populations that would otherwise bear the burden of such a program. In applying this two-part test, Brennan concluded that the attempt to remedy past societal discrimination was sufficient to justify the use of a race conscious admissions program, and that members of the racial majority were not “in any sense stamped as inferior by their rejection” (p. 375). Brennan also wrote that the Davis program was a sufficiently narrow and reasonable means of remedying the lack of representation of minority populations in medical school: “…minority underrepresentation is substantial and chronic, and
the handicap of past discrimination is impeding access of minorities to medical school” (pp. 376-377).

Justice Powell, however, writing for the majority, believed that any racial or ethnic classification, including the one at hand, required strict review, which meant that the Davis program would be upheld only if (1) its objective was a permissible and substantial, or compelling; and (2) the racial classification was necessary to accomplish that objective. In applying the strict standard, Powell analyzed four possible objectives of the Davis program, none of which he found to be completely satisfied. Three he rejected without detailed explanation: (1) the need to reduce the historic shortage of minority medical students and doctors; (2) the need to cure the results of past discrimination by society; and (3) the need to increase the number of doctors who would practice in underrepresented communities. Powell was not satisfied with the University’s method of addressing the fourth objective, that of the need to obtain “the educational benefits that flow from an ethnically-diverse student body” (p. 315). Although he believed that the University had a compelling interest in pursuing “genuine diversity” through consideration of race as one factor in the admissions process, it was not necessary, and therefore, not permissible, to use a quota scheme. Powell also took issue with the fact that Davis’ was a two-track system that insulated applicants with certain desired qualifications from competition with all other applicants.

On the other hand, Powell concluded that affirmative action programs that used race or other desired characteristics as a “plus” factor (as opposed to using pre-determined quotas, preferences or goals), would be constitutional. He described the attainment of a diverse student body as being a “clearly…constitutionally permissible goal for an institution of higher education” (p. 312).
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. It is not too much to say that the “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. 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,” [the University of California] invokes a countervailing constitutional interest, that of the First Amendment. In this light [the university] must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission. (pp. 311-313)

Powell referred to academic freedom as a special concern of the First Amendment: “The freedom of a university to make its own judgments as to education includes the selection of its 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” (p. 312). Powell saw this special First Amendment concern that universities be allowed to select those students who will contribute most to the “robust exchange of ideas” as having arguably greater force in undergraduate admissions, but also being pertinent to professional programs such as medicine and law (p. 313). “Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background whether it be ethnic, geographic, culturally advantaged or disadvantage 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” (p. 314). Reaching back thirty years, Powell also quoted *Sweatt v. Painter*:  

*Sweatt v. Painter*:
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…removed from the interplay of ideas and the exchange of views with which the law is concerned. (p. 314, quoting, *Sweatt v. Painter*, 1950, p. 634)

Therefore, Powell voted with the Brennan group only to the extent of reversing the California Supreme Court ruling that race could never be considered in educational admissions programs (p. 320).

*Bakke* was the first higher education affirmative action case to be decided by the Supreme Court, *Gratz* and *Grutter* were the second and third. To understand the context of *Bakke*, it should be understood that few universities in the 1960s initiated the recruitment of minority students. Most colleges and universities adopted such programs for reasons that were related to their traditional mission: they sought both to enhance the learning environment for all students through greater diversity of the student body, and they wished to create business, government, and professional leaders from among the rank of black and other minority students (Bowen & Bok, 1998). This “diversity rationale,” as it came to be known by the end of the 20th century, became the basis for many of the arguments made in favor of diversity in *Gratz* and *Grutter*. *Croson* (1989), *Metro Broadcasting* (1990), and *Adarand* (1995)

Although these three cases do not deal directly with higher education, they are very important in understanding the history of the development and the application of strict scrutiny. In *Bakke*, the Court could not agree on a standard of review for voluntary programs. It took nearly twenty years before a rigorous strict scrutiny standard was developed. These three cases represent a series of cases involving the evolution of strict scrutiny. In *City of Richmond v. Croson* (1989), the Richmond City Council adopted the Minority Business Utilization Plan
which required contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises. This case assessed the constitutionality of state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment. *Metro Broadcasting v. FCC* (1990) involved a challenge of FCC’s policy awarding preference to minority owners in awarding licenses. *Adarand Constructors, Inc. v. Pena* (1995) involved a constitutional challenge to a Department of Transportation program that compensated businesses if they hired subcontractors certified as small businesses controlled by “socially and economically disadvantaged” individuals which included designated racial and ethnic minority groups. A non-minority firm submitted the low bid on a contract but did not get the contract because another firm subcontracted to a minority-owned firm and received the contract. The non-minority firm sued the Department of Transportation in violation of the Fifth Amendment’s Due Process Clause.

In *Croson* the Court applied a strict scrutiny review for state and local programs, in *Metro* it applied mid-level scrutiny for federal programs, and in *Adarand* the other two cases were overruled and it applied strict scrutiny for state and federal programs. It settled on a rigorous strict scrutiny standard policy and concluded that judicial skepticism was appropriate whenever race was utilized to accomplish governmental aims (*Adarand*, pp. 227-228). This case held that all racial classifications, imposed by whatever federal, state, or local government, must be analyzed by a reviewing court under a standard of “strict scrutiny,” the highest level of Supreme Court review and that such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.
Hopwood v. Texas (1996)

This case involved a challenge to the race-sensitive admissions policy at the University of Texas Law School. In this case, Cheryl Hopwood, a Caucasian applicant to the University of Texas Law School was denied admission then sued based on the premise that she was subjected to a different and more rigorous admission standards than minority candidates were. The basis for the case of the plaintiff was that the denial violated their rights as guaranteed by the Constitution and the 1964 Civil Rights Act. The plaintiff in this case was represented by the Center for Individual Rights. The University of Texas School of Law is one of the nation’s leading law schools, consistently ranking in the top twenty. Accordingly, admission to the law school is fiercely competitive, with over 4,000 applicants a year competing to be among the approximately 900-offered admission to achieve an entering class of about 500 students. Many of these applicants have some of the highest grades and test scores in the country. The law school largely based its initial admissions decisions upon an applicant’s so-called Texas Index (“TI”) number, a composite of undergraduate grade point average (“GPA”) and Law School Aptitude Test (“LSAT”) score. The law school used this number as a matter of administrative convenience in order to rank candidates and to predict, one’s probability of success in law school. Moreover, the law school relied heavily upon such numbers to estimate the number of offers of admission it needed to make in order to fill its first-year class. The law school did not rely upon numbers alone. The admissions office necessarily exercised judgment in interpreting the individual scores of applicants, taking into consideration factors such as the strength of a student's undergraduate education, the difficulty of his major, and significant trends in his own grades and the undergraduate grades at his respective college. Admissions personnel also considered what qualities each applicant might bring to his law school class. The law school
could consider an applicant’s background, life experiences, and outlook. These hard-to-quantify factors were especially significant for marginal candidates.

Because of the large number of applicants and potential admissions factors, the TI’s administrative usefulness was its ability to sort candidates. For the class entering in 1992, the admissions group at issue in this case, the law school placed the typical applicant in one of three categories according to his TI scores: “presumptive admit,” “presumptive deny,” or a middle “discretionary zone.” An applicant’s TI category determined how extensive a review his application would receive.

Most, but not all, applicants in the presumptive admit category received offers of admission with little review. Applicants in the presumptive denial category also received little consideration and were usually rejected.

Applications in the middle range were subjected to the most extensive scrutiny. For all applicants other than blacks and Mexican Americans, the files were bundled into stacks of thirty, which were given to admissions subcommittees consisting of three members of the full admissions committee. Each subcommittee member, in reviewing the thirty files, could cast a number of votes typically from nine to eleven among the thirty files. Subject to the chairman’s veto, if a candidate received two or three votes, he received an offer; if he garnered one vote, he was put on the waiting list; those with no votes were denied admission.

Blacks and Mexican Americans were treated differently from other candidates, however. First, compared to whites and non-preferred minorities, the TI ranges that were used to place them into the three admissions categories were lowered to allow the law school to consider and admit more of them. In March 1992, for example, the presumptive TI admission score for resident whites and non-preferred minorities was 199. Mexican Americans and blacks needed a
TI of only 189 to be presumptively admitted. The difference in the presumptive-deny ranges is even more striking. The presumptive denial score for “nonminorities” was 192; the same score for blacks and Mexican Americans was 179. While these numbers may speak little to those unfamiliar with the pool of applicants, the results demonstrate that the difference in the two ranges was dramatic. According to the law school, 1992 resident white applicants had a mean GPA of 3.53 and an LSAT of 164. Mexican Americans scored 3.27 and 158; blacks scored 3.25 and 157. The category of “other minority” achieved a 3.56 and 160. These disparate standards greatly affected a candidate’s chance of admission. For example, by March 1992, because the presumptive denial score for whites was a TI of 192 or lower, and the presumptive admit TI for minorities was 189 or higher, a minority candidate with a TI of 189 or above almost certainly would be admitted, even though his score was considerably below the level at which a white candidate almost certainly would be rejected. Out of the pool of resident applicants who fell within this range (189-192 inclusive), 100% of blacks and 90% of Mexican Americans, but only 6% of whites, were offered admission. In addition to maintaining separate presumptive TI levels for minorities and whites, the law school ran a segregated application evaluation process. Upon receiving an application form, the school color-coded it according to race. If a candidate failed to designate his race, he was presumed to be in a nonpreferential category. Thus, race was always an overt part of the review of any applicant’s file.

The law school reviewed minority candidates within the applicable discretionary range differently from whites. Instead of being evaluated and compared by one of the various discretionary zone subcommittees, black and Mexican American applicants’ files were reviewed by a minority subcommittee of three, which would meet and discuss every minority candidate. Each of these candidates’ files could get extensive review and discussion. And while the
minority subcommittee reported summaries of files to the admissions committee as a whole, the minority subcommittee’s decisions were “virtually final.”

Finally, the law school maintained segregated waiting lists, dividing applicants by race and residence. Thus, even many of those minority applicants who were not admitted could be set aside in “minority-only” waiting lists. Such separate lists apparently helped the law school maintain a pool of potentially acceptable, but marginal, minority candidates.

The Hopwood case was similar to Bakke, in that a white student who was denied admission to the University of Texas’ Law School brought suit, claiming reverse discrimination. The Law School’s admission process was found by the Fifth Circuit Court of Appeals to be similar to that practiced by U. C. Davis and declared unconstitutional in Bakke over two decades earlier. The admissions policies at the University of Texas However, instead of merely declaring the Law School’s admission policy to be invalid by its failure to meet the Bakke test, a majority of the judges in the case went so far as to actually declare Bakke to be no longer be representative of the view of the Supreme Court, and therefore, no longer “holding precedent.” The University, and in fact, the entire Fifth Circuit could not take race into consideration at all in admissions unless such action was necessary to remedy past discrimination by that particular institution. The Court declared that diversity alone was not a compelling enough state interest to meet the strict scrutiny standard now required in most race classification cases. The Court held that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school’s poor reputation in the minority community, or to eliminate any present effects of past discrimination.
This case was very important in the history of race-sensitive admissions cases because it held that *Bakke* was not controlling authority and reversed the district court’s injunction against the Law School. It is a case where the plaintiff won the decision and the University’s admissions policies for minority applicants were overturned.

*Smith v. University of Washington Law School (2000)*

In *Smith v. University of Washington*, the plaintiffs, Katuria Smith, Angela Rock, and Michael Pyle were seeking admission to the University of Washington’s Law School. They were rejected for admission and they sued based on the premise that they were subjected to different and more rigorous admission standards than minority candidates were. The plaintiffs disclosed evidence that for various combinations of GPA and LSAT scores, every black applicant was admitted, while no whites, with the same combination of scores were admitted. Also all, and only, minority candidates received letters asking how they could contribute to diversity. They claimed that race was improperly considered as a factor in the admissions process claiming that the policy was not “narrowly tailored” to meet a “compelling governmental interest” which violated federal law. The basis for the plaintiffs’ case was that the denial violated their rights as guaranteed by the Constitution and the 1964 Civil Rights Act.

It is interesting that the plaintiffs were represented by the Center for Individual Rights, the same group representing the plaintiffs in *Gratz* and *Grutter*. In *Smith*, the University of Washington did not deny that it treated minority candidates in a preferential manner. The University justified its admission policies by stating that it had the right to provide preferential treatment based on the *Bakke* decision. Before this case was brought to court, a state statute was enacted making it unlawful, in the state of Washington, to consider race in any public
educational institution that dealt with employment or contracts. After several appeals, both to the Federal District Court and to the Ninth Circuit Court, the court held that the university’s admissions programs at the law school were in fact narrowly tailored and that their use of race in the admissions process is a compelling governmental interest, meeting the demands of strict scrutiny.

*Wooden v. Board of Regents of the University System of Georgia (1999), Tracey v. Board of Regents of the University System of Georgia (2000, 2001), and Johnson v. Board of Regents of the University System of Georgia (2001)*

These four cases involved challenges to the University of Georgia’s race-conscious admissions policy. The 11th Circuit Court of Appeals declined to reach the question of whether diversity is a compelling governmental interest but struck down the policy on the grounds that it was not “narrowly tailored” to serve that interest. In particular, the appeals court was troubled that only a small portion of the applications were read individually, that race was a factor for every minority applicant, and that there was no coherent rationale linking the interest in diversity to the specifics of the policy. After the district court decision, the University discontinued the use of its race-conscious policy and settled the individual plaintiffs’ claims. There were several opinions from the district court on the standing of particular plaintiffs, on the prior admissions system and on the application of LeSage to the plaintiffs’ claims for damages. On July 24, 2000 the district court held that the admissions policy was unconstitutional. On July 31, 2002, the University announced a new policy in which factors such as creativity, maturity and a history of public service would be taken into account in admissions.

This case involved a challenge to the admissions program of the University of Maryland School of Medicine. The School’s strategic admission plan called for a diverse student body, but there were not a specific number of seats set aside for any particular classification. Instead, the admissions committee was permitted to consider “non-cognitive” criteria, which included the race of the applicant that was indicated on an application. The case was brought in federal court in Maryland by a white male (Farmer) who had been denied admission twice. Farmer contended that the School of Medicine manipulated the “non-cognitive” criteria in order to admit minority students with weaker grades and test scores than non-minority students had. The district court used the “same decision” test articulated in Wooden (mentioned above) to find that the plaintiff lacked standing to bring the suit because he would have been rejected regardless of any constitutional violation. Under this test, a university may defeat liability by showing that an applicant would not have been admitted even if race had played no role in the decision process. This was based upon an examination of the plaintiff’s undergraduate grades, letters of recommendation, MCAT scores, and personal statements. The School of Medicine produced adequate evidence that all applicants with academic records and letters of recommendation similar to those of the plaintiff were denied admission. The Fourth Circuit Court of Appeals affirmed the decision on August 3, 2002. The courts found no direct evidence of either discrimination against the plaintiff or the School of Medicine operating a quota system.

University and Community College System of Nevada v. Farmer (1997)

This case involved an unwritten affirmative action policy of the University of Nevada-Reno entitled the “Minority Bonus Program,” which allowed a department to hire an additional faculty member after the hiring of a minority faculty member. The court found the policy was
constitutionally sound and promoted *Bakke’s* holding that race may be considered among other factors. The goal of achieving a diverse faculty was seen as analogous to achieving a diverse student body.

*Weser v. Glen (2002)*

This case involved a challenge to the admissions policy of the City University of New York Law School at Queens College brought by a rejected white male applicant. Summary judgment was granted for the defendant. The school stated that it strove to achieve diversity through actively seeking to recruit “men and women of all races, national origins, classes, sexual orientations, and belief systems.” In effect, diversity is achieved through recruiting the largest applicant pool possible. Race and gender are not factors in admissions decisions and all students admitted are held to the same academic standards. The court found this policy to be facially neutral and non-discriminatory.

**Summary and Analysis**

Education, race, and the law have been woven together to form a history that has shaped the landscape of universities and society. The early history of the founding of our universities, the legislation enacted in Congress, and the landmark cases in the judicial system are all parts of a cycle of action and reaction in the area of diversity and civil rights in education. The decisions and actions taken during this history are, many times, a starting point for change. Just over a century ago the Supreme Court upheld racial segregation in *Plessy v. Ferguson* by upholding the constitutionality of racially segregated railroad cars and reaffirming the “separate but equal” doctrine. This set the stage for many years of constitutionally endorsed segregation and inequality. Between *Plessy* and *Brown*, came a series of cases that exposed the true nature of the “separate but equal” doctrine. These cases revealed that facilities for blacks were either unequal
or nonexistent. The resulting series of cases was primarily aimed at states that that did not make any provisions for separate education. *McLaurin*, for example, concluded that a black student was deprived of equal protection when forced to receive his education under lesser conditions than white students. In *Gaines, Sweatt*, and *McLaurin* universities conducted a series of charades that set up facilities and assigned faculty to make the “appearance” of a separate educational program for blacks. Most of these attempts contained huge disparities between the white schools and the schools contrived for blacks. In *Sweatt* for example, the University of Texas sought to maintain segregation by quickly opening a small, minimally staffed and scarcely equipped law school for blacks (*Sweatt*, 1950, pp. 633-634). The Supreme Court recognized this sham and it condemned the University of Texas for attempting to create such a sham, just to get around the law as established in *Plessy*. Both *Sweatt* and *McLaurin* laid the foundation for *Brown’s* conclusion that separate educational institutions denied black students equal protection by creating educational environments that were not equal to those for whites. In *Brown* the fundamental question of whether segregation was, by itself, unconstitutional. In *Brown*, the Supreme Court handed down a unanimous decision stating that separate educational facilities are inherently unequal. It took *McLaurin* and *Sweatt* before *Brown*, to reach the conclusion that *Plessy* must be overruled (*Brown I*, 1954, pp. 494-495).

In *Bakke* (1978), the Court could not agree on a standard of review. The questions of what constituted a compelling governmental interest and what level of review was necessary were not clearly spelled out. In *Adarand*, the court settled on the very toughest level of standard and stated that such review was “appropriate whenever race was utilized to accomplish governmental aims” (*Adarand*, 1995, pp. 227-228). By doing this the Court made it riskier for universities to adopt admission policies that included the use of race because these policies
needed to conform to strict scrutiny and raised the question whether such policies would indeed pass such rigorous tests. *Adarand* raised the key question of whether governmental interests might justify race as a factor in university admissions. This, as we shall see in Chapter 6, was put to the test in *Gratz* and *Grutter*. 
CHAPTER V. DIVERSITY AT THE UNIVERSITY OF MICHIGAN

Introduction

In order to provide the reader with the rationale for the motivation of the University of Michigan to become involved in the case, and to answer the research question posed by this dissertation—“How did historical events, student activism and university policies contribute to the University of Michigan’s experience with Gratz v. Bollinger and Grutter v. Bollinger?”—three events at the University of Michigan—the admission of women—the Black Action Movements, and the Michigan Mandate and the resulting policy decisions are examined.

It was no coincidence that the Center for Individual Rights (CIR), the primary organization behind the Gratz and Grutter lawsuits, chose the University of Michigan as its primary target to bring the issue of affirmative action to the national limelight. Various factors led to this choice. As outlined in the previous chapter, many lawsuits concerning affirmative action in higher education have been filed. Until 2003, only one, Regents of the University of California v. Bakke (1978), made it to the Supreme Court. Why was the University of Michigan chosen? For starters, the University of Michigan is a public university. Being a public university, the laws and statutes pertaining to governmental and state statutes, laws and regulations. It receives federal and state monies in the form of student financial aid, federal grants, state subsidies, and similar types of funding. Being a public institution it must make itself to available to full access of all documentation via the “sunshine laws.” The “sunshine laws” are a series of federal and state laws designed to increase public disclosure of government agencies. Looking at the cases that have been brought forward concerning affirmative action in admissions have all taken place at public universities. Private institutions do not need to concern themselves with divulging the factors used in the admissions process because they are not subjected to the
same level of openness and disclosure required by the “sunshine laws.” Initially when Carl Cohen, the University of Michigan faculty member concerned about the fairness of the admissions process, requested information, he was denied access. He invoked the freedom of Information Act to begin the disclosure process. Discussion concerning opening of the federal and state records to the public began in the 1960s and culminated in the Freedom of Information Act (FOIA) which was signed into law on July 4, 1966 (5 U.S.C.A. § 552). The FOIA allowed, because the University of Michigan is a public-state supported (i.e., governmental) university, access to admission records and processes critical to the claims made by the Center for Individual Rights.

Another reason that the University of Michigan was chosen as a target was that it is generally regarded as one of the top public research universities. In an article in the Michigan Daily in December, 2005 (The Michigan Daily, 12/8/2005) the University of Michigan was ranked as the third-best public university in the country and was rated as one of the top 20 universities in the world. Winning a case at the University of Michigan would gain attention nationwide. In retrospect, the Center for Individual Rights did not fully understand the history of the University of Michigan when selecting the target. The University of Michigan, as this chapter will try to illuminate, has a long history of diversity. It had distinguished alumni of all races, much scholarly firepower, and a historical commitment to diversity.

Early Years and the Admission of Women and Minorities

The University of Michigan was founded on August 26, 1817. From its beginning, the University of Michigan was innovative and different from other universities in the United States, most which were located on the east coast. Four unique innovations were especially responsible to making the University of Michigan different.
The first innovation was a different curriculum. The East coast schools focused on the classics and the classical curriculum of ancient languages, religion, philosophy and math. In addition to these standard subjects, the University of Michigan would emphasize science and economics as well. This was a bold move at this point in history, a real breaking of academic tradition. The significance of this addition is a willingness for the leadership to be innovative and bold. The tradition of bold leadership became a hallmark of the institution.

The second innovation peculiar to the University of Michigan at that time was that it was to serve as the flagship and supervise the entire educational system in the state of Michigan. Other states did not give this power to its universities. The University of Michigan was given the power to establish schools and to hire instructors at those schools all across the state of Michigan.

The third innovation was having the professors themselves run the university. This made the University nonsectarian, which was a radical departure from other universities at that time.

The fourth innovation was that the entire process of education was to be supported by taxes, which made primary and secondary schools free and a university education was available to all economic classes (Peckham, pp. 22-23).

Setting a new curriculum, running the entire state educational system, having the faculty run the university, and offering a university education free for its constituents set the tone for innovation in leadership and a continuing responsibility for the public good. This concept was captured in President James Angell’s commencement address in 1879 when he argued that the university had a special responsibility to cultivate the talents and abilities for all and made a plea for economic and social diversity “not merely on account of the poor and gifted scholars
themselves, but also for the good of society” (James B. Angell, President of the University of Michigan, commencement address, June 25, 1879).

The University of Michigan grew and became one of the leading institutions in the country. It was the largest university in the United States in the 1890s and early 1900s. It was unique during that time because of its diversity. Two-thirds of the campus population came from twenty-eight other states, Canada, and other foreign countries. Michigan was not only a national university but an international one as well (Peckham, 1994, p. 63).

Another important innovation in leadership and a direct indicator of a commitment to diversity at the University of Michigan was the admission of women. No woman sought admission to Michigan, however, until 1858, and the regents of the university faced the question for the first time at their June meeting. Sarah Burger and Harriet Patton, both of Ann Arbor, and Augusta Chapin, of Lansing, were the first women to formally apply to the University. President Henry P. Tappan (1852-63) opposed their acceptance and contended that the faculty was wholeheartedly behind him. Michigan governor Kinsley Bingham favored the women’s admission, as did two of the three regents who were appointed to a committee to review the situation and prepare a report. Although the debate was lively, a decision was postponed until September, and the committee continued its investigation of the merits and problems of coeducation. The regents ultimately refused admission to the women (Regents Proceedings, June, 1858). However, in 1867 the state legislature adopted a joint resolution calling for the admission of women to the university (Regents proceedings, September, 1867).

Erastus O. Haven (1863-69), who had replaced Tappan as president of the university, was not opposed to the higher education of women, as Tappan had been, but he was not an advocate of fully integrated coeducation. He believed in establishing a separate Ladies
College, affiliated with and parallel to the university like a number of schools on the east coast such as Radcliffe at Harvard, Pembroke at Brown, and Barnard at Columbia. At Michigan, President Haven’s plan was opposed principally on the ground that creating an affiliated college for women would be prohibitively expensive.

In 1867 the legislature of the State of Michigan recommended to the Board of Regents that women should be admitted to the University. The Regents and then President Haven recoiled at the thought and simply said no. “Youth is a transitional period,” Haven wrote, “when passion is strong and restraint is feeble, and if, just at this period, multitudes of both sexes are massed together, not in families and not restrained by the discipline of the home circle, consequences anomalous and not to be supported by an Institution supported by the State are likely to ensue” (Peckham, 1994, p. 67).

“A dangerous experiment” was the phrase used by the University of Michigan’s Board of Regents to describe the possibility of coeducation at the University of Michigan. “By many it is regarded as a doubtful experiment, by some as a very dangerous experiment…certain to be ruinous to the young ladies who should avail themselves of it…and disastrous to the institution which should carry it out” (Proceedings of the Board of Regents of the University of Michigan, 1837-64, p. 796).

Soon after the University of Michigan’s winter term began in 1870, Professor Martin L. D’Ooge informed his students that on the next Monday “a young lady will join this class. I will seat her as you are, alphabetically. I expect you all to be gentlemen” (Letter from Frieda Blackenburg to F. Clever Bald, December 1, 1954, Madelon Stockwell Papers, Bentley Historical Library, University of Michigan). The young woman was Madelon Stockwell of Kalamazoo, long a scholar of the classics, who did so well on her entrance examinations that
she was admitted to the university with advanced standing and was able to graduate with the class of 1872, a class that had begun its studies as an all-male body in 1868.

Although some professors and students had not been overjoyed to see Michigan become coeducational, the new departure, the “dangerous experiment,” went remarkably well. The next fall Madelon Stockwell was joined by thirty-three other women, two in law, eighteen in medicine, and thirteen in what was then the Department of Science, Literature and the Arts. In 1875 over one hundred women were enrolled (Peckham, 1994, p. 91). Coeducation at the University of Michigan was underway.

When Michigan opened its doors to women, women had had limited access to higher education. There were educational opportunities for women in colleges and universities, but most of the older and more distinguished universities were closed to women. The University of Michigan’s “dangerous experiment” was an innovative first.

Women joined the University of Michigan community in every capacity except one; they did not become part of the senior faculty. As the number of women undergraduates and professional degree candidates grew in the 1870s, however, they did find instructional and other jobs at Michigan. Although many newly graduated women were employed at Michigan, they were excluded from the most important positions—those on the university faculty. The University of Michigan, like many institutions, both in and outside of academia, was slow to include women in leadership positions. While women were accepted as students, finding women in faculty and university leadership positions was difficult. Any progress in these areas came from a long line of women leaders who pulled, pushed, and sometimes dragged the University toward equality for women. An excellent account of this history can be found in *Women at Michigan: The “Dangerous Experiment”, 1970’s to the Present* by Ruth Bordin (1999).
account provides a detailed chronology of the various developments and progress of women at the University of Michigan.

Despite the efforts of many individuals to achieve success in this area, it was clear that the University still had a long way to go to construct an environment conducive for women leaders on campus. In 1987, the University presented the Michigan Mandate: A Strategic Linking of Academic Excellence and Social Diversity to the academic community. This document (described in more detail later in this chapter) outlines strategic initiatives that were designed to expand and enhance the diversity at the University of Michigan. Its primary focus was directed at expanding and enhancing minorities. The Michigan Mandate was a detailed “roadmap” complete with strategic plans, goals, benchmarks, objectives, and listed desired outcomes. This plan was woven into all aspects of the university and gained great momentum and provided direction for the University.

In 1994, President James Duderstadt announced the Michigan Agenda for Women, a plan to make Michigan “the leader among American universities in promoting and achieving the success of women as faculty, students, and staff” (Duderstadt, 1999, p. 498). The foci of the Michigan Agenda for Women were to: increase the number of women faculty and women administrators, retain current women faculty, improve the culture so it was more receptive and open to women, provide leadership opportunities for women, recruit more minority women, and create an environment for women students-faculty-and staff to succeed (Duderstadt, 1999, pp. 491-495). The Michigan Agenda for Women produced results. Soon after its inception, the Institute for Research on Women and Gender was founded, the Women’s Studies Program was established, the Women of Color project was launched, the Graduate School appointed Dean Nancy Cantor as the Provost and Executive Vice President for Academic Affairs, the regents
appointed three women to positions as executive officers, bringing the total to five. For the first time an equal number of women and men held leadership positions (Bordin, 1999, p. xxxii). On August 1, 2002, Dr. Mary Sue Coleman, a biochemist and former president at the University of Iowa, was installed as the University of Michigan’s first female president.

While it had been a very long time since the bold and “dangerous experiment” of admitting women at the University of Michigan in 1870, progress had been made. The Michigan Agenda for Women provided an intentional plan for the inclusion and integration of women at the University of Michigan. Although there was heated debate concerning the admission of women at the University of Michigan, the admission of African-American students John Summerfield Davidson and Gabriel Franklin Hargo in 1868 caused no headlines and the University did not bother to record that they were African-Americans. Student records simply did not record students’ race. John Summerfield Davidson only stayed at the University for one year, but Gabriel Franklin Hargo graduated from the Law Department in 1870 (Peckham, 1994, p. 64). From this unheralded beginning few records were kept about the numbers of African-American students at the University of Michigan and little was mentioned about them from the late 1800s to the early 1900s. Some records indicate that various discussions arose concerning the plight of African-Americans but nothing rose to the campus-wide level. In retrospect, it is interesting to note that the initial intake of black students in the 1860s did not cause any headlines. The university was not questioned publicly concerning its selection.

Student Activism and the Black Action Movements (BAM)

The University of Michigan has had a long history of political activism and has established a rich dialogue and discussion concerning diversity. During the early 1960s and 1970s students at many colleges and universities were beginning to protest and mobilize over a
number of issues. The Vietnam War was escalating and television was bringing very disturbing images of the war into the living rooms of most Americans. On October 15, 1969, over 20,000 students gathered in the Michigan football stadium after a game to protest the war (Peckham, 1994, p. 291). The students at the University of Michigan questioned the purpose of the war and linked the military and corporate America to the continuation of the war. Additionally, at this time, Civil Rights movements were spreading across the country. These factors led to a belief across many college campuses that the bureaucracy of the university was not responding to students’ needs. On June 15, 1962 The Students for a Democratic Society at their convention in Port Huron, Michigan, issued the Port Huron Statement which was written primarily by Tom Hayden (a University of Michigan student at the time who later became a U.S. Senator). This statement critiqued American society by highlighting the differences between the stated American ideals and the realities of life. Much of the focus of the Port Huron Statement concerned racial bigotry, the Vietnam War, and the build-up of nuclear weapons. Efforts of the U.S. government in these and other areas were roundly criticized (www.orlok.com/tribe/insiders/huron.html).

The critiques offered by Students for a Democratic Society’s Port Huron Statement and other viewpoints against the government spilled over to include the university administrations at many campuses. The University of Michigan’s students, because of Tom Hayden and others, and because of their willingness to introduce change on campus and in the greater society, became embroiled in student activism in the 1960s and 1970s. There was a feeling on the campus of the University of Michigan that activism and protest could lead to change. There were many civil rights initiatives on campus and the Black Action Movement (BAM), an organization comprised of many campus groups, initiated the Black Action Movement strike of
1970. The main focus of this strike was to increase the number of minority students on campus. The BAM strike, which lasted eight days, consisted of picketing and distributing flyers instructing the students not to go to class with only 25% of students attending classes in certain disciplines. Students also honored the picket lines at the heating plant, food services building and other areas during the strike. The food was not delivered and garbage was not collected all over campus. The administration made a public commitment to increasing the number of black students on campus to 10% of the total student body, to increase minority aid, staffing and services (Peckham, 1994, p. 295).

Seventeen years later students began to notice and compile a variety of racial incidents on campus. Student concerns and grievances were documented in the *Detroit Free Press* in an article titled “Being Black at the University of Michigan” (Being Black at the University of Michigan,” Detroit Press, March 31, 1985). In this article, the author lists many racial slurs and racial harassment occurring on the University of Michigan campus.

In 1987 a student group, the United Coalition Against Racism (UCAR) published a list of racial incidents at the University of Michigan and brought to light the fact that the University did not fulfill the promises of more minority students, agreed upon after the BAM I and BAM II protests. UCAR organized its first major rally on March 4, 1987. On March 5, 1987 Representative Morris Hood of the Higher Education Subcommittee held a hearing on racism in the student union on campus. Over 40 different speakers testified that they had experienced or witnessed racism in their personal lives at the University of Michigan. Then President Shapiro was given a chance to speak and he described the steps that the University was taking to combat racism. This rally attracted media from all over the country. This led to a public reading (with over 300 students in attendance) of 12 UCAR demands before the Michigan House of
Representatives on March 5, 1987 (Wilkerson, 1987). The UCAR presented very similar grievances to those, which led to the first BAM strike. The students felt that the University had acted in bad faith. The public became more interested in these racial incidents and unattained recruitment goals and the students became more vocal about their demands.

BAM II was organized and another rally followed on March 18, 1987 with an overnight sit-in in the Fleming Administration Building on March 19. The sit-in moved to the Michigan Ballroom on March 20 where the Regents were holding a meeting (Peckham, 1994, p. 349). The tension was very high but the sit-in eventually dissipated.

It is interesting to note here that after the crisis had been resolved, one of the Regents, Ms. Sarah Goddard Power committed suicide by jumping to her death from the Burton Clock Tower in the center of main campus. Many speculated that her suicide was a direct result of the tension, the media frenzy, and the perceived harm that the University of Michigan’s reputation was receiving due to the student demands.

On March 22, 1987 the Reverend Jesse Jackson came to Ann Arbor to meet with the UCAR/BAM III students. The next day Rev. Jackson, the student leaders, and President Shapiro reached agreements which were announced in a packed meeting in Hill Auditorium on March 23rd. After the Plan was announced, Rev. Jackson gave a rousing, nationally televised speech, in which he proclaimed, “There may be darkness on campuses all around the country, but in Ann Arbor, a light is shining today” (The Michigan Alumnus, 1987, p. 19).

The Dean of the College of Literature Science and Arts, Peter O. Steiner, was quoted in the recorded minutes to have said:

Our challenge is not to change this university into another kind of institution where minorities naturally flock in much greater numbers. I need not remind you that there are
such institutions, including Wayne State University and Howard University. Our challenge is not to emulate them, but to make what is the essential quality of the University of Michigan available to more minorities.” (Recorded minutes. The University of Michigan, College of Literature, Science and Arts, Chairman and Directors Meeting 9/17/1987. See also Editorial “Affirmative Action Misinterpreted.” Michigan Chronicle, January 23, 1988, p 6A.)

This set off another round of student protests and a rebuttal of racism by the University President Shapiro (The Michigan Alumnus, 1987, p. 15). In addition to the BAM I protests and the UCAR (twelve demands) demands there came additional strikes and demands in BAM II (nineteen demands) and BAM III (ten demands). While all these demands were a bit different there were the over-arching themes in the demands, including the lack of a “critical mass” of minority students, increased financial aid to attract minorities, lack of a “critical mass” of minority faculty and staff, the lack of offices designed to assist minority students, the lack of academic and retention services for minorities, and a lack of respect for different cultures. The University adopted a six-point plan to address the demands for greater diversity. This did not guarantee success.

A key point here is that the University needed a commitment to not only change its image, but needed to change elements of its culture. It appears that from as early as 1968 the University of Michigan had made efforts to become a more diverse educational institution. However, the students grew increasingly frustrated over this slow, decades-long march to diversity. In the 1960s, 1970s and 1980s racial unrest and concern over the lack of diversity was eventually voiced in a series of unified efforts and demands, in BAM I, UCAR, BAM II, and BAM III. These protests and demands caught the attention of the entire student body, the media,
faculty, and alumni. There were so many and continuing protests and demands because the response by the University administration was less than adequate. To change required a commitment that would bring diversity to every level of decision making within the University.

A committee was formed in the office of the Provost to discuss these fundamental changes. Two months after the Meetings in Hill Auditorium, President Shapiro resigned and accepted a new position as President of Princeton University, effective January 1988. The new President of the University of Michigan was Dr. James Duderstadt, former Dean of Engineering and Provost at the university. Dr. Duderstadt made diversity one of the hallmarks of his administration with the introduction of an ambitious program called the “Michigan Mandate”.

To address the issues and challenges and lack of University response to student protests, the University of Michigan needed to change dramatically to achieve the level of diversity demanded by the BAM movements. Although various steps were promised and certain actions were taken, the first concrete step occurred after the BAM III movement when a group of faculty with direct experience in organizational change and multicultural environments was convened by President Duderstadt when he was the Provost. Dr. Duderstadt, as Provost, implemented an ambitious strategic planning process to guide the University of Michigan into the twenty-first century. The basis of the new strategic plan was a vision of the future that contained three important elements: knowledge, globalization, and pluralism. Beginning in 1987, the program known as the “Michigan Mandate” was implemented to increase the number of students, faculty, and staff in all under-represented groups on campus in order to increase the University’s commitment to diversity (Peckham, 1994, p. 358). The University was finally taking serious steps to address the issues raised by the BAM I, BAM II, UCAR, and BAM III movements.
Michigan Mandate and the Duderstadt Era

Before beginning to discuss the particulars of the Michigan Mandate, it seems important to outline the background of Dr. Duderstadt and the initial formation of the planning process for the project. Dr. Duderstadt received his bachelor’s degree in electrical engineering with highest honors from Yale University in 1964 and his doctoral degree in engineering science and physics from the California Institute of Technology in 1967. After a year as an Atomic Energy Commission Postdoctoral Fellow at Cal Tech, he joined the faculty of the University of Michigan in 1968 in the Department of Nuclear Engineering. He taught a wide range of courses in science, mathematics, engineering, nuclear fission, laser technology, thermonuclear fusion, computer simulation, and higher education. He has received numerous awards for his teaching and research activities. He became the Dean of the College of Engineering in 1981 and Provost and Vice President for Academic Affairs in 1986. He was appointed as President in 1988 and served in this role until July, 1996 (http://milproj.ummu.umich.edu/home/biography.htm). I met with Dr. Duderstadt early in the planning stages of this dissertation. At that time, he was working with the Millennium Project, which is designed as an educational “think tank” at the University of Michigan. He is a brilliant man with a penchant for strategic planning.

In light on the various student protests and the lack of action of the administration to the demands of the students, Dr. Duderstadt, as Provost, organized a small group of hand-picked advisors on this matter. This group nicknamed the Change Group, worked together to conceive and design the Michigan Mandate. The purpose of the plan was to change the institution in such a way that all institutional barriers so all people, of all races, could participate in the life of the University. Why did Dr. Duderstadt feel this way? Was it another move to quell the student protesters, or was it a move because of deeper convictions? In a paper titled “The Michigan
Agenda for Women: Leadership for a New Century”, Dr. Duderstadt describes the rationale for the formation of the Michigan Mandate as a call to respond to the upcoming realities and challenges of the 21st Century.

The “Change Group” recognized that the University of Michigan needed to change in order to respond to the main challenges of the 21st Century which were seen as “the fact that our nation was rapidly becoming more ethnically and racially pluralistic” and that the “growing interdependence of the global community, which called for greater knowledge, understanding, and appreciation of human history than ever before” (Duderstadt, 1999, p. 474). In their discussions, the Change Group became convinced that the University’s ability to achieve and sustain racial and cultural diversity would be a major part of the University’s ability to serve the public. They saw that diversity would need to be a cornerstone of the University’s efforts to achieve excellence. The Michigan Mandate made every effort to link diversity and excellence as the two most important goals of the institution. They felt that the University needed to “broaden its vision, to draw strength from its differences, and to learn from new voices, new perspective and different experiences of the world” (Duderstadt, 1999, p. 475). The group believed that the University of Michigan’s commitment to affirmative action and equal opportunity is based on their fundamental social, institutional, and scholarly commitment to freedom, democracy, and social justice. The group believed that the academic quality of the institution would be enhanced by being able to draw upon a diversity of people with a diversity of ideas to generate the intellectual and social vitality needed to respond to a dynamic and changing world. The group also believed that the University of Michigan, as a public university, had the obligation to serve a changing society, which meant educating students for a more diverse society (Duderstadt, 1999, pp. 467-469).
In summary, the rationale behind the plan was simple, it was the morally right thing to do, it would help to achieve greater excellence in teaching and research, and it addressed the fact that the United States would be a nation without a dominant ethnic majority in the future. The ethical rationale behind strategic plan drove the actual “action plan”, the Michigan Mandate. This document was continually updated and changed as it evolved. It had many different names along the way including the “Michigan Plan”, the “Michigan Commitment” and others. The version analyzed here, named, “the Michigan Mandate: A Strategic Linking of Academic Excellence and Social Diversity” was draft 6.0 housed at the Bentley Historical Library. The Michigan Mandate had four primary objectives:

(1) to substantially increase the hiring of tenure-track minority faculty, to increase the success of these faculty, and to increase the number of underrepresented minority faculty in leadership positions,

(2) to achieve success in increasing the number of underrepresented minority students and increase minority graduation rates,

(3) to focus on the achievement of affirmative action goals in all job categories and to strengthen support services for minority staff, and

(4) to improve the environment for diversity. (The Michigan Mandate, 1990, pp. 1-19)

While all these objectives are worthy of study, the one that has the greatest impact on the following analysis of the Gratz and Grutter cases, in the next chapter, is the emphasis on minority recruiting. The crux of the entire argument in these cases comes down to the value of diversity and the methods used to achieve this diversity. Dr. Duderstadt, the Change Group, and the University of Michigan believed that it had the moral obligation to set a new agenda for the future of the University of Michigan. The Michigan Mandate was intended to address and meet
two of, what they believed, the primary challenges facing the University in the next century. These two challenges were the fact that the country was rapidly becoming more ethnically and racially pluralistic, and, that the country was growing more interdependent with the world which called for greater knowledge, understanding, and appreciation of human diversity (Mandate, 1990, p. 1). To do this, the Michigan Mandate set forth very explicit goals for these increases. These goals were tied directly to strategic goals and performance evaluations in all areas of the university. The first two years after its implementation, the University of Michigan saw a 52% increase in the number of African American hires in the tenured faculty ranks. A 23.4% increase in African American students, a 36.9% increase in Hispanic American students, a 7.0% increase in Native American students, and a 24.7% increase in Asian American students. The numbers of minority fellows increased by 32.1% and minority enrollments in the MBA programs increased to 22% (Mandate, 1990, pp iv, v). These increases represented an unprecedented effort to increase minority enrollments at the university. In the next chapter we will see that applicants Barbara Grutter and Jennifer Gratz will sue the University claiming that the admissions criterion used to achieve these goals discriminated against them. The University will argue that the educational benefits of diversity, achieved by having a critical mass of minority students on campus, outweighed the perceived discrimination by the plaintiffs.
CHAPTER VI. GRATZ AND GRUTTER

Introduction

On June 23, 2003 the United States Supreme Court delivered rulings in two extremely significant affirmative action cases. In one, *Grutter v. Bollinger*, the court upheld the admissions program of the University of Michigan’s Law School. In the other, *Gratz v. Bollinger*, the Court found that the admissions program of the Undergraduate School of the University of Michigan was unconstitutional. In introducing these two cases for analysis it is important to understand the history of civil rights and affirmative action in the United States as outlined in Chapter 3, to understand race in education and its history in higher education law as outlined in Chapter 4, and the historical background of diversity and race at the University of Michigan as outlined in Chapter 5. These contexts “set the stage” for the analysis of both the *Grutter* and *Gratz* cases. The actual analysis of *Grutter* and *Gratz* will follow the typical case brief analysis format as outlined in Dernbach, Singleton, Wharton, and Ruhtenberg (1994). This traditional method of legal case analysis presents the facts of each case, provides the issues, outlines the rule or rulings in each case, provides the analysis of the case, and finishes with the conclusion portion of the case brief analysis. The analysis section is the most important portion of this process where the rules, tests, precedent cases, statutes, and Constitutional provisions are applied to the facts of the case.

Before the traditional legal case brief analysis, a description of the arguments against the use of race in university admissions by the Center for Individual Rights will be presented, the role of the media, and the amicus briefs will be presented and analyzed to gain fuller understanding of the issues involved and to understand the significance of the case. Along with the actual cases and their legal arguments, I was fascinated by the role of the media and the
interplay between the political right and the political left during the trial. The politics and media play surrounding the entire process is worthy of deeper exploration.

The Center for Individual Rights, Political Climate, and Media

There were four groups at the forefront of the battle of race-conscious admissions policies at the University of Michigan. Each one of these groups opposed the position taken by the University of Michigan. The Center for Individual Rights (http://www.cir-usa.org/) is a conservative Washington-based group that supplied most of the money in the case, on behalf of the plaintiffs, to battle against the University’s affirmative action policies. The American Civil Rights Institute (http://www.acri.org/), a Sacramento-based group successfully banned racial and ethnic preferences in the state of Washington and in California. The Center for Equal Opportunity (http://www.ceousa.org/), based in Sterling Virginia, attempts to discourage any race-based college admission policies. The National Association of Scholars (http://www.nas.org/) seeks to rebut claims that racial diversity has any educational value (Schmidt, *Chronicle of Higher Education*, April 2003).

Of these groups, the Center for Individual Rights stood at the forefront of those opposing the pro-diversity stance of the University of Michigan. The Center for Individual Rights was founded by Michael Greve and Michael McDonald in 1988 to champion civil liberties that conservatives valued. They entered the affirmative action debate by agreeing to assist in the representation of four white plaintiffs in *Hopwood v. University of Texas* (1995) case, which, as explained earlier, involved the admissions policy at the University of Texas Law School. In this case, Cheryl Hopwood, a Caucasian applicant to the University of Texas Law School, was denied admission. She was rejected for admission and then sued based on the premise that she was subjected to a different and more rigorous admission standards than
minority candidates. The basis for the case of the plaintiff was that the denial violated her rights as guaranteed by the Constitution and Title VI of the 1964 Civil Rights Act. In that case the majority of the Fifth Circuit Court held that the diversity rationale articulated in Justice Powell’s opinion in Bakke no longer applied. This case was only binding in the Fifth Circuit (Texas, Mississippi, and Louisiana) but a similar case occurred at the University of Washington in March, 1997, in which the Ninth Circuit ruled in favor of the University of Washington’s Law School’s inclusion of diversity as a factor in the admissions process.

It is interesting to note that soon after the Washington lawsuit was filed, several Michigan lawmakers sought the help of the Center for Individual Rights to help in mounting a legal challenge to the admissions policies at the University of Michigan. The Center selected its plaintiffs from dozens of prospects and filed two lawsuits against the University in the fall of 1997. Mr. Greve, the co-founder of the Center stated that both the cases against the University of Washington and the University of Michigan were “part of a larger strategy to put the consideration of race beyond the reach of the state” (Schmidt, 2003, pp. A32-33). The University of Michigan was seen as a perfect battleground for this fight. Why? The timing was right. The Hopwood case in the Fifth Circuit and the Washington case in the Ninth Circuit were based on the university’s use of racial preferences in university admissions. The results of these two cases were opposite, the Hopwood case found for the plaintiffs and the Washington case against the plaintiffs.

The two cases at the University of Michigan also had different results in the same Circuit Court, the Sixth Circuit. In Grutter, the District Court for the Eastern District of Michigan, did not recognize diversity as a compelling governmental interest that withstands equal protection analysis. The District Court further held that even if diversity were
recognized as a compelling interest, the policy itself, with race as a predominant factor, was not narrowly tailored to meet that interest. The Court of Appeals, however, reversed the District Court and held that diversity was a compelling governmental interest and was recognized by Justice Powell’s opinion in *Bakke*. In *Gratz*, the District Court held that there is a compelling governmental interest in a diverse student body and then held that the point system was narrowly tailored, but that the practice of holding “protected seats” amounted to an unlawful quota system. *Gratz* was appealed to the Sixth Circuit and a hearing was held. However, while waiting for the Circuit Court’s decision in *Gratz*, the Sixth Circuit decision in *Grutter* had been appealed to the Supreme Court. Petitioners in *Gratz* then asked the Supreme Court to hear both cases together. The case was going to go to the United States Supreme Court and would give the Center for Individual Rights a national stage.

In addition to the legal front, the location of the University of Michigan was important. Ann Arbor, Michigan, is located close to Detroit, which was home to serious race riots over the years. This and other factors led white families to leave the city of Detroit to the surrounding suburbs. Since 1940 the share of Detroit’s population that is black has risen from about 9 per cent to more than 75 per cent. The city has lost nearly a million residents, mostly white, to the suburbs. This fact, coupled with the fact that nearly 80 percent of the city’s white students come from predominantly white neighborhoods and that 42 percent of the black students attended schools where members of minorities were in the majority. One fifth of all in-state students were from affluent schools (Schmidt, 2003). The University of Michigan’s own history, as outlined in Chapter 5, shows that the push for affirmative action admission policies grew out of a response, the Michigan Mandate, to the students’ strikes and unrest orchestrated by the Black Action Movements. One of the primary concerns during the BAM movements was the lack of minority
students on campus and the Michigan Mandate provided the framework to counter those claims. The local economy was also a player. State Senator Dave Jaye said that affirmative action is “the No. 1 economic and social issue” in the suburbs he represents, where he says, nearly everyone knows someone “who has suffered a loss due to minority preferences” (Schmidt, April 4, 2003). The climate in Michigan was ripe for the legal confrontation. Jennifer Gratz and Barbara Grutter, both white, both female, both from middle class families, both attractive, both good students, both were the “ideal victims” of affirmative action. The Center for Individual Rights had what it felt was the perfect environment to express their position.

As stated earlier in Chapter 1, I watched the segment concerning the Gratz and Grutter cases on an October 29, 2000, episode of television’s 60 Minutes (The original transcript is located at: http://www.cir-usa.org/articles/64.html). This program was emotionally charged and caught the attention of viewers across the nation. In addition to this program, the media in various forms were reporting various aspects of the case. The New York Times, the Associated Press, the Chronicle of Higher Education, and the various papers on the campus of the University of Michigan and the surrounding area all ran numerous stories and articles related to the cases. An Internet search found no less than 2224 references to the cases in the New York Times alone. The University of Michigan developed an excellent Web site (http://www.vpcomm.umich.edu/admissions/) that provides an updated legal overview, a listing of the court filings, frequently asked questions, news releases and articles relevant to the case, supporting research, statements by University leaders, press kits, photos, and media contacts. The Center for Individual Rights also maintained an active website (http://www.cir-usa.org/) that contained articles, news releases, and supporting research concerning the cases.
As early as October, 1998, The Chronicle of Higher Education began to follow the issues surrounding the cases with an article by Peter Schmidt (1998). In this article, The Chronicle began to outline the position of the University of Michigan on diversity and the position of the Center for Individual Rights alleging that the university’s use of racial preferences violates the 14th Amendment’s Equal Protection Clause and the Civil Rights Act of 1964. The article summarized and outlined some difficult issues of the case concerning the educational benefits of diversity, the fairness of the policies, and the actual effects of the policies on diversity to individual students. After this original article ran, there were, at this date, 58 different articles and stories concerning the cases.

The debate and interest in the affirmative action cases did not stop at the newspapers, journals, and television. It continued all the way to the White House. The debate over the use of affirmative action in the admissions process was joined by the President of the United States. On January 15, 2003, the Office of the President issued a press release prior to the Supreme Court deliberations, in which President Bush stated that he strongly supported student diversity in public universities, but that he opposed the methods being used by the University of Michigan to achieve those goals. He stated that he believed that the University of Michigan’s policies amounted to a quota system, and that the use of awarding extra points for being a minority and the establishment of numerical targets for minorities were unconstitutional. The President outlined the fact that minority students received 20 points, out of a total of a maximum of 150 points, for their race. He stated that “some minority students are admitted to meet percentage targets while other applicants with higher grades and better scores are passed over.” He stated that the “motivation for such an admission policy may be very good, but its result is discrimination and that discrimination is wrong” (President Bush

Amicus Briefs

An incredible array of organizations representing business, professional organizations, labor, public officials, higher educational groups and institutions and legal professionals filed legal briefs in support of the University of Michigan’s affirmative action policies. More than 80 groups, including some of the largest corporations in the United States, filed amicus or “friends of the court” briefs to support the University of Michigan. General Motors and Steelcase led the filing of amicus briefs on behalf of 21 multinational companies with others joining later. The number of amicus briefs files on behalf of the University of Michigan is the largest number ever filed in a Supreme Court case. The number of briefs filed is an indication of the interest of the outcome of affirmative action practices in higher education and it speaks to the value placed on diversity at universities. While the range of interests varied in each brief, those from the larger corporations spoke to the need of racial and ethnic diversity in institutions of higher education. The effort to achieve a diverse educational environment was vital to these companies’ efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated and trained in a diverse environment. Business leaders understand the demographic changes that are occurring in the next 25-50 years in the United States.

They recognized that the United States is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand
exposure to widely diverse people, cultures, ideas and viewpoints. In the amicus brief submitted by more than 60 leading businesses (located at the University of Michigan legal Web site) business leaders stated that they are seeking a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives and a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees and clientele in the United States and around the world. They also state that those educated in a diverse setting are likely to contribute to a more positive work environment, by decreasing incidents of discrimination and stereotyping. They urged the Court “to find that the pursuit of diversity in higher education is a compelling state interest, and that the University of Michigan may take appropriate, narrowly tailored actions to admit a student body that, among other things, is racially and ethnically diverse” (http://www.vpcomm.umich.edu/admissions/).

In addition to business leaders, the overwhelming support from professional organizations, labor, public officials, higher educational groups and institutions and legal professionals provided the Court with various insights into the value and importance that they placed on achieving diversity in an educational setting. Several amicus briefs were also filed on behalf of the plaintiffs, but were limited in number and did not have the high profile of many of the briefs filed on behalf of the University of Michigan.

A Case Analysis: Grutter and Gratz

The following format will be used for the presentation and analysis of Grutter v. Bollinger and Gratz v. Bollinger:

Bollinger and Gratz v. Bollinger:

(1) Facts. Legally relevant facts plus necessary background information will be presented.

(2) Issues. The salient and important questions being addressed in the case are presented.
(3) Rulings. The outcome/outcomes of the case are presented.

(4) Analysis. The rules, tests, cases, and statutes that were used to reach the ruling are presented and applied.

(5) Conclusion. This section includes both the outcome and the meaning of the case, presented in this chapter, and in the summary.

At the time of *Grutter* and *Gratz*, the Justices sitting on the Supreme Court bench were Justice Breyer, Justice Ginsburg, Justice Kennedy, Justice O’Connor, Justice Rehnquist, Justice Scalia, Justice Souter, Justice Stevens, and Justice Thomas.

*Grutter v. Bollinger*

The facts of the *Grutter* case involved a class action challenge to the University of Michigan Law School’s race-conscious admissions program. In this case, Barbara Grutter, a white female Michigan resident with a 3.8 grade-point average and a 161 LSAT score, applied to the Law School at the University of Michigan. She was not immediately admitted but was placed on a waiting list initially and was later rejected. Grutter filed suit against the Law School, the University, the president, the dean of the Law School, and the university director of admissions. She alleged violations of the equal protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. She argued that the law school’s policy and admissions decisions unlawfully used race and ethnicity as “predominant factors” and gave applicants who belonged to certain minority groups a “significantly greater chance of admission” than other applicants with similar credentials.

The Law School at the University of Michigan ranks among the Nation’s top law schools. It receives more than 3,500 applications each year for a class of around 350 students. According to the admissions policy, adopted in 1992, the Law School looks for individuals with “substantial
promise for success in law school” and “a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others”. The Law School seeks a mix of students with varying backgrounds and experiences and stresses that “no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems”.

In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court’s most recent ruling on the use of race in university admissions. The committee used Bakke (1978) as a guide to craft its policy. Upon the unanimous adoption of the report by the Law School faculty, it became the Law School’s official admissions policy. The Law School at the University of Michigan, like most other competitive law schools, weighs several factors, including GPA, LSAT score, personal statement and essay, letters of recommendation, quality of undergraduate institution, difficulty of undergraduate course selection, and unique personal and professional experiences.

Additionally, officials must look beyond grades and scores to so-called “soft variables,” such as recommenders’ enthusiasm, the quality of the under-graduate institution and the applicant’s essay, and the areas and difficulty of undergraduate course selection. The policy does not define diversity solely in terms of racial and ethnic status and does not restrict the types of diversity contributions eligible for “substantial weight,” but it does reaffirm the Law School’s commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers. The policy explicitly states its longstanding dedication to the inclusion of a “critical mass” of members of underrepresented populations, particularly racial and ethnic
minorities (African Americans, Hispanics, and Native Americans). Critical mass was not specifically defined, but rather left open to interpretation. This lack of definition was significant to Justice Rehnquist and Justice Kennedy who, in their dissents, both felt that the lack of a firm definition of critical mass gave universities too much latitude, and therefore, too much emphasis on race in the admissions process.

In the case, many expert witnesses were called to testify. The Law School, represented by past and present admissions directors, the dean, and faculty members involved in the drafting of the policy, argued that no specific percentage of racial and ethnic minority admissions was ever sought, but that a critical mass of minority students in “meaningful numbers” and “meaningful representation” would offer multiple perspectives and viewpoints and would help the Law School realize the educational benefits of a diverse student body. According to the defendants’ testimony, there must be a sufficient number, without defining this number, of racial and ethnic minorities in each class in order to demonstrate multiple views and to lessen the possibility of stereotyping and isolation that may exist with a low number.

The testimony of Ms. Grutter revealed that race is an “extremely strong” factor in the admissions decision, but conceded that race was not necessarily the “predominant” factor. Defendants’ experts testified that race-blind admissions would have resulted in significantly less minority representation in the Law School which questioned the fairness of the current system.

Applying strict scrutiny analysis, the court held that since the defendants did not defend the policy on the goal of remedying past discrimination by the Law School and since the Supreme Court in *Regents of the University of California v. Bakke* (1978), did not recognize diversity as a compelling governmental interest, the Law School did not articulate a compelling governmental interest that withstands equal protection analysis. The District Court further held
that even if diversity were recognized as a compelling interest, the policy itself, with race as a predominant factor, was not narrowly tailored to meet that interest. The Court of Appeals reversed the District Court and held that diversity was a compelling governmental interest and was recognized by Justice Powell’s opinion in Bakke. Furthermore, the Court of Appeals found the policy to be narrowly tailored, in that race and ethnicity were merely “plus factors” among many factors used to encourage and support a diverse Law School class. Grutter appealed to the Supreme Court.

The fundamental and threshold issue of the case was whether diversity is a compelling governmental interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. The ruling in the case was affirmed. The Supreme Court of the United States, on June 23, 2003, voted 5-4 in favor of the Law School’s admissions policies. Justice O’Connor provided the critical swing vote for the majority that included Justices O’Connor, Stevens, Souter, Ginsburg, and Breyer. They concluded that a diverse student body is a compelling governmental issue that can justify the use of race in university admissions.

In an equal protection analysis, the Law School’s admissions policy must be narrowly tailored to meet a compelling governmental interest. To address the policy under this standard of strict scrutiny, the Court looked not only at the Law School’s policy, but also at the decision in Bakke (1978), which was the only other Supreme Court case concerning affirmative action in higher education. The highly divided 1978 Court decision in Bakke yielded six opinions, and none of them received a five-vote majority. Justice Powell, announcing the judgment of the Bakke Court, wrote the most crucial and most widely cited opinion. In that opinion, Justice Powell provided the fifth vote that invalidated the quota system at the University of California Medical School, but, with four other Justices, voted to reverse the lower court’s use of race in
admissions decisions. Justice Powell cited academic freedom among his defenses for diversity as a compelling interest: the “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” (p. 313). In an important statement, however, Justice Powell noted that race may only be a factor—one of many considered for the furtherance of diversity. “It is not an interest in simple ethnic diversity … [T]he 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” (p. 315).

Among the most debated discussions that Bakke generated was whether the Court actually endorsed diversity of a student body as a compelling governmental interest for purposes of the equal protection analysis. The majority in Grutter put an end to that 25-year question by holding that diversity is, indeed, a compelling governmental interest. First, the Court rejected the plaintiff’s claim that remedying past discrimination is the only acceptable compelling interest. Second, and more importantly, the Court deferred to the academic decisions of the Law School and upheld student body diversity as an element of academic freedom. “The freedom of a university to make its own judgments as to education includes the selection of its student body” (p. 2339). It recognized that “universities occupy a special niche in our constitutional tradition,” and deferred to the University of Michigan Law School’s good faith educational judgment that diversity is essential to its institutional mission.

The Court found that the educational benefits of diversity “are not theoretical but real,” and had been substantiated by the University and its amicus briefs that were filed in this case. Those benefits include cross-racial understanding and the breaking down of racial stereotypes. The Court cited social science research showing that “student body diversity promotes learning
outcomes, … better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals”. It acknowledged that “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”, and that high-ranking former military leaders have asserted that “a highly qualified, racially diverse officer corps” is essential to national security. Finally, the Court noted that diversity is particularly important in the law school context because law schools “represent the training ground for a large number of our Nation’s leaders”. The Court concluded that “[e]ffective 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”. The Court was pleased with the University of Michigan’s goal of admitting a “critical mass” of students from underrepresented populations, in that a specific number or percentage of minority students was not targeted, but rather a number sufficient enough to achieve the overall educational benefits that a diverse student body is designed to produce. Among the benefits asserted were cross-racial understanding, break-down of racial stereotypes, understanding persons of different races, livelier and more spirited classroom discussion, and better professional preparation for an increasingly diverse workforce and society. The Court also cited to several amicus briefs filed in support of the University. Those briefs not only emphasized the academic freedom associated with student body admissions, but also the real results of education in a diverse school setting. For example, business leaders and retired officers and civilian leaders of the military argued that decades of experience working in racially diverse settings have helped to fulfill the essential goals of their respective organizations. “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” (p. 2341). Thus, the Court held that
diversity was a compelling governmental interest.

On the question of whether the Law School’s policy was narrowly tailored, the Court
again cited heavily to Justice Powell’s decision in Bakke. From Bakke, in order to be narrowly
tailed, an admissions program must not engage in quotas. Nor must it “insulate each category
of applicants with certain desired qualifications from competition with all other applicants” (p.
2342). Instead, race and ethnicity may be used as “plus factors.” The Court held that
universities may consider race or ethnicity as a “plus” factor in the context of individualized
review of each applicant, and that admissions programs must be “flexible enough to consider all
pertinent elements of diversity in light of the particular qualifications of each applicant”. In
other words, an admissions committee placing more weight on the race or ethnicity of an
applicant than it does on other factors does not transform a program into a quota. Similarly,
some attention to numbers, by way of the admissions director’s monitoring of daily reports on
racial and ethnic makeup of the applicant pool, does not harden an otherwise flexible program.

The Court praised the University’s program for its highly individualized and holistic
review of each application. All factors that may contribute to student body diversity are
considered alongside race, for example, “an unusual intellectual achievement, employment
experience, nonacademic performance, or personal background” (p. 2344). According to the
Law School, with respect to the admissions committee’s use of race, all underrepresented
minority students have been deemed qualified: “[b]y virtue of our Nation’s struggle with racial
inequality, such students are both likely to have experiences of particular importance to the Law
School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences” (p. 2344).

The Court then rejected the plaintiff’s argument that narrow tailoring requires the exhaustion of every conceivable race-neutral alternative. Race-neutral options, such as lottery systems or decreased emphasis on GPA and LSAT scores for all applicants, would diminish greatly the achievement of the goal of diversity, destroy the individualized review of each applicant, and would harm the academic quality of each entering class and the Law School as a whole. The Court recognized that race-conscious programs must not unduly burden individuals who are not members of the favored minority classes. Because the Law School provided sufficient evidence that admissions is based on many factors of diversity, the Court held that the admissions program does not overly burden non-minority applicants. The Court held that the Law School flexible admissions program does not unduly harm members of any racial group, because all applicants have the opportunity to demonstrate how they would contribute to the diversity of the entering class.

Finally, the Court held that “race-conscious admissions policies must be limited in time” and that racial classifications, “however compelling their goals,” may not be employed any more broadly than their interest demands. In the context of higher education, the Court noted that “sunset provisions” or periodic reviews of the policy would satisfy this durational requirement.

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. (p. 2346)
In addition to the opinions expressed by the majority, the minority offered dissenting views. Justice Thomas stated in his dissent that

The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. (p. 2352)

Justice Thomas criticized the majority’s opinion, emphasizing that most racial classifications will not and should not withstand strict scrutiny. He argued that national security and remedying past discrimination are the only two compelling interests that the Court has ever recognized, and that the Law School’s purported interest does not come close to the compelling nature of the previously accepted two. Justice Thomas proceeded to define the Law School’s proposed compelling interest as he saw it—“unique educational benefits [of a diverse student body] based on racial aesthetics and race for its own sake” (p. 2353).

Since the Law School claimed that a purely race-neutral policy would sacrifice a core element of its educational mission and diminish its academic quality as a school, Justice Thomas assailed the Law School’s claimed interest in its elite academically selective status nationwide. He noted that, for equal protection analysis of admissions policies like the one at issue here, it is a state interest that is important and not a national one. Statistical reports cited by Thomas revealed that only 27% of each entering class, on average, is from Michigan, and while the University of Michigan produces 30% of Michigan’s law school graduates, only 6% of the graduates in 2002 applied to take the bar in Michigan. This, according to Justice Thomas, is hardly evidence that justifies the existence of a public law school, elite or not, as a compelling state interest.
Further attempting to dismantle the majority, Justice Thomas criticized the majority’s reliance on academic freedom to justify the Law School’s use of race in admissions. He argued that there is no First Amendment right for a university to do what the equal protection clause would not permit, that is, promote government racial discrimination. Finally, he argued, that the use of race in admissions decisions does not benefit underrepresented populations. According to Justice Thomas, with such policies, each person of color admitted to the Law School will be labeled as unqualified and there only because of the color of his or her skin.

The dissent’s overall criticism of the majority comes from the majority’s alleged softening of the strict scrutiny standard to something less than strict. According to the dissent, the Supreme Court—before the majority’s opinion—had never used the “good faith” motives of decision-makers and the particular setting (here, higher education) to define the scrutiny attached to governmental racial classifications. “Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference” (p. 2366).

A substantial argument from Justice Rehnquist comes in his criticism of the Law School’s definition and defense of “critical mass.” Rehnquist argues that the admissions policy, in application, bears little or no relationship to its stated goals. Specifically, Rehnquist cites to the fact that a significantly higher number of African Americans are admitted than Hispanics and Native Americans. He then wonders why such disparities exist in a program designed to enroll a critical mass of minority students: Why does it take fewer Hispanics and Native Americans than African Americans to reach “critical mass”? Rehnquist then cited facts that revealed that several African Americans were admitted over similarly qualified Hispanics and Native Americans. The results of the policy’s application, Rehnquist argued, are not the results of merely “some attention to numbers,” as asserted by the defendants and highlighted by the majority, but the
results of a concerted effort at racial balancing for percentage—an effort Rehnquist argued is unlawful. “Indeed the ostensibly flexible nature of the Law School’s admissions program that the Court finds appealing, appears to be, in practice, a carefully managed program designed to ensure a proportionate representation of applicants from selected minority groups” (p. 2369). Admissions decisions based on statistical representation of minority applicant groups, according to the dissent, are unlawful.

In his dissent, Justice Kennedy articulated two related primary criticisms of the majority’s opinion. First, he argued that while the majority presented the appropriate strict scrutiny standard for analysis of governmental racial classification—narrowly tailored to achieve a compelling state interest—it did not apply the necessary rigorous judicial review. According to Justice Kennedy, the majority’s judicial deference to the academic definition of diversity goals was fine, but the deference afforded the policy means by which the Law School attempted to meet that definition was not fine. “The majority fails to confront the reality of how the Law School’s admissions policy is implemented.…[T]he concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas” (p. 2371). Second, Justice Kennedy argued that the admissions policy emphasized so heavily the pursuit of a critical mass of underrepresented minorities that the proclaimed individualized review of each applicant disappeared. Testimony of the admissions officers revealed that daily reports were generated on the percentage of racial and ethnic minorities admitted such that race was becoming a predominant factor, particularly toward the end of the admissions season. Kennedy felt that the Law School was merely perpetuating the use of race as dominant factor “tantamount to quotas” (p. 2373). He feared that such latitude would reduce the incentive of universities to look for
fairer ways to use race appropriately in admissions decisions. “Constant and rigorous judicial review forces the law school faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution” (p. 2372).

*Gratz v. Bollinger*

The facts of this case involved a class action challenge to the University of Michigan’s race-conscious admissions program to its largest undergraduate college, the College of Literature, Science, and the Arts (LSA). Named plaintiffs Jennifer Gratz and Patrick Hamacher were unsuccessful white applicants to that college in 1995 and 1997, respectively, and the Center for Individual Rights sued University officials on their behalf in October 1997. They argued that the program violated the 14th Amendment and Title VI of the Civil Rights Act because it considered race and gave race too much “weight”. The University argued that its program is justified by the pursuit of educational benefits of diversity, and that the program is “narrowly tailored” to pursue that interest. The University considered a variety of factors in a point system, including, among others, whether the student was socio-economically disadvantaged or came from an educational environment that was socio-economically disadvantaged, and whether the student was a member of an underrepresented racial or ethnic community or came from a school that served those communities. The vast majority of the points (110 out of 150) were awarded based on academic criteria, and the remainder related to personal characteristics and accomplishments that could contribute to the diversity of the class as a whole. The Office of Undergraduate Admissions monitored the admissions process for the LSA. The exact admissions criteria fluctuated each year. During 1995-1996, the admissions office considered a variety of factors, including GPA, SAT/ACT scores, high school, strength of high school curriculum, geographical residence, alumni relationships, and unusual circumstances. To make
initial admissions decisions, the SAT/ACT scores were plotted on one axis and the GPAs, in-state/non-minority, in-state/minority, out-of-state/non-minority, and out-of-state/minority. It was undisputed that virtually every qualified applicant who was African American, Hispanic, or Native American was admitted. In 1997, the process was amended to award certain points based on minority status, membership in an underrepresented population, or socioeconomic disadvantage. In 1998, the office of admissions dispensed with the score-plotting system and adopted a “selection index,” on which an applicant could score a maximum of 150 points. One hundred points guaranteed admission. Each applicant received points based on the same factors used in previous years, including test scores, residency, alumni relationships, high school curriculum, personal essay, and other personal achievements or leadership activities. In a “miscellaneous” category, applicants were awarded 20 points based on underrepresented racial or ethnic minority group. In addition, toward the end of the admissions season, “protected seats” were held for late-arriving applications from racial and ethnic minorities. Finally, an admissions review committee was given the discretion to “flag” certain applications for further individualized review. Among the applications eligible for flagging were those who achieved a minimum selection index score or possessed an important quality, characteristic, or special talent. Racial and ethnic minority status qualified as an important characteristic and the 20 points awarded to them was the basis for the claim by the plaintiffs that the system was unfair.

On the same day as the *Grutter* decision, in an opinion by Chief Justice Rehnquist, the Court reiterated its holding from the *Grutter* decision that diversity is a compelling state interest that can justify the consideration of race as a plus factor in university admissions. It found, however, that the automatic distribution of twenty (20) points to students from underrepresented minority groups is not narrowly tailored to achieve this purpose. The Court
emphasized the importance of individualized review to assess all of the qualities each applicant might contribute to the diversity of the entering class. It ruled that the admissions process of the College of Literature, Science, and the Arts did not meet this standard insofar as points were automatically awarded to all applicants from underrepresented minority groups, without further consideration of their other individual attributes. The Court concluded that this automatic distribution of 20 points had the effect of making race a decisive factor for underrepresented minority applicants. The fact that certain files were flagged for further individualized consideration by a committee was not deemed sufficient to meet the narrow tailoring standard, because such reviews were found to be “the exception and not the rule” and because they occurred only after the points were distributed.

Finally, the Court held that “the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system”. The case was remanded to the federal district court for further proceedings consistent with this opinion. The University subsequently altered its undergraduate admissions policy so as to constitute a holistic, individualized review process in which race is one of many factors considered but in which points are not used and race is not give a particular weight.

At trial, the University of Michigan asserted a state interest in the educational benefits that result from having a racial and ethnically diverse student body and that its program is narrowly tailored to meet that interest. The District Court held that there is a compelling governmental interest in a diverse student body and then held that the point system, including the 20 points awarded to members of minority classes, was narrowly tailored, but that the practice of holding “protected seats” amounted to an unlawful quota system. The case was appealed to the
Sixth Circuit and a hearing was held. However, while waiting for the Circuit Court’s decision, the Sixth Circuit decision in *Grutter* had been appealed to the Supreme Court. Petitioners in *Gratz* then asked the Supreme Court to hear both cases together.

The primary issue then is whether the University of Michigan’s use of racial preferences in undergraduate admissions violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964. The court ruled that yes, in a vote of 6-3, the use of racial preferences in undergraduate admissions at the University of Michigan did violate the Equal Protection Clause of the Fourteenth Amendment and Title VI. Justices Rehnquist, O’Connor, Scalia, Kennedy, Thomas, and Breyer found the undergraduate program’s admissions policies to be unconstitutional, and Justices Stevens, Souter, and Ginsburg dissented.

In the analysis of the *Gratz* case, the Supreme Court deferred to the majority opinion in *Grutter* for its holding that student body diversity is a compelling governmental interest and proceeded to determine whether the undergraduate admissions policy was narrowly tailored. The majority in *Gratz* agreed that it was not. The university argued that the policy provided for the individualized review that Justice Powell emphasized in his *Bakke* opinion, but the majority held otherwise. Justice Powell encouraged the use of multiple diversity factors in the course of holistic individual review of each application. According to the Court in *Gratz*, the undergraduate policy did not allow for such individualization. The university argued that the number of applications received makes it impossible to engage in the sort of individualized review upheld in *Grutter*. But the Court held that administrative burden is not an excuse. The fact that 20 points are awarded to racial minority status without other review discounted any of the individualized and broadly diverse review in *Bakke* and the opinion in *Grutter*. The university attempted to convince the court that the individual qualities and experiences of non-
minority applicants are considered without dependence on race. True as that may be, the Court stated that those individual qualities and experiences would only warrant a few points, as opposed to the 20 automatically given to racial minorities. The fact that certain non-minority applicants are also “flagged” for individual review means much less when flagged applicants who are members of certain racial or ethnic minority groups start 20 points ahead. “[T]he University’s version of a ‘plus’…makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant” The fact that certain non-minority applicants are also “flagged” for individual review means much less when flagged applicants who are members of certain racial or ethnic minority groups start 20 points ahead. “[T]he University’s version of a ‘plus’…makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant” (p. 2428).

Justice O’Connor, who wrote the majority opinion in Grutter voted against the position of the university and wrote separately to emphasize the differences between the policy upheld in Grutter and the one struck down in Gratz. The law school’s policy allowed for a legitimate case-by-case individualized review of each applicant and favored multiple diversity factors. The undergraduate policy, on the other hand, mechanically assigned 20 points for certain racial status and virtually guaranteed admission for each applicant in those favored categories. Individualized review came only after those points were assigned. In addition to various points for academic performance, the non-academic factors and points were ten points for Michigan residents, four points for children of alumni, three points for an outstanding essay, and five points for personal achievements, leadership, or public service. “Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented solely based on the fact of his or her
race” (p. 2432). While Justice Powell, in *Bakke*, stated that the weight given to each of the multiple diversity factors could vary from year to year, Justice O’Connor criticized the automatic and weighty distribution of points based solely on race.

Summary and Analysis

The Court’s decisions in *Gratz* and *Grutter* do not establish new legal standards for equal protection and the Fourteenth Amendment. The cases apply the “strict scrutiny” standard, a principle that has been evolving since its initial introduction in *Korematsu v. United States* (1944), in a specific way to address the direct question of whether and how universities may consider race or ethnicity as a one factor among many to further their interests in promoting the educational benefits of diversity in a student body. These cases provide universities with an important framework to use in reviewing their race-conscious, diversity-based admission programs.

There are three important points that are of primary interest when analyzing the outcome of the Court’s decisions. The first of these points is the determination of whether the interest of universities in promoting the educational benefits of diversity is sufficiently compelling to justify the use of race or ethnicity in university admissions. The second is narrow tailoring which involves the issue of whether the admissions programs that consider race or ethnicity to promote the educational benefits of diversity are considering those factors only to the extent necessary, and in a manner consistent with their mission-driven diversity goals. And third, the Court ruled that universities must perform periodic reviews of their race-based admissions programs.

Compelling Interest

At the heart of the Court’s decision in both cases, it held that the interest of promoting the educational benefits of diversity of both the University of Michigan’s Law School and its
undergraduate program were sufficiently compelling to justify the limited use of race in student admissions. It ratified that Justice Powell’s position in Bakke (1978) was, in fact, a correct statement of the law. The Court “endorsed” Justice Powell’s opinion and his “diversity rationale,” which served as the law for many years after Bakke was decided.

Recognizing that context matters when evaluating the race conscious admission policies under strict scrutiny, the Court held that the higher education context is unique. According to the Court, “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”. The Court deferred to the University of Michigan’s educational judgment that diversity is essential to its educational mission.

In finding the diversity interest to be compelling, the Court strongly endorsed the educational benefits of diversity and recognized the need for additional efforts to counter racial issues in society and recognized that race still matters. The Court also stressed the importance of students from all racial and ethnic groups having access to universities. The Court stated that, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. 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.

The Court determined that the compelling nature of the diversity rationale provided by the university, the expert witnesses, and the companies and organizations that filed amicus briefs was substantial. Importantly, the Court decided that when a university’s interest in promoting
the educational benefits of diversity are central to its mission, then that interest is compelling as a matter of law.

In *Grutter* the Court also decided that universities, in order to promote the educational benefits of diversity, can seek to enroll a “critical mass” of students from different racial and ethnic groups so long as the critical mass is “defined by reference to the educational benefits that diversity is designed to produce,” and that the goal is not “some specified percentage of a particular group merely because of its race or ethnic origin” (p. 2369).

The Court outlined the difference between the establishment of permissible numerical goals and illegal quotas. The Court, in *Grutter*, stated, that if properly understood, a ‘quota’ is a program in which a certain fixed number or proportion of opportunities are “reserved exclusively for certain minority groups” and that quotas “impose a fixed number or percentage which must be attained, or which cannot be exceeded”, and “insulate the individual from comparison with all other candidates for available seats” (p. 2342). This compares and contrasts with a permissible goal which “requires only a good-faith effort…to come within a range demarcated by the goal itself,…and permits consideration of race as a ‘plus’ factor in any given case while still ensuring that each candidate competes with all other qualified applicants” (p. 2366).

*Narrow Tailoring*

The Court decided and further defined the definition of “narrow tailoring” that has guided various affirmative action cases for decades. The Court made distinctions between the University of Michigan Law School admissions program in *Grutter* and the University’s undergraduate admissions program in *Gratz*. In *Grutter*, the Court decided that individualized consideration of applicants in the context of a race-conscious admissions program is critical. This means that to use race or ethnicity in student admissions, universities must include an individualized, non-
mechanical, full-file review of each applicant. “In other words, an admissions program must be
‘flexible enough to consider all pertinent elements of diversity in light of the particular
qualifications of each applicant, and to place them on the same footing for consideration,
although not necessarily according them the same weight” (p. 2342).

The Court in Grutter upheld the Law School’s admissions program because it consisted
of “highly individualized, holistic review” (p. 2342) of each applicant’s qualifications. The
Court acknowledged and approved the inclusion of diversity factors in the admission process.
The Court in Gratz, on the other hand, struck down the undergraduate program because the
admissions system did not offer an individualized review so each applicant’s diversity
experiences could not be compared with the other applicants. The Court’s majority questioned
the awarding of an automatic 20 points for being a minority. They did not see this as
representing an individualized view of each applicant. The Court also stated that even though
instituting individualized admissions programs for the undergraduate program may cause
administrative problems for the university because of the large volume of applicants, it still does
not excuse them from adopting admissions policies that conform to the law. In Grutter, the Court
also stressed that the need to ensure the limited consideration of race “does not require
exhaustion of every conceivable race-neutral alternative….Narrow tailoring does, however,
require serious, good faith consideration of workable race-neutral alternatives that will achieve
the diversity the university seeks” (pp. 2344-2345). By these remarks the Court was encouraging
universities to learn from other universities in regard to race-neutral alternatives as promising
practices to develop. The Court stressed that the consideration of race-neutral alternatives would
be evaluated in the context of mission driven goals such as diversity. The Court did not want
universities to sacrifice academic quality by de-emphasizing grades or test results to promote
diversity before using race. The Court expressly questioned the use of percentage plans in the admissions process stating “Even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along the qualities valued by the university” (p. 2345).

Time Considerations

The Court reaffirmed that one of the primary purposes of the Fourteenth Amendment is to eliminate distinctions based on race, so it asserted that “race-conscious admissions policies must be limited in time”. The Court stated, “In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity”. Finally the Court ended its opinion in Grutter with a look into the future:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education….We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today (p. 2347).
CHAPTER VII. DISCUSSION AND CONCLUSION

“All right, then, I’ll go to hell.”
Huckleberry Finn

Two of my favorite American authors are Ernest Hemingway and Mark Twain. Hemingway for his simple, direct, powerful writing style and Twain for his wise and witty, but serious, social satire of the society of his time. One of my favorite books by Twain is The Adventures of Huckleberry Finn. In describing Huckleberry Finn in The Green Hills of Africa Hemingway wrote that “all modern American literature comes from one book by Mark Twain called Huckleberry Finn….All American writing comes from that. There was nothing before. There has been nothing since” (http://www.answers.com/topic/green-hills-of-africa). I am not a book critic, or a famous author like Hemingway, and am not qualified to make such a statement. I can state, however, that in his satirical way Twain, in Huckleberry Finn was offering his critique of society’s mindset on race at the time. The book takes place before the Civil War when the institution of slavery was the primary influence on race relations. In the book, Twain tries to draw the reader into the moral dilemma of slavery and race. His main character, Huck Finn, runs away from home and has many adventures with a slave named Jim who is trying to secure his freedom. Jim was a caring and compassionate man who helped and protected Huck on the trials and tribulations he encountered along the way. Huck had never had the opportunity to know and understand Jim before their journey together. He had only seen Jim as a slave, not as a human being. As the book continues, Huck begins to appreciate Jim and his culture. He begins to realize that there are diverse ways of seeing the world and that Jim’s views and aspirations and ways of living in the world are worthy and honorable. This realization was quite contrary to the dominant culture of the time, which viewed slaves, and in fact all blacks, as inferior and pieces of property. Huck, because of his exposure, began to internalize Jim’s plight...
and he became Jim’s friend. Society did not provide Jim with an opportunity for freedom, but Huck decided to provide him with that opportunity. At the end of their trip together Huck had the initial idea to return Jim to his previous owners. He agonized about this decision. Despite the pressures of his upbringing and his socialization in the slave culture, Huck decided that slavery was wrong. He was sure that he was going to burn in the “everlasting fire.” But he decided that “All right, then, I’ll go to hell” and he helped Jim to freedom.

*The Adventures of Huckleberry Finn* has the dubious honor of being banned so many times that it has made the American Library Association’s top-five list of books banned by schools and public libraries. Most of the reasons for book being banned are Twain’s use of racial slurs, his use of stereotypes, and a paternalistic depiction of blacks. However, looking deeper into Twain’s satirical motives, I contend that he was using his writing to illuminate issues of race for himself and for his readers. In *Finn*, he dared to question the prevailing social structures of the time and wrote about race in a manner that raised the consciousness of those that read the book.

*Huckleberry Finn* is controversial. It has sparked academic debate concerning race and the language that can be used to describe race, it has been banned and vilified, and it has been described by famous authors (including Hemingway) and critics as one of the best American novels ever written.

*Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003) are also about race. These cases are also controversial. And they have sparked academic debate about race and the language used by the courts and institutions of higher education in describing race. The legal outcome of the cases, especially *Grutter*, has been vilified by organizations such as the Center for Individual
Rights and, at the same time, has offered hope for the continuation of achieving a diverse educational environment in colleges and universities.

Race has been, and continues to be, an issue and a major concern in the United States of America. Concerns about race have permeated our national conscience before and after the Civil War, before and after the Civil Rights Act of 1964, before and after the eloquent speeches of Dr. Martin Luther King, and before and after the decisions handed down in *Gratz* and *Grutter*.

Providing opportunities for interaction, like Huck had with Jim, are what Justice Powell had in mind when he stated in *Bakke* that “experimentation and creation” was “widely believed to be promoted by a diverse student body”. Justice Powell went on to say that “people do not learn very much when they are surrounded by the likes of themselves” (p. 313). Justice Powell recognized that, in the classroom, “a black student can usually bring something what a white person cannot offer” (p. 318). Even after declaring that he could not support quotas, he stated that diversity requires “the necessity of including more than a token number of black students” which could not be accomplished without some attention to numbers” (p. 323). Powell went on to state that there should be enough black students at a university to “bring their classmates and to each other the variety of points of view, backgrounds, and experiences of black people in the United States” and to overcome the “sense of isolation among the black students themselves [which would] make it more difficult for them to develop and achieve their potential” (p. 323).

A university should have the right to take the necessary steps to achieve a critical mass of minority students. Justice Felix Frankfurter, in *Sweezy v. New Hampshire* (1957), described the four essential freedoms of a university determining “for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study (p. 263). Determining who may be admitted to study is the crux of *Bakke* (1978), *Hopwood* (1996), *Smith
(2000), Gratz (2003), and Grutter (2003). Will this decision be left to universities in the future or will the decision be made by the courts or by the state government? How can students learn about their neighbors if they are not provided an opportunity to study and learn with them? In Harper Lee’s To Kill a Mockingbird, another one of my favorite books, attorney Atticus Finch tries to explain the basis of positive human interaction to his young daughter, Scout, with these words: “First of all, if you can learn a simple trick, Scout, you can get along a lot better with all kinds of folk. You can never really understand a person until you consider things from his point of view…until you climb into his skin and walk around in it” (p. 34). Huck Finn did not understand Jim, his culture, or his perspectives without living and learning with him. Justice Powell and the five-Justice majority in Grutter would, I believe, agree with Atticus Finch.

The University of Michigan, because of its history of diversity, its challenges with student activism during the BAM movements, and the commitment of its leadership to address the concerns of BAM in the Michigan Mandate was faced with a difficult challenge when it decided to pursue its defense of its admissions policies in both Gratz and Grutter. To stay the course during the five-and-one-half-year litigation costing millions of dollars was exceptionally challenging. The challenge was daunting because it dealt with race. The challenge was difficult because Justice Powell’s opinion in Bakke had restricted the way that universities could address affirmative action. Justice Powell spoke about the “educational benefits of diversity” but never offered a workable definition of either educational benefits or of diversity. Americans generally agree, I believe, that access to employment and access to higher education should be a fair process. Many agree that it should be a color-blind process. They believe that public and private institutions and individuals should not be influenced by race or ethnicity. This concept permeates our thinking and is firmly rooted in the Equal Protection Clause of the Fourteenth
Amendment to the United States Constitution. While the law allows deviations from this principle, it does so through the evolution of language in the various court cases analyzed in this study. Deviations in the name of race and national origin are always “suspect” and they always demand justification in the form of a “compelling interest” and must be “narrow tailored.”

The University of Michigan has a long history and a commitment to diversity. As early as 1887 a *Harpers Weekly* article observed,

> The most striking feature of the University [of Michigan] is the broad and liberal spirit in which it does its work. Women are admitted to all departments on equal terms with men; the doors of the University are open to all applicants who are properly qualified, from whatever part of the world they may come. (*Harper’s Weekly*, 1887, as quoted in Howard Peckham, 1994, p. 95)

Then President James Angell also underscored this point in his 1879 commencement speech titled: *The Higher Education: A Plea for Making It Accessible to All*. Inclusiveness has been part of the university’s goals, either stated or unstated, from almost the beginning of its founding.

From the “Dangerous Experiment” of admitting women in 1870 to the admission black students, John Summerfield Davidson and Gabriel Franklin Hargo in 1868, the University of Michigan was a place where qualified women and blacks could enroll. However, even though a culture of diversity may have existed, for most years the number of black students could be counted on one or two hands and the number of women was not much higher. So despite a long history of accepting women and students of color, the numbers of these two groups remained relatively small compared to the overall population of the University. The tradition of diversity could be said to be a passive rather than an active effort. It wasn’t until President Johnson’s Executive Order 11246 which launched “affirmative action” programs and the tying of those orders to the
Civil Rights Act, which provided for the withholding of federal funds, did universities, including the University of Michigan, begin to feel the pressure to admit and hire minorities. This, coupled with the an era of student activism across the nation against the Vietnam War, by civil rights movements (the 1965 march on Selma, Alabama, for example) and a series of confrontations between students and administrators in the three BAM movements at the University of Michigan, added to the pressure to admit and hire minorities at the U of M. Goals of increasing minority enrollment by at least 10%, as established by the Black Action Movements, were not met. In 1988 President Duderstadt announced the Michigan Mandate to ensure that all racial and ethnic groups would be full participants in the life of the university. The fundamental principle of the Mandate was that the university should become a leader in creating a multicultural community that would serve as a model for society as well as for higher education. Duderstadt, in *Positioning the University of Michigan for the New Millennium*, stated the primary rationale for implementing the Michigan Mandate was simple: “First and foremost, it was and still is the morally right thing to do.” Diversity became the cornerstone of the commitment of the University of Michigan to, actively rather than passively, change. The belief in the achievement of excellence in teaching and scholarship was predicated on the benefits of varied intellectual perspectives and experiences of a diverse student body and faculty. Overcoming past inequities, providing equal opportunities, and providing equal access were seen as fundamental values of the University of Michigan and were among the most important reasons for its commitment to diversity. Duderstadt’s and the University’s buy-in to the Michigan Mandate was finally a solid response to the demands of student unrest as outlined by the BAM movements, an active rather than a passive response to the historical and societal reforms for affirmative action, and the “morally right thing to do”.
Developing an atmosphere of diversity was at the heart of Justice Powell’s argument in *Bakke*;

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. (pp. 312-313)

So, if *Bakke* recognized a “robust exchange of ideas” as important to the educational mission of a university and the University of Michigan stated that one of its important educational missions was the creation of a diverse student body, why were groups such as the Center for Individual Rights so angry about the University of Michigan’s admissions policies? Why the media coverage? Why is this issue so important that the President of the United States decided to weigh-in on the debate? These questions are what make *Gratz* and *Grutter* so interesting. These cases represent the confluence of so many issues: The importance of race in our society, the importance of diversity in an educational setting, the stance of the legal system in these matters, and the stance of university leadership to the moral and ethical questions posed by affirmative action programs. This study has attempted to prove insight into these issues.

Chapter 3 outlined how, as asked in the first research question, the various federal policies and social movements shaped civil rights prior to the Civil Rights Act of 1964. In looking back at the various policies and social movements, I feel that I am guilty of collapsing the entire civil rights process into a continuous stream from the early movements to the present day. I recognize that there were ups and downs, good and bad, and peaks and valleys. The important question to this research is the importance of these movements to *Gratz* and *Grutter*
and to the present situation today. In essence, the questions are, “What is the link between past events and contemporary policy?” “How does the past bring us to the present?” “How does this past relate to higher education?” And, more importantly, “Why are these questions even necessary?” Myrdal (1972), in An American Dilemma, concluded, not surprisingly, that race has played a significant role in America. The American dilemma that he refers to in the title of his book is that of the differences in the American ideal and the American reality for blacks in this country. Myrdal looks at a modern democracy that had developed a system that had separated blacks from whites in many different spheres. The period from the 1890s to the 1940s witnessed blatant public violence including lynchings and abject poverty caused by a variety of factors including lack of access to education. There existed a system of segregation that was not only tolerated but mandated by the courts. The Supreme Court in Plessy v. Ferguson (1896) upheld a lower court’s decision that a man was guilty in refusing to leave a “whites only” car in a train and codified the legal principle of “separate but equal”. The Court concluded that as long as blacks had nominally equal access to resources, the states could legally separate blacks from whites. In speaking for the majority in Plessy, Justice Brown stated that “it [the Fourteenth Amendment] could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either” (Plessy, pp. 543-544). It took several decades for the Supreme Court in Brown (1954) to state that separate but equal was unconstitutional.

In addition to Brown, the federal government tried to demonstrate its concern for racial discrimination in the form of issuing executive orders and forming a variety of committees to ensure fair hiring and housing practices. However, those orders and committees had any real powers of enforcement. In the 1960s, President Johnson spoke eloquently about the problems of
race in America when he stated that think it is fair to bring those that have been “hobbled by chains, liberate him, bring him to the starting line of a race” and expect him to “compete with all the others”. Although he did not spell out the definition of affirmative action he stated that we needed “affirmative actions” to remove those inequities of the past to make the race fair. Finally with the passage of the Civil Rights Act in 1964, legislation obtained the “teeth” to enforce its affirmative action.

As we witnessed in Chapter 4, the public debate over education and opportunity raged across the country and numerous battles were waged in the courts. The second research question, “What is the history of affirmative action in university admissions?” was addressed by outlining the various cases involving significant legal cases. Education proved to be an important battleground for discussions, litigation, and decisions about race.

Education is vital to the attainment of the American dream. Becker (1993) in his often cited work, *Human Capital: A Theoretical and Empirical Analysis*, the human capital built by education generates substantial economic returns. There is also much evidence from longitudinal research like the study cited in the *Shape of the River* (Bowen & Bok, 1998) that the economic returns on investments on education are enhanced by attendance at institutions of high quality and that studying at these institutions are amply rewarded in the marketplace (p. 118). Diener (1984), in his studies, indicated that education provides many different outcomes that also contribute to satisfaction and success apart from income. Education is important for all, but the importance of including minorities in selective universities through race sensitive admission policies has been controversial and has resulted in many court cases resulting in rigorous legal requirements when race is used as an admission criterion. These requirements arose from the Equal Protection Clause of the Fourteenth Amendment, which applies to any public institution of
higher education and from Title VI of the Civil Rights Act of 1964 with applied to any university public or private that received federal funding.

The Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act impose that any use of race or ethnicity in admissions decisions must be narrowly tailored to serve a compelling governmental or institutional interest. Across the country there were a number of cases that challenged the use of race and ethnicity in diversity-based admission. Common to all these challenges is that the university used a dual admissions program with different criteria or different procedures for evaluating minority and non-minority applications. The plaintiffs in these cases generally claim that applicants with similar academic credentials do not compete for all available seats on equal footing, as Bakke (1978) requires. They claim that the universities admit minority applicants at far higher rates than they admit non-minority applicants. Defendants typically argue that they maintain no formal policy prescribing a dual system, that no candidate is admitted unless he or she meets basic academic qualifications regardless of race or ethnicity, and that the systematic use of race and ethnicity as substantial “plus factors” is consistent with Bakke (and now Grutter), that the plaintiff would not have been admitted even if race and ethnicity had not been considerations, and that the use of race and ethnicity is necessary to achieve educational diversity. In Bakke racial quotas were found to be unconstitutional but the use of race as one of many factors could serve a compelling interest of the university. In Hopwood (1995) the court ruled that Justice Powell’s opinion in Bakke established no binding precedent and made the entire Fifth Circuit so it could not take race into consideration at all in admissions unless such action was necessary to remedy past discrimination by that particular university in question. Other cases—Smith (2000), Johnson (2001) and others—also debated the use of race in admissions. The evolution of these processes was slow.
It took twenty years of educational litigation to shape the decisions in *Brown* and another twenty plus years of civil unrest and litigation to shape the decisions in *Bakke* and still another twenty-plus years to shape the decisions in *Gratz* and *Grutter*.

Research question four concerns the legal implications of *Gratz* and *Grutter*. In *Gratz* the Court found that the use of race in the admissions process at the University had educational merit and that educational benefits “flow from a racially and ethnically diverse student body” including improved learning, greater engagement in active thinking processes and growth in intellectual engagement and motivation. However, the Court concluded that the admissions programs in effect were impermissible because, among other things, the system of awarding extra points for race automatically excluded non-minorities from receiving these points. In *Grutter* the Supreme Court ruled that the Law School’s admission policy of holistic review is narrowly tailored to pursue a “critical mass” of students from under-represented groups, providing a class with meaningful numbers of minority students “to ensure that all students—majority and minority alike—will be able to enjoy the educational benefits of a diverse student body.” The Court found that the Law School's admissions program is narrowly tailored to achieve its compelling interest. The Court held that universities may consider race or ethnicity as a “plus” factor in the context of individualized review of each applicant, and that admissions programs must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.” Institutions may not, however, “establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks.” The Law School’s admission policy was found to meet these requirements and was found to be “a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.” The Court
went on to hold that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” and that a university need not choose between commitments to excellence and to a diverse student body. Institutions must give “serious, good faith consideration” to workable race-neutral alternatives to achieve these objectives, but the Court indicated that the Law School had adequately done so. Finally, the Court held that “race-conscious admissions policies must be limited in time,” and that universities should consider sunset provisions and periodic reviews for such programs. It concluded with an expectation that, “25 years from now, such programs will no longer be necessary.”

The decisions of the Supreme Court in the Gratz and Grutter cases have provide higher education a road map that permits colleges and universities to create policies of affirmative action that more clearly articulate diversity. For the 25 years between Bakke and Gratz/Grutter universities across the nation interpreted the Court’s decisions in Bakke differently. There was little consistency in race-sensitive admission policies from one institution to the next. Now, after the University of Michigan cases, universities will need to more clearly define and articulate their policies within the context of the new decisions. Gratz and Grutter, although clarifying the way that universities can use race in admissions programs will not stop the debate surrounding affirmative action, rather it will lead to the next phase of conversations and litigation about affirmative action, and as we shall see, the debate still continues.

In November 2006, the state of Michigan placed Proposition 2 on the ballot. Proposition 2 is an amendment to Michigan’s constitution banning affirmative action in public employment, public education, and public contracting. This amendment passed with 58 percent of the vote, despite strong opposition from government, business, labor, education and religious leaders. Its passage, in spite of the strong opposition, is an indication that such affirmative action bans could
likely happen in any jurisdiction. The campaign to ban affirmative action was led by the Michigan Civil Rights Initiative. Jennifer Gratz, as executive director of the Michigan Civil Rights Initiative, helped to set the initial campaign in motion, and after two years of legal challenges was put on the ballot and voted into law. This proposal was largely prompted by the Gratz and Grutter cases. Jennifer Gratz, after Proposition 2 was passed, was quoted in the Detroit Free Press (November 7, 2006) as saying “I am excited and hopeful that Michigan will finally be a place of equal opportunity for all. The people of Michigan are the ones who have won today. They stood up to big business, big labor, to the entire establishment as said ‘we want to be treated equally.’”

The approval of Proposition 2 makes Michigan the fourth state, all with highly ranked public universities, to forbid racial preferences because of ballot propositions or decisions by state officials. The effect of this ban in California, a decade after it was voted in resulted in only two percent of this year’s freshman at the University of California are black, a thirty-year low. At Berkeley, the number of blacks in the freshman class dropped by half the year after the California ban took effect, and the number of Hispanics declined by nearly as much (New York Times, January 26, 2007, p. A13). The ban in Michigan explicitly applies to the University of Michigan.

Where does the University of Michigan go from here? The University is currently considering using other factors to determine admission including family income and admitting the first in the family to attend college. Although this may not provide the type of diversity, or the critical mass of students articulated in their defense statement in Gratz and Grutter, it may be a way to try. However, groups will be watching to determine whether striving for diversity
means that they are somehow trying to get around the ban in a way to “bypass” the terms in Proposition 2.

In *The Shape of the River*, Bowen and Bok quote Mark Twain:

Here was a piece of the river which was all down in my book, but I could make neither head nor tail of it; you understand, it was turned around. I had never faced about to see how it looked when it was behind me. My heart broke again, for it was plain to see that I had got to learn this troublesome river both ways. (Mark Twain, *Life on the Mississippi*, as quoted in Bowen & Bok, p. 275)

The river in the present study is the ongoing debate concerning affirmative action in higher education that can never be “learned” once and for all. Society changes, the laws change, university presidents come and go, students are admitted and students graduate. The value of examining *Gratz* and *Grutter*, the history of the university where the cases took off, and the events and court cases leading to the decisions of the Supreme Court is to examine each piece of the “river”, as Twain said, both ways. What really was learned? Justice Powell, the University of Michigan’s expert witness and faculty member, Dr. Patricia Gurin, in her testimony (http://www.vpcomm.umich.edu/admissions/research/expert/gurintoc.html), the majority of the Court in *Grutter*, and countless others have carefully and articulately examined and explained the value of diversity in the educational setting. The Court outlined the narrow tailoring needed to use race in university admissions and established that diversity is, in fact, a compelling interest of the government. Yet, the voters of Michigan banned the use of race in university admissions in Michigan. It is easy for those that have worked so hard to increase minority enrollments to become defensive or disillusioned. Those experts believe, as President Duderstadt stated as the primary rationale for implementing the Michigan Mandate, that “First and foremost,
[establishing and maintaining diversity in the student body] was and still is the morally right thing to do.” Diversity became the cornerstone of the commitment of the University of Michigan to, actively rather than passively, change to include diversity in the admission processes. It is also possible that those opposing affirmative action programs feel vindicated that the system is fairer without racial preferences. This debate has imposed real costs on individuals and institutions and has raised profound questions of educational policy that deserve the most careful consideration. What does an examination of the “river” suggest about its future course and direction?

The Court, speaking on programs using race in university admissions, hoped that, “25 years from now, such programs will no longer be necessary.” So do I, but even with new ways to include diversity in university admissions, more elementary issues need to be addressed. The answer lies in the interpretation of merit in university admissions and the fact that society is not educating enough minority candidates and is not educating them well enough to assure that they will comprise a significant percentage of the applicant pool.

The meaning of merit in university admissions warrants additional research and is beyond the scope of this study; however, a brief discussion here may help to understand what is needed in the future. It is difficult to determine the precise meaning of merit. It means so many things to so many people. Early in university admissions, potential students received a letter of recommendation from their high school principal, took an exam and would be admitted. There were no qualitative measures. Over the years, as the number of applicants increased, a myriad of factors were used to determine who would and who would not be admitted. The use of various factors was institution-specific and the factors were tailored to fit the educational mission of the university. As stated earlier, Judge Frankfurter, in *Sweezy v. New Hampshire* (1957), stated that
the four essential freedoms of a university are to “determine for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study.”

This importance on institutional autonomy in the admission process should not be downplayed; however, the trials of Dred Scott and Homer Plessy and the difficulties of James Meredith at the University of Mississippi warn us that there is a downside to total reliance on institutional autonomy. Even though some institutions of higher education believe that diversity is an important educational element, some may not. Race, whether we like it or not, is part of the American fabric. As Justice Blackmun once stated, “To get beyond racism, we must first take account of race.” Universities have taken race into account and have tried to get beyond racism by crafting a class that includes diversity for the purpose of extracting and enhancing the educational benefits to all students. Still ways must be found to improve the elementary and secondary school experiences of minority students to prepare these students for a day when race is no longer an issue in society. Universities need to learn from the complex issues in Gratz and Grutter and accomplish more in the next twenty five years than it had in the previous twenty five years. Hopefully universities have a clearer understanding of the issues and will be able to provide leadership to achieve the goal Justice O’Connor articulated for a future when the “use of racial preferences will no longer be necessary….”

Suggestions for Leadership and Practice

If we do not change our direction, we are likely to end up where we are headed.

Ancient Chinese proverb

Where does the leadership at the University of Michigan, and in higher education, go from here? The analysis of historical precedents, the legal battles, the court cases, and the events after Gratz and Grutter tells of a long journey of successes and setbacks in dealing with race in higher education. It is a journey that has taken many curves and twists just like the journey
down a river. Where is this river headed and what can the leadership in higher education do to steer our institutions in the proper direction? At the University of Michigan, conflicting directions and difficult challenges seem to be waiting in the future. The University of Michigan has a culture and leadership that embrace diversity as a means to enhance the educational mission and has successfully defended its position in the Supreme Court. In spite of these advantages, the voters of the state of Michigan have chosen, in Proposition 2, to eliminate all affirmative action programs including the use of race as a plus factor in the state universities. Now what?

During the BAM movements the administration was reluctant to meet the challenges and demands of the student body. Even though the University’s history implied a commitment to diversity it was not willing to make the changes necessary to begin to address the racial problems on campus or to respond to the demands to increase minority students and faculty. It took the leadership of President Duderstadt to, as the Chinese proverb states, to begin to change the direction of the institution toward the inclusion of diversity in the central mission of the institution. How? To begin, Duderstadt discussed his plan with a very small, hand selected group with shared vision called the Change Group. The Change Group discussed the issues, contemplated strategies, and began to outline a plan before these ideas were presented to the various groups on campus. Peter Senge (1990), in the *Fifth Discipline: The Art and Practice of the Learning Organization*, describes the practice of utilizing pilot groups to initiate change. Senge describes pilot group places that serve as incubators where a concept or an idea can be formed and transformed into practice. These small pilot groups, like the Change Group at the University of Michigan, can serve to begin profound changes in organizations. After the ideas were “incubated” they were widely discussed and then a plan was “hatched”. What comes next?
To operationalize and begin the change process, many organizational change theorists, including research by Maslow (1970), Senge (1994), Schein (1985), Kotter (1996), and Argyris (1999), support Kurt Lewin’s (1951) early work in the field theory of organizational change. By looking briefly at Lewin’s work we can more clearly understand the change dynamics at the University of Michigan and can learn valuable lessons in what to do, and what not to do in the future.

Lewin’s initial work in field theory conceptualized change as moving from a current state to a desired state. Lewin’s view of change assumes that most organizations are held in equilibrium by two sets of forces—those that facilitate movement to a desired state and those forces that restrain such movement. Under normal situations an organization will maintain the status quo. When forces in one direction exceed those in the opposite direction, the organization will move in the direction of the greater force. So, if the forces for change exceed the resistance to change, then change will likely occur. In thinking of the processes at the University of Michigan in these terms, one sees an intentional plan to mobilize forces to move the university forward in a way by creating enough inertia to exceed the resistance to change. After the Change Group conceptualized the ideas and after these ideas were honed by discussion and input from the community, the Michigan Mandate was established and introduced to generate the inertia needed to ensure that all racial and ethnic groups would be full participants in the life of the university and that the university would create a multicultural community to serve as a model for society as well as for higher education. The Michigan Mandate established measurable goals and objectives, established numerical targets, and established mechanisms for assessing results. Resources were provided to ensure the success of recruiting efforts targeting minorities including additional staffing and scholarships, monies were allocated for recruiting minority faculty, and
offices were enhanced to improve the environment for diversity. These strategic goals were tied
directly to performance evaluation in all areas of the university which immediately got the
attention of all.

These strategies achieved results. The first two years after its implementation, the
University of Michigan saw a 52% increase in the number of African American hires in the
tenured faculty ranks. A 23.4% increase in African American students, a 36.9% increase in
Hispanic American students, a 7.0% increase in Native American students, and a 24.7% increase
in Asian American students. The numbers of minority fellows increased by 32.1% and minority
enrollments in the MBA programs increased to 22% (Mandate, 1990, pp iv, v).

The University of Michigan not only achieved remarkable successes in achieving the
strategic goals established in the Michigan Mandate, in *Gratz* and *Grutter* it successfully
defended its philosophical argument that the educational benefits of diversity were compelling
and sound.

Change implies movement. Lewin’s (1951) describes change as a process of unfreezing,
moving, and refreezing organizations. Change should be thought of as a journey rather than as
simple steps, but each journey begins with a first step. The Michigan Mandate provided those
first steps to unfreeze the University of Michigan’s organization to enable it to respond to the
problems identified in the BAM movements and to set it on course towards the new millennium.
As the University of Michigan unfreezes it is now moving forward, however new challenges are
being confronted. Research by Kotter (1996) and Senge, Roberts, Ross, Roth (1999) suggests
that change is a difficult process because additional changes may be just around the corner.

The passage of Proposition 2 is making the University of Michigan rethink of how it will
respond to new challenges to diversity. It needs, perhaps, to contemplate Lewin’s two dynamics
of field theory and to think less about those forces that facilitate movement toward diversity and focus more on forces that may be responsible for restraining such efforts. The course and shape of the river keeps changing and the leaders need to keep looking up and down the river to continue, as Twain suggested, to “learn this troublesome river both ways.” I do not expect the next 25 years to be less tumultuous or less challenging for universities than the previous history. Leaders will be faced with providing answers and direction without comprehensive maps of how to navigate the river. History provides a partial map, as does the examination of campus environments and analysis of legal cases dealing with diversity in higher education. In order for leaders to have a better map of the river, additional research is needed.

Specifically, additional case studies are needed to chronicle the history of individual institutions and their work to increase the diversity of their student bodies. In addition, more information is needed in describing the political factors and institutions that inhibit affirmative action plans at universities. An investigation of the history and motivations of the Center of Individual Rights or the factors and politics of the efforts behind Proposition 2 for example, would serve to illuminate those forces.

As mentioned earlier, I took the opportunity to meet and discuss my research ideas with the former president of the University of Michigan, Dr. James Duderstadt. I had the opportunity of reading his presidential papers at the Bentley Historical Library and would like to suggest more research concerning his specific leadership style and tenure as president at the University of Michigan. The decision to engage the University of Michigan in the long and expensive process of litigation in the *Gratz* and *Grutter* cases rested with President Bollinger, and I found little documentation describing this decision making process. Further research in this process would be valuable to university leaders.
A deeper analysis of the amicus briefs submitted in *Gratz* and *Grutter* by America’s leading companies would provide valuable insight into the thinking concerning the needs of corporate America and would be very important to future leaders of higher education in constructing arguments for administrative and pedagogical responses to future challenges to diversity.
PRIMARY REFERENCES


Angell, James “The Higher Education: A Plea for Making It Accessible to All” University commencement, June 25, 1879. Angell Presidential Papers, Bentley Historical Library, University of Michigan.

Bakke v. Regents of the University of California, Superior Ct. of Yolo County, No. 31287 (1976).

Bakke v. Regents of the University of California, 533 P.2d. 1152 (Cal. 1976).


Frieda Blackenburg (letter to) F. Clever Bald, December 1, 1954, Madelon Stockwell Papers, Bentley Historical Library, University of Michigan.


Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).


Johnson v. Board of Regents of the University of Georgia, 263 F.3d 1234 (11th Cir. 2001).


Plessy v. Ferguson, 163 U.S. 537 (1896).

Proceedings of the Board of Regents of the University of Michigan 1837-1864, vol. 796, Ann Arbor, Michigan, University of Michigan, Bentley Historical Library.


Scott v. Sandford, 60 U.S. 393 (1857).


Smith v. University of Washington Law School, 233 F.3d 1188 (9th Cir. 2000).


Tracey v. Regents of the University System of Georgia, 208 F.3d 1313 (11th Cir. 2000)


U.S. Const. amend. XIV.


Wooden v. Regents of the University System of Georgia, 247 F.3d 1262 (11th Cir. 2001).
SECONDARY REFERENCES


