2003 WL 152371 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

Barbara GRUTTER, Petitioner,
v.
Lee BOLLINGER, et al., Respondents.
Jennifer GRATZ and Patrick HAMACHER, Petitioners,
v.
Lee BOLLINGER, et al., Respondents.

Nos. 02-241, 02-516.
January 16, 2003.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence In Support of Petitioners

John C. Eastman, Of Counsel
The Claremont Institute Center
For Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Drive
Orange, CA 92866
(714) 628-2587

Edwin Meese III
Counsel of Record
214 Massachusetts Ave. N.E.
Washington, D.C. 20002
(202) 546-4400
Counsel for Amicus Curiae The Claremont Institute
Center for Constitutional Jurisprudence

***ii** QUESTIONS PRESENTED

1. Whether the Court of Appeals in *Bollinger* and District Court in *Gratz* erred in holding that the state has a compelling interest in discriminating against citizens on the basis of race in order to ensure racial "diversity" in the classroom.

2. Whether Michigan's current admissions programs are narrowly tailored to serve any compelling governmental interest.

***iii** TABLE OF CONTENTS

***v** TABLE OF AUTHORITIES

Cases

*1 INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority ***2** in our national life," including the principle, at issue in this case, that the self-evident truth of equality articulated in the Declaration of Independence and now codified in the Constitution of the United States guarantees to every individual the right to the equal protection of the law, regardless of his or her race.

The Institute pursues its mission through academic research, publications, and scholarly conferences. Of particular relevance here, the Institute and its affiliated scholars have published a number of books and monographs about the Founders' views on equality and on the unconstitutionality of laws that categorize Americans on the basis of their race, including Harry V. Jaffa, Equality and Liberty: Theory and Practice in American Politics (The Claremont Institute 1999) (1965), Thomas G. West, Vindicating The Founders: Race, Sex, Class and Justice in The Origins of America (1997), and Edward J. Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 Notre Dame J. L. Ethics & Pub. Pol'y 15 (1997).

In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence, to help further the mission of the Claremont Institute through strategic litigation. The Center has previously participated as *amicus curiae* in this Court in such important cases as *Zelman v. Simmons-Harris,* 122 S. Ct. 2460 (2002); *Adarand Constructors v. Mineta,* 534 U.S. 103 (2001); *Dale v. Boy Scouts of America,* 530 U.S. 640 (2000), *United States v. Morrison,* 529 U.S. 598 (2000), and has previously participated in this case as *amicus curiae* in support of the petition for certiorari in *Grutter v. Bollinger.*

*3 SUMMARY OF ARGUMENT

The decisions by the Sixth Circuit in *Grutter* and the District Court in *Gratz* should be reversed for at least three reasons:

• Both courts erroneously interpreted *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), when they held that Justice Powell's separate opinion in that case was the narrowest and therefore controlling opinion, and that Justice

Powell "held" (rather than merely stating in *dictum*) that an admissions policy including racial classifications such as the ones at issue here were Constitutional.

• The procedural posture of *Grutter* in the Court of Appeals, discussed at length in the dissent's procedural appendix and the concurring opinions, as well as the procedures followed in *Adarand Constructors* and other cases, demonstrate that this Court is facing the same recalcitrance among defenders of racial discrimination that this Court faced in the immediate wake of *Brown v. Board of Ed.,* 347 U.S. 483 (1954). A forceful statement by this Court, similar to those issued following *Brown*, is necessary to enforce the constitutional demand that all Americans be treated equally, without regard to the color of their skin.

• Most fundamentally, the government's classification of American citizens by race is fundamentally at odds with the equality principle of the Declaration of Indpendence, the "principle of inherent equality that underlies and infuses our Constitution." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

*4 ARGUMENT

I. THE COURTS BELOW MISINTERPRETED AND MISAPPLIED THIS COURT'S PRECEDENT.

A. Justice Powell's Opinion in *Bakke* Did Not Uphold Racial Classifications Such As Those at Issue in These Cases.

The fractured nature of the opinions in *Bakke* make it sometimes difficult to assess precisely what portions of that opinion constitute binding precedent. But it is clear that Justice Powell's opinion squarely rejected the sort of racial favoritism which lies at the heart of Michigan's admission policies at issue in this case. As the dissent in *Grutter* below noted, the mere fact that the Law School's policy is less severe than the one which was struck down in *Bakke* does not mean that the Law School's policy is constitutional *See Grutter v. Bollinger,* 288 F.3d 732, 777 (6th Cir. 2002) (Boggs, J, dissenting).

In his *Bakke* opinion, Justice Powell correctly denounced racial classifications as contrary to our nation's constitutional principles. Such "distinctions of any sort are inherently suspect," he wrote. 438 U.S., at 291. Thus, "[i]t is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.*, at 295. Yet that is just what Michigan seeks to do here, when it asserts that "the only way for the Law School to achieve meaningful racial diversity in its student body (while maintaining academic selectivity) is to take race into account." Brief in Opposition, *Grutter v. Bollinger,* No. 02-241 ("*Grutter* BIO"), at 1.

Justice Powell also wrote in *Bakke* that programs which aim to "remedy" past discrimination in general by creating ***5** new legal discriminations unjustly "forc[e] innocent persons … to bear the burdens of redressing grievances not of their making." *Bakke*, 438 U.S., at 298. The race-based components of Michigan's admissions programs do just that. Michigan admits, for example, that "minority applicants [are] admitted at substantially higher rates than *otherwise similar* non-minority applicants." *Grutter* BIO at 8. What that means, *necessarily*, is that a substantial number of better-qualified applicants, white and non-preferred minorities alike—"innocent persons," to use Justice Powell's language—are denied admission simply because of their race or ethnic background in order to make way for less-qualified (indeed, unqualified, as Michigan itself concedes) [2] preferred minorities. For a state-run institution of higher learning to do this is unconstitutional as well as unjust, not just for the Barbara Grutters of the world but for the preferred minority students who are plucked—Michigan paternalistically uses the word "chosen," *Grutter* BIO at 1—by the University of Michigan from academic institutions where they would be competitive and thrust into an environment where they are forced to compete with students of significantly stronger academic credentials. When one considers how pervasive is the use of race in college and law school admissions nationwide, the problem becomes intolerable. As Michigan itself concedes, "[o]ver the past two and a half decades, nearly every selective university and professional school in the United States has … ***6**

craft[ed] admissions and financial aid policies" based on race, ostensibly in reliance on Justice Powell's opinion in *Bakke.* A student like Barbara Grutter is thus likely to find the door of elite higher education closed to her, not just in Michigan but throughout the land, based solely on the color of her skin. It is just this kind of pervasive racial discrimination that the Fourteenth Amendment, and this Court's holding in *Bakke*, were designed to prevent.

Moreover, even if Justice Powell's opinion can be read to support Michigan's blatant use of race in making admissions decisions, no other member of the Court joined the relevant parts of Justice Powell's opinion. To be sure, four Justices —Justices Brennan, White, Marshall, and Blackmun—agreed with Justice Powell's brief statement that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin," *id.*, at 320 (opinion of Justice Powell); *id.* at 326 n. 1 (Brennan, J., concurring in part, dissenting in part), but that statement, phrased in the language of intermediate or even rational basis scrutiny, simply cannot serve to authorize Michigan's use of race, which, as subsequent decisions of this Court have made clear, must be subjected to the strictest scrutiny. Not a mere "substantial" interest but only a compelling interest of the first magnitude is sufficient to permit government to discriminate among its citizens on the basis of race, and then only if the program is narrowly tailored (and not just "properly devised") to achieve that compelling government interest. *Adarand*, 515 U.S. at 227.

Whether "diversity" is such a compelling interest is not addressed, much less adopted, by any majority in *Bakke. See Hopwood v. Texas,* 236 F.3d 256, 275 (5th Cir. 2000) (noting that *Bakke* did not "approve student body diversity as a justification for a race-based admission criterion"); *Johnson v. Bd. of Regents,* 263 F.3d 1234 (11th Cir. 2001) (noting that "a majority of the Supreme Court has never ***7** agreed that student body diversity is, or may be, a compelling interest sufficient to justify a university's consideration of race in making admissions decisions"); Walter Dellinger, Office of Legal Counsel Memorandum to General Counsels Re: *Adarand* at 12, 1995 DLR 125 d33 (June 29, 1995). But subsequent to the fractured ruling in *Bakke*, this Court has explicitly rejected "diversity" as a compelling rationale for race discrimination and recognized in its stead only a single governmental interest compelling enough to warrant the use of race by government: actual remediation of past discrimination by government. *Adarand*, 515 U.S. 200 (1995), *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469 (1989); *see also Hopwood*, 78 F.3d, at 944 ("In *Bakke*, the word 'diversity' is mentioned nowhere except in Justice Powell's single-Justice opinion.… Thus, only one Justice concluded that race could be used solely for the reason of obtaining a heterogenous student body"); *Podberesky v. Kirwan,* 38 F.3d 147 (4th Cir. 1994) (holding that racial preferences in school admissions are only permissible in remedying actual articulable cases of past discrimination). Even *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990), in which this Court approved the federal government's racial quota system for broadcast licenses on a "diversity" rationale, did so only after holding that such "benign" racial classifications were subject merely to intermediate scrutiny, a holding that was expressly overruled by *Adarand*, 515 U.S., at 227.

Michigan, like the courts below, seems to assume that the four dissenters in *Bakke* would have approved treating "diversity" in education as a compelling governmental interest since they were all willing to uphold the University of California's racial quota system under the lower level of scrutiny they thought applicable to so-called "benign" racial discrimination, and that, as a result, *Bakke* should be read as actually "holding" that diversity is a compelling governmental interest. Such hypothetical speculations form ***8** no part of the Court's holding, of course, and it is improper for the lower courts to base decisions on them.

This is particularly true where, as here, there are good reasons for questioning Michigan's assumption about how the four dissenters would have treated "diversity" under strict scrutiny. The dissenters' embrace of Justice Powell's apparent approval of the use of race as a "plus" factor in the Harvard plan came with an important caveat. They "agree[d] with Mr. Justice Powell that a plan like the 'Harvard' plan is constitutional under our approach, *as least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.*" *Bakke*, 438 U.S., at 326 n.1 (Brennan, J., concurring in the judgment in part and dissenting in part). Absent past discrimination —and Michigan has not provided any evidence that the statistical disparity in its applicant pool is the result of past

discrimination—the use of race would not serve such a remedial purpose but would rather amount to a raw, perpetual racial balancing of the kind that this Court has repeatedly rejected. *See, e.g., Freeman v. Pitts,* 503 U.S. 467, 491 (1992) (holding that courts should withdraw supervision of formerly segregated school district "where racial imbalance is not traceable, in a proximate way, to constitutional violations"); *Pasadena Bd. of Ed. v. Spangler,* 427 U.S. 424, 434-35 (1976); *see also Croson*, 488 U.S., at 495 (plurality opinion of O'Connor, J.) (rejecting an argument for "diversity" in government contracting, noting that "[t]he dissent's watered down version of equal protection review effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'elimat[ing] entirely from government decisionmaking such irrelevant factors as a human being's race' … will never be achieved") (quoting *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)).

***9** Moreover, treating "diversity" as a compelling interest might allow, perhaps even require, states to ban historically black colleges, or the federal government to exclude them from Title VI funding, a proposition that, one might just as easily assume, the four *Bakke* dissenters would have soundly rejected. The lack of racial diversity at the historically black Lewis College of Business in Detroit, Michigan, therefore, would be problematic, not to mention the lack of racial diversity at the more than one hundred other historically black colleges and professional schools throughout the country— major names in higher education such as Grambling State University in Louisiana, Morehouse College in Atlanta, Georgia, and even Lincoln University in Pennsylvania and Howard University in Washington, D.C., one of the *Bakke* dissenter's own alma maters.[3] Indeed, as with all of these great institutions, Morehouse College, which numbers among its alumni Dr. Martin Luther King, Jr., former U.S. Surgeon General David Satcher, former U.S. Secretary of Health and Human Services Louis Sullivan, former U.S. Ambassador to the United Nations James Nabrit, award-winning filmmaker Spike Lee, Olympic Gold Medalist Edwin Moses, as well as numerous congressmen, business and academic leaders,[4] and which rightfully boast that it "enjoys an international reputation for producing leaders who have influenced national and world history,"[5] should be offended—we all should be offended—by Michigan's patronizing statement that "preparing ***10** students for work and citizenship in our diverse society is difficult, if not impossible, in racially homogenous classrooms and racially segregated campuses." *Grutter* BIO at 18 (citing *Sweatt v. Painter,* 339 U.S. 629, 634 (1950)); *see also id.* at 4 (asserting that, according to one of its trial witnesses, "all law students receive an immeasurably better legal education, and become immeasurably better lawyers, in law schools and law school classes where the student body is racially heterogeneous"); *cf. Missouri v. Jenkins,* 515 U.S. 70, 114 (1995) (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior").

B. Even if Justice Powell's Reference to Racial Diversity Was A Binding Holding of this Court in *Bakke*, It Should Be Repudiated.

The notion of "diversity" that Michigan would attribute to Justice Powell is, in fact, a plain violation of Constitutional principles. The fundamental creed upon which this nation was founded is that "all men are created equal." Declaration of Independence ¶ 2. This principle is, in Abraham Lincoln's words, a "great truth, applicable to all men at all times." *Letter from Abraham Lincoln to H.L. Pierce* (Apr. 6, 1859), *in* 3 Collected Works 374, 376 (1953). "All men" meant all human beings—men as well as women, black as well as white. *See, e.g.*, James Otis, *Rights of the British Colonies Asserted and Proved* ("The colonists are by the law of nature freeborn, as indeed all men are, white or black"), *reprinted in* B. Bailyn, ed., Pamphlets of the American Revolution 439 (1965); *id.* ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?").

These sentiments were codified in the first State constitutions established after the American colonies declared ***11** their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." Va. Dec. of Rights § 1 (1776), *reprinted in* 1 The Founders' Constitution 6 (P. Kurland & R. Lerner, eds., 1987). And the Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" Mass. Dec. of Rights (1780), *reprinted in* 1 The Founders' Constitution at 11. Even those founders who owned slaves recognized

that slavery was inconsistent with the principle of equality articulated in the Declaration of Independence. "The mass of mankind has not been born with saddles upon their backs," wrote Thomas Jefferson, "nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God." *Letter to Roger C. Weightman* (June 24, 1826), *in* Jefferson: Writings 1516, 1517 (M. Peterson, ed., 1984). This was true, according to Jefferson, even if people were not of equal capabilities. "Whatever be their degree of talent it is no measure of their rights," wrote Jefferson shortly before the end of his second term as President. "Because Sir Isaac Newton was superior to others in understanding, he was not therefore lord of the person or property of others." *Letter from to Henri Gregoire* (Feb. 25, 1809), in *id.*, at 1202.

The Founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to as equality of opportunity, not equality of result.[6] Indeed, James Madison described the "protection of different and unequal faculties" as "the first object of government." The Federalist No. 10, at 78 (Rossiter ed. 1961) (1788). Alexander ***12** Hamilton agreed, writing that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. *The door ought to be equally open to all.*" The Federalist No. 36, at 217 (emphasis added).

With the eradication of slavery and the passage of the Fourteenth Amendment, the promise of legal equality was opened to all. Unfortunately, in *Plessy v. Ferguson,* 3 U.S. 537 (1896), this Court, in one of its darkest moments, held that legal policies which separated Americans by race were acceptable under the Constitution. Alone in dissent, Justice John Marshall Harlan eloquently penned the judicial equivalent of the Declaration's creed:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559 (Harlan, J., dissenting). Fifty-eight years later, in *Brown v. Board of Education* and its progeny, this Court repudiated *Plessy's* separate but equal doctrine and ultimately renewed America's dedication to what Martin Luther King would later describe as his dream, "that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.' " King, I Have A Dream (1963) *reprinted in* A Testament of Hope: The Essential Writings And Speeches of Martin Luther King, Jr. 217, 219 (James Washington ed. 1986).

***13** The evils of racial discrimination are not lessened because they are allegedly created to benefit previously excluded groups. After the Civil War, new racist laws, such as Black Codes and Jim Crow laws, were created in order to keep newly freed slaves from voting, earning a living, or owning property. But the paternalism of "benign" whites limited the freedom of blacks in many ways, too. The former slave Frederick Douglass addressed this problem when he wrote that "in regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested toward us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply justice." Frederick Douglass, *What The Black Man Wants* (Jan. 26, 1865), *reprinted in* 4 Frederick Douglass Papers 59, 68-69 (Blassingame & McKivigan, eds. 1991). Douglass continued:

Everybody has asked the question… "What shall we do with the Negro?" I have had but one answer from the beginning. Do nothing with us!.… All I ask is, give him a chance to stand on his own legs!.… If you will only untie his hands, and give him a chance, I think he will live.

Douglass understood that paternalistic programs such as this one "constitute badges of slavery and servitude." *Civil Rights Cases*, 109 U.S. 3, 36 (1882) (Harlan, J., dissenting). They are akin to legislation that once blocked women from entering a variety of professions, which was "apparently designed to benefit or protect women [but] could often, perversely, have the opposite effect." Ruth Bader Ginsburg, *Constitutional Adjudication in the United States As A Means*

of Advancing The Equal Statute of Men And Women Under The Law, 26 Hofstra L. Rev. 263, 269 (Winter, 1997); *cf. Muller v. Oregon,* 208 U.S. 412 (1908). Such legislation was "ostensibly to shield or favor the sex regarded ***14** as fairer but weaker, and dependent-prone," Ginsburg, at 269, but was in fact "premised on the notion that women could not cope with the world beyond hearth and home without a father, husband, or big brother to guide them." *Id.*, at 270.

In exactly the same way, racial preferences, whether in hiring or contracting, the provision of government benefits, or, as here, in law school and college admissions, are ostensibly designed to shield minority group members, but in fact are premised on the notion that they are incapable of competing without a big brother—a white big brother—to guide them. [7]

As Justice Douglas wrote, "A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard* 416 U.S. 312, 337 (1974) (Douglas, J., dissenting); *see also Bakke*, 438 U.S., at 298 (opinion of Justice Powell) ("there is a measure of inequity in forcing innocent persons in [Bakke's] position to bear the burdens of redressing grievances not of their making"); *id.*, at 290 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color").

***15 C. The Courts Below Erred In Holding That Michigan's Programs Were Narrowly Tailored to Achieve "Diversity."**

Even if the lower courts' interpretation of *Bakke* were correct, they erred by holding—without any actual discussion—that Michigan's admissions policies actually serve the purpose of diversity. Strict Scrutiny requires that the policy be narrowly tailored to advance that purpose. *Bakke*, 438 U.S. at 294-295; *Adarand*, 515 U.S. at 227. "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant*, 476 U.S., at 280 (*quoting Fullilove v. Klutznick,* 448 U.S. 448 (1980) (Stevens, J., dissenting)).

The Sixth Circuit in *Grutter* held that the Law School's admissions policy is narrowly tailored because the Law School does not use a hard "quota" system for admissions, *Grutter*, 288 F.3d at 745-46, and because "the Law School considers more than an applicant's race and ethnicity," *id.*, at 747. The Circuit Court's determination is based on an erroneous reading of this Court's precedent, however. The Circuit Court held that "consideration of race-neutral means is necessary to satisfy the narrowly tailored component of strict scrutiny." *Id.* at 44. While this may be a *necessary* component of narrow tailoring, it is hardly *sufficient. See Johnson*, 263 F.3d at 1253-1254 ("the mere fact that race technically does not insulate a candidate from competition with other applicants does not, by itself, mean that the policy is narrowly tailored"). Narrow tailoring is not satisfied by a policy which is overinclusive or underinclusive—a policy which will punish those not intended to come within the policy's boundaries, or which will unjustly reward those who are not within the government's asserted "compelling interest." In other words, if the Law School's desire to achieve a racially diverse student body is a sufficiently compelling interest—which it is not—that purpose ***16** is not served by creating preferences for blacks and Hispanics at the expense of, *e.g.*, Asian immigrants. As the dissent below noted, Chinese or Jewish immigrants have suffered a great deal of legal discrimination in American history, and their life experiences might be far richer than that of an upper class black or Hispanic student, yet the latter would benefit under the Law School's policy, at the expense of the former.

More importantly, however, the "diversity" rationale is inherently opposed to the principles of equality enunciated in the Declaration of Independence and the Fourteenth Amendment. This was made clear by one of the concurring opinions in the *Grutter* case below, which claimed that "a comparably-situated white applicant is a 'different person' from the black applicant [because] this black applicant may very well bring to the student body life experiences rich in the African-American traditions emulating the straggle the black race has endured in order for the black applicant even to have the opportunities and privileges to learn." *Grutter*, 288 F.3d, at 764 (Clay, J., concurring). That stereotypical assumption is also repeated in Michigan's briefs in this court. *See Grutter* BIO, at 28 ("students from these [preferred minority] groups

are particularly likely to have had experiences of special importance to [the Law School's] educational mission"). In other words, an applicant's *race* is the determining factor in that applicant's character and quality as a student. According to this view, a black applicant is inherently different from—is *not equal* to—the white applicant, because the *content of the applicant's mind is thus determined by his race.* This is the very definition of racism. *See* American Heritage Dictionary (4th Ed. 2000) ("Racism: the belief that race accounts for differences in human character or ability and that a particular race is superior to others"). It is fundamentally contrary to the principle of equality to presume that a person's contributions to the classroom will be determined by the person's race.

***17** Such discrimination is morally wrong because it "treats the accidental feature of race as an essential feature of the human persona [and thus] violates the principles of human nature—those principles in The Declaration of Independence that are said to stem from the proposition that 'all men are created equal.' " Edward Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 Notre Dame J. L. Ethics & Pub. Pol'y 15, 49 n. 132 (1997). As Charles Sumner, one of the principal authors of the Fourteenth Amendment's Equal Protection Clause, wrote:

[The principle of equality] is the national heart, the national soul, the national will, the national voice, which must inspire our interpretation of the Constitution and enter into and diffuse itself through all the national legislation. Such are the commanding authorities which constitute 'Life, Liberty, and the Pursuit of Happiness,' and in more general words, 'the Rights of human Nature,' without distinction of race…as the basis of our national institutions. They need no additional support.

Charles Sumner, *The Barbarism of Slavery* (1860) *reprinted in* Against Slavery: An Abolitionist Reader 313, 320 (Mason Lowance, ed. 2000).

Michigan's admissions policies are also not narrowly tailored in that they punish innocent members of disfavored racial groups in order to "remedy" past discrimination. "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual." *Adarand*, 515 U.S., at 239 (Scalia, J., concurring in part and concurring in the judgment). In all, "[t]he vice… [is] not in the resulting injury but in the placing of the power of the State behind a racial classification ***18** that induces racial prejudice…." *Anderson v. Martin,* 375 U.S. 399 (1964).

II. THE PROCEDURES FOLLOWED BY THE COURT BELOW AND BY OTHER COURTS IN SIMILAR CASES DEMONSTRATE THAT THIS COURT FACE THE SAME OBSTACLES IN ENDING "BENIGN" RACISM THAT IT FACED IN THE *BROWN* ERA.

A. Racial Classifications Are Not Eradicated Easily.

Unfortunately, experience has shown that racism is not overcome easily, whether it be in segregated schools or in legal classifications like the racial set-aside programs at issue here. This Court spent more than two decades fighting such classifications after the *Brown I* case. *See Griffin v. County Sch. Bd.,* 377 U.S. 430 (1968); *Green v. County Sch. Bd.,* 391 U.S. 430 (1968); *Brown v. Board of Ed.,* 349 U.S. 294 (1955) ("*Brown II* "); *Cooper v. Aaron,* 358 U.S. 1 (1958); *Loving v. Virginia,* 388 U.S. 1 (1967); *Dayton Bd. of Ed. v. Brinkman,* 443 U.S. 526 (1979). Since then, America has made remarkable progress. Today, Americans generally believe that race is an illegitimate factor for government classification. Across the country, Americans have rejected the notion of racial classifications, including supposedly "benign" ones. *See* Clint Bolick, *Blacks and Whites on Common Ground*, 10 Stan. L. & Pol'y Rev 155, 158 (Spring 1999); Terry Eastland, Ending Affirmative Action: The Case for Colorblind Justice 164-165 (2d ed. 1997). States have begun to incorporate Justice Harlan's *Plessy* dissent into law. *See* Cal. Const. art. I, 31, cl. A (1996) (Proposition 209); *Hi-Voltage Wire Works, Inc. v. City of San Jose,* 24 Cal. 4th 537 (2000) (noting that Proposition 209 "adopt[s] the original construction of the Civil Rights Act"); ARCW § 49.60.400 (1) (Washington Initiative 200).

***19** "In a nearly unbroken line of recent decisions, federal courts in recent years consistently have struck down racial preference policies adopted by federal, state, and local governments." Clint Bolick, *Jurisprudence in Wonderland: Why Judge Henderson's Decision Was Wrong*, 2 Tex Rev. Law & Pol. 60 (Fall, 1997); *see, e.g., Hopwood*,, 78 F.3d at 932; *Maryland Troopers Ass'n v. Evans,* 993 F.2d 1072 (4th Cir. 1993); *Koski v. Gainer,* No. 92-C-3293, 1995 WL 599052 (N.D. Ill. Oct. 5, 1995) (mem. op.); *Ensley Branch, NAACP v. Seibels,* 31 F.3d 1548 (11th Cir. 1994); *but see Smith v. Univ. of Washington Law Sch.,* 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (May 29, 2001). Yet today, defenders of racially discriminatory laws, as emphatic as their predecessors in the 1950s, are exhibiting the same determination to avoid the commands of the Equal Protection Clause. Reliance upon Justice Powell's opinion in *Bakke* to rationalize racial classifications that violate the fundamental commands of Equal Protection is no more permissible that the long and sordid reliance on *Plessy v. Ferguson* to rationalize "separate but equal" segregation and its scheme of racial classifications. *Compare Grutter* BIO at 12 ("*Bakke* has been relied upon by universities and public officials for decades, and has become an important part of our national culture"), *with* Brief for Appellees, *Brown v. Board of Education,* at 18 (asserting that in upholding the Kansas legislature's decision to classify students according to race and assign them to segregated schools, the Kansas Supreme Court "relied specifically on the decision of the Supreme Court of the United States in the case of *Plessy v. Ferguson*"), *reprinted in* P. Kurland and G. Caspar, 49 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 67, 85 (1975).

The time for government to cease treating individuals on the basis of their skin color rather than their merit is long overdue. As this Court held in *Croson Co.*, any discrimination ***20** on the basis of race must cease, except (perhaps) as a remedy for government's own prior or continuing discrimination on the basis of race. 488 U.S., at 493-94; *see also Adarand*, 515 U.S., at 239 (Scalia, J., concurring in part and concurring in the judgment) ("Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual"). "The time for mere 'deliberate speed' [to fully enforce this principle] has run out." *Griffin*, 377 U.S. at 234; *see also Green v. County Sch. Bd.,* 391 U.S. 430 (1968); *cf. Brown II*, 349 U.S. at 301 (ordering that assignment of pupils to schools based on race be ended "with all deliberate speed").

B. Defenders of Racial Discrimination Are Refusing to Implement The Demands of The Equal Protection Clause.

For examples of the defiance demonstrated by today's defenders of racially discriminatory laws, consider some recent cases:

• *Grutter v. Bollinger*: As the procedural appendix in the dissent below notes, this case was the subject of a number of questionable procedures. The appeal was first assigned to a panel consisting of two judges who had heard an earlier interlocutory appeal in the case, and was filled out by the Chief Judge of the Circuit, who appointed himself rather than accepting a random assignment. The panel (or perhaps the Chief Judge alone) then waited to refer a motion for initial hearing en banc until after two Circuit Judges (both appointed by President Reagan) had taken senior status. While this Court should be reluctant to find that the Circuit was engaged ***21** in result-driven improprieties, these extremely unusual procedures at least raise the appearance that the court below may have been stacked with judges sympathetic to the Law School.

• *Adarand Constructors v. Pena,* 515 U.S. 200 (1995): This Court held that federal "set-aside" programs were subject to strict scrutiny, and remanded the case to the Tenth Circuit, which sent the case back to the District Court. Using strict scrutiny, the District Court held the program unconstitutional. *Adarand Constructors, Inc. v. Pena,* 965 F. Supp. 1556 (D. Co. 1997). While that decision was on appeal, the Circuit Court declared that the plaintiff, a white contractor, had been the victim of racial discrimination and was therefore a member of a disadvantaged minority. As a result, the court held, the plaintiff's case was moot. *Adarand Constructors, Inc. v. Slater,* 169 F.3d 1292 (1999). This Court reversed this attempt to deprive the plaintiff of his day in court. *Adarand Constructors, Inc. v. Slater,* 528 U.S. 216 (2000). The Circuit Court then, under the pretext of applying strict scrutiny, but in fact applying intermediate scrutiny, nevertheless upheld the

racial classification. *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147 (2000). This Court was again required to grant *certiorari*, but later dismissed the case for procedural reasons. *Adarand Constructors, Inc. v. Mineta,* 534 U.S. 103 (2001).

• *Coalition for Economic Equity v. Wilson,* 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997): *Wilson* involved a challenge to California's Proposition 209, which prohibited the state government from discriminating against or granting preferential treatment to any individual or group on the basis of race. In a clever version of "forum shopping," the plaintiffs persuaded a party to an unrelated case (*F. W. Spencer & Son, Inc. v.* ***22** *City and County of San Francisco,* C 95-4242 THE (N.D. Cal.) to amend its pleading to include a request for a ruling on the constitutionality of Prop. 209. Once this amendment was accepted by the court, the judge in that court was therefore empowered to take over the *Wilson* case from the judge to whom it had originally been assigned. *See* Gail Heriot, *University of California Admissions under Proposition 209: Unheralded Gains Face An Uncertain Future*, 6 Nexus: J Op. 163, 167, n 26 (2001); Carol Ness, *Prop. 209 Foes Win Effort to be Heard in S.F. Court*, San Francisco Examiner, Nov. 14, 1996 at A5; Doug Bandow, *No Justice for Proposition 209*, Washington Times, Jan. 14, 1997 at A15. This judge then, coincidentally enough, ruled in favor of the plaintiffs. *Coalition for Economic Equity v. Wilson,* 946 F. Supp. 1480 (N.D. Ca. 1996). The Ninth Circuit later reversed. 122 F.3d 692 (9th Cir. 1997).

Experience has shown that racial discrimination is not easily eradicated. Professor Lino Graglia has noted the "intense resistance that can be expected from academics and the educational bureaucracy" in eliminating racial preferences. Despite California's state laws prohibiting such preferences, for instance, "the Governor and the Board of Regents have encountered the recalcitrance, not to say insubordination, of the President of the University System who is seeking to delay implementation of [a racially-neutral admissions policy] as long as possible." Lino Graglia, "*Affirmative Action," Past, Present, And Future*, 22 Ohio N.U.L. Rev. 1207, 1219 (1996). The federal government's response to this Court's decision in *Adarand Constructors* parallels California's experience. As one commentator notes, despite *Adarand*'s holding, awards to racially preference contractors actually increased in the years following the decision. No honest attempt has been made to fix the problems with the program at issue in *Ada* ***23** *rand*—instead, those who defend racially discriminatory laws have sought "to marginalize *Adarand*' s holdings by tinkering with the operation of set-aside programs, but by no means calling for their termination." R. Brad Malone, *Note: Marginalizing* Adarand: *Political Inertia and the SBA 8(A) Program*, 5 Tex. Wesleyan L. Rev. 275, 298-299 (Spring 1999).

These facts reveal that the political opposition to the demands of the Equal Protection Clause is every bit as powerful as the opposition this Court faced in the years following *Brown.* What Martin Luther King, Jr. said in 1964 is therefore equally true today: "the announcement of the high court has been met with declarations of defiance. Once recovered from their initial outrage, these defenders of the status quo had seized the offensive to impose their own schedule of change" Martin Luther King, Jr., Why We Can't Wait 5-6 (1964). Indeed, the defiance of today's defenders of racial classifications is, in some ways, even more pernicious, because their reliance on "diversity" as a governmental interest is one that "effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'elimat[ing] entirely from government decisionmaking such irrelevant factors as a human being's race' … will never be achieved." *Croson*, 488 U.S., at 495 (plurality opinion of O'Connor, J.) (quoting *Wygant*, 476 U.S., at 320 (Stevens, J., dissenting)). Only by insisting, as the post-*Brown* Court did, that racial discrimination is no longer tolerable, can this Court end racial classifications in the law once and for all.

C. The Time To End Racial Categorizations in The Law Is Now.

Barbara Grutter asks only for a fair chance at a legal education. Now, as this Court faces increasing recalcitrance against eliminating legal classifications in the law, it must ***24** speak with the same language it used in the post-*Brown II* cases. "The vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, 349 U.S. at 300.

It is also time to realize that the principles of the Declaration, codified at long last in the Constitution via the Fourteenth Amendment, will not countenance racial discrimination that purports to remedy past wrongs against individuals of one race by conferring benefits upon others who happen to share the same skin color, at the expense of those who do not. As Dr. King also noted that August day on the steps of the Lincoln Memorial, "In the process of gaining our rightful place [as beneficiaries of the Declaration's promise of equality,] we must not be guilty of wrongful deeds." *I Have A Dream, in* Washington, *supra* at 218. In short, "there has been entirely too much deliberation and not enough speed in enforcing the constitutional rights" of the Petitioners in these cases. *Green*, 391 U.S. at 229. It is now for this Court to say, as it said in *Green*, this recalcitrance is unacceptable and that legal categorization by race must end "*now." Id.* at 439.

*25 CONCLUSION

In the marble above the grand entrance to this Court are chiseled the words, "Equal Justice Under Law." The Court should reaffirm this principle by holding that legally dividing Americans by race is unconstitutional under any circumstances. It should embrace the doctrine of complete racial equality, and stand "for what is best in the American dream and for the most sacred values in our Judeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence." Martin Luther King, *Letter from Birmingham Jail, reprinted in* Why We Can't Wait *supra* at 99.

The decisions of the lower courts to the contrary should be reversed.

Footnotes

1 The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties, previously filed. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

2 *See* Brief in Conditional Opposition, *Gratz v. Bollinger,* No. 02-516 ("*Gratz* BIO"), at 8-9 (acknowledging that the "pool of *qualified* under-represented minority applicants" is "insufficient to enroll a student body with meaningful numbers of unrepresented minorities" "[w]ithout considering race and ethnicity in admissions") (emphasis added); *Grutter* BIO at 21 n.17 (noting that other efforts to increase diversity, such as California's ten-percent plan, "may also force the enrollment of students who are *unprepared* for the academic demands of selective institutions") (emphasis added).

3 "Historically Black Colleges and Universities," available at http:// edonline.com/cq/hbcu/; "Marshall, Thurgood," available at http:// encarta.msn.com/encnet/refpages/refarticle.aspx?refid=761556389.

4 *See* "The Morehouse Legacy: Prominent Alumni," at http:// www.morehouse.edu/morehouselegacy/alumni.html.

5 *See* "Brief History of Morehouse College," at http:// www.morehouse.edu/morehouselegacy/index.html; *see also Missouri v. Jenkins,* 515 U.S., at 122 (Thomas, J., concurring) (noting that historically black colleges "provide examples of independent black leadership, success, and achievement").

6 The distinction can probably be traced to President Lyndon Johnson's speech at Howard University on June 4, 1965: "It is not enough just to open the gates of opportunity …. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." Lyndon B. Johnson, *Commencement Address at Howard University: To Fulfill These Rights, in* 2 Public Papers of the Presidents 1965, at 635, 636 (1966).

7 Unfortunately, the results of such "benign" discrimination have often been just as bad for their alleged beneficiaries as were the ills which gave rise to such programs. *See, e.g.*, T. Sowell, The Economics and Politics of Race 200 (1983) (illustrating "counterproductive trends" caused by "beneficial" discrimination.)