A Roadmap for the Continuing Legal Challenge to Race-Based Admissions

*By Curt A. Levey**

The higher education establishment breathed a sigh of relief in June when the Supreme Court's split decision in the Michigan cases allowed the continued use of race in admissions. But a careful reading of *Grutter v. Bollinger*[1] and *Gratz v. Bollinger*[2] suggests that the decisions ensure only a temporary and limited reprieve for race-based admissions policies. Already, a roadmap for a continuing legal challenge to these policies is clear. That roadmap can yield substantial improvements over the status quo in the short term, and, in the long term, may hasten the decline and eventual elimination of race-based admissions.

I. The Roadmap's Textual Underpinnings

The strategic roadmap envisions litigation which will serve to enforce, strengthen, and even expand the restrictions on race-based admissions contained in the *Gratz* and *Grutter* decisions. Those restrictions involve both the current scope of racial admissions preferences and the obligation of schools to transition from race-based to race-neutral methods of achieving diversity.

Concerning the current scope of preferences, the Michigan decisions held that race must be used in a "flexible, nonmechanical way"[3] and cannot generally be a "decisive factor."[4] Instead, colleges must engage "in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."[5] In such a review, "the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it.*"[6] Thus, higher-education institutions may not treat race as if it "automatically ensured a specific and identifiable contribution to a university's diversity."[7] This language, if taken seriously, should result in admissions policies that place less emphasis on race and more on factors such as unusual experiences or viewpoints and socioeconomic, educational, or other types of disadvantage.

A more direct boost for race-neutral policies arises from the Supreme Court's requirement that colleges engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[8] Such alternatives are already in operation in states where racial preferences were banned by ballot initiatives, legislative action, and court rulings. The Court, noting the "wide variety of alternative approaches," said each institution must "draw on the most promising aspects of these race-neutral alternatives" and must conduct "periodic reviews to determine whether racial preferences are still necessary" in order to "terminate its race-conscious admissions program as soon as practicable."[9]

In addition, the Justices called for "sunset provisions in race-conscious admissions policies" and expressed, at very least, an expectation that such policies will end within 25 years.[10] One goal of future litigation should be to establish that time limit as an essential part of narrow tailoring. After all, a more permissive reading ignores the immediately preceding paragraphs in *Grutter*, which emphasize that the grant of compelling-interest status to student diversity is conditional on a time limit. In any case, a school still using race-based admissions 25 years from now will be doing so without the Supreme Court's clear sanction.

Though supporters of racial preferences were relieved by the Michigan decisions, even they recognize that the Court's sanction of race-based admissions is limited. Consider the joint statement issued in July by some of the most prominent legal scholars on the other side of the debate, including Laurence Tribe, Christopher Edley, and Drew Days. The statement, published by the Harvard University Civil Rights Project, acknowledges that the decisions have resulted in "additional narrow tailoring requirements addressing race-neutral alternatives, undue burdens, and time limits" that "must be incorporated into *all* analyses of race-conscious policy making."[11] More specifically, the scholars concede that "even a holistic, non-numerical system can be constitutionally vulnerable, if a racial 'plus' factor is assigned automatically to all racial minority applicants."[12] Instead, "[a]dmissions officials are required to evaluate each applicant on the basis of all of the information in the file, including a personal statement . . . and a personal essay describing the applicant's potential contribution to the diversity of the Law School."[13] Moreover, "a policy that offers such a heavy advantage to minority applicants that it virtually guarantees their admission" is "not sufficiently flexible to satisfy narrow tailoring."[14]

Perhaps most importantly, the Harvard statement concedes that "although an institution may have a permanent interest in gaining the benefits of a diverse student body, its use of race to advance that goal is subject to time limits."[15] The liberal scholars envision a transition towards race-neutral admissions policies, acknowledging the Court's "understanding that diversity will continue to be a compelling interest, but that less race-conscious measures will be required to produce it."[16] Therefore, "the effectiveness of race-neutral policies at other schools should be monitored" as part of "an institution's documentation of its good faith efforts to develop effective [race-neutral] solutions."[17]

These scholars clearly are aware that the Supreme Court's sanction of race-based admissions is limited in both scope and time. One goal of the litigation roadmap is to make sure that this circumscribed sanction does not expand into

something more in practice. This is particularly important in light of higher education's proven willingness to stretch any standard it is given. This propensity makes it inevitable that the courts will be called upon to keep universities honest and to gradually put meat on the bones of the new standards.

The success of future litigation will depend on how much deference courts show to universities when comparing their behavior to the new standards. After *Grutter*, strict scrutiny remains – in word at least – an "exacting standard" which demands that the preferential treatment be "precisely tailored."[18] If the lower courts take this language seriously, there will be little room for deferring to defendant universities with regard to either the scope of their racial preferences or their good faith efforts to adopt race-neutral alternatives. Though the Supreme Court found that Michigan's law school was paying only "[s]ome attention to numbers"[19] and would "like nothing better than to find a race-neutral admissions formula,"[20] schools cannot be confident that other courts will be so generous.

II. Issues Along the Roadmap

"The University of Michigan decisions have settled one set of legal questions, but we can expect many more to arise in our courts," said the joint statement published by the Harvard Civil Rights Project.[21] Indeed, the potential issues for future legal challenges to race-based admissions are too many to fully enumerate in this article. However, I will lay out some of the most significant ones here. Justice Scalia's discussion of "future lawsuits"[22] in *Grutter* also addresses "areas where institutions must be careful not to overstep the bounds of the *Grutter* and *Gratz* cases."[23] Given *Grutter's* holding that student body diversity satisfies the compelling interest part of the strict scrutiny test, most of the issues and arguments concern the narrow tailoring part of the test. Nonetheless, there are still several important open questions concerning a school's reliance on the diversity rationale.

One such avenue applies to K-12 education. *Grutter* relied on assertions that "universities occupy a special niche in our constitutional tradition" and "represent the training ground for a large number of the Nation's leaders," such that "nowhere is the importance of [inclusive institutions] more acute than in the context of higher education."[24] Therefore, K-12 schools that use race in admissions are vulnerable to the argument that *Grutter's* holding on diversity is limited to higher education. The joint statement from Harvard concedes that "K-12 decision makers may not enjoy the same academic freedoms as their higher education counterparts, and among the educational benefits of diversity in higher education is the 'robust exchange of ideas,' which is less applicable to education in the lower grade levels."[25] The use of race in K-12 admissions will likely come before the courts soon as educators, emboldened by *Grutter*, test the limits imposed by recent decisions involving magnet schools. [26] The large number of students potentially disadvantaged by the use of race in grades K-12 – far more than attend the highly competitive colleges where race plays a large role in admissions – also suggests that *Grutter's* relevance at the K-12 level soon will be tested.

Even in higher education, the diversity rationale does not automatically provide legal cover for using race in admissions, because strict scrutiny requires that the proffered compelling interest for a racial classification be the actual motive. Thus, a school would lose its cover if it could be demonstrated that the benefits of broad-based intellectual diversity are not the real motive behind its race-based admissions policy. In fact, Justice Scalia suggests exactly this vulnerability in his *Grutter* dissent when he says that future "suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*."[27] Scalia notes that schools that extol the benefits of multiculturalism "but walk the walk of tribalism and racial segregation on their campuses" are likely to be "[t]empting targets."[28]

It is important to remember that "outright racial balancing [remains] patently unconstitutional."[29] Whether a particular school is engaged in racial balancing or, instead, is paying only "[s]ome attention to numbers"[30] in pursuit of broad-based intellectual diversity is a factual determination that each court will have to make based on the evidence. But if the former is found to be true, then the school is engaging in "discrimination for its own sake," and the diversity rationale cannot protect it.[31]

Although it probably is fruitless to argue that the genuine pursuit of broad-based diversity in higher education is not a compelling interest under the U.S. Constitution, the diversity rationale may not fare as well under the equal protection guarantees of various state constitutions. In states with favorable law or sympathetic Supreme Courts, we'll likely see state constitutional claims against race-based admissions systems, challenging both the diversity rationale itself and the requirements of narrow tailoring. The University of Michigan's victory in *Grutter* will do it no good if the Michigan Supreme Court finds that diversity-based preferences violate the state constitution's prohibition of racial and ethnic discrimination.[32] A victory in Michigan or another state could effect momentum and the public perception of race-based admissions as substantially as California's passage of Proposition 209 did in 1996.

While there doubtless will be continuing litigation over the diversity rationale, the most fertile ground for future litigation likely involves a variety of narrow tailoring issues, concerning both the scope of preferences and the use of race-neutral alternatives. It is worth noting that most of the court decisions striking down racial admissions preferences have been based on narrow tailoring. Five times the U.S. Courts of Appeal have addressed whether a school's race-based admissions policies are narrowly tailored to achieve an interest in diversity, and four times the answer has been

no.[33] And those victories occurred before *Gratz* highlighted potential areas of vulnerability.

Turning now to the details of narrow tailoring, it is important to note that the mere elimination of a point-based admissions system is not sufficient to meet the requirement that race be used in a "flexible, nonmechanical way."[34] Even the joint statement published by the Harvard Civil Rights Project concedes that *Gratz* "makes clear that policies which automatically and inflexibly assign benefits on the basis of race . . . are constitutionally suspect."[35] Thus, any admissions system that gives minority applicants a preference without a "highly individualized, holistic"[36] showing of how that applicant will contribute to broad-based intellectual diversity is vulnerable to challenge. Larger schools will be particularly vulnerable, because of the difficulty of conducting highly individualized reviews of many thousands of applicants. In fact, until *Gratz* and *Grutter* came down, the University of Michigan contended that "the volume of applications ... make it impractical for the [undergraduate college] to use the [individualized] admissions system" upheld in *Grutter*.[37] But the Supreme Court was clear that administrative ease is no defense: "[t]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."[38]

Larger schools in particular may be tempted to limit the "highly individualized" review to a subset of their applicants. But universities that take this approach will be at risk if the filtering process uses race at all. In that case, the filtering process must also comply with all the requirements of narrow tailoring. In *Gratz*, the College admissions system was struck down, in part, because the "individualized review is only provided *after* admissions counselors automatically distribute the University's version of a [racial] 'plus.'"[39]

Schools will also be at risk if their race-based admissions policies consistently admit substantially more than a "critical mass" of underrepresented minorities – that is, more than about ten percent of the student body, which Michigan officials testified is the threshold minority enrollment necessary to achieve the educational benefits of diversity. The *Grutter* Court found only that "a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."[40] It did not find that additional minority enrollment – beyond a critical mass – is even more beneficial, and it certainly did not sanction an admissions policy based on that assumption. While honest people will disagree over how much leeway a university has on this issue, it would be fair to say that a school that uses racial admissions preferences to consistently achieve minority enrollment well in excess of ten percent will be operating without constitutional cover.

Race-based admissions policies will also be vulnerable if they do not explicitly give nonminority applicants "the opportunity to highlight their own potential diversity contributions."[41] Schools could meet this requirement, for example, by explicitly requesting of each applicant and "seriously consider[ing]" an "essay describing the ways in which the applicant will contribute to the life and diversity of the [school]."[42]

In addition, schools will be at risk if they treat nonracial diversity factors as *substantially* less important than race and ethnicity. In part, Michigan's undergraduate admissions system was found to be unconstitutional because "the points available for other diversity contributions . . . are capped at much lower levels."[43] Without a point system, it will be more difficult for courts to evaluate the importance of nonracial diversity factors. But, for instance, a plaintiff can assemble statistical data that compares the odds of admission for minority applicants to the odds for similarly situated candidates who are diverse in other ways. Also, consider that schools, because they are no longer permitted to "automatically and inflexibly assign [preferences] on the basis of race,"[44] may be tempted to make special efforts to encourage minority applicants to describe the ways in which they can contribute to diversity. In fact, the University of Washington Law School did exactly this through letters it sent to only minority applicants.[45] Such a practice is an example of non-quantitative evidence that a school is treating nonracial diversity factors less seriously than minority status. Ultimately, regardless of the form the evidence takes, it is the defendant university – not the plaintiff – that has the burden of proving compliance with the requirements of narrow tailoring.

Admissions policies also may fail the narrow tailoring test if they use race as a "decisive factor."[46] The devil is in the details of what "decisive" means, but there are at least two ways that schools will be vulnerable. One is if a school gives "such a heavy advantage to minority applicants that it virtually guarantees their admission."[47] Michigan lost *Gratz*, in part, because it did exactly that. The other defines decisiveness in a more relative sense, looking at whether "the factor of race [is] decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism."[48] A large disparity between the average grades and test scores of minority and nonminority admittees, while not unlawful in and of itself, will be evidence that race is being used in a decisive manner, in both the relative and absolute sense. It is the nation's most selective schools, where the magnitude of the racial bonus tends to be greatest, that will potentially be the most vulnerable to the charge that race is decisive. However, the degree of vulnerability will depend on whether the lower courts look at what the Supreme Court said or, instead, what it did – namely, uphold a law school admissions policy that relied on race just as heavily as the undergraduate system.

That concludes my discussion of arguments involving the static, scope-related restrictions on the use of race in admissions. But arguably the most important restrictions in

the Michigan decisions concern the phasing out of race-based admissions, and the phasing in of race-neutral alternatives. While it's tempting to think of these as a single transition, that view is not entirely accurate. After all, the Court's command that "race-conscious admissions policies must be limited in time"[49] – as well as Michigan's concession that "race-conscious programs must have reasonable durational limits"[50] – were not predicated on the success of race-neutral alternatives, much less academe's perception of that success. Although there *may* be other ways to meet the requirement for a durational limit, the Court, at very least, strongly suggests that race-conscious admissions policies contain "sunset provisions." [51] Although it will be up to the lower courts to add detail about what sunset provisions should look like, a race-based admissions system will be vulnerable if its sunset provision – or alternative durational limit – is more like a vague aspiration than a concrete plan with not-too-distant milestones. While schools will surely be given some flexibility in adhering to their termination plans, it seems reasonable to expect that unanticipated extensions of the race-based system be, at the very least, explicitly and openly approved by the university's governing body.

Even if a university adopts durational limits, it must, nonetheless, engage *now* in "serious, good faith consideration of workable race-neutral alternatives" and "draw on the most promising aspects of these race-neutral alternatives as they develop" in order to "terminate its race-conscious admissions program as soon as practicable."[52] Even the Harvard statement acknowledged that "the Court's language expresses its understanding that . . . less race-conscious measures will be required to produce [diversity]."[53] Given the Supreme Court's recognition that "a wide variety of alternative approaches" are already in operation in states with race-neutral admissions policies,[54] the Court envisions the transition to race-neutral methods as a process that should start sooner rather than later. Put another way, time limits are intended to function as caps, not licenses to delay the consideration and adoption of race-neutral alternatives. Universities that can be shown to be dragging their feet will be attractive targets for litigation.

While "a university [need not] choose between maintaining a reputation for excellence or fulfilling a commitment to [diversity],"[55] schools will be particularly hard-pressed to explain a failure to adopt those race-neutral methods of promoting diversity that require no sacrifice in academic excellence. For example, the University of Georgia saw a modest increase in minority enrollment after eliminating race from its admissions criteria in 2002 and substituting more aggressive outreach to potential applicants.[56] Schools that fail to use such methods to, at least, reduce their reliance on race are especially vulnerable to the argument that they are "unduly burden[ing] individuals who are not members of the favored racial and ethnic groups." [57]

Ironically, on the issue of race-neutral alternatives, the Court's reliance on a "critical mass" theory should work to the advantage of those seeking to end race-based admissions. While it will always be possible to point to schools with race-neutral admissions where minority enrollment is somewhat lower – or somewhat higher – than under the previous race-based regime, all that matters legally is whether a critical mass of minorities is attained. And on this point, the evidence is clearly in a plaintiff's favor. In the five states with race-neutral admissions policies, virtually every college and professional school – including those at flagship universities such as the University of California-Berkeley and the University of Texas-Austin – has a critical mass of underrepresented minorities.[58]

The success of race-neutral alternatives in those states means that it will be difficult for them to legally justify a return to race-based admissions policies. After all, states may not use such policies unless they demonstrate that "racial preferences are still necessary to achieve student body diversity."[59] But a state cannot convincingly claim that a "serious, good faith consideration of workable race-neutral alternatives"[60] has revealed that racial preferences are still necessary, when that state's own race-neutral methods were just as successful as race-based policies in achieving a critical mass of minorities. As an example, consider the University of Texas at Austin, where president Larry Faulkner recently signaled his intent to restore race as a factor in admissions. Yet, by Faulkner's own report, black and Hispanic enrollment recovered fully and minority academic performance increased at Austin's flagship college after *Hopwood v. Texas* banned the use of race in admissions.[61]

III. A Strategic Vision

In sum, the legal landscape for race-based admissions is filled with potholes, thus inviting continued court challenges along a number of fronts. Though the specifics of future litigation depend on the unfolding development of universities' revised admissions policies, a major focus is likely to be the Court's requirement that universities "draw on the most promising aspects of these race-neutral alternatives."[62] That requirement is likely to draw litigants, because the issues surrounding it are very much in play. A couple of good court decisions addressing the good-faith consideration and adoption of race-neutral admissions methods could well have a major impact on the law, while also helping to educate the public about the success of these methods. Most vulnerable in the near-term are states that abandon their successful race-neutral admissions policies.

Race-based admissions will be challenged on the political front as well. Given the huge gulf between public and elite opinion on this issue[63], the biggest political threat to racial admissions preferences comes from ballot initiatives like California's Proposition 209 and Washington State's I-200, which allow voters to go over the heads of politicians and powerful lobbies. In fact, just two weeks after *Gratz* and *Grutter* were decided, Ward Connerly – a prominent figure

behind Proposition 209's passage – announced a campaign to put a racial preference ban on the Michigan ballot.

While it is unlikely that legislators will enact such preference bans – notwithstanding Florida's example – critics of affirmative action may have some success lobbying federal and state representatives and the U.S. Department of Education for legislative or regulatory rules that put teeth into the Michigan decisions' restrictions on race in admissions. One example, based on the Court's call for sunset provisions, would be a rule mandating each university to publish a plan and timetable for phasing out race-based admissions, with the additional requirement that the planned termination point be no later than June 23, 2028 – 25 years after the Michigan decisions.

Federal and state lawmakers also could require transparency for race-based admissions policies, including statistics on admitted students' grades and test scores, broken down by race. In addition to the side effect of making racial preferences less politically palatable, transparency would make it easier for litigators and the courts to keep universities honest. Powerful interest groups will undoubtedly oppose any reform, but notions of transparency and an end to racial preferences by 2028 should prove popular with the general public.

These are just some of the reasons to expect progress on the issue of race-based admissions. The strategic vision of those opposed to using race in admissions should be informed by the lesson of the Supreme Court's 1978 *Bakke* decision, which, like the Michigan decisions, left a number of important open questions. Though the *Bakke* Court struck down the race-based admissions system before it, the persistence of the higher education establishment and its allies filled the voids in such a way that *Bakke* came to be seen a big victory for affirmative action. The lesson learned is that a Supreme Court decision – especially one with ambiguous language and conflicting messages – is the beginning of the story, not the final chapter. The rest of the story will be written by those that have the clearest vision and the most energy.

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Footnotes

[1] 123 S. Ct. 2325 (2003).
[2] 123 S. Ct. 2411 (2003).
[3] *Grutter*, 123 S. Ct. at 2342.
[4] *Gratz*, 123 S. Ct. at 2430.
[5] *Grutter*, 123 S. Ct. at 2343.
[6] *Gratz*, 123 S. Ct. at 2429 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (appendix to opinion of Powell, J.)) (emphasis added in *Gratz*).
[7] *Id.* at 2428.
[8] *Grutter*, 123 S. Ct. at 2345.
[9] *Id.* at 2346.
[10] *Id.* at 2346-47.
[11] Erwin Chemerinsky et al., *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases; A Joint Statement of Constitutional Law Scholars*, Harvard University Civil Rights Project, at 17-18 (July 2003) (emphasis added), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf.
[12] *Id.* at 19.
[13] *Id.* at 11.
[14] *Id.* at 9.
[15] *Id.* at 11.
[16] *Id.*
[17] *Id.* at 10-11.
[18] *Grutter*, 123 S. Ct. at 2336.
[19] *Id.* at 2343 (quoting *Bakke*, 438 U.S. at 323 (Powell, J.)).
[20] *Id.* at 2346 (quoting Brief for Respondent Bollinger et al. at 34).
[21] Chemerinsky et al., *supra* note 11, at 26.
[22] *Grutter*, 123 S. Ct. at 2349 (Scalia, J., concurring in part, dissenting in part).
[23] Chemerinsky et al., *supra* note 11, at 16.
[24] *Grutter*, 123 S. Ct. at 2339-41.
[25] Chemerinsky et al., *supra* note 11, at 23.
[26] *See, e.g.*, Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).
[27] *Grutter*, 123 S. Ct. at 2349 (Scalia, J., concurring in part, dissenting in part).
[28] *Id.* at 2349-50 (Scalia, J., concurring in part, dissenting in part).
[29] *Id.* at 2339.
[30] *Id.* at 2343 (quoting *Bakke*, 438 U.S. at 323 (Powell, J.)).
[31] *Gratz*, 123 S. Ct. at 2428 (quoting *Bakke*, 438 U.S. at 307 (Powell, J.)).
[32] *See* MICH. CONST. art. 1, § 2 ("No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.").
[33] Race-based admissions policies were struck down on narrow tailoring grounds in *Johnson v Bd. of Regents of the Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001), *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999*)*, *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), and *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998). However in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), the Sixth Circuit held that the University of Michigan Law School's race-based admissions system was narrowly tailored. Only the Fifth Circuit struck down a race-based admissions system on compelling interest grounds. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
[34] *Grutter*, 123 S. Ct. at 2342.
[35] Chemerinsky et al., *supra* note 11, at 2.
[36] *Grutter*, 123 S. Ct. at 2343.
[37] *Gratz*, 123 S. Ct. at 2430.
[38] *Id.*.
[39] *Id.* (emphasis in original).
[40] *Grutter*, 123 S. Ct. at 2341.
[41] *Id.* at 2344.
[42] *Id.*
[43] *Gratz*, 123 S. Ct. at 2432. Interestingly, the University of Michigan's undergraduate admissions system was struck down despite awarding the same twenty points for *some* other diversity factors as it did for race. Those factors included being from a socio-economically disadvantaged background, attending a predominantly minority high school, being an athlete, or being identified by the University's Provost as having a special characteristic. This could indicate that schools will have a hard time demonstrating compliance with this requirement, but it is also a measure of the confusing nature of the Court's Michigan decisions.
[44] Chemerinsky et al., *supra* note 11, at 2.
[45] *Smith v. Univ. of Washington Law School*, No. 97-cv-00335, slip op. at 11 (W.D. Wash. June 5, 2002).
[46] *Gratz*, 123 S. Ct. at 2430.
[47] Chemerinsky et al., *supra* note 11, at 9.

[48] *Gratz*, 123 S. Ct. at 2428 (quoting *Bakke*, 438 U.S. at 317 (Powell, J.)).
[49] *Grutter*, 123 S. Ct. at 2346.
[50] Brief for Respondents Bollinger et al. 32.
[51] *Grutter*, 123 S. Ct. at 2346.
[52] *Id.* at 2345-46.
[53] Chemerinsky et al., *supra* note 11, at 11.
[54] *Grutter*, 123 S. Ct. at 2346. The Court explicitly mentions only California, Florida, and Washington, the three states where race-based admissions are prohibited by *state* law. However, in response to federal court decisions, race-neutral admissions policies were also implemented in Texas and at the University of Georgia.
[55] *Id.* at 2344.
[56] Clarissa Collier, *Georgia Preview Day Aimed at Minorities*, RED AND BLACK (University of Georgia), December 03, 2002 (reporting that black enrollment increased from 4.8 to 5.4 percent, and overall minority enrollment increased from 13 to 14 percent).
[57] *Grutter*, 123 S. Ct. at 2345 (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).
[58] "Critical mass" is defined here as ten percent or more of the student body, based on testimony by University of Michigan officials.
[59] *Grutter*, 123 S. Ct. at 2346.
[60] *Id.*
[61] Larry Faulkner, *'Top 10 Percent Law' Functioning Well*, DALLAS MORNING NEWS, October 24, 2000, at 15A.
[62] *Grutter*, 123 S. Ct. at 2346.
[63] Though the nation's elite institutions – from the Fortune 500 to the military to the Ivy League – sided with the University of Michigan, polls conducted this year by the Gallup Organization, NBC, *Newsweek,* the *Los Angeles Times,* and the *Chronicle of Higher Education* – to name just a few –showed that the overwhelming majority of Americans oppose the use of race in admissions. A 2001 poll by the *Washington Post* and others found that 94 percent of whites and 86 percent of black people disagree that "race or ethnicity should be a factor when deciding who is ... admitted to college." Richard Morin, *Misperceptions Cloud Whites' View of Blacks*, WASHINGTON POST, July 11, 2001, at A1 (finding that "an overwhelming majority of all whites and blacks continue to reject giving outright preferences to blacks and other minorities in employment or admissions to college"); Michael E. Rosman, *Thoughts on Bakke and Its Effect on Race-Conscious Decision-Making*, 2002 U. CHI. LEGAL F. 45, 47 (2002) (providing percentages and wording of question).