UM TO MU: DIVERSITY IN HIGHER EDUCATION
AND WHY MIAMI’S GOT IT ALL WRONG

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Abstract

Midway through the summer of 2003, the U.S. Supreme Court handed down two decisions concerning the University of Michigan's use of race preferences in undergraduate and law school admissions. The question of affirmative action in higher education had long been an issue of debate; however, the Supreme Court’s decisions in Grutter v. Bollinger and Gratz v. Bollinger answered that question. The court held that race preferences in higher education admissions are constitutional if considered alongside other factors as adding to the student body's “diversity.” As explained by the Supreme Court, “diversity” based solely on racial difference is unconstitutional. This decision was immediately applicable to colleges and universities throughout the nation.

Part I of this thesis provides a brief history of affirmative action, as well as an explanation of the Grutter and Gratz decisions. Using court opinions, historical sources, and law review articles, Part I seeks an understanding of the significance of these two decisions: where they lie within the history of affirmative action, and what comprise the key arguments of both proponents and detractors. Part II focuses on a close analysis of Miami University's admissions process in light of Grutter and Gratz. Miami University’s admissions process reflects the Supreme Court’s holdings to the letter. However, using Miami University publications, interviews with admissions staff, and speeches and comments by Miami's president, Part II demonstrates that, for Miami University, “diversity” outside the official admissions policy means racial diversity. At the end of this analysis, it is clear that Miami University's admissions process, though adhering to the letter of the law established in Grutter and Gratz, fails to adhere to the true spirit of the court’s decisions.
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# Table of Contents

## Part I

THE MICHIGAN CASES ................................................................. 5

- A Brief History of Affirmative Action .................................. 8
- The Michigan Cases ............................................................ 15
- Dissents All Around ......................................................... 20
- Moving On and Trying Something New ................................. 24

## Part II

A CLOSER LOOK ........................................................................ 27

- Emphasis on Diversity ....................................................... 28
- Reality Check ................................................................. 33
- Straight From the Horse’s Mouth ......................................... 39
- Why It Matters ............................................................... 46

Works Cited ........................................................................... 53
Part I

THE MICHIGAN CASES:
GRUTTER, GRATZ, AND AFFIRMATIVE ACTION IN HIGHER EDUCATION
“[N]o state shall [ … ] deny to any person within its jurisdiction the equal protection of the laws.”

-Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution

“[N]o 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 program or activity receiving Federal financial assistance.”

-Title VI, Civil Rights Act of 1964
42 USCS § 2000d

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, [ … ] and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.”

-Title VI, Civil Rights Act of 1964
42 US § 1981a
Midway through the summer of 2003, the U.S. Supreme Court handed down two decisions concerning the University of Michigan’s use of race preferences in undergraduate and law school admissions. The question of affirmative action in higher education had long been an issue of debate in the lower courts; 1978’s Regents of the University of California v. Bakke was the last time the Supreme Court had spoken on the matter, and it had not spoken in a unified voice. This time, in Gratz v. Bollinger and Grutter v. Bollinger, the Supreme Court, though sharply divided, did produce a majority opinion: institutions of higher education could not preference race in admissions, but they could give an individual extra consideration if her attributes, including race and ethnicity, suggested that she might add to the school’s diversity. Since 2003, colleges and universities throughout the United States have clung to the Grutter and Gratz decisions, modeling their admissions processes after the one approved by the Supreme Court.

Since its inception in the 1960s, affirmative action has been an issue of repeated controversy and debate; opinions concerning its constitutionality and morality often fall along party lines, and the Supreme Court’s multiple affirmative action decisions have generally been met by protest on whatever side they did not fall. The University of Michigan cases were no different. The Court in both cases found a majority holding, meaning that the Court’s decisions would be binding precedent; many of those Justices not included in the majorities voiced strong dissents. These dissents continue to be echoed throughout the legal and scholarly community; support for the Court’s decisions is equally present. Part I of my thesis seeks an understanding of the Supreme Court’s Grutter and Gratz decisions by placing them in the context of previous affirmative action legislation and litigation. Furthermore, in order to fully understand the Court’s rulings, one must understand the ways in which the Court’s arguments both adhere to
and break from legal precedent. I believe that, by the end of Part I, it will become apparent that the Michigan Cases and the precedent they established represent a new kind of affirmative action that is likely here to stay.

A Brief History of Affirmative Action

Though affirmative action finds its roots in legislative and executive orders designed to end discrimination and create equal opportunity for all regardless of race, the issue has been largely argued and defined in a series of cases heard before the U.S. Supreme Court. Each case provides increased insight into the purposes and pitfalls of affirmative action in practice; furthermore, the majority of the cases produced binding precedent that appears repeatedly throughout the Court’s opinions in Grutter and Gratz. Beginning with Brown v. Board of Education, an understanding of each landmark affirmative action case is essential to one’s comprehension and analysis of the Michigan cases.

Racial inequality in public education has long been an issue in the United States. Though 1868 saw the ratification of the Constitution’s Fourteenth Amendment, intended to guarantee equal protection of the law to all persons regardless of race, it was many years before a strong attempt was made to enforce this ideal. Indeed, despite the Fourteenth Amendment’s passage, the Supreme Court in Plessy v. Ferguson established for some time the constitutionality of “separate but equal” racial segregation (Compelling Interest 186). Two cases handed down by the Court in the early 1950s, Sweatt v. Painter and Brown v. Board of Education, were instrumental in changing this; these cases are also recognized by many to be the first developments of government-sponsored affirmative action measures (187-88). Sweatt, decided in 1950, addressed the issue of separate but equal facilities in the nation’s state-sponsored law schools. An African American man, seeking admission to a Texas law school, was granted
admission to a racially segregated school; that law school had neither its own faculty nor its own library, and was not an accredited institution. Using language similar to that found in the later Grutter and Gratz decisions, the Court found that a law school “cannot be effective in isolation from the individuals and institutions with which the law interacts” (Sweatt v. Painter, 339 U.S. 629 (1950)). Though the decision did not overrule Plessy v. Ferguson, it did determine that the language of the Fourteenth Amendment required that the African American be admitted to one of Texas’s state-operated (and previously white-only) law schools, striking down racial segregation in state-run law schools (Compelling Interest 187). Brown v. Board of Education, handed down in 1954, however, was to provide a much farther-reaching decision. The Court distinguished the case from Sweatt, stating that in the case at hand “there are findings [ … ] that the Negro and white schools involved have been equalized, or are being equalized;” as a result, the Court’s judgment had to look beyond the equality of facilities and faculty to determine whether schools that appeared equal on the surface could, in fact, provide equal educations. The Court’s answer was both firm and resolute: the majority opinion reversed the “separate but equal” standard that had been established in Plessy as contrary to the Fourteenth Amendment, demanding that there be an immediate end to racial segregation in public education (Brown v. Board of Education, 347 U.S. 483 (1954)). Harry T. Edwards, in “The Journey From Brown v. Board of Education to Grutter V. Bollinger: From Racial Assimilation to Diversity,” argues that “Brown set a standard for Congress, the courts, and the executive branch [ … ].” Indeed, in the years after Brown, the nation saw increased attention paid to creating racial equality. In the 1960s colleges began recruiting African American students; President Kennedy, in a 1961 Executive Order, demanded that contractors take “affirmative action to ensure that all applicants” were treated equally without regard to race, marking the first time that the term “affirmative action” was used in law
and the first time penalties were proscribed for individuals’ failure to comply (qtd. In *Compelling Interest* 188). Though both of these demonstrate the government’s growing support of racial equality, the Executive Order was largely unnoticed and African American students admitted to colleges still generally made up less than one percent of their student body.

1964 saw the passage of the Civil Rights Act, Title VII of which was designed to end racial discrimination by public and private employers. The Act gave the U.S. courts authority to demand remedies to past and continuing racial discrimination, including “reinstatement or hiring of employees” (qtd. in *Compelling Interest* 189). Throughout the 1960s, the government continued to try new methods of affirmative action that were more aggressive, including actions such as the Philadelphia Plan that suggested numerical goals as a viable means of solving discrimination problems. This dependence upon numbers continued into the 1970s, supporting the validity of temporary racial preferences and goals while denying the constitutionality of quotas (190). Amendments to Title VII were passed in 1972 that would increase the earlier legislation’s possibilities: the Equal Opportunity Employment Act allowed the previously established Equal Opportunity Employment Commission to initiate civil suits, and other amendments extended the reach of Title VII to state and local employees as well as educational institutions (192). The more aggressive numerical affirmative action initiatives were addressed again in 1973 by a memorandum issued by the Office of Federal Contract Compliance; the memo reiterated that “race-conscious numerical remedies had to be flexible, realistically attainable, and not involve the displacement of current employees or the hiring of unqualified ones” (192-93). Throughout the 1960s and 70s, one notes an attempt on the part of the government to both increase and limit the reach and effects of affirmative action: while searching for more instrumental and effective means of providing equal opportunity to all citizens, it is
clear that the government also sought to do so without negatively affecting those members of society who had previously been given preference. A balance, then, between providing opportunity for those individuals who had been traditionally oppressed and preserving the opportunities for those who had been the oppressors, was what the government needed. Multiple Supreme Court cases between the 1970s and the 2003 University of Michigan decisions sought to find that balance.

The first of these cases, and arguably one of the most important, was Regents of the University of California v. Bakke. Decided in 1978, Bakke was the first time that the Supreme Court would address the constitutionality of affirmative action in higher education; it was also the last time that the Supreme Court would take up the issue for review until it did so in the Michigan cases. The case dealt with a Caucasian man who had sought and been denied admission to one of the University of California’s medical schools. The medical school had a two-track admissions program, in which minority and non-minority students competed for two different sets of seats: 16 of the 100 available seats were specifically reserved for minority applicants; as a result, those minorities who applied did not compete with non-minority applicants for admission (R. of U. of Cal. v. Bakke, 438 U.S. 265 (1978), Powell, J opinion). Though the Court was able to reach a plurality judgment concerning the case (that race could be used in some form in higher education admissions but that the specific program at hand was unconstitutional), the Court produced no majority opinion (Bloch). Justice Powell, who provided the swing vote on both parts of the decision, wrote the Court’s holding; however, his opinion was not joined by the other justices, and therefore created no legal precedent (Fullinwider and Lichtenberg 152). Despite this, an understanding of the Michigan cases requires an understanding of Justice Powell’s Bakke opinion. Powell argued that, of the four
reasons offered by the University of California as justification for their racial preferences in admissions, only one was constitutional: “the attainment of a diverse student body” (R. of U. of Cal. v. Bakke, 438 U.S. 265 (1978), Powell, J opinion). Powell stated that this justification was “clearly [ … ] a constitutionally permissible goal for an institution of higher education.” Basing his argument upon previous cases in which the Supreme Court had given a certain amount of deference to educational institutions in choosing their faculty and curriculum, Justice Powell found “that the right [of a college or university] to select those students who will contribute the most to the ‘robust exchange of ideas’” is also within the reaches of the Constitution. One of the ways in which universities may do this, according to Justice Powell, is by preferencing students that will add to educational diversity; he cites the language of Sweatt v. Painter as proof. What constituted diversity for Justice Powell, however, was more than simply a student’s race or ethnicity: using the admissions program at Harvard University as an example, he found that diversity must flexibly take into account other “qualities [such as] exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [or] ability to communicate with the poor” (qtd. in R. of U. of Cal. v. Bakke, 438 U.S. 265 (1978), Powell, J opinion (internal quotations omitted)). Justice Powell therefore not only found that a college or university could use its goal of “diversity” as a means of giving preference to minority students, he also defined exactly how the admissions program must do so: “diversity” must include multiple non-racial factors that might add to the variety of experiences and opinions within the student body, and the admissions policies must be flexible enough to take each of those factors into account when determining a candidate’s potential (R. of U. of Cal. v. Bakke, 438 U.S. 265 (1978), Powell, J opinion). Despite the fact that it created no actual legal precedent, universities and colleges throughout the nation
(including the University of Michigan) viewed Justice Powell’s singular opinion as law; fifteen years later in the Grutter and Gratz decisions, the Supreme Court would react similarly, reinforcing the constitutional validity of Justice Powell’s opinion (Tushnet 227).

The cases that followed Bakke, though they did not necessarily deal specifically with matters of public education, demonstrate aspects of affirmative action that the Court could and could not decide; all add to the history surrounding Grutter and Gratz. Justice Brennan’s dissenting opinion in Bakke raised the issue of the level of scrutiny under which the Court must review affirmative action programs. Traditionally, the Court uses different levels of scrutiny in their judicial review, depending upon the class of people being discriminated against. In dealing with non-suspect classifications of people (that is, those who do not have a history of oppression), the Court traditionally reviews cases using the lowest level of judicial scrutiny, rational basis review; in this level of review, the Court must simply determine that legislation is “rationally related to a legitimate state interest” (City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985), qtd. in Huskey). Intermediate scrutiny is used to review cases dealing with discrimination against quasi-suspect classifications (those based upon gender, for example). The highest level of review, strict scrutiny, is traditionally applied to classifications on the basis of race as established in Korematsu v. United States (1944). Justice Brennan’s dissenting opinion argued that intermediate, rather than strict, scrutiny should be applied in cases of “benign” racial classifications; that is, affirmative action programs that help rather than hurt the traditionally oppressed groups (Huskey). Though the Bakke judgment included no decision on this matter either, it was taken up in Fullilove v. Klutznick (1980). Here the Court reviewed an affirmative action program under intermediate rather than strict scrutiny because it stemmed from a Congressional Act, arguing that the less strict judicial review was necessary in order for the
Court to show “appropriate deference to the Congress” (Fullilove v. Klutznick, 448 U.S. 448 (1980), qtd. in Huskey). This issue would later be addressed in 1995’s Adarand Constructors, Inc. v. Pena. Wygant v. Jackson Board of Education (1986) provides another example of the Court’s uncertainty concerning race preference in higher education; this time, unlike Bakke, the question was one of race preference in the hiring and retention of faculty. The school in question had sought to achieve an African American presence in its faculty that was more proportionally representative of the community. When it came time to lay off teachers, the Board of Education had developed a plan that required the two groups of teachers, black and white, to have the same percentage of members let go in order to preserve the racial balance it had achieved. Like in Bakke, the Court struck down the policy at hand but produced no majority opinion and therefore no legal precedent (476 U.S. 267 (1986)). United States v. Paradise, handed down by the Supreme Court in 1987, established more specific requirements for affirmative action plans. Approving a plan by which the Alabama state police force had to promote as many African Americans as whites to the level of corporal, the Court suggested four factors that determine whether racial preferences are “narrowly tailored” and therefore constitutional: “the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief [ ... ], the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties” (United States v. Paradise, 480 U.S. 149 (1987), Brennan, J opinion). These factors would be raised and relied upon again, though in slightly different language, in the Grutter and Gratz cases. The question of what level of judicial review was necessary in affirmative action cases was again addressed and finally determined in two cases: City of Richmond v. J.A. Croson Co. (1989) and Adarand Constructors Inc. v. Pena (1995). Richmond established that all race-based governmental programs must be reviewed under strict
scrutiny, whether their discrimination was intentional or not; that is, governmental race preferences were to be reviewed under strict scrutiny regardless of whether they appeared to be harmful or benign (488 U.S. 469 (1989)). Furthermore, the Court held that attempts to remedy past societal discrimination do not constitute a compelling governmental interest, and therefore could not be used to justify affirmative action programs (Huskey). The Court in Adarand reinforced this decision, holding that “all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny;” that is, all government programs must be narrowly tailored to meet a compelling government interest (515 U.S. 200 (1995)). The precedents set by Richmond and Adarand would still be in place in 2003 as the Supreme Court heard arguments in the Michigan cases, and they would require the Court’s attention in determining the constitutionality of race preferences in the quest for diversity in higher education.

The Michigan Cases

In 1996, the Fifth Circuit Court of Appeals decided in Hopwood v. Texas that Justice Powell’s Bakke opinion, upon which numerous colleges and universities had built their race-based admissions programs, was not binding precedent. Because of this, the Hopwood court applied strict scrutiny and found that any use of race preference for the purposes of diversity was not narrowly tailored to fulfill a compelling governmental interest. Though this decision did not apply to all of the nation’s schools, it was binding for all public institutions of higher education in Texas, Mississippi, and Louisiana (Compelling Interest 199). More importantly, it signaled that diversity as a compelling interest justifying affirmative action was an issue of debate and disagreement in the lower courts; Justice Powell’s Bakke opinion had, after all, been the standard
in higher education for years. It was now time for the Supreme Court to take up the issue for the first time since 1978; this time, the Court would speak as a majority that could not be ignored.

The University of Michigan’s Law School had long used admissions criteria similar to that described in Justice Powell’s *Bakke* opinion: each applicant was evaluated individually in order to determine not only each applicant’s merit, but also his or her potential to add to educational diversity. The admissions office, therefore, in evaluating each applicant, took into account a number of “soft variables,” including the applicant’s race and ethnicity. Though race and ethnicity were not the only variables considered, (other variables included were “the enthusiasm of recommenders” or “the quality of the [applicant’s] undergraduate institution”) the Law School did have a “longstanding commitment” to racial and ethnic diversity; specifically, the Law School sought inclusion of African American, Native American, and Hispanic students (*Grutter v. Bollinger*, 539 U.S. 306 (2003)). Barbara Grutter, a white female who had applied for admission to the Law School in 1996 and been rejected, filed suit in 1997 against the University of Michigan Law School; she alleged that the use of race-based preferences by the admissions office discriminated against her on the basis of race and therefore violated the Fourteenth Amendment, as well as Title VI of the Civil Rights Act of 1964. The District Court that heard Grutter’s case found that the Law School’s admissions policy was not constitutional; the District Court, in applying strict scrutiny, found that the Law School’s attempt to “attain [ … ] a racially diverse class … was not recognized as [a compelling interest] by *Bakke*” (qtd. in *Grutter v. Bollinger*, 539 U.S. 306 (2003)). Furthermore, the District Court found that, even if diversity were a compelling interest, the Law School’s plan was not narrowly tailored to achieve that compelling interest, and would still be unconstitutional. The Court of Appeals for the Sixth Circuit reversed the District Court’s decision, holding that “Justice Powell’s opinion in *Bakke*
was binding precedent establishing diversity as a compelling state interest,” and that the Law
School’s plan was narrowly tailored (Grutter v. Bollinger, 539 U.S. 306 (2003)). The Supreme
Court granted certiorari in the case of Grutter v. Bollinger in order to resolve the disagreement
between the lower courts (for example, the Appeals Court in Hopwood and the Appeals Court in
Grutter), and to answer the question of whether or not “diversity is a compelling interest that can
justify the narrowly tailored use of race in selecting applicants for admission to public
universities” (Grutter v. Bollinger, 539 U.S. 306 (2003)).

The Supreme Court began by reviewing and endorsing Justice Powell’s view of diversity
as contained within his Bakke opinion. Though the Supreme Court did not rule on whether or
not Justice Powell’s opinion had been binding precedent before the case at hand, Grutter v.
Bollinger made it clear that henceforth it would be: “we endorse Justice Powell’s view that
student body diversity is a compelling state interest that can justify the use of race in university
admissions” (Grutter v. Bollinger, 539 U.S. 306 (2003)). Citing Adarand and Richmond, the
Court reviewed the Grutter case under strict scrutiny; in order to be constitutional, the Law
School’s program therefore had to be narrowly tailored to achieve a compelling interest. With
this in mind, the Court then continued with the question of diversity as a compelling
governmental interest. Giving “a degree of deference” to the Law School’s constitutional right
to make its own academic decisions and taking into account numerous amicus briefs citing the
importance of diversity to various levels of education, the Court found that student body
diversity was a compelling interest (Grutter v. Bollinger, 539 U.S. 306 (2003)). Having found
this, however, the Court continued its review under strict scrutiny to determine whether or not
the Law School’s admissions procedures were narrowly tailored to achieve that end. Again, the
Court found in favor of the Law School. Previous affirmative action cases had established that
quotas were an unacceptable means of racial preference; Justice Powell’s *Bakke* opinion had demanded that race be used in a “flexible, nonmechanical way” (*Grutter v. Bollinger*, 539 U.S. 306 (2003)). The Supreme Court found that the Law School’s program complied with both of these requirements. Not only was there variation in the numbers of minority applicants accepted each year (signaling the absence of a quota), the Law School’s method of individual review of applications meant that no “soft variable,” including race, meant automatic acceptance of an applicant. The Court found that the Law School considers all factors that may add to student body diversity, and that the Law School does indeed give substantial weight to those non-racial factors when judging applications. The Court then took up the remaining factors it had established in *U.S. v. Paradise* as necessary for review of race-based discrimination programs: the duration of the program, and its disparate impact upon third parties. The Court found that, because of the reasons earlier discussed, the Law School’s admissions does not “unduly burden individuals who are not members of the favored racial and ethnic groups” (qtd. in *Grutter v. Bollinger*, 539 U.S. 306 (2003)). Furthermore, the Court accepted the Law School’s statement that it would “‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable” as fulfilling the requirement that race-based discrimination (and, therefore, race-based admissions policies) must be limited in time. As such, the Supreme Court affirmed the decision of the Appeals Court; the majority opinion in *Grutter v. Bollinger* established that diversity can be a compelling governmental interest in higher education, and that programs such as the one in place at the University of Michigan’s Law School are narrowly tailored to achieve that interest and therefore are constitutional (*Grutter v. Bollinger*, 539 U.S. 306 (2003)).
The second of the two Michigan cases decided in June of 2003 was Gratz v. Bollinger; though it dealt with the admissions process used by the University of Michigan’s undergraduate college of literature, science and the arts (LSA), the Court’s decision was based upon reasoning identical to that established in Grutter. The LSA’s admissions program was based upon a points system, rather than a system of individualized review, in which an applicant received up to 150 points for grades and test scores as well as “soft variables” similar to those considered by the Law School. Under the LSA’s admissions program, however, racial and ethnic variables were often the deciding factor in admissions decisions. Out of the 100 points required for automatic acceptance to the LSA, an applicant received 20 points for minority status (minority status, as was the case for the Law School, included African Americans, Native Americans, and Hispanics); other “soft variables” such as recommendations, artistic talent, or leadership potential, were awarded far fewer points (extraordinary artistic talent, for example, would receive only 5 points under this system). Jennifer Gratz and Patrick Hammacher, both white students, had sought admission to the LSA and had been denied; like Grutter, they brought a suit asserting that they had been the victims of racial discrimination in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 because of the LSA’s use of race preference in admissions. Using the standard it had just established under Grutter, the Supreme Court found that the LSA’s policies were indeed unconstitutional. Though the undergraduate program, like the Law School program, could claim diversity as a compelling interest, the Court found that the means used by the LSA in achieving that interest was not narrowly tailored. Not only did the admissions program give significant weight to race and ethnicity that was disproportionate to the weight given to other “soft variables,” the Court found that the program had the result of admitting virtually every minimally qualified minority applicant. The LSA’s
program also failed to meet strict scrutiny because its program did not rely upon the flexible and nonmechanical means of evaluating applications that had been suggested by Justice Powell’s Bakke opinion and had been established by the Court in Grutter. Though the LSA had established a review committee to read individual applications, the Court found that this committee was the exception to the rule; nothing within the LSA’s admissions program suggested that there was a true attempt to provide individual and holistic review of applicants. Because the LSA’s admissions policy functionally made race the deciding factor in nearly every minority application, the Court found that the program was not sufficiently narrowly tailored to achieve student body diversity. The Court declared the LSA’s admissions process unconstitutional, and remanded the case to the lower courts for further proceedings (Gratz v. Bollinger, 539 U.S. 244 (2003)).

Dissents All Around

Though the Court in Grutter and Gratz effectively established legal precedent stating that race preferences could be used in higher education admissions in order to achieve a compelling interest in student body diversity so long as the programs were narrowly tailored to achieve that goal, they found much opposition both within and outside the Court. Justices Scalia, Rehnquist, Kennedy, and Thomas all wrote strong dissenting opinions in Grutter v. Bollinger, attacking the Court’s application of strict scrutiny. These arguments were echoed throughout legal reviews that offered multiple reasons why the Court’s holding was inherently flawed.

Chief Justice Rehnquist, in his Grutter dissent, argued that the Law School’s program was not narrowly tailored and that the Court would have noted this had it truly applied strict scrutiny. He found that, in an examination of the Law School’s admissions statistics, the percentage of admitted students who were minority applicants mirrored the percentage of
minority applicants within the entire applicant pool; put more simply, if 9.7% of the applicants for one year were African American, then the percentage of admitted students that year that were African American was nearly identical. Chief Justice Rehnquist suggested this as evidence of racial balancing, which has been found to be unconstitutional. Furthermore, the Chief Justice argued that the Court’s acceptance of the Law School’s poorly defined time limit would allow this program to be virtually permanent; as such, the specific time limit required by strict scrutiny was also ignored in the Court’s decision (Grutter v. Bollinger, 539 U.S. 306 (2003), Rehnquist, CJ dissenting opinion). Justice Kennedy made similar arguments positing that strict scrutiny was not applied; he argued that, though the Court could give deference to an educational institution concerning its educational objectives, it should not give that same deference to the means by which those educational objectives are obtained. Put more simply, the Court could accept the Law School’s need for educational diversity, but must apply strict scrutiny to the admissions program by which the Law School achieves that diversity. Justice Kennedy further argued that a more careful understanding of the Law School’s plan showed it to be “indistinguishable from quotas,” because the number of minority admissions and enrollment had fluctuated less than 2.2% in the years discussed (Grutter v. Bollinger, 539 U.S. 306 (2003), Kennedy, J dissenting opinion). Like Chief Justice Rehnquist, Justice Kennedy suggested this as evidence of racial balancing; however, his greater point was that, had the Court truly applied strict scrutiny, the Law School would have been required to explain this connection; instead, because the Court deferred to the Law School’s judgment, there was no strict scrutiny and therefore no explanation (Grutter v. Bollinger, 539 U.S. 306 (2003), Kennedy, J dissenting opinion). Justice Scalia was similarly displeased with the Court’s application of strict scrutiny review, and argued that the Constitution allows for no racial discrimination at all on the part of the government (Grutter v.
Justice Thomas, however, brought new arguments to the forefront against affirmative action in higher education. Citing a speech by Frederick Douglass that argues that “if the negro cannot stand on his own legs, let him fall […] Your interference is doing him positive injury,” Justice Thomas used affirmative action precedent not addressed by the majority in order to argue against the constitutionality of the Law School program (qtd. in Grutter v. Bollinger, 539 U.S. 306 (2003), Thomas, J dissenting opinion). The only two compelling governmental interests that Justice Thomas says the Constitution allows are the following: national security and efforts to remedy past discrimination for which the program in question is directly responsible. Furthermore, Justice Thomas argues that, in light of Wygant v. Jackson Board of Education, it is unreasonable to find student body diversity as a compelling interest in higher education: after all, the Wygant Court had found that faculty diversity was not a compelling interest. Justice Thomas further rejected the Law School’s claim to a compelling interest: because several states within the nation do not operate law schools, and only very few operate law schools that are highly selective, he found that operating an elite law school (as well as any methods used by that law school to remain elite) could not possibly be a compelling governmental interest. He concludes by asserting that, though the Law School proclaims its diverse student body as providing educational benefits, it is unclear to whom those benefits are directed (Grutter v. Bollinger, 539 U.S. 306 (2003), Thomas, J dissenting opinion). He saw little evidence showing that minority students attending elite law schools received any better education than those attending “less ‘elite’ law school[s] for which they were better prepared” (qtd. in Tushnet 237). It seems, from the Law School’s arguments, that the supposed benefits are directed only towards the nonminority portions of the student body.
who are likely to be underexposed to diverse opinions (Grutter v. Bollinger, 539 U.S. 306 (2003), Thomas, J dissenting opinion).

These arguments against the majority decision in Grutter were well-received by many legal scholars. In her article “Affirmative Action in Higher Education – Strict in Theory, Intermediate in Fact?,” Libby Huskey argues that the Supreme Court in Grutter v. Bollinger “recited its strict scrutiny analysis but did not apply it.” The Court, instead of holding the Law School to the same strict scrutiny it had traditionally applied in various other affirmative action cases, undermined that form of judicial review in its attempt not to break with the precedent established in Adarand. Huskey cites the Court’s extreme deference in several matters as proof of this. Huskey further argues that, rather than trying to reinforce the Adarand holding, the Court should have “explicitly broke[n] from precedent and upheld the Law School’s benign use of racial classifications under intermediate scrutiny.” The consequences of the Court’s actions, as posited by Huskey, are that the Court’s strict scrutiny analysis will “no longer effectively protect Americans against malicious discrimination when called upon to do so.” In a 2004 lecture at the University of Buffalo Law School entitled “Who Gets In? The Quest for Diversity After Grutter,” Frank H. Wu asks the question of how, if racial diversity is a necessary and positive aspect of higher education, there can be any merit to traditionally African American institutions such as Howard University. This was not addressed in the Supreme Court’s decision, and the lecture’s other panelists were unable to provide an answer. This question, however, returns to a point made by Justice Thomas in his dissenting opinion: does racial diversity in the classroom really benefit the minority students that it targets? Yale’s Peter Schuck argues that diversity provides few benefits to anyone: “many professors who are ‘affirmative action’s more forthright
defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds” (qtd. in Zelnick, 174).

**Moving On and Trying Something New**

Another question of interest outside the validity of the Supreme Court’s decision, however, is how the two Michigan cases fit within the changing history of affirmative action. Obviously, the Court’s rulings indicate where it believes the cases fall within legal precedent; however, Harry T. Edwards, as well as Paul Frymer and John D. Skrentny, offer helpful explanations for the Supreme Court’s ruling and the recent popularity of the diversity ideal. In his article “The Journey From Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity,” Edwards examines the shifts in affirmative action since its first inception. He notes that affirmative action was first grounded in efforts of inclusion. Brown v. Board of Education as well as the resulting employment legislation were focused largely upon ending that exclusion by methods of forced inclusion: businesses and schools were required to integrate African Americans into their previously all-white populations. As a result of the failure of many affirmative action programs in the first fifteen years after Brown, however, Edwards notes that “the assimilationist model of integration lost favor with many African Americans.” Instead, African Americans began valuing their differences rather than attempting to conform them to white society; this “radically different” approach to racial integration included increased emphasis upon African American history, tradition, and culture, and was typified by the popularity of the afro in the 1970s. Edwards argues that American society’s recent emphasis on diversity, first apparent in Justice Powell’s endorsement in the Bakke decision, is a direct result of this. Now that minorities are valuing rather than hiding their differences, the diversity that results from minority integration into white society is being praised (Edwards). In a dissimilar
though related analysis, Frymer and Skrentny present the history of the Supreme Court’s approval of employment programs that use bona fide occupational qualifications (BFOQs). BFOQs have been used largely in companies and police forces that require special knowledge of minority cultures or languages; police forces serving largely minority populations, for example, have traditionally been allowed to preference officers of those minority groups when hiring. The rationale behind these preferences is that, in order to appear credible in the eyes of the citizenry, a police force must accurately reflect that citizenry’s racial composition; it has also been argued that an officer with personal knowledge of and experience within a minority culture is better received in that minority’s community than one who has no such knowledge or experience (Frymer and Skrentny). These arguments parallel the statements made by several government organizations in their amicus briefs supporting the University of Michigan’s compelling interest in achieving a diverse student body. The U.S. military, for example, suggested that their need for an officer corps that accurately reflects the presence of minorities in American society requires that ROTC programs at public colleges and universities have access to racial preferencing. This argument used the tensions in the military during the Vietnam War as an example of why a multiracial officer corps was essential to national security: conflicts had arisen in multiple troops because, though the military was largely made up of minorities, most officers were white (Amici Curiae 27, referenced in Grutter v. Bollinger, 539 U.S. 306 (2003)). Frymer and Skrentny explain this allowed racial preference as a shift in the nature of affirmative action: where the nation’s earlier affirmative action programs had focused upon remediating past inequalities and increasing racial integration, these new policies employing BFOQs represented a less remedial and more instrumental form of affirmative action that was being regularly approved by the Court. The relationship that I see between the arguments of Frymer and
Skrentny and the earlier discussed arguments of Edwards is essential to an understanding of Grutter and Gratz. The legal shift from remedial to instrumental affirmative action was accompanied by the social shift from inclusion to diversity: that is, traditional remedial actions were necessary to include African Americans where they had previously been precluded from participation. With the new emphasis upon the value of individual and racial diversity, however, it became necessary to foster programs that used instrumental affirmative action to seek that diversity. The face of affirmative action is changing to meet the needs of a society that is increasingly accepting of its minority populations: Grutter and Gratz typify American society’s new emphasis on diversity as well as the Supreme Court’s recent deference to instrumental programs that produce that diversity. And, though they do so differently than many previous Supreme Court decisions, the Michigan cases still demonstrate an attempt to work towards the original goal of affirmative action: equality of opportunity regardless of race.

Regardless, however, of whether the Supreme Court’s decision in the Michigan cases was correct or fitting with past affirmative action decisions, the Grutter and Gratz decisions did create binding precedent. Despite multiple dissents from the Justices outside the majority and numerous legal scholars, universities and colleges across the nation have accepted the Supreme Court’s rulings and reshaped their policies (Zelnick 178). Though social scientists and psychologists are currently performing studies to determine how to better evaluate potential students without relying upon race as an equalizing factor, it is apparent that diversity-related racial preferences will be common in higher education admissions until a better answer is found (“Who Gets In? […]”). And, absent a change of faces on the Supreme Court bench, all of this will likely be done without interference from the Court.
Part II

A CLOSER LOOK:

MIAMI UNIVERSITY AFTER GRUTTER
It is unquestionable that, in the wake of the Supreme Court’s holdings in *Grutter* and *Gratz*, many public universities as well as private schools receiving federal funding were forced to reevaluate and rework their admissions policies. Schools whose previous methods of judging applicants closely resembled that of the University of Michigan’s undergraduate program reshaped their policies to reflect the Court’s instructions (Zelnick 181); however, it is apparent that some schools, having followed more closely Justice Powell’s definition of diversity as explained in *Bakke* prior to the summer of 2003, necessitated fewer and less drastic changes to their admissions criteria.

**Emphasis on Diversity**

Miami University in Oxford, Ohio seems to have been one of the latter, changing little in its admissions process after the Supreme Court’s decisions. Jen Collignon, Associate Director for Admission Operations and Communications for Miami University, stated in an interview that, while many schools were forced to reform their admissions policies after the Michigan cases, Miami at that time already had a policy of comprehensive application review like that of the University of Michigan’s Law School. Collignon also stated that, in her three years experience with Miami University (that is, both before and after the Michigan cases were decided), the admissions office had used neither a points-based system of evaluation, nor a method in which evaluation was singularly dependent upon test scores and GPA. Instead, through the use of a full-time admissions counseling staff as well as outside readers, the University’s admissions office evaluates each application individually. Collignon also explained that Miami University does not have a list of what factors they consider as adding to the school’s diversity; rather, admissions counselors and readers look at each case closely in order to consider the applicant’s qualities in context and determine whether or not an applicant is qualified.
Collignon gave examples of how additional factors may be taken into account when a potential student is evaluated: a student who has worked throughout high school to support his family would have his application read and his qualifications judged in light of that experience; similarly, a student from a less-advantaged rural school who had taken advantage of all his or her available opportunities might easily be preferable to another student from a highly-advantaged school who had not embraced opportunities such as Advanced Placement courses. Indeed, throughout our entire discussion of diversity in the University’s admissions process, race was never mentioned. Neither was nationality or ethnic background.

The information provided by Miami University on its Undergraduate Admissions website showed similar adherence to the requirements that educational diversity must meet in order to act as a compelling interest for race preferences in higher education. The “Admissions Standards” portion of the website explains the application review process:

Our review process is comprehensive; we look at applicants holistically, and it is individualized, as Admission staff members read and review the entire contents of every application. We consider many variables during the review process, but rather than evaluating these variables independently, we strive to see the interrelationships between them and to establish the context of a student’s achievements and demonstrated potential up to this point in his or her life (emphasis in original).

The website continues by listing a series of factors considered during the application review process, among them employment status during high school, special talents and achievements, significant extenuating circumstances, and life experiences. As demanded in Justice O’Connor’s majority opinion in *Grutter*, Miami University shows itself to have an admissions policy “flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes the applicant’s race or ethnicity the defining feature of his or her application.” Indeed, multiple “soft variables” unrelated to race and ethnicity are included within the list of factors considered by Miami. Race and ethnicity, in fact, appear only within one of the nineteen
“academic and contextual variables” enumerated by Miami University: that variable is “potential contributions to diversity” (“Admissions Standards”). Adherence to the Supreme Court’s approved diversity quest, however, requires that a student’s “potential contributions to diversity” extend beyond the general implications of race and ethnicity. As first stated in Justice Powell’s Bakke opinion and later repeated and reinforced by Justice O’Connor’s majority opinion in Grutter,

race is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. [...] [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 (internal quotations omitted).

As such, universities wishing to take race into consideration in their admissions process must do so only if they also consider other diversity-producing factors; Miami University is no exception. Though Ms. Collignon offered few specific examples of what the admissions office considers as factors adding to diversity, the University’s “Admissions Standards” are much more clear: the explanation of “potential contributions to diversity” includes “breadth of experience, geography, ideology, lifestyle, [...] socio-economic status, [and] world view” in addition to the obvious racial and ethnic factors. In light of its individualized and comprehensive review of applications, as well as the multiple factors beyond race and ethnicity that are assumed to contribute to student body diversity, it would seem that Miami University’s admissions program certainly follows the instructions of the Supreme Court to the letter.

In reading literature provided by Miami University and especially that written and approved by University President James Garland, one cannot help but notice the university’s emphasis upon diversity beyond just the admissions process. This is not unreasonable or even unexpected; in his article “The Journey from Brown v. Board of Education to Grutter v.
Bollinger: From Racial Assimilation to Diversity,” Edwards explains that “[i]n the years since Bakke, diversity has gained increasing favor in American life” and that this trend has continued with the decisions of Grutter and Gratz. Certainly since the summer of 2003 universities have paid greater attention to their student body diversity; their only other constitutional option concerning use of race preference in admissions would be to claim such preferences as an attempt to fix past discrimination on the individual school’s part (Zelnick 184). Diversity is the natural choice, allowing colleges and universities to both satisfy the Court’s holding as well as demonstrate their commitment to providing their students with the best possible education; again, Miami University is no exception to the rule. Beyond the attention to diversity that might be ordinarily found at any public university following Justice Powell’s Bakke opinion or even the Grutter holding, Miami University’s publications show it to be notably dedicated to the cause of improving and increasing diversity within the student body, the faculty, and the staff.

“Diversity” first became a major tenet of Miami University’s educational mission in 1998 with the publication of the “Plan for Institutional Diversity;” laying “groundwork for a systematic approach toward including diversity in all aspects of university life,” the publication was only one of many future mentions of the need for diversity on Miami’s campus (“Progress in Diversity at Miami University” (summary)). As early as February of 1998, President James Garland included in his official statements the idea of diversity within Miami University: “We need to […] maintain the momentum of our dialogue on diversity” (“Dr. Garland on Diversity,” February 18, 1998). Similar statements on diversity appear throughout the late nineties: “institutional diversity” is named as a “continuing priorit[y]” in Garland’s 1998 State of the University Address, and one of several “Diversity Update[s],” issued in November of 1999, deals with the university’s attempts to eliminate intolerance of diversity (“Dr. Garland on Diversity”).
Indeed, the concept of diversity is present everywhere in the university’s literature and on its website. The university’s official “Statement Asserting Respect for Human Diversity” emphasizes that, in an open and diverse university setting, “our unique viewpoints and life experiences [are brought] together for the benefit of all”: “Through valuing our own diversity and the diversity of others, we seek to learn from one another, foster a sense of shared experience, and commit to making the university the intellectual home of us all.” Furthermore, the university claims diversity as a necessary step toward its established goals for success; “Dr. Garland on His Vision for Miami” makes this clear. Better known as the “First in 2009” initiative, the “Vision” is that Miami University “be the leader in the nation among public universities having a primary emphasis on undergraduate education and also having significant graduate and research programs” by the year 2009; the achievement of this initiative (and, assumedly, the betterment of the university) rests upon the accomplishment of eight specific goals. Number five on the list, hardly unexpected after a review of the university’s literature and past policies, is “[i]ncreasing diversity of the faculty, staff, and student body” (“Dr. Garland on His Vision for Miami”).

All of these documents demonstrate a clear dedication to diversity on the part of Miami University; they show an avid support of progress toward inclusion of contrary opinions, multiple cultures, and a variety of life experiences. What is critical before praising a university for its dedication to the cause of diversity, however, is an understanding of what exactly its conception of diversity includes. The definition provided by Miami University’s admissions office is promising in its inclusion of factors beyond mere race and ethnicity. However, the question of whether Miami University’s diversity policy follows both the letter and the spirit of
the Supreme Court’s Grutter decision requires an in-depth analysis beyond its official admissions policy.

**Reality Check**

In *Leveling the Playing Field*, Fullinwider and Lichtenberg note that, despite Justice Powell’s explanation of diversity as dependent upon multiple non-racial factors,

> when colleges and universities point to their offices of diversity affairs, write reports on their progress in achieving diversity, or set out to defend diversity against hostile courts, they are not talking about [those non-racial factors]. Their reports are not about the number of Japanese Buddhists on campus, or the number of rugby players, Young Socialists, Mormons, bluegrass fiddlers, award-winning pianists, military veterans, [ … ] or ex-newspaper columnists. When they defend their programs, their focus is on *race and ethnicity*. (168, emphasis in original)

Fullinwider and Lichtenberg continue, giving examples from prominent schools and organizations in which “‘diversity’ is identified with ‘racial and ethnic diversity’;” that is, “although colleges and universities appealed to *Bakke* as the grounds for their affirmative action policies, they were not attentive to Justice Powell’s actual conclusions” (168-69). These examples make an interesting point; the suggestion that university admissions offices hold different definitions of what makes a diverse student body than do the university-issued statistics and diversity plans is one of great importance. Indeed, if the suggestion is warranted, it indicates that higher education is truly only complying to the Supreme Court’s Grutter decision in part. It also suggests that, despite the statistics and amici supporting the University of Michigan’s argument that student body diversity is essential to higher education, there is really only one reason that universities seek such diversity: to increase traditionally underrepresented races in their admissions.

In order to better examine the argument posited in *Leveling the Playing Field*, I turn again to an analysis of Miami University’s diversity policy; now, however, one must take into
consideration the University’s continuing dialogue on its dedication to and progress in diversity. The sources used in this section are all official publications generated by Miami University; they can be found both in the Oxford campus Office of Admissions and on the University’s official website. Despite the numerous reports, websites, and booklets that applaud and critique Miami University’s dedication to diversity, one need look only in the simplest of places to generate a very clear understanding of what diversity means to the University. Miami’s Admissions office provides visiting students with a small booklet entitled “Introducing Miami;” the publication provides basic information on the University, as well as photographs of campus and University statistics. Though the mention of diversity within this publication is quite brief, it is also to the point: “Diversity: 10% of the first-year class is multicultural. Miami has the best retention and graduation rates for African American students of any Ohio public university” (7). One cannot help but note that non-racial diversity factors are conspicuously absent from this statistic. Of course, one must admit that the nature of this publication does not allow for detailed explanation of what other forms of diversity Miami University has to offer; it is possible that the “at a glance” layout of the booklet requires that information be watered down and simplified to its most essential (and most attractive) parts. However, a closer look at Miami University’s more extensive publications concerning diversity suggests that this booklet is not simplified, but rather honest: diversity on Miami’s campus and for Miami’s purposes means racial diversity. Sometimes it just means African American.

Miami University’s website contains links to multiple University-generated pages that comment upon the campus’s efforts toward diversity, all of which continue to suggest that “diverse” means “multiracial” or “multiethnic.” The “Quick Facts” portion of the website is similar to the booklet earlier discussed; it gives basic introductory information concerning the
Oxford campus, addressing topics such as affiliation, calendar, and cost. Among these facts is a description of Miami’s diversity: stating only that “[m]ulticultural students make up 10 percent of the first-year class and 8.6 percent of the entire student body,” it is nearly as disappointing as the similar statement found in the “Introducing Miami” publication. Giving Miami University the benefit of the doubt, however, one may assume that the more complicated and informative the University’s publications become, the more likely they will be to have a definition of diversity that is in keeping with Justice Powell’s opinion; unfortunately, this is not the case. “Diversity Facts” consists of multiple linked web pages that address the issue of diversity in many aspects of university life. On the first of this set of web pages, one can easily identify the definition of what comprises campus diversity: the only topic addressed is “What progress is Miami making on multicultural enrollment?” Other pages within the set provide a similarly restricted understanding of diversity. Statistics are given concerning the Oxford campus’s “Multicultural Enrollment,” designating “minority students” as African American, Asian American, Hispanic, Native American, and Non-Resident Alien; numbers are given for the freshman class, the undergraduate program, and the graduate program, and for the years 1995, 2003, and 2004. Statistics show a general (though slight, in many cases) increase in the numbers of minorities on campus since 1995. This is a good sign; Miami seems to be slowly but surely increasing one aspect of its student body diversity. Unfortunately, however, this one aspect is not, according to Justice Powell and the Grutter Court, sufficient to demonstrate a compelling need for diversity in higher education. Furthermore, the remainder of the Miami website does not reflect the Court’s opinions either: ten out of the twelve remaining sections listed under “Diversity Facts” deal solely with race and ethnicity, and the only statistics given concerning Miami’s diversity are race-specific. “Retention and Graduation” provides statistics similar to
those discussed earlier, presenting very general information concerning the graduation rates of
the minority student body. “Funding and Scholarships” details progress made by Miami towards
providing better and more “diversity scholarships;” though the information given doesn’t define
exactly what constitutes qualification for such scholarships, a later discussion of funding for
students wishing to study abroad mentions only “students of Native American, African
American, Hispanic American, or Asian American ethnicity.” One can only assume that the
“diversity scholarships” are similarly restricted, and would (in the absence of the University’s
need for diversity) be more aptly named “minority” or “multiracial” scholarships. Indeed, the
only non-racial topics mentioned within the University’s “Diversity Facts” are “Disability
Services” and “Gay, Lesbian, Bisexual, Trans Students.” While it is commendable that these
groups are addressed as part of the University’s campus-wide diversity effort, their respective
web pages pale in comparison to those devoted to racial diversity. More information is given
concerning University support for those individuals, such as student organizations,
administrative offices, and efforts to end harassment. Though one may argue such information
would in any case be inappropriate, there are no statistics provided concerning the admission or
retention of those students; there is also a lack of information concerning special scholarships to
which those individuals have access, or recruitment efforts on the part of Miami University to
attract students with either disabilities or differing sexual orientations. There is a similar lack of
information concerning socio-economic composition of Miami’s student body, the number of
Miami students having studied abroad, or the various student body ideologies. The fact that this
information may be provided by the University elsewhere in its publications is beside the point.
What is crucial to understand is this: each of these factors, “breadth of experience, geography,
ideology, lifestyle, race/ethnicity, socio-economic status, world view,” supposedly contributes to
a student’s diversity (“Admission Standards”). The multiple web pages detailing Miami
University’s diversity initiative and progress, however, mention less than half of these factors. If
one sets aside the minor references to disability and sexual orientation, it is clear that only one of
these seven factors that the University claims increases a student’s “potential contributions to
diversity” is even remotely discussed in the University’s “Diversity Facts”: and, contrary to the
Supreme Court’s ruling, that single factor defining student diversity is “race/ethnicity.”

The University’s explanation of “Diversity Planning,” detailing how the university
“coordinate[s] diversity efforts and assess[es] change,” is similarly focused upon race. Other
than listing several administrative changes scheduled to take place, as well as student
government actions (such as approving a “new diversity statement” for the University), the major
point deals with changes in the Oxford campus’s faculty. “Miami’s Council of Academic Deans
[…] will continue ongoing discussions about the hiring and retention of women and minority
faculty […] throughout 2004-05.” Though this statement at least extends the definition of
diversity to include gender diversity within the faculty, it is still largely focused upon racial
identity. Absent is an effort to hire on the basis of diverse political opinion or extensive unique
experience in the individual’s field; no mention is made of obtaining a faculty with differing
teaching methods or varying lifestyles. One may argue that these efforts are already being made
by those responsible to hire new faculty; perhaps factors such as political leanings and teaching
methods are already considered during the hiring process. However, what is apparent is that
Miami feels it needs to diversify its faculty, and that its answer for future diversification is an
increase in “women and minorit[ies].” While it is possible that such an increase will indeed
diversify and better the University, what is more important is that (even though coupled with
gender) race continues to be the defining factor of the school’s educational diversity. This is as
easily noted on the web page detailing “Multicultural Faculty.” Again statistics are given demonstrating the increase in multiple cultures on Miami University’s Oxford campus, this time within the realm of employed faculty. These statistics give even less information than did those concerning student body breakdown. Information is given concerning the number and percentage of multicultural faculty hires, tenure-track faculty, and total faculty; however, these general statistics are broken down only slightly. Instead of giving the number and percentage of faculty within several different ethnic and racial identifications, these statistics focus only upon African American faculty (and, briefly, upon Native American faculty). This pattern is true in the web page’s introductory paragraphs (“there are 120 multicultural faculty members [ … ], including 43 African Americans”) as well as the provided tables containing statistics. Again, perhaps there is a ready explanation for this; perhaps Miami has a particular historical concern for hiring African American faculty. What is again more important, however, is that the Supreme Court’s decision in Grutter does not allow for diversity to be defined wholly in terms of race and ethnicity. One can assume that this is true of both student bodies and of university faculty. It makes little sense to argue that, while multiple forms of non-racial diversity in a student body improves those students’ education, only a faculty’s racial diversity matters. Certainly diverse opinions and world views are dependent upon similar factors, regardless of who holds those opinions and views. However, the absence of Miami University web pages detailing the percentage of women faculty, faculty members who consider themselves to be politically conservative, or faculty with particularly unique life experiences suggests that this is not true. The University’s emphasis upon a multiracial and multicultural faculty reinforces the evidence found throughout its web and admissions publications: that diversity at Miami means race.


**Straight from the Horse’s Mouth**

In being critical of these University publications, one must temper that criticism with the possibility of an alternate explanation for their apparent focus upon racial diversity. It is highly likely that the authors of these publications, especially those that are presented in the form of “Miami at a glance,” prepare these web pages and booklets for a specific audience that is interested only in racial and ethnic diversity. It would be unnecessary, then, to give examples of and statistics concerning anything else. If these web pages are intended to target multiracial and multiethnic prospective students, then it is only natural that information concerning race and ethnicity on Miami’s Oxford campus be emphasized, and my analysis of these web pages is inherently overjudgmental. In order to avoid such a mistake, I turn my attention now to official University publications concerning the actual plans for improving diversity and the progress in diversity made thus far, as well as statements made by University President James Garland.

As earlier discussed, President Garland has commented repeatedly upon the need for increased diversity throughout the Miami University community; an analysis of those statements suggests a definition quite similar to that connoted by the University’s web and admissions publications. In “Dr. Garland on Higher Education Issues,” Garland supplies the primary reason why diversity matters: describing the First in 2009 agenda, he states that “[…] Miami will be a better institution than it is today […] And by ‘better’ I mean that we will be more diverse and representative of American society than we are now […].” Miami must be diverse in order to improve itself as well as the education it provides its students. This reasoning seems laudable enough; the goal of accurately representing society suggests an attempt on the part of the University to reach out to all types of American citizens, not just those whose opinions and histories have traditionally been a part of the institution. However, one must again look to
multiple sources in order to verify that the goal just identified is really one that the University is pursuing. The abridged statements included in “Dr. Garland on Diversity” demonstrate evidence that diversity still means racial diversity in the context of Miami University. While most of the comments found within this source are vague and do little to explain what diversity entails, some do give hints as to Garland’s opinion on the matter. In his “Diversity Update” dated November 15, 1999, Garland addresses “the need to maintain and redouble our efforts to eliminate homophobia and racial and ethnic intolerance from our campus.” The attention here is paid directly to race and ethnicity, as well as sexual orientation. Similarly, the “State of the University Address” given on August 20, 1998 speaks of the goal of “institutional diversity” as “our broad initiative to eradicate violence, harassment, intimidation, discrimination, and incivility.” This also seems a merit-worthy goal; however, continuing his comments, Garland narrows that goal to address discrimination based upon “race, ethnicity, gender, or sexual orientation.” This is a positive step: the University appears to be attacking a history of intolerance on campus, and the initiative is concerned with more than just race and ethnicity. Further and more specific discussions of diversity, however, are less promising. The “Diversity Update” found at the “Office of the President” web page details steps being taken in “our progress toward making Miami a truly diverse and accepting community.” Of the steps listed that give specific information, (that is, those that contain more detail than “interest in learning more about diversity”) all are related to minority- and multicultural-related initiatives. As discussed earlier, attempts to “diversify the faculty” focus upon “[m]inority professors.” Emphasis is placed upon creating a “multicultural campus environment” and eradicating “homophobia and racial and ethnic intolerance.” With the exception of the mention of accepting diverse sexual orientations, race and ethnicity are again the only aspects of diversity addressed.
The other program mentioned is the “I am Miami” campaign launched by the Division of Student Affairs. The program included posters and advertisements designed as a “recruitment effort aimed at increasing the number of minority students on campus.” Indeed, the “I am Miami” poster, still found in several locations on Miami’s Oxford campus, makes such an emphasis upon minority students clear. The poster pictures five Miami students: three women, two men, one Caucasian, two African Americans, one Asian American, and one Hispanic. It includes the following language as well: “Multicultural Opportunities for Reaching Excellence” and “Miami University: Equal Opportunity in education and employment.” The poster, however, though certainly appealing to someone seeking a multicultural and multiracial student body, distorts a true perception of the Miami student body. In the poster, there seems to be one Caucasian student for every four multicultural students; in reality, Miami’s 2004 freshman class offered only one multicultural student for every nine Caucasians; the ratio of multicultural to Caucasian students in the undergraduate student body is even less impressive (“Multicultural Enrollment”). In addition to this misrepresentation of the student body demographics, the “equal opportunity” claimed by the poster is, in the poster, limited to racial and ethnic equality of opportunity. Though the University’s “Conclusion” section of their “Progress in Diversity Website” states that “we must [ … ] create an environment where every person regardless of race, religion, ethnicity, gender, age, disability, or sexual orientation can feel welcome, included, engaged and able to truly say ‘I am Miami,’” this overall inclusion was obviously not the purpose of the original “I am Miami” campaign. The poster earlier mentioned could not of course capture a student’s political leanings, life experiences, socio-economic class, religion, or sexual orientation; however, there are other demonstrable factors related to diversity that are noticeably absent: none of the students have visible disabilities, none are nontraditional students,
and none show any variation of physical appearance or presentation other than the color of their skin. Again, it is understandable that this campaign was aimed specifically towards multicultural students and therefore included only depictions that emphasize multiple cultures; however, the fact that multiracial students are the only group targeted for recruitment is just one more example of Miami’s intense focus upon race and ethnicity rather than other factors that might contribute to a diverse educational experience.

The “Progress in Diversity at Miami University” report, generated by a subcommittee of the University’s Multicultural Council, concerns a demonstration of Miami’s progress in achieving diversity for the 2003-04 school year. The report, which analyzes both the past and necessary future actions of the University, is promising in its understanding of diversity: an evaluation of the University’s success in “foster[ing] diversity on campus” mentions several non-racial diversity issues, including the recent union strike on the Oxford campus, same-sex partner benefits for Miami faculty and staff, and the limited handicapped access to campus facilities (1). Lists of University-sponsored events exemplifying the inclusion of diverse cultures, viewpoints, and lifestyles include many instances of activities that are unrelated to race and ethnicity, including symposiums and presentations that discuss gender, sexuality, and social class (2). Multiple groups have been established to support sexual diversity on campus, and some dorms include a class that focuses activities upon a discussion of “topics such as race, religion, class, [and] sexual orientation” (4, 3). Indeed, much seems to have been done in the Miami University community to safeguard the interest in and increase the possibility of diversity. Minorities are, of course, repeatedly mentioned as a part of this diversity plan, but it is also made clear that race and ethnicity are only one part of community diversity. Unfortunately, as was true with multiple other University publications, the suggestions made by this report as to how the University might
improve diversity further are focused upon the racial and ethnic composition of its student and faculty populations. The report states that the University has a “goal of having by 2003 a student body in which 10% of the students are from racial minorities,” and it continues by giving examples of how the necessary minority student recruitment might be accomplished (6-8). More importantly, however, the report includes “[i]ndicators of progress towards the goal of cultivating a diverse and diversity-friendly student body;” of the eight factors listed, six are focused upon the enrollment, retention, and graduation of racial minorities and international students. The other two deal with study abroad opportunities and the percentage of students at Miami with disabilities (8-9). The fact that six of these eight indicators are race-related is reminiscent of the heavy attention paid toward race and ethnicity in the University publications earlier discussed; this emphasis upon race as defining diversity is reinforced throughout the rest of the “Progress in Diversity at Miami University” report. Though the report states that increasing diversity requires that “Miami University [ … ] work together to ensure that all people, regardless of race, background, appearance, culture, or sexual orientation [ … ] feel sufficiently welcomed, included, and valued,” this emphasis on multiple non-racial diversity factors is undermined by the report’s statement only a few sentences earlier that “[t]he struggle to create a diverse student body entails not only attracting members of minority groups to matriculate, but also enabling them to complete their degrees successfully” (9). Furthermore, the report offers that, in the University’s progress toward diversity, it “has actively sought to increase the employment of minorities;” the report suggests not only that these minority faculty are necessary to build a healthy and diverse academic community, but that the specifically African American faculty “must increase in order to attract and nurture African American students” (9, 10). Though the University’s report states that admitting and hiring minorities is
only part of the push toward diversity, it appears that the other part, keeping those minorities in
the community, is equally race-related (11). Throughout this document, there is a conflict of
ideas that seems irreconcilable. On the one hand, diversity is defined as “particularly race,
ethnicity, religion, gender, sexual orientation, class, and physical ability” (12). On the other, the
means to get to diversity is presented for the most part as singularly racial: the University must
“[v]igorously recruit Miami students, faculty and staff who bring diversity to this community,”
namely “women and persons of color” (12). This disparity seems complicated, but may in fact
be easily explainable; the most obvious explanation is that, while the University prides itself on
its candid discussion of non-racial diversity (including sexual orientation, social class, and
disability) in various community forums, the path that it chooses to establish diversity within its
student body and faculty is one that relies largely upon race.

This conclusion is supported by the “Diversity Update” issued in September of 2004 by
the University Multicultural Council. The update again concerns the University’s efforts
towards “a more diverse community,” providing various statistics concerning student and faculty
diversity. These numbers, like those provided on Miami’s website and like the discussion of
diversity in the “Progress in Diversity at Miami University” report, are focused largely upon race
and briefly upon gender. The document makes no indication that anything other than race or
gender might suggest improvements in diversity; like publications earlier discussed, though this
does not imply that the University does not seek non-racial diversity in its faculty and students, it
does indicate where the University’s greatest attention lies. Furthermore, one of the University’s
most emphasized policies of late seems almost to discard one of the several diversity factors
listed in the “Admissions Standards.” As earlier mentioned, one of Dr. Garland’s eight goals
essential to Miami “becom[ing] the leader in the nation” through the “first in 2009” initiative is
“Increasing diversity of the faculty, staff and student body” (“Dr. Garland on His Vision for Miami”). Little information is given establishing exactly how this goal is to be achieved; however, what little information is given requires note. One of the two “Guiding Principles” that are intended to accomplish the eight goals is to “build on the Oxford campus’s core strengths.” Though this does not include an emphasis upon diversity, it does suggest that the University adhere to “a diverse, traditional age student body, recruited nationally and internationally” (emphasis mine). It is this emphasis upon age that I find particularly telling. In Leveling the Playing Field, Fullinwider and Lichtenberg include a list of attributes and qualities that are considered as “enliven[ing] the intellectual climate on campus” according to Neil Rudenstine of Harvard University; among them is age. “How we look at the world varies considerably by age. Older students on campus might help diminish some of the self-absorption common to eighteen-to twenty-two-year-olds” (167). Indeed, even Miami University’s “Admission Standards” lists “breadth of experience” as one of the factors potentially contributing to diversity. Certainly age adds to breadth of experience and therefore to campus diversity; however, President Garland’s “Vision for Miami,” in emphasizing a “traditional age student body,” shows little support for those nontraditional students who may have much in the way of diversity to share with the University. Though this does not indicate a necessary preference against admission of nontraditional students, it does imply that age (and, consequently, the likelihood of related experiences such as raising a family or serious employment) is not here a strongly emphasized aspect of diversity, and is certainly not nearly as preferable an attribute as race and ethnicity seem to be.
Why It Matters

In this discussion of Miami University, I am in no way challenging the constitutionality of the University’s admissions policies; it appears as though the emphasis placed upon diversity in the reading of applications and awarding of admission is indeed in keeping with the Supreme Court’s rulings in Grutter and Gratz. The University takes into account multiple non-racial factors when determining a student’s potential, and the admissions system in place is clearly similar to that of the University of Michigan Law School.

What I am suggesting, however, is that there is a notable distinction between the University’s definition of diversity as used in admissions and the definition used when pursuing diversity-related initiatives developed by the administration: the former includes race as well as a host of other factors, while the latter is for the most part focused entirely upon race. There are a few notable exceptions to this rule that merit discussion. The STRIVE initiative, launched in 2003, is described by the University as “tak[ing] a voluntary, grassroots approach to advancing academic excellence through inclusion” (“Diversity Planning”). Its “Call For Initiatives and Ideas” demonstrates a dedication to both attracting and making more comfortable a University community “from a wide range of racial, ethnic, religious, geographical, socioeconomic backgrounds and sexual orientations,” seeking to build up all aspects of diversity within Miami University. Another point of note is Miami’s recent attention to inclusion of various sexual orientations, including the same-sex partner benefits mentioned within the “Progress in Diversity at Miami University” report. Gender and sexual orientation are also included in a portion of the statistics provided by the University as described earlier. It appears, however, that these examples are the exceptions to the rule. Despite these positive steps, the great majority of
University literature continues to emphasize and support multiple races and ethnicities as tantamount to diversity.

The discrepancy between diversity in admissions and diversity in Miami’s community is discouraging; perhaps the fault lies within the abstract nature of the term itself. As the Court understands “diversity,” it signifies a multiplicity of opinions that enhance the process and results of higher education; it is defined by no specific attributes, but includes many factors that make an individual’s experiences and beliefs unique. As Miami University seems to understand the term outside of its admissions office, however, diversity appears to be nothing more than the new buzzword for racial and ethnic difference. I will not argue that racial and ethnic diversity is not a positive addition to society at large and more specifically to higher education; furthermore, I do not argue that all schools operate similarly to Miami University in terms of their use of diversity in admissions and campus initiatives. I do believe, however, that an analysis of Miami University’s web and administrative publications demonstrates that, at least for Miami’s Oxford campus, educational and community diversity are synonymous with racial and ethnic diversity, and not with the multiple diversity-creating factors demanded by the Supreme Court in Grutter.

And, though the University’s admissions office seems to be in compliance with the Supreme Court’s holding, the aforementioned discrepancy raises a simple question: can a school that repeatedly works toward and applauds racial diversity on its campus and in its initiatives honestly downplay that obvious racial emphasis in conducting its admissions procedures? It may be. At the very least, however, one must take note that the different connotations of diversity within Miami University suggest that, while the University is following the letter of the law established in Grutter, it has failed to understand and heed the spirit of the law: that higher education not conflate diversity of viewpoint and diversity of race. And, though the University’s
admissions office seems to be in compliance with the Supreme Court’s holding, the aforementioned discrepancy raises a simple question: can a school that repeatedly works towards and applauds racial diversity on its campus and in its initiatives honestly downplay that obvious racial emphasis in conducting its admissions procedures? It may be. At the very least, however, one must take note that the different connotations of diversity within Miami University suggest that, while the University is following the letter of the law established in Grutter, it has failed to understand and heed the spirit of the law: that higher education not conflate diversity of viewpoint and diversity of race. The natural question then, becomes one of how Miami University can and should correct this problem. The answer is simple: reconcile the discrepancy. The first way that this might be done requires an overhaul of the University’s diversity initiatives and literature to reflect the admissions office’s definition of diversity; the second requires the opposite to be done.

In the first instance, the University administration, student body, and coursework must begin by paying attention to non-racial diversity. The First in 2009 initiative and all others like it must do more than suggest that we strive for student body diversity; they must specifically focus upon ways in which we might attract students from varying geographic and socioeconomic backgrounds who have differing political and world views. Part of this process is understanding why students who might add to that diversity are not attracted to and do not apply to Miami: perhaps it is in part the racial homogeneity of the student body; it might also be the price, or the courses and activities offered. Furthermore, if the administration truly wishes to make Miami University a more accurate representation of the American population, it must do so by focusing its recruiting efforts upon more than the color of the student body’s skin: it must put in place campaigns and initiatives that are not limited in their understanding of diversity. The “I am
Miami” campaign was a superb marketing strategy; however, in order to make all prospective students feel as though they would be welcome on Miami’s campus, that campaign must be extended to focus upon acceptance of non-racial diversity as well. Students pictured must be of various ages and sexual orientations; some must have disabilities. Furthermore, differences in physical appearance cannot be limited to the student’s skin color: students pictured should not all fit within the skinny, attractive, well-dressed Miami ideal that is so prevalent on its campus and in its classrooms. I am not suggesting that the University misrepresent the student body composition as was done in the first “I am Miami” campaign; however, I would suggest that the lack of any representation of these groups is as damaging a misrepresentation of the student body. Furthermore, the University must also produce statistics concerning non-racial diversity factors so that it might note its progress and determine the need for future initiatives; if Miami can have an administrative goal of achieving a 10% minority population by 2009, why cannot it also set a goal of balancing political views, lifestyles, and socioeconomic classes within the student body? This extends to studies already done by the University as well. Though the lists published within the “Progress in Diversity Report” note numerous attempts by the University to increase diverse intellectual dialogues on campus, why is there not more attention paid to how many students and faculty actually attend these events? Why is there especially no attention paid to the number of students that attend these events of their own choice (that is, not because of an assignment or extra credit)? Certainly if we wish to have an exchange of diverse ideas, we must also note whether the audiences at these events are wholly composed of students and faculty who already agree with everything the speaker will say; after all, if everyone is in agreement, where can be the intellectual debate that these events are supposed to foster? Furthermore, it must be apparent to the current student body and faculty that diversity encompasses something other than
race; the Miami community must understand that the administration supports all types of diversity in education. That means that discussions of diversity in lectures and publications must include information and statistics concerning all those non-racial diversity factors; after all, if the admissions office can judge non-racial factors, they can be demonstrated in empirical studies as well.

More than this, however, the University must honestly foster an environment of educational and intellectual diversity. Though the University has done much in recent years to support its GLBT and minority communities, it must turn some of its attention to supporting ideological difference as well. We must support opinions that break from the status quo instead of condemning them as intolerant, racist, uneducated, or un-American. We must invite speakers to campus who sometimes have unaccepted views and who will meet with intellectual debate; when students and professors do speak out against those lecturers or their ideas, it must be done so in a manner appropriate to an intellectual forum; furthermore, those other members of the audience who agree with the lecturer’s statements must show respect for contrary opinions. This year’s lecture by Professor Sut Jhally provides just one example of an intellectual environment in which these things were not done; though the situation was ripe for intellectual debate, students and faculty were embarrassed and angered when members of the audience actually attempted to question the speaker’s statements. As such, we must make efforts to teach the student body (and the faculty if necessary) that disagreement on intellectual and political issues fosters greater knowledge for both sides of the argument; it does not simply demonstrate the ignorance of one’s opponent, as is often assumed. Furthermore, we must increase diversity of opinion in classrooms by shortening lectures and increasing discussion of controversial issues; the University as a whole must fight against actions such as the recent “Academic Bill of Rights” proposed by the
Ohio Senate that seeks to limit professors’ and students’ freedom of speech in the classroom. Students should find themselves regularly disagreeing with their peers and with their professors, and voicing those disagreements. Student organizations with differing viewpoints should not be allowed to function in isolation; debates and activities presenting both contrary opinions should be regularly held as well as attended by the student body. Furthermore, because racial and ethnic diversity do make up components of educational diversity, attempts must be made not to increase the percentage of minority students within the student body, but rather the interaction between minority and nonminority students.

Obviously, all of these things cannot be done solely by the administration, or even by the faculty; in fact, a majority of them require an honest effort on the part of the student body. However, many of these changes can find their root in a simple change within the administration’s policies and initiatives and the University’s faculty: make it clear that Miami University values all kinds of educational diversity; let it be known that those minority students that have chosen to enroll at the University are not expected to be nor will be allowed to be the sole providers of diverse opinions on campus. When students speak their opinions, applaud them for speaking, regardless of whether their speech is condemnable. When students begin to debate, set aside a portion of that day’s power point presentation or lecture and foster that debate. Answer questions, play devil’s advocate, don’t let a class composed of students with similar views leave the room until those views have been challenged and defended. Allow critiques of the University and its policies as often as you allow its praises. Education and betterment do rely upon diversity of opinion: so teach students to voice their diverse opinions in all situations and show them that they will be heard. After all, the University’s other possible option for reconciling the two opposing definitions of diversity will not have nearly the same positive
consequences: if the definition of diversity used by the admissions program is redefined to match that found within the University’s publications and programs, it will only be a short time before the courts come knocking at the door of Roudebush demanding an explanation.
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