SOME COMMENTS ON *GRUTTER V. BOLLINGER*

*Paul Brest**

I. INTRODUCTION

For well over a quarter century, law schools have been taking race into account in the admission of students in order to promote diversity. This spring, the Supreme Court will reconsider the 1978 decision in *Regents of the University of California v. Bakke*[1] that held this practice constitutionally permissible.[2] As a former law school dean who saw the benefits of affirmative action first hand, I fervently hope that the Court will reaffirm this precedent. To do otherwise would be to compromise the core educational mission of American law schools and to set back great progress in integrating the elite ranks of the legal profession.

I would like to begin by briefly elaborating these substantive points, and then turn to the legal issues that inform the Court's consideration of the constitutionality of race-conscious admissions. Although most of this Comment is applicable to undergraduate as well as law school admissions, I will focus on legal education—the issue in *Grutter v. Bollinger*[3]—with which I am most familiar.

II. THE POLICY ARGUMENTS

There are essentially two policy arguments supporting affirmative action in law school admissions: the importance of racial diversity for the education of all law students and the role of law schools as pathways to professional success.

A. *Why Racial Diversity Is Important to Legal Education*

American legal education is highly interactive, aimed at getting students to examine the law from all possible perspectives. It is conducted not mainly through lectures, but rather by the professor's orchestration of students' discussions of legal precedents. Students are pressed to examine even well-

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

2. *Id.* at 272.

3. Grutter v. Bollinger, 228 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (Dec. 2, 2002).

settled cases with a skeptical eye. This process is designed to teach problem-solving skills and to impart the critical stance characteristic of all good lawyers. This method of education depends on students bringing diverse perspectives to the classroom.

Of course, a law student's race does not determine his or her point of view on issues of legal policy. As a professor, I encountered a range of viewpoints within every racial and ethnic group. But it is a fact that people of different races and ethnicities often have different experiences. For example, African Americans regularly encounter discrimination that is not experienced by whites and that is scarcely believable to white students. A recent *New Yorker* profile on Condoleezza Rice describes a salesperson's assumption that, because she was black, Ms. Rice was interested only in purchasing costume jewelry rather than real gems.[4] By itself, the incident was trivial. What is not trivial is African Americans' recurring experiences of being treated in a demeaning or discriminatory manner. My white students were always shocked to learn that this happens even in today's America. Their black classmates brought an important "reality check" to discussions of employment and housing discrimination and racial profiling by the police.

Because of their different experiences, policies that seem benign or neutral to whites may have quite a different meaning for the members of minority groups. Moreover, the salience of discriminatory acts may be different—a factor that is relevant in the inevitable balancing of competing interests that courts perform. While most white members of the Supreme Court understand the message conveyed by cross burning, reports of the recent oral argument in the cross-burning case suggest that the justices understood it differently after listening to Justice Thomas's passionate description from the bench.[5]

To be sure, students can learn something of value simply by reading about Ms. Rice's or Justice Thomas's experiences. But this is a poor substitute for face-to-face discussions, in which students can directly engage their classmates, confront the meanings of such experiences, and debate the legal policies that should respond to them.

Such discussions, inside and outside the classroom, gave rise to some of the best and worst of times during my years as dean. At their best, they provided powerful educational moments for all involved. While minority students complained of the burden of constantly having to educate their white classmates, the minority students learned as well. One vivid experience involved a year-long

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4. Nicholas Lemann, *Profiles: Without a Doubt*, THE NEW YORKER, Oct. 14 & 21, 2002, at 169.

5. Oral argument in *Virginia v. Black*, No. 01-1107, 2002 WL 31838589 (U.S. Dec. 11, 2002).

debate about whether the university should punish so-called "hate speech." I do not know how many students changed their minds as they better appreciated both the psychic injuries of being the target of racial slurs and the importance of free expression in an academic community. I do know, however, that many students who started out with adamant convictions came to understand the other side and, indeed, learned to deal constructively with disagreement about such a highly charged question.

These encounters were often painful for the students, their professors, and for the institution as a whole. Minority students were sometimes quick to interpret actions by classmates or the administration as discriminatory, when others believed that no discrimination had occurred. But that is precisely the point. These different interpretations were born out of different experiences, and just as the students learned from each other, so did the institution learn from even the most wrenching confrontations. The school became a better place in the process—better able to teach all of its students.

Learning does not occur only through controversy. A class drawn from various backgrounds allows students to appreciate commonalities as well as differences among their classmates, and to learn to communicate across racial boundaries. Such understandings are essential for lawyers, who will yield enormous power and play leadership roles in increasingly diverse political, civic, and private organizations. No less than anyone else, law students of all races hold stereotypes and prejudices. Encounters with classmates from different backgrounds, especially within an institution that affirmatively values diversity and encourages discourse, tend to reduce such prejudice.

These views are based on my experience as a professor and dean at Stanford Law School; they are shared by many colleagues at Stanford and elsewhere. While they are supported by some empirical studies,[6] one would have to concede that the evidence to date is largely impressionistic.

III. Law Schools As Pathways to Professional and Financial Success

The Court in *Bakke* held that institutions of higher education could engage in race-conscious admissions in pursuit of the educational objectives outlined above.[7] Justice Powell did not explicitly address a rationale for affirmative

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6. *See, e.g.*, Anthony Lising Antonio & Kenji Hakuta, *The Effects of Racial Diversity on Cognitive Complexity in College Students*, *at* http://www.stanford.edu/group/diversity/ (last modified Feb. 4, 2003) (presenting findings of a study testing the effects of racial composition in college student discussions).

7. Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 272. Although Justice Powell announced the judgment of the Court, his opinion does not speak for a majority. It is, however, the lowest common denominator for upholding race-based affirmative action and has generally been treated as if it were the opinion of the Court.

action that many law school deans, myself included, believe is at least as compelling: increasing the minority presence in the legal profession, and especially increasing the presence of African Americans in elite positions in the profession. Perhaps because Justice Powell seemed at best cool to any rationale other than the educational benefits of diversity,[8] most universities subsequently designed and justified race-based admissions programs in these terms. Nonetheless, it is at least worth sketching the contours of the argument.

The premise is that the United States continues to be burdened—morally, socially, and economically—with a large, self-perpetuating racial underclass. No one seriously contests the origins of this underclass in slavery and its perpetuation through de jure discrimination during much of the past century and a half. Whatever the causes of its continuation into the current century, it is wishful thinking to believe the phenomenon will be solved without focused intervention. Surely institutions of higher education, no less than any others in our society, may appropriately concern themselves with this deep social problem. One plausible role they may play is to strengthen the black middle class, for there are reasons to believe that a strong black middle class has benefits for African Americans more broadly. And there is little doubt that the African American graduates of law schools—perhaps especially graduates of the "elite" law schools—are among the core of the black middle class.

Miranda McGowan and I have made this argument in some detail elsewhere,[9] and I will only outline it here. The argument ultimately depends on the external benefits flowing from the success of a member of a disadvantaged group to other members:

> Individuals tend to be especially charitable toward members of groups with which they identify on the basis of characteristics such as race, ethnicity, and religion, and tend to give to organizations supporting those groups. Thus, wealthy members of such groups tend to benefit the more disadvantaged members.[10]

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8. Justice Powell dismissed, as legitimate objectives for the University of California's affirmative action program: (1) assuring a "specified percentage of a particular group" in the student body; and (2) "ameliorating . . . the disabling effects of identified discrimination." *Id.* at 307. Although the "increasing representation" rationale mentioned in the text is distinct from either of these—it seeks to address a present and continuing social problem rather than to remedy past discrimination (with all the complexities of matching wrongdoers and beneficiaries it carries)—institutions may reasonably have decided that it was too close for comfort.

9. *See* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995).

10. *Id.* The philanthropic giving of the late African American businessman, Reginald Lewis, provides an example. More recently, Luis Nogales, a successful Latino businessman, gave $1 million to the Mexican American Legal Defense Fund.

> The presence of minorities in decision-making roles in corporations, government, and nonprofit entities tends to make those organizations more sensitive to the interests of minorities affected by their decisions.
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> Successful minorities in visible positions of importance serve as role models for youth who might not otherwise aspire to such positions, and tend to counter the negative stereotypes held by whites.[11]

Attending selective institutions of higher education tends to improve graduates' socioeconomic status and power. One would expect as much because of the quality of the education in those institutions and the access they provide to powerful networks. Although there is supporting empirical evidence here as well as with the diversity rationale,[12] it is far from conclusive or unequivocal.[13]

IV. THE NEED FOR RACE-CONSCIOUS ADMISSIONS

Can the most selective law schools achieve significant diversity without taking race into account? The short answer is no. For whatever reasons, African American college graduates are not getting into elite law schools by numbers and race-neutral criteria alone. Whatever may be said of the University of Texas's practice of admitting the top ten percent of students in all state high schools, no similar strategy is available to law schools, which admit from diverse colleges from throughout the United States. The admission of students from families with low socioeconomic status, or students who have overcome disadvantage, does not have the same goals as racial diversity. Nor, given the racial and ethnic demography of the American population, would such criteria achieve significant racial diversity in the more selective law schools. Even in the unlikely event that such a school admitted 100 percent of its students based on their low

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11. *Id.* Of course, unsuccessful minorities whose positions are perceived to be the result of affirmative action may reinforce white stereotypes.

12. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (discussing and providing data relating to affirmative action programs at selective schools). Data assembled in the *amicus* brief in *Grutter v. Bollinger* submitted by the Association of American Law Schools indicates that the selective private and public law schools account for 25% of Senators, 50% of United States court of appeals judges, and about 33% of United States district court judges. Brief of Amici Curiae Association of American Law Schools at 6, Grutter v. Bollinger, 2003 WL 399076 (6th Cir. 2003) (No. 02-241). Leaving aside Howard, which was the only law school with significant African American enrollment until the late 1960s, selective law schools trained 37% of African American federal judges and 47% of Hispanic judges. *Id.* at 7. Nearly one-third of the members of the Congressional Black Caucus have law degrees, many from elite schools. *Id.* at 8.

13. *See, e.g.*, STEPHEN COLE, FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH ACHIEVING MINORITY STUDENTS (2003).

socioeconomic status, it would not likely have more than a handful of black students.

V. THE PROBLEMS WITH *BAKKE*—AND SINCE

Virtually everything I have said thus far is the proper subject of debate by legislatures, regents, trustees, and faculty. So why has the Supreme Court not left the issue to political or policy arguments, as, for example, it has done with the question of whether government school vouchers may be used in religious schools?[14] Why, in other words, did the Court hold that Mr. Bakke stated a constitutional claim at all, let alone one that called for strict scrutiny under the equal protection clause of the Fourteenth Amendment?

A. *Toward a Coherent Theory of the Fourteenth Amendment*

I want to argue that a proper reading of the Constitution calls for little if any scrutiny of affirmative action. Of course, the argument is moot from a practical point of view; it was lost a quarter century ago in *Bakke* and has been completely driven into the ground by decisions since then. But the correctness of an argument—be it constitutional or moral—cannot be resolved by adjudication. As Supreme Court Justice Robert Jackson said: "We are not final because we are infallible, but we are infallible only because we are final."[15] If only for reasons of intellectual integrity, it is worth raising the argument again.

All or most members of the contemporary Court who oppose affirmative action espouse an "originalist" approach to constitutional decision making. For those who are intentionalists, the Court can only strike down a practice if the adopters of the relevant constitutional provision intended to prohibit practices of the same sort. Absent strong evidence of such intentions, the legitimacy and desirability of such practices are matters for political debate and decision making by the other branches of government.

Yet it requires quite a stretch for an originalist to claim that the Fourteenth Amendment is even concerned with, let alone that it prohibits, affirmative action. Given their historical context, the thirty-ninth Congress and ratifying legislatures focused on preventing discrimination *against* the recently-emancipated slaves—that is, preventing the subordination of a racial minority by a white political

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14. *See* Zelaman v. Simmons-Harris, 536 U.S. 639 (2002) (finding voucher portion of Ohio program did not violate Establishment Clause, thus leaving the issue to be decided in political arena).

15. Brown v. Allen, 344 U.S. 443, 540 (1953).

majority. The idea of affirmative efforts to redress such discrimination was not even on the table until a century later.[16]

Indeed, at first glance, it is not evident that affirmative action would even state a claim under the most oft-voiced modern rationale for scrutinizing so-called "suspect" classifications. In the famous footnote four of *United States v. Carolene Products Co.*,[17] Justice Stone articulated what might be called an anti-subordination theory of the Fourteenth Amendment, requiring heightened scrutiny where a law manifested prejudice against "discrete and insular minorities."[18] The theory was that prejudice against such minorities can produce defects in majoritarian decision making, requiring judicial intervention.[19]

But this may be too cramped a view of the situation. As Justice Brennan noted in *Bakke*, there is a danger that even a well-intentioned affirmative action program can "stereotype and stigmatize politically powerless segments of society" and that it "may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own."[20] Therefore, Brennan concluded that affirmative action in university admissions should be subject to so-called "intermediate scrutiny"; a race-conscious admissions process "must serve important government objectives and must be substantially related to achievement of those objectives."[21] This weaker standard does not require the virtually conclusive evidence demanded by strict scrutiny.

Justice Brennan gave a second reason—one also implicit in Justice Powell's language in *Bakke*—why classifications based on immutable characteristics like race should be subject to at least some degree of scrutiny: Such classifications, he wrote, "are contrary to our deep belief that 'legal burdens should bear some relationship to individual responsibility . . .' and . . . should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual."[22]

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16. One might see a hint of affirmative action in the War Department's provision of "forty acres and a mule" to emancipated slaves. *See* Salim Muwakkil, *Why American Blacks Deserve Reparations*, CHI. TRIB., Feb. 5, 2001, at N1 (discussing General Sherman's Special Field Order No. 15, Jan. 16, 1865). However, President Johnson subsequently rescinded the land grants and vetoed congressional efforts to redistribute captured lands to freed men. *Id.* The analysis in the text would not phase a textual originalist, who applies a more or less literal meaning of a textual provision, and for whom the word "equal" in the Fourteenth Amendment would imply symmetrical application.

17. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

18. *Id.* at 152 n.4.

19. *See* JOHN ELY, DEMOCRACY AND DISTRUST 75-77 (1980) (discussing footnote four in the *Carolene Products* decision and the theory that produced it).

20. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) (citations omitted).

21. *Id.* at 361-62.

22. *Id.* at 360-61 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

Although its links to the original understanding are weak, this is an attractive theory from a moral point of view, and it is a good adjunct to the anti-subordination principle articulated in *Carolene Products*. But it cannot be pressed too far. For example, one cannot invoke the "immutability" rationale to justify the strict scrutiny of admissions based on race while not applying the same standard to, say, an admissions policy seeking geographic diversity or favoring the children of alumni. After all, college applicants seldom have control over where they were brought up, and surely none over where their parents attended college.

In sum, neither the original understanding nor the more philosophically-based immutability rationale readily supports the strict scrutiny of race-conscious affirmative action. I emphasize the point about originalism, not because I believe that this is a plausible approach to constitutional interpretation,[23] but because many of the justices who were opposed to affirmative action in *Bakke* and many who will be deciding *Grutter* style themselves as originalists. At the very least, they owe the public an explanation for a vote against the University of Michigan Law School's admissions policy.

B. *Fudging the Standard of Review*

Be this as it may, one must treat as settled precedent that race-conscious affirmative action states a claim under the Fourteenth Amendment. What is less settled is the appropriate standard of review to be applied to affirmative action. *Bakke* articulated a more or less strict standard of review. As articulated by Justice Powell, a racial classification must be "necessary" to the accomplishment of a "substantial state interest."[24] I say "more or less strict," because the usual articulation of strict scrutiny standard requires that the interest be "compelling," not merely "substantial."

Strict scrutiny was developed as a standard for reviewing discrimination against the members of minority groups and, with the lamentable exceptions of the Japanese exclusion cases, it has almost been "strict in theory, but fatal in fact."[25] If the standard were applied candidly to affirmative action, then race-conscious admissions to increase diversity would fare no better than race-conscious admissions designed to exclude minorities. To see why, first consider the nature of the evidence that racial diversity contributes significantly to educational outcomes and to improving the status of minorities more broadly. As mentioned above, many educators believe that diversity is educationally valuable. But the evidence is impressionistic and the conclusions are speculative,

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23. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (discussing originalism and presenting the author's views on this approach to constitutional interpretation).

or perhaps just hopeful. Suppose, for the sake of argument, that a state institution that intentionally excludes the members of minority groups presented equally weak evidence that education is improved by racial segregation.[26] Is there any doubt that it would be laughed or shamed out of the courtroom?

Simply put, Justice Powell applies a lower standard to affirmative action than to traditional discrimination—as do all decisions that have upheld race-conscious decisions designed to benefit the members of minority groups. This is not mainly the result of substituting "substantial" for the usual "compelling," for no one would doubt that improving educational outcomes or ameliorating the perpetuation of a racial underclass is a compelling interest. Rather, the lower standard results from a quite permissive reading of "necessary." As mentioned above, the state of empirical knowledge about the educational benefits of diversity belies any claim of necessity. The major issue facing the Supreme Court in *Grutter*, then, is whether to adhere to what Justice Powell said or what he did.

C. *Fudging the Permissible Admissions Criteria*

Bakke also reflects another form of fudging, reflected in Justice Powell's hostility to quotas or point systems, and in his embrace of an admissions process that considers race as one factor among many others.

In fact, there is much to be said for assuring a "critical mass" of minority students—to provide mutual support and a comfort level—and this does require setting goals if not absolute quotas. And, although my own preference is for Stanford's system of comparing multiple admission files on a highly individualized basis, there is also much to be said for using a relatively easy-to-administer point system rather than requiring the use of subjective criteria, which are inevitably arbitrary.[27]

Justice Powell's position seems to be that if the state does take race into account for benign purposes, it must obscure that fact as much as possible. Perhaps he was anticipating a rationale that Justice O'Connor made explicit in

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24. Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 320.

25. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 362).

26. This was among the arguments that southern de jure segregated schools made in an effort to avoid desegregation. *See, e.g.*, Briggs v. Elliott, 98 F. Supp. 529, 535-36 (E.D.S.C. 1951) (stating that "mixed schools will result in racial friction and tension and that the only practical way of conducting public education in South Carolina is with segregated schools").

27. It is worth noting that many law schools can achieve considerable diversity in respects other than race just by admitting by the numbers.

her approach to race-conscious districting—that overt race-consciousness conveys a bad message to the citizenry. As she wrote in *Shaw v. Reno*:[28]

> [W]e believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. See, e.g., *Holland v. Illinois*, 493 U.S. 474, 484, n.2 (1990) ("[A] prosecutor's assumption that a black juror may be presumed to be partial simply because he is black . . . violates the Equal Protection Clause" (internal quotation marks omitted)); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-631 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury"). By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.
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> The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.[29]

Justices Powell and O'Connor may be legitimately concerned with the *expressive* harms—of the sort that Justice Brennan noted in *Bakke*—caused when government discriminates based on race. On balance, however, I would prefer that our institutions, whether public or private, be candid with their various stakeholders, including the public. One of the hard-won civil rights victories of the 1970s, after all, was persuading courts to look behind all sorts of imaginative disguises of de jure discrimination to find hidden race consciousness. However you cut it, admissions is a zero-sum game: The preference given an applicant because of her race entails that another applicant was not admitted. Whether or not the injury is constitutionally cognizable, it is not lessened by pretense or disguise.

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28. Shaw v. Reno, 509 U.S. 630 (1993).
29. *Id.* at 647-48.

VI. CONCLUSION

In an ideal world, the racial diversity necessary to educate tomorrow's lawyers would occur without having to take race into account in admitting a law school class. But an ideal world would not be heir to the legacies of prejudice and discrimination that continue even today. Apart from its educational benefits, affirmative action in law school admissions has produced many highly successful minority lawyers and has noticeably desegregated the profession. It would be tragic if the Court were to halt this work in progress just at a time when Americans of many persuasions appreciate both the progress that has been made to date and the unmet needs still before us.

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

QUESTION: Latricia Williams, a senior at Drake University. What is the *Bakke* case, the precedent? Could you go more into that? I've never heard of that before.

RESPONSE: The *Bakke* case involved a suit by an unsuccessful white applicant to the University of California's medical school at Davis who challenged the affirmative action plan that the medical school had. The Court ended up striking down the Davis plan, but in the opinion of Justice Powell, who ended up speaking, in effect, for five out of the nine Justices, Justice Powell said that a plan in which race was a factor in admission, one of many factors, and he cited in particular Harvard University's admissions process, that such a plan would be constitutional. That you couldn't have a set-aside, you couldn't have a quota, but that race could be considered like diversity, like the fact that your mother or father was an alum, like the fact that they were a rich alum who had contributed to the school, that race could be considered a factor like others. When I call it fuzzy, I think that is my own view, I have to say, is that race is either considered or it is not considered. It is always useful when you talk about affirmative action to flip things and imagine that a university was considering race as a factor in preferring whites. We would be pretty skeptical about that as a factor. So my own view is that Justice Powell was too fuzzy and that what he really should have said is you can take race into account non-fuzzily if your goal is to achieve diversity. The reality is that the law from *Bakke*, which most universities and law schools have followed for the last twenty or so years, is kind of a fuzzy approach considering it is a factor and it is my fervent hope that through cases we affirm that kind of fuzziness.

QUESTION: I am Professor Keith Miller. I am on the law school faculty. It seems to me an interesting coincidence that with our military being so

prominently in the news these days, that it seems like the role of the military in affirmative action could play some role in the Supreme Court's decision. I wonder if you think that the military stance on this, especially at this time in our history, whether that will play much of a role in the Supreme Court's decision?

RESPONSE: Never having been a spectator sports fan in athletics, I also have always hesitated to predict how the Supreme Court is going to do things. So rather than predict what difference it will make, I just noted that the Court seemed very interested in that. It can't be a coincidence. The military, by and large, is not thought of as an out-there, left, progressive organization. The fact that former military officers and people who care about the military being affected think that having minorities in the leadership is important, and that affirmative action in the military academies is necessary for that. There has to be a lot of public support.

QUESTION: Addison Parker. I am a retired lawyer from the Dickinson Law Firm. What I wanted to ask you, sir, is this. There are hints, in fact more than hints, in the second abortion decision that reliance over time on the original decision weighs against overruling the original decision. I wonder if that argument has any application, in your view, to the reliance that universities and the military have placed on Justice Powell's determination in *Bakke*?

RESPONSE: It seems to me at some point something becomes sort of settled, and institutions have changed the way they do work around a precedent and that it would be highly disruptive to change it. It is surely the case that every major institution in the United States has adopted admissions practices based on the assumptions of *Bakke*. My own view is that precedent alone and precedent that causes institutional change creates a lot of momentum and requires an additional burden to overcome, but it can never be dispositive. You can consider the reliance that this country placed on separate but equal for many years. It was appropriate for the Court to realize that that was wrong and change it. It does add some weight to the other side of it.

QUESTION: I am Hunter R. Clark, a law professor here at Drake. I have two questions for you. One, you have said that at the super duper law school level, when you take into consideration just the numbers, that results in a lot of diversity socio-economically and culturally, except it does not produce racial diversity at that level. I was curious as to why you think that is? And the second thing I wanted to ask is, I think if you look into the background of the *Bakke* decision, no one ever expected that affirmative action, as it was thought of then, would go on forever. I was wondering how long would it go on, or should it go on?

RESPONSE: Both of your questions raise a common set of empirical issues. Why is it in the year 2003 that many African Americans, even ones who have gone to good undergraduate institutions, are not making it on the numbers?

It is a question that social scientists, my colleague at Stanford, Claude Steele, has done a lot of work on. There are differing views. I am not a good enough social scientist to give you a theory with any great certainty. It is not a surprise to me, I think. If I were an anthropologist from some other planet, it wouldn't be a surprise to me that a group, even in the years since slavery has been, and continues to look at Conde's example in Nordstrom's in Washington continues to be the object of discrimination, would find itself disabled academically someplace. I can tell you simply as a fact, based on my experience at one so-called super duper law school, that we would not, if Stanford did not take race into account in law school admissions, we would have very, very few African Americans. So exactly why that is the case I don't know. But we do have, without taking poverty into account, or a background of poverty, we do have quite a few students who come from impoverished backgrounds and have diversity in other ways. I am not trying to evade it as much as to say that I am just not sure of the complex sociological factors that go into it.

QUESTION: My name is Scott Kreider. I am a third-year law student here. This is sort of a follow-up to Professor Clark's question. I guess the implication of what you are talking about is that diversity is an educational value in and of itself. It seems to me the implication of that is that affirmative action then would never end, because we are always looking for an appropriate balance just to make sure that diversity exists. To that extent it sort of creates a distinction that will go on into the future infinitely. It would only ever be random chance that you have the appropriate racial balance, the "critical mass" I think is the terminology that is used. How do you reconcile that kind of permanent class-based distinction one, with the original goal which was just to overcome past discrimination, and then secondly, how do you reconcile that with at least the tendency of the Constitution that there should be no grants of nobility, there should be no class-based distinction?

RESPONSE: Let me take your second question first. Grants of nobility or title referred to something quite different from how a university can base its admissions criteria. My own view of the Fourteenth Amendment, which I hold on a non-originalist view, I think would be a good originalist view, because the Fourteenth Amendment doesn't speak to this issue if we use it to give schools what they want. The first question is the more important one, I think, which is, is affirmative action here forever? Well, imagine your vision of a racially just society in which there is no one group that is perpetually on the bottom. That society doesn't need affirmative action because there would be no point. That is a society in which black applicants to different law schools would be as likely to get in, plus or minus—there is always a fair amount of randomness in large numbers—as anybody else. Affirmative action is designed to move us toward that society. If it doesn't get there, if it takes one or two or three generations to get there, then I think we have to ask ourselves why is it. What is it about our

society that keeps African Americans at the bottom? But in effect, it is a self-ending process. When our society becomes the society that I think all of us hope it will be, then affirmative action will not be necessary. And if it doesn't become the society we hope it is going to be, then why not? Why aren't we making that kind of society? And if affirmative action is not a route to that, then what is? And that is perhaps something that Kirk Kolbo will talk about.

QUESTION: My name is Teri McMurtry-Chubb. I am on the law faculty at Drake and I am also the chair of the Iowa National Bar Association. I want you to address two issues that you raised. One was with regards to the historical context of the Fourteenth Amendment. The other you mentioned at the close of your comments—the flip thing. You were talking about racial preferences as they pertain to whites and that we would find that automatically suspect. My question is, haven't racial preferences always existed for whites in higher education, and why is it now that when we are trying to address past racial discrimination, and we are trying to remedy the situation with regards to blacks, that that is now considered wrong?

RESPONSE: Well, certainly until some of the higher education cases, such as *Harvard v. Brown*, or . . . . Since then it has always been a struggle to actually get this implemented in higher education as well as elementary and secondary education. Since then the courts have been unequivocal. It doesn't mean the institutions themselves don't discriminate, but courts have been unequivocal, as has federal policy and most state policy. Those cases simply didn't deal with the issue. It was inconceivable even when I was with the Legal Defense Fund in the late sixties in Mississippi. The notion of affirmative action was not in our case, because there was so much work to be done just to undo the segregated structure. Why is it good lawyers will always take precedent that was designed for one purpose and try to use it for another? That is part of the creativity that we all learn in law school. How does precedent change? It changes very often if you look at a doctrine and a creative lawyer will shift it some. I think that the lawyers who have challenged affirmative action have been very creative. I don't use that negatively. Creativity is good. My own view is it is creativity that is not consistent with the original understanding of the Fourteenth Amendment and it is creativity that is not consistent with kind of a good role for the courts in a democratic government. I certainly don't want to fault lawyers' creativity.