YOU'VE GOT TO HAVE FRIENDS: LESSONS LEARNED FROM THE ROLE OF AMICI IN THE UNIVERSITY OF MICHIGAN CASES

I. THE ROLE OF AMICI

When the Supreme Court decided the University of Michigan admissions lawsuits in 2003, *Grutter v. Bollinger* and *Gratz v. Bollinger* (collectively “Michigan cases”), it had before it a record number of amicus briefs from an unprecedented array of organizations and institutions in society. Noting that some of these briefs were cited by the Court in oral argument and throughout the various written opinions in these cases, commentators have asked whether and to what extent these briefs made a difference in the outcome of the cases. Judges and legal scholars have long debated the role and importance of amicus briefs in litigation, and these cases--when compared in historical context with predecessor cases on similar issues as well as other recent high-profile cases--provide an important window into that debate and its evolution over time. This debate, in turn, reflects a larger political and constitutional issue regarding the role of the judicial branch and its relationship to other sources of authority and influence in our society.

Some judges and commentators have downplayed the significance of amicus briefs and criticized their use (or overuse). Judge Richard Posner, for example, has argued that amicus briefs are generally repetitious and that courts should not routinely grant permission for such filings. In a recent opinion, Judge Posner declared that amicus briefs increase litigation costs, evade page limitations, and promote “interest group” politics in the judicial process. Professors Rustad and Koenig, in reviewing the use of social science amici in the Supreme Court's punitive damages cases, contend that lobbying has been smuggled into the courts disguised as social science. The number of amici has increased dramatically in the past half century, and they have become more actively involved in advocacy for particular positions and policy approaches. In some instances, the purposes the amici serve have also expanded to include presenting evidence and arguments, as well as supporting the grant or denial of certiorari by the Supreme Court.

Other commentators applaud the trend toward increased amicus activity, however, as a method of improving judicial decision-making. Supreme Court advocate Roy Engert argues that amicus briefs may play a significant role in court decisions because amicus briefs offer unique perspectives. In opposition to Judge Posner's view, Engert asserts that permission to file amicus briefs should be denied only if it is clearly shown that they are extraneous. Amici may be particularly helpful to the courts if they provide specialized medical, technical, or scientific data or evidence otherwise not presented by the parties. Since the seminal *Brown v. Board of Education* decision, social science has expanded...
its reach in Supreme Court filings and frequently social scientists have submitted amicus briefs. Moreover, the identity of the amici or the category of case may matter. For instance, Solicitor General filings and/or a brief filed by a large group of states may significantly influence the Supreme Court because of the amici's perceived expertise or interest.

In their longitudinal study of amicus filings before the Supreme Court during the period 1946-95, Professors Kearney and Merrill conclude that amicus briefs may play a role in the Supreme Court's decisions, particularly if amicus briefs come from experienced attorneys and institutional litigants who best respond to the Court's preferences for information--what Kearney and Merrill refer to as the “traditional legal model” of judicial decision-making. Based on their research and the outcomes of the cases they studied, Kearney and Merrill argue that other models of judicial decision-making--i.e., the “attitudinal model” (contending that amicus filings matter little, since judges bring their own prejudices to cases) and the “interest group model” (arguing that amicus filings by organized groups influence judges particularly if the briefs tend to support one side) are less explanatory in terms of how the Supreme Court has resolved cases over time. Other commentators have found that amici for disadvantaged one-time litigants *506 can level the playing field with repeat players, the so-called “haves.”

Recent Supreme Court decisions suggest that amicus briefs may affect the outcome of highly charged cases as measured by reasoning and citations in the Court's decision. In recent abortion decisions, for example, amicus briefs figured prominently in the Court's decision and also contributed to the public debate. More recently, amicus briefs in Lawrence v. Texas and the Michigan cases appear to have significantly influenced the Court's rulings. In Lawrence, an historical amicus brief undermined the Court's assumption in Bowers v. Hardwick of a long tradition of anti-sodomy laws in the United States. In the Michigan cases, the amicus briefs overwhelmingly supported the continued importance and vitality of the plurality holding in Bakke in 1978.

Drawing on the unusual amicus record in the Michigan cases recently decided by the Supreme Court, we argue that amicus briefs can contribute significantly to the courts' understanding and decision-making. In particular, we will argue that the following factors should be weighed in considering whether amicus briefs will assist the advocates or the court: (1) whether amici can best supply interdisciplinary (or specialized) research and information that might validate or contradict important claims being advanced; and (2) whether amici can best describe the societal importance and implications of any decision.

Amici also may demonstrate the development of policy positions by interest *507 groups, experts, or institutions. A comparison of the amicus briefs filed in the Bakke case decided in 1978 and the Michigan cases decided in 2003 shows that major institutions and interest groups changed or adapted over time in response to Supreme Court precedent. As reported in the New York Times, most of the major institutions of American life resoundingly took a position in favor of the University of Michigan at the Supreme Court stage. Amicus briefs thus may allow courts to understand how legal precedent has or has not served society and its institutions. Amici then may argue from experience for the continued vitality of precedent, or may demonstrate the need to overturn a previous ruling.

The voices of amici and their reactions to courts' precedents may be especially important in dealing with controversial social issues such as race and equality of opportunity in education--the issues at the heart of Bakke and the Michigan cases--in which perspectives of institutions and individuals have evolved throughout the nation's history. A generation apart (with the Bakke case coming, in turn, a generation after the Supreme Court's landmark 1954 decision on race and equality of opportunity in education in Brown v. Board of Education), the Supreme Court's decisions in the Bakke and
Michigan cases revealed that the Court acted with an acute sense of the societal significance of these decisions beyond the immediate litigants, and that the amici played a central role in helping the Court to assess the long-term ramifications of its decisions. 27

II. THE ROLE OF THE EDUCATION AMICI

In Bakke and the Michigan cases, the Supreme Court's decisions made clear that educational institutions and organizations played a major role in providing context for the justices. 28 The education amici in each of these cases included, among others, public and private colleges and universities, higher education associations and organizations, and (particularly in the Michigan cases) organizations and groups representing faculty and student voices. 29 These amici were able to provide specialized research and information regarding how race and integration affect the environment in higher education, and the relationship of these issues to the core educational mission of the institutions themselves. The education amici were also able to describe the implications of the Court's potential decisions for higher education in concrete terms. 30 As the Court said in its *508 decision in Grutter, “context matters” when employing the strict scrutiny standard that applies to any consideration of race in decision-making by public institutions. 31

Even though these institutions vary widely in terms of their missions, history, selectivity, size, diversity, etc., the institutions spoke with remarkable unity in both Bakke and the Michigan cases. This unity may have provided additional credibility to their arguments, especially in light of the courts' historic deference to academic freedom and educational judgments-- particularly in the context of higher education. 32 The amici in both Bakke and the Michigan cases called the Court's attention to this tradition of judicial deference to educational judgments. 33

Justice Powell discussed the Court's tradition of deference to educational (as contrasted with legal) judgments in Bakke, 34 and Justice O'Connor reiterated this analysis approvingly in Grutter. 35 Justice Powell noted that “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.” 36 Justice O'Connor reiterated that “Justice Powell grounded his analysis in the academic freedom that ‘long has been viewed as a special concern of the First Amendment.’” 37 and went on to underscore the continuing vitality of this notion of academic freedom a generation after Bakke: “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” 38

In these cases, the defendant universities argued that decisions relating to the criteria considered in putting together a student body reflect their educational mission, and are guided by the goal of creating the best possible learning environment for all students. 39 Within this context, the whole of a student body is greater than the sum of its individual parts-- because the individual parts (i.e., the students) are each expected to contribute to the learning environment and to learn *509 from each other, as well as from the faculty. Amici in both Bakke and the Michigan cases reinforced this argument for the educational benefits of a diverse student body. 40

Underscoring the importance of these educational judgments and the generally united front presented by educational institutions and organizations, Justice Thomas in dissent in Grutter tried to draw attention to a lack of unanimity among education amici on particular points (e.g., on the appropriate use of standardized test scores in the admissions process) as a way to attack the broad notion of deference to these institutions. 41 In the end, however, such criticism may simply have reinforced the notion for the majority of the Court that the selection criteria used by educational institutions will
vary based on institutional history, mission, needs, etc. --and that these essentially non-legal decisions are best left to the professional judgment of experts in the field.

In the Michigan cases, the Court took note of the fact that the University of Michigan--along with other colleges and universities around the country--had modeled their own admissions policies after the framework set forth by Justice Powell in *Bakke* in 1978, relying in good faith upon their best understanding of the Court's guidance. Indeed, in its own guidance to colleges and universities through several successive administrations (Republican and Democratic alike), the federal government had also embraced the *Bakke* framework and diversity rationale in the contexts of admissions and financial aid. Thus, in spite of longstanding arguments about the nature and degree of controlling authority in Justice Powell's opinion in *Bakke*, the Court was nevertheless faced with the fact that Justice Powell's opinion had been enormously influential in shaping the expectations and fabric of admissions and other decisions at colleges and universities across the country. This reliance involved institutional, rather than individual, decisions, of course, but these institutional decisions were in turn driven by educational judgments as to what would benefit the individual students within these college and university settings.

Another challenge faced by the University of Michigan in terms of this reliance argument was the view that so-called affirmative action (such as the consideration of race as one of many factors in admissions) was intended to be nothing more than a temporary tool to address problems of inequality of access in higher education. Indeed, university amici a generation earlier in the *Bakke* case had suggested that the consideration of race in admissions would be necessary on a temporary basis only. At the time, not long after the passage of the Civil Rights Act of 1964, many of these institutions had premised the need for the consideration of race, at least in part, on a remedial rationale--i.e., they argued that the consideration of race in the admissions process was necessary to overcome segregation and discrimination in society. This argument, at least insofar as it pertained to general societal discrimination rather than specific institutional discrimination, was of course rejected in the Court's decision in *Bakke*.

Relying in part on continuing federal guidance from the executive branch, as well as the courts, colleges and universities had not focused on demonstrating the continuing necessity of considering race in admissions--until they were jolted out of complacency by the Fifth Circuit's decision in the *Hopwood* case in 1996. In that case, a few years prior to the University of Michigan decisions, the higher education community learned a valuable lesson--not to take Justice Powell's *Bakke* framework for granted--after the Fifth Circuit held that this diversity rationale was no longer good law. Although the Supreme Court declined to review that decision, the decision sent a shockwave throughout higher education and inspired experts to develop an evidentiary basis to support the continuing vitality and necessity of the *Bakke* framework.

Thus, largely in response to the *Hopwood* case and the threat its reasoning posed to institutions nationwide, experts throughout the higher education community built an evidentiary record of interdisciplinary social science research to support the assumptions made by Justice Powell in *Bakke*. Education amici in *Bakke* had urged the Supreme Court not to rule against the University of California based in part on the lack of evidence in the record demonstrating that the University of California had workable alternatives to achieve its educational goals. Much of the argument at the time was grounded in experience and anecdote. The amici did not, however, have a strong body of positive research or evidence to bolster the claim that student body diversity produced educational benefits for the entire student body.
Recognizing the need for this sort of positive evidence a generation later, social scientists approached the question from a variety of vantage points—e.g., looking at the benefits of diversity from the perspectives of students, faculty, and alumni. In addition to institution-specific evidence developed by the University of Michigan, national organizations studied and reported on the educational benefits of a diverse student body from a variety of perspectives. As Justice O'Connor noted:

The Law School's claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”

Building upon an extensive record developed by the University of Michigan and amici in the lower courts, the education amici presented a substantial and growing body of social science evidence on the educational benefits of a diverse student body both inside and outside the classroom. Whereas Justice Powell had relied primarily on the Harvard College admissions model and a pragmatic sense of how diversity provides educational benefits, the Michigan cases provided the Court with substantial interdisciplinary research to back up these claims. Higher education associations focused on educational research (such as the American Educational Research Association (“AERA”)) summarized a “large and growing body of research demonstrating that diversity can promote positive learning outcomes, democratic values and civic engagement, and preparation for a diverse society and workforce—goals that fall squarely within the University’s basic mission.” This research included studies and expert testimony from various sources of data showing that “[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.” This data and analysis directly supported the University's educational rationale for considering race as one of many factors in the admissions process.

Fairly late in the litigation process, as the impact of this research was increasingly recognized nationally by commentators and legal experts as a key element of the Michigan cases, the University's opponents and their supporters attempted to criticize and downplay the research methodology and significance. They could offer virtually no contrary evidence to the Court, however, and in the end their attempts to discredit the research of educational experts did not seem to make an impact on the majority of the Court. Although the Court may have had increased skepticism of the continuing need for the consideration of race in admissions a generation after Bakke, the Court had in front of it much more information about the educational impact than was presented when Bakke was decided.

The education amici also broadened the discussion in the Michigan cases by focusing on the larger implications of the Court's decisions beyond admissions practices at highly selective colleges and universities (a small subset of American higher education as a whole, after all). For example, the education amici discussed the potential impact of the Court's decisions on race-conscious programs in financial aid, outreach, recruiting, and retention— as well as admissions. Race-conscious efforts in these other areas are in fact much more common than the consideration of race as a factor in admissions; thus, many more institutions would be affected by the decisions than the most elite and highly selective schools.
YOU’VE GOT TO HAVE FRIENDS: LESSONS LEARNED FROM..., 30 J.C. & U.L. 503

The education amici also reinforced the point that the impact of the decisions in these cases involving law school and undergraduate admissions would have an impact on lots of other programs, undergraduate and graduate alike. Bakke, in turn, had dealt with these issues in the medical school context, and the Bakke amici included other universities with other types of undergraduate and graduate programs. 72

In both the Bakke and Michigan cases, the education amici drew the Court's attention to the impact colleges and universities have on the rest of society--an impact underscored by amici from beyond higher education (as discussed in Part III infra). 73 In Grutter, the Supreme Court acknowledged the role played by top law schools, such as the University of Michigan, in producing leaders for the bench and bar, as well as government at all levels. 74 Instead of the isolated ivory tower, the picture that emerged from the amici coalition was of the vital role of colleges and universities as the gateway to opportunity in many institutions and facets of life in our society.

Furthermore, although the Universities of California and Michigan are public institutions and were sued under the Equal Protection Clause of the Constitution, the plaintiffs in each of these cases also included claims under Title VI of the Civil *514 Rights Act of 1964. 75 Title VI applies to private as well as public institutions that receive federal financial assistance 76 (i.e., the vast majority of colleges and universities in the country)--thus private institutions had as much of a stake in the outcome of these cases as public colleges and universities. 77

In Bakke, these private institutions provided the model (from Harvard College) embraced by Justice Powell for race-conscious admissions. 78 In the Michigan cases, many of these amici noted that private institutions employed admissions models similar to the holistic, individualized approach of the University of Michigan Law School that was ultimately ratified by the Supreme Court. 79 In addition, the involvement of leading private institutions such as Harvard, Stanford, and MIT (that draw from a national and even worldwide pool of applicants) greatly weakened the force of the most significant amicus brief on the other side--i.e., the brief filed by the U.S. government. 80 The Bush administration chose to focus its brief on race-neutral alternatives to the consideration of race in admissions to achieve diversity, emphasizing the percentage plans used in Texas, California, and Florida. 81 These plans were largely irrelevant, however, to private institutions or other schools (especially at the graduate level) that draw applicants from all over the country and the world. 82 The research-oriented education amici also demonstrated that a percentage plan was particularly ill-suited to the University of Michigan, due (among other factors) to its selectivity, large number of out-of-state applicants, and relationship to other campuses within the state system of higher education. 83

In terms of the societal impact and implications of the decisions in the Michigan cases, the education amici were also able to build upon Bakke and other academic freedom/institutional autonomy cases to argue that judicial second-guessing of educational judgments in one realm (namely admissions criteria) could lead to an erosion of respect and deference to academic decision-making in other areas in which courts have been largely reluctant to intervene (such as grading or tenure cases). 85 The plaintiffs in the Michigan cases had frequently attempted to cast *515 doubt on the intentions and integrity of higher education decision-makers. 86 The Supreme Court responded, however, by finding that “good faith” on the part of a university is ‘presumed’ absent a showing to the contrary.” 87

The Court's deference to the good-faith educational judgments of colleges and universities, and to the evidence brought forth by experts in the field of higher education, may also have been bolstered by the widespread perception that American higher education is one of the great success stories of American society. The American system of higher
education—in stark contrast to the country's elementary and secondary schools—is widely considered to be the best in the world. The Court was not facing a situation, therefore, in which the system as a whole appeared to be broken and in need of legal repair.

This perception of a well-functioning sector of society was reinforced by the success of the particular schools in question. For example, the Court noted at the outset of the Grutter decision that the University of Michigan Law School is “one of the Nation's top law schools.” The plaintiffs, the U.S. government, and many of the Justices themselves had readily conceded that the goal of a diverse student body was legitimate and worthy. With this important concession at the outset from all sides, to rule against the University of Michigan the Court would have had to assume bad faith, laziness, or ineptitude on the part of virtually all leading colleges and universities with regard to identifying and employing the best means to achieve this important end. With no major institution of higher education on the other side claiming that it had completely solved the diversity dilemma satisfactorily without resort to some consideration of race, the Court would have had no real alternative model to offer to much of higher education had it struck down both the Law School and undergraduate admissions policies at the University of Michigan.

III. AMICI AS EXTERNAL AND INDEPENDENT VALIDATORS

As discussed above, Justice O'Connor's opinion for the Court in Grutter relied extensively on amicus briefs to support the notion that student body diversity constituted a “compelling interest.” The Court did not rest this judgment on the arguments set forth by colleges and universities alone, however. In fact, the coalition of amici supporting the University of Michigan's position included a broad spectrum of institutions and organizations outside higher education. Taken together, these amici represented a continuum of experience (from elementary and secondary school education through leadership in the business world) that vividly portrayed the impact the Court's decision would have beyond higher education. In its decision, the Court expressly recognized the link between education and civic leadership throughout society's institutions (e.g., law, government, business, the military, etc.). The “external” amici in Grutter and Gratz showed the Court that leadership institutions in America beyond higher education had embraced the framework outlined in Bakke twenty-five years earlier and overwhelmingly, if not unanimously, accepted it as a valuable and necessary tool to achieve diversity.

A. Corporate (and Labor) Community

Over eighty major corporations joined one of several amicus briefs supporting the importance of training students in diverse environments, linking it to increased productivity and global competitiveness, and reduced discrimination and stereotyping in the workplace. The General Motors (“GM”) brief, the most extensive of the corporate briefs, argued that “the Nation's interest in safeguarding the freedom of academic institutions to select racially and ethnically diverse student bodies is indeed compelling: the future of American business and, in some measure, of the American economy depends upon it.” A consortium of over sixty-five leading American businesses opined that student body diversity helped train more effective community and corporate leaders. IBM and DuPont joined the Massachusetts Institute of Technology (“MIT”), Stanford, and others in making the case for promoting diversity in fields where minorities are traditionally underrepresented—namely science and engineering.

By contrast, corporate amici in Bakke opposed vociferously the University of California-Davis (“UC Davis”) affirmative action program. The Chamber of Commerce (“Chamber”) (which did not file an amicus brief in the Michigan cases) argued in Bakke that only remedial reasons could justify any consideration of race and ethnicity in admissions. The
American Subcontractors Association similarly argued in *Bakke* that “preferential programs” must be tailored to address prior discrimination. 95 In its 1977 *Bakke* amicus brief, the Chamber focused on the spillover of “quotas” and “goals” to the workplace but also took a strong stance against any consideration of race unlessremedying specific discrimination. 96

The Michigan cases considered college and university admissions only, not employment. Perhaps more significantly the so-called Harvard College system cited favorably by Justice Powell in *Bakke* had come to be the norm for most selective colleges and universities in the intervening years between *Bakke* and the Michigan cases. In any event, the corporate community rallied to the defense of universities' ability to create diverse student bodies in the Michigan cases, in sharp contrast to the corporate community's disdain in *Bakke*. The transformation in the corporate community's stance from *Bakke* to the Michigan cases demonstrated that the worst fears of some of these amici from the time of *Bakke* had not been realized, and that instead the corporate community had gradually received and recognized benefits from the framework set forth by Justice Powell in *Bakke*. Additionally, for many leaders in corporate America, diversity itself had become an overriding objective, giving rise to advertising and dedicated staff resources. 97

Similarly, organized labor evinced ambivalent views about affirmative action in *Bakke*, but by 2003, amicus briefs representing labor overwhelmingly supported the notion of diversity as a compelling interest. In *Bakke*, the AFL-CIO filed no brief. The American Federation of Teachers filed an amicus brief opposing quotas and any consideration of race. 98 Yet another brief supporting *Bakke* was filed by a consortium including a local New York City union and the Jewish Labor Committee, contending that the Constitution and the Civil Rights of Act of 1964 forbade any consideration of race. 99 The national Fraternal Order of Police and other law enforcement officer groups also supported Bakke in his challenge, focusing more specifically on the UC Davis special admissions program. 100

Doubtless, the ambivalence of labor groups in 1977 can be traced to concerns that such affirmative action programs might be applied in the employment context. 101 By 2003, legal standards for affirmative action in employment and in higher education were more clearly delineated and some fears, at least of the leadership of organized labor, had abated. Additionally, one might assume the changing composition of the workforce—and of its leadership—had affected organized labor's views on affirmative action. Thus, the amicus briefs representing organized labor asserted their support for affirmative action programs such as those that existed at the University of Michigan. 102

In its amicus brief in the Michigan cases, the AFL-CIO declared that the state had a compelling interest in eradicating employment discrimination, which was best served by promoting student body diversity. 103 The AFL-CIO linked diverse higher education and training to reducing stereotypes and discrimination in the workplace. 104 The National Education Association, representing K-12 teachers, praised diverse classrooms, both in higher education and primary education, for preparing students to function better in a multicultural society. 105 No organized labor or similar group filed in support of petitioners.

Thus, for both the corporate community and the organized labor community, the official attitudes differed significantly in *Bakke* and the Michigan cases. Whereas in *Bakke*, both communities leaned toward opposition to affirmative action programs like the UC Davis special admissions program, in the Michigan cases, both communities expressed overwhelmingly positive views of the diversity justification and, in general, of programs like those at the University of Michigan. The admissions systems differed, and so presumably had the fears that “quotas” would be enshrined. Moreover, both communities embraced the value of diversity, eradicating discrimination and promoting multicultural workplaces and workforces. Perhaps, too, the fear that affirmative action might adversely affect employment opportunities had lessened. 106
The corporate amici clearly had an impact on the Court in the Michigan cases. Justice O'Connor's opinion in Grutter found, “[t]hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” She cited the corporate consortium and GM briefs to support this conclusion. Media accounts repeatedly focused on the corporate amicus briefs, as well as that of the ex-military officers. Thus, the Court and public debate were influenced significantly by the corporate voices.

B. United States and State Governments

At the Supreme Court stage in the Michigan cases, the Solicitor General's brief *carefully avoided* taking a position on whether diversity was a compelling interest, *although* stating that diversity represented “a laudable goal.” The Solicitor General's brief argued vigorously that the two University of Michigan admissions systems at issue were not narrowly tailored, since they amounted to essentially quota systems. Moreover, the United States argued that race-neutral alternatives were available, relying heavily on the percentage plans propagated by Texas, California, and Florida. The U.S. position changed during the course of this litigation, since at the District Court in both cases, the Department of Justice under the Clinton administration filed amici urging that Justice Powell's opinion in Bakke should be affirmed for reasons including the reliance by universities and other institutions on that framework, and the social science evidence confirming the benefits of a diverse student body. Although the Department of Justice under the Bush administration did not file at the Sixth Circuit or at the certiorari stage, President Bush himself held a press conference announcing the Administration's position that the two admissions systems were unconstitutional. At oral argument, the Solicitor General asserted an even stronger position, contending that the United States did not support Justice Powell's opinion as the correct approach.

Thus, the U.S. position changed during the course of the Michigan cases, reflecting at least in part the changed political leadership of the Justice Department. By contrast, the U.S. brief filed by the Carter Administration in the Bakke case, under Attorney General Griffin Bell and Solicitor General Wade McCree, took a strong stance that university admissions might consider race to remedy the effects of societal discrimination. In 1977, the legal standard for “benign discrimination” had not yet been clarified as “strict scrutiny;” the United States urged the examination of race-conscious programs to ensure that the purpose was in fact benign and matched an “important” governmental objective. The Solicitor General's brief in Bakke rejected the notion that socioeconomic status could be substituted for race, and urged the reversal of the Supreme Court of California's injunction against any use of race in admissions.

Only California participated in the Bakke briefing, joined by no other states. The Michigan cases attracted significant state amicus participation. At the certiorari stage in the Law School case, the attorneys general of ten states and the Northern Mariana Islands urged that the Court accept the case to resolve the apparent circuit split between the Sixth Circuit and the Ninth Circuit on the one hand, and the Fifth and Eleventh Circuits on the other. At the merits stage, the State of Florida alone urged that diversity not be considered a compelling interest, contending that the “race-neutral alternative” embodied by that state's percentage plan satisfied the need for student body diversity. By contrast, twenty-two state attorneys general and the Virgin Islands as well as the Governor of Michigan were represented in amicus briefs urging affirmance of diversity as a compelling interest. In a brief submitted by twenty-one states led by Maryland and New York, the states contended that diversity enhanced public universities and that Michigan's admissions programs should be upheld because individualized consideration of race satisfied narrow
tailoring standards. Echoing the theme of other public and private institutions of higher education, the states invoked the importance of public universities and First Amendment principles to contend that the Court should defer to the educational judgment of these institutions as to how best to fulfill their missions.

C. Jewish and Asian-American Groups

Affirmative action critics frequently assert that Jewish and Asian-American applicants suffer negative consequences because of affirmative action. Although the UC Davis special admissions program at issue in Bakke included Asian-Americans, the two Michigan admissions programs gave consideration, as one factor, only to those minority groups underrepresented in the student body--namely African-Americans, Latinos, and Native Americans.

In 1977, organized Jewish groups overwhelmingly supported Bakke, no doubt influenced by aversion to anti-Jewish quotas. An amicus brief authored by Alan Dershowitz, representing various ethnic and cultural groups including the American Jewish Congress and the American Jewish Committee (as well as such groups as the Italian-American Foundation), condemned the UC Davis special program and quotas. The brief rejected the notion of compensating for societal discrimination and flatly declared that any legitimate objective could be achieved with race-neutral means. Similarly, the Anti-Defamation League of B'nai B'rith (“ADL”), a New York City union, and other Jewish groups condemned the UC Davis admissions program as violating both the Constitution and federal civil rights laws. The amicus briefs discussed neither the so-called diversity rationale, nor a Harvard College-type admissions program.

By 2003, such multi-factor systems had become the norm, colleges and universities publicly and clearly denounced quotas, and Jewish groups took a markedly different position in the Supreme Court. An amicus brief on behalf of many Jewish groups, including the American Jewish Committee and the Union of American Hebrew Congregations (the central body of the Jewish Reform movement), expressly supported the Michigan admissions programs as narrowly tailored and distinguishable from quotas. Goals in university admissions, on the other hand, are appropriate and similar to “aspirational business plans,” argued the Jewish Committee brief. Moreover, the brief accepted the proposition that student body diversity in a public university qualified as a compelling government interest. The ADL took a position in support of neither party, but argued that Michigan's admissions programs were not narrowly tailored and should be struck down. The ADL asked the Court not to reach the central legal question of whether diversity was a compelling interest.

Thus, the organized Jewish community, as represented in the amicus briefs, had moved from opposition to, at the least, a mixed view of the value of diversity and affirmative action programs. This change presumably reflects the development of multi-faceted admissions programs and with it, less concern that any consideration of race or ethnicity reflected quota systems.

Asian-Americans have also been highlighted as bearing the “burden” of affirmative action programs in higher education. In 1977, Asian-American groups supported the UC Davis special admissions program, however, they were eligible for those sixteen slots, as well as for those in the regular admissions pool. The Asian-American Bar Association of the Greater Bay Area filed an amicus brief in support of UC Davis, arguing that historic discrimination against Asians justified special admissions programs even under a strict scrutiny standard. A brief joined by many union and progressive groups, including the National Council of Churches of Christ, the Urban League, and the Japanese-
American Citizens League, claimed that special admissions programs were the only realistic way of including minorities in the UC Davis Medical School. 136

By 2003, most affirmative action programs in higher education did not include Asian-Americans as underrepresented minorities. The University of Michigan, while considering such factors as immigrant status and educational or socioeconomic disadvantage, did not consider Asian-Americans underrepresented in the pool. Nevertheless, the vast majority of Asian-American organized groups advocated the affirmance of Michigan's admissions programs. Twenty groups, including the National Asian Pacific American Legal Consortium, the Asian Law Caucus, the Japanese American Citizens League, and the National Council of Asian American Business Associations, contended that diversity benefited all students and that flexible admission practices eradicated harm to Asian-Americans. 137 Additionally, the brief drew on the California experience post-Proposition 209 to argue that elimination of affirmative action would not significantly benefit Asian-Americans. 138 The Asian American Legal Foundation countered this view, contending that any use of race should be outlawed and that a pro-affirmative action ruling would harm Chinese schoolchildren in San Francisco by reopening the door to racial and minority admissions quotas in the public schools. 139

D. The U.S. Military

Although the military's affirmative action promotion policies had triggered (one or two) employment discrimination cases in federal district courts prior to the Michigan cases, 140 there had been little public discussion and no litigation related to the military academies or ROTC admission policies prior to the amicus filing in the Michigan cases. The United State's brief in Bakke did not mention the military as affected by any ruling. The Justice Department's affirmative action review post-Adarand found that the military had made “special race-conscious (though not racially exclusive) efforts to recruit officer candidates.” 141 Services had set specific goals for minority representation, and a “second look” practice gave underrepresented groups extra consideration. 142

The amicus brief, and considerable press attention just before and after its submission to the Court, emphasized the importance of racial and ethnic diversity, particularly in ensuring troop cohesion. 143 Moreover, for the first time, military leaders expressly revealed that the services did in fact consider race and ethnicity in selecting officer candidates. 144 The military amicus brief surfaced repeatedly at oral argument, dominating questions put to the petitioners' counsel and the Solicitor General in the Grutter argument. 145 While the Solicitor General conceded that the service academies (other than the Coast Guard) did consider race in admissions, he stated that the United States believed race-neutral means should be employed by the academies. 146 When pressed by Justice Souter, Solicitor General Olson answered that widespread recruiting should achieve the objective of being accessible. 147

*524 The military brief shifted the focus of oral argument by forcing petitioners and the United States to explain why universities could not follow policies practiced by the federal government itself. Although the military brief commanded attention during the Law School case, the military academies actually are akin to undergraduate institutions--military academies draw from a very competitive national pool of graduating high school seniors. Compared with virtually any undergraduate institution, military service academies spend more time and effort on recruiting, as do ROTC programs, which actually produce the vast majority of military officers, and have access to funding to recruit on virtually all college campuses. 148
YOU’VE GOT TO HAVE FRIENDS: LESSONS LEARNED FROM..., 30 J.C. & U.L. 503

Not only did the military amicus undermine the government's position at oral argument, it clearly influenced the outcome in the Michigan cases. Justice O'Connor's opinion for the Court explicitly cited two groups of external amici outside the educational context: the corporations and the military officers. After accepting the military amici's contention that race-conscious recruiting and admissions policies are essential to achieving diversity and fulfilling the military mission, the Court endorsed the application to "our country's other most selective institutions." This amicus brief from significant leaders of our nation's most trusted institution, particularly during a time of anxiety about national security, validated the claims being made by respondents both about the value of diversity and the necessity of employing race-conscious measures to achieve that goal.

E. Professional Organizations

In both Bakke and the Michigan cases, professional organizations (particularly *525 bar associations) filed amicus briefs generally supporting the constitutionality of affirmative action in admissions. In addition to the Asian Bar Association of the Greater Bay Area and various California bar groups, the American Bar Association ("ABA") submitted a brief supporting the UC Davis program on the ground that student body diversity improves legal education and the profession. The ABA in 1977 also invoked citizenship and civic leadership interests. The ABA amicus brief in the Michigan cases relied on similar, if updated arguments, about the necessity of ensuring racial and ethnic minorities' full participation in the legal profession. Although not cited explicitly, the link between law schools and access to civic leadership features prominently in Justice O'Connor's opinion.

Other professional organizations also filed amicus briefs in both Bakke and the Michigan cases. The National Medical Association and the National Bar Association, representing blacks in their respective professions, supported UC Davis by pointing to the "racial isolation" and underrepresentation of blacks in law and medicine. This rationale, of course, did not obtain support from Justice Powell. For the Michigan cases, numerous bar associations, including the Hispanic National Bar Association, joined in the call for diversity both as an educational goal and as a means to attain greater diversity in the legal profession. The National Academy of Sciences and the National Academy of Engineering, joining the brief of MIT, Stanford, IBM and DuPont, argued that diversity in science and engineering produced "increased creativity, productivity and success." Not only did diverse work teams improve results, but minorities' underrepresentation threatened to undercut American competitiveness because science and engineering-driven opportunities would shift to countries with available workforce. These professional organizations, when viewed alongside the corporate and labor organizations, helped reinforce the connection between higher education, trained workforces, and economic growth. These claims went virtually unchallenged in the course of the litigation.

Finally, in Bakke and the Michigan cases, other amici (such as leading civil rights organizations, states, and political leaders, among others) helped to provide a broader societal and historical context, describing the many ways in which race affects life experiences and opportunities in American society. The Court acknowledged this history and context at the outset of its opinion in the Grutter decision when it stated that "race still matters" in many facets of American life. Indeed, the Court declared that diversity within the nation's law schools (and by *526 implication, other professional and graduate programs as well) is necessary "so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."

IV. LESSONS LEARNED
YOU'VE GOT TO HAVE FRIENDS: LESSONS LEARNED FROM..., 30 J.C. & U.L. 503

The extent to which amicus briefs can and should play a significant role in litigation depends largely on the nature and complexity of the legal issues at stake. The factors mentioned at the outset of this article (i.e., (1) whether amici can best supply interdisciplinary (or specialized) research and information that can independently validate or contradict important claims being advanced by the parties; and (2) whether amici can best describe the societal importance and implications of any decision) are by no means an exhaustive list. These factors are centrally and directly related, however, to the nature and complexity of the legal issues involved.

The need for research and information from sources outside the primary litigants may arise where the legal issues are particularly complex and technical. This need can also arise, however, where the issues involved require judgments that in turn will benefit from expert research and analysis rather than reliance on mere anecdotes, speculation, or the individual circumstances of one set of parties. *Bakke* and the Michigan cases focused on core academic questions that could not be resolved by abstract legal standards alone. Does a diverse student body produce educational benefits? If so, what is the best way to achieve these educational benefits?

The Supreme Court said in *Grutter* that “context matters” when applying strict scrutiny. The social science research brought to bear in these cases (particularly in the Michigan cases), coupled with the many briefs that outlined the nation's troubled past and present with regard to race and equality of opportunity, allowed the Supreme Court to apply its strict scrutiny analysis in a nuanced, contextualized manner that went beyond mere legal abstractions. Thus, carefully designed and executed social science research from credible sources can play an important role in helping courts to look beyond abstract principles and preconceived notions in applying the law. This kind of information from credible expert sources can also give courts the freedom to limit the extent to which they micro-manage or second-guess the considered, good-faith judgment of institutions acting within their range of expertise. As Justice O'Connor remarked in reflecting on the Supreme Court's role in addressing pressing, complicated social issues such as racism and civil rights:

[T]he breadth of cases now heard by judges in the United States has reminded us that humility is a virtue still worth pursuing. Faced with a staggering variety and complexity of problems, the Justices of the Supreme Court have in recent years learned--some would say relearned--that there are limits on our judicial authority, expertise, and ability to resolve social issues couched in terms of individual rights. By and large, we are not trained economists, educators, social workers, or criminologists. Our efforts to describe broad legal principles assured by the Constitution have sometimes run aground when the Court attempted to translate those principles into detailed, workable rules that achieve the constitutional goal.

In *Bakke* and the Michigan cases, the Supreme Court clearly understood that it was dealing with emotionally and historically charged issues of great social importance. The symbolic importance of these cases, and the signals sent to all of society about equality of opportunity, were underscored by the tremendous publicity that accompanied the cases. The magnitude of the impact of the cases was further highlighted by the tremendous interest from the President and executive branch, members of Congress, states, and organizations and interest groups representing a broad spectrum of the American public. The range of interests affected, therefore, could not possibly have been adequately represented at the Supreme Court by any one college or university--or by any single applicant for admission, for that matter.

Members of the Court themselves have publicly acknowledged that the voices of amici are especially important in these types of cases. For example, in response to a question regarding the impact of public activism on the Court as part of a recent interview, Justice Ruth Bader Ginsburg recited that the Court “is not and should not be affected by the weather of the day, but it should be affected by the climate of the era.” In speaking of civil rights, she went on to say that “if
YOU'VE GOT TO HAVE FRIENDS: LESSONS LEARNED FROM..., 30 J.C. & U.L. 503

citizens do care, courts can reinforce our most cherished values and see that they are preserved and not sacrificed.” 163 In a speech to a group of Chicago lawyers, Justice John Paul Stevens referred to the Michigan cases in raising the question, “Who should decide? ... The nine of us sitting in the chambers of the Supreme Court or the accumulated wisdom of the country's leaders?” 164 Similarly, Justice Stephen Breyer noted in a speech at New York University Law School that “the real-world consequences of a particular interpretive decision, valued in terms of basic constitutional purposes, play an important role in constitutional decision-making.” 165 These sentiments underscore the Court's core principle that “context matters” when interpreting the law, and that amici can play a critical and necessary role in developing and articulating the societal implications and larger context within which the courts must decide particular cases.

The external validation provided by amici in the Michigan cases appeared to play a pivotal role in convincing the Court that the impact of its decisions would indeed resonate well beyond the parties themselves and the immediate policies and practices in question. The Court seemed most impressed by amicus briefs from groups that were not the “usual suspects” in terms of civil rights litigation—in this instance, major corporations and former military leaders. 166 These voices made clear that other institutions outside of colleges and universities had come to rely upon the admissions framework and outcomes resulting from the Court's Bakke decision, and that this framework had served their interests well. These types of surprising, less predictable voices may have special credibility in high-profile, emotionally charged cases of great social and symbolic importance. As reflected in the study by Professors Kearney and Merrill, 167 that credibility may be further strengthened when such briefs are written by experienced attorneys who are known and respected by the Court.

The role of the amici in the University of Michigan cases provides a useful model for future cases of a similar nature in other ways as well. For example, the sheer volume of amicus briefs is not the most important factor—indeed, too many briefs on similar points can be repetitive and distracting. The goal of such briefs should be for a court to read them because they will add unique perspective. Thus, where a large number of amicus briefs are likely, coordination of amici to the extent possible is crucial in ensuring that the amici provide the kind of help and information the courts want and need from them. Whenever possible, for example, entities with similar interests and arguments should be encouraged to work together to file jointly rather than separately. Amici should resist the temptation to act like parties and try to cover all of the possible points and arguments involved in a case, focusing instead on what they as organizations and entities bring that is unique in terms of expertise and experience.

Amicus briefs can also be helpful if central, unifying themes emerge from the cacophony of voices in front of the court. In this respect, amicus briefs that focus solely on external organizations' own agendas are not as helpful as briefs that highlight the broader societal impact, and that also ideally point toward pragmatic solutions to complex legal issues to provide a court with a roadmap for its own decision.

Finally, the coalition-building involved in a major amicus brief effort such as the Michigan cases should provide some lessons for how organizations and entities can work together across institutional lines outside the context of litigation. The challenges set forth by Justice O'Connor in Grutter for the next generation, for example, cannot possibly be met by the University of Michigan—or any other college or university—acting alone. Indeed, the Court recognized that the enduring legacy of segregation and discrimination resulted in a nation in which “race unfortunately still matters.” 168 Thus, the spectrum of organizations represented by the amici (including but not limited to federal, state, and local governments, K-12 schools, the business community, and military leaders) must find ways to work together across institutional lines to meet these challenges.

The ways in which amici combine to contribute unique perspectives and arguments to the Court may be translated into action in other venues once the litigation is concluded. In the long run, this sort of continuing inter-institutional
cooperation can help to address legal issues that are too large and multi-faceted to be resolved by any single entity or in any single piece of litigation. 169

Footnotes

a1 Assistant General Counsel, University of Michigan, Ann Arbor, Michigan (B.A., Swarthmore College; J.D., Harvard Law School). The authors both worked extensively on the University of Michigan’s defense in the U.S. Supreme Court in the admissions lawsuits discussed herein, and are listed as co-counsel on the University’s briefs in the Supreme Court. The authors would also like to thank Eric Wobser, law clerk in the University of Michigan’s Office of the Vice President and General Counsel, for his invaluable research and editorial assistance.

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2 539 U.S. 244, 123 S. Ct. 2411 (2003).

3 See, e.g., Nat’l Org. for Women v. Scheidler, 223 F.3d 615 (7th Cir. 2000); Ryan v. Commodities Futures Trading Comm’n, 125 F.3d 1062 (7th Cir. 1997).


7 Krislov, supra note 6, at 694-97 (stating that the role of amicus briefs has shifted from “neutral friendship to positive advocacy and partisanship”).

8 On the ability of amici to present arguments and evidence, see Michael K. Lowman, The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?, 41 AM. U. L. REV. 1243 (1992) (discussing certain district court’s endorsement of litigating amicus, as distinct from party intervenor, but with full rights of participation in judicial proceedings), but see United States v. Michigan, 940 F.2d 143 (6th Cir. 1991) (rejecting concept of litigating amicus curiae). On the ability of amici to affect the Supreme Court’s decision to hear a case, see Gregory A. Caldeira & John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 AM. POL. SCI. REV. 1109, 1122-23 (1988) (amicus briefs increased probability of cert being granted during 1982 Supreme Court term); David L. Hudson, Detainees Have Some Powerful 'Friends', 2 NO. 45 A.B.A. J. E-REP. 1, Nov. 14, 2003 (amicis helped persuade the Supreme Court to hear cases filed by detainees in Guantnamo Bay, Cuba).


10 Id. See also ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 658 (2002) (stating that Supreme Court rules and practice generally permit the filing of amicus briefs).

**347 U.S. 483 (1954).**


*See* Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298, 304-05 (1987) (when more than ten states participate as amici, success rate increased from 1974-1983; the Solicitor General enjoyed greater independence and influence than state attorneys general); Barbara L. Graham, *Explaining Supreme Court Policymaking in Civil Rights: The Influence of the Solicitor General*, 1953-2002, POLY STUD., May 1, 2003 at 13-14 (Solicitor General filings in civil rights cases have “significant effect” on outcomes, although the Solicitor General filing is more likely to influence outcomes if the Court is predisposed toward that policy).


Kearney & Merrill, *supra* note 6, at 816-19 (Kearney and Merrill note that they did not see a huge impact when there were large disparities between the number of briefs favoring one side, but they also found a few instances of significant imbalance of support). For instances in which the expert community split and opposing amicus briefs were cited in majority and dissenting views, see, e.g., Schwartz & Boland, *supra* note 13, at 138 (citing, in particular, a split between the American Psychiatric Association and the American Psychological Association). *See also* Cruzan v. Dir., *Mo. Dept of Health*, 497 U.S. 261, 264-65 (1990) (opposing amici filed on one side by American Hospital Association, American Medical Association and American College of Physicians, and on the other side by the American Academy of Medical Ethics and the Association of American Physicians and Surgeons).


The attitudinal model would posit that such citations merely are utilized because they reinforce the Court’s existing predilections. *See* Kearney & Merrill, *supra* note 6, at 779-82. Since no researcher has access to the record of the Justices’ singular and collective deliberations, we can look at citations as a measure of influence, accepting the limitations of this measure.


*See* Englert, *supra* note 9, at 50.
YOU'VE GOT TO HAVE FRIENDS: LESSONS LEARNED FROM ..., 30 J.C. & U.L. 503

478 U.S. 186 (1986) overruled by Lawrence, 539 U.S. at __, 123 S. Ct. at 2484.


See Gratz v. Bollinger, 539 U.S. 244, 123 S. Ct. 2411 (2003), Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325 (2003) (record number of amicus briefs were filed in these two cases, representing hundreds of organizations and thousands of individuals). For purposes of this article, we will focus our attention on particular types of amici that illustrate the points discussed herein.


This article will focus on selected amici in Bakke and the Michigan cases. The authors have chosen to focus on certain briefs (if not all) filed on both sides to test their conclusions as to the efficacy of amicus briefs or an amicus “strategy.”

See generally Bakke, 438 U.S. at 269-320 (Powell, J.); Grutter, 539 U.S. at __, 123 S. Ct. at 2325-47 (O'Connor, J.).

For representation of student voices, see, e.g., Brief of 13,922 Current Law Students at Accredited American Law Schools as Amici Curiae in Support of Respondents, Grutter (No. 02-241); Brief of the University of Michigan Asian Pacific American Law Students Association et al. as Amici Curiae in Support of Respondents, Grutter (No. 02-241); Brief of Howard University as Amicus Curiae in Support of Respondents, Grutter (No. 02-241).

See, e.g., Brief of the Society of American Law Teachers, Amicus Curiae, Bakke (No. 76-811); Brief of the American Association of University Professors, Amicus Curiae, Bakke (No. 76-811); Brief of Amicus Curiae Association of American Law Schools in Support of Respondents, Grutter (No. 02-241); Brief of Harvard University et al. as Amici Curiae in Support of Respondents, Grutter (No. 02-241).

See Grutter, 539 U.S. at __, 123 S. Ct. at 2338.


See Bakke, 438 U.S. at 311-15.

See Grutter, 539 U.S. at __, 123 S. Ct. at 2339.

Bakke, 438 U.S. at 312.

Grutter, 539 U.S. at __, 123 S. Ct. at 2336.

Id. at 2339.

See generally Bakke, 438 U.S. 265; Grutter, 539 U.S. 306, 123 S. Ct. 2325; Gratz, 539 U.S. 244, 123 S. Ct. 2411.

See, e.g., Brief of Columbia University, supra note 33, Bakke (No. 76-811); Brief of the American Association of University Professors, Amicus Curiae, Bakke (No. 76-811); Brief Amicus Curiae of the Law School Admission Council in Support of Petitioner, Bakke (No. 76-811); Brief of Harvard University, supra note 30, Grutter (No. 02-241) and Gratz (No. 02-516).
See Grutter, 539 U.S. at ___, 123 S. Ct. at 2359-60 (Thomas, J., dissenting).

Justice O'Connor, during the oral argument in the Michigan cases, alluded to the tough choices the University of Michigan must make while filling the limited number of available slots from the thousands of received applications, and pointed out that there were in fact many reasons why a particular student would or would not be admitted. See Transcript of Oral Arguments in Grutter v. Bollinger, available at http:// www.supremecourtus.gov/oral_arguments/argument_transcripts/02-241.pdf (last visited April 1, 2003).

This deference however, is certainly not unlimited in discrimination cases. See, e.g., Univ. of Pa. v. EEOC, 493 U.S. 182 (1990) (holding that judicial deference to institutions of higher education did not extend to protect confidential peer review materials from disclosure in a Title VII race and sex discrimination case).

See Grutter, 539 U.S. at ___, 123 S. Ct. at 2336.

See Brief for Respondents at 21-22, Grutter (No. 02-241).

See Grutter, 539 U.S. at ___, 123 S. Ct. at 2337.

See Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992) (regarding stare decisis being most important where individual reliance and judgments are at stake).


See, e.g., Brief of the Association of American Medical Colleges, Amicus Curiae, Bakke, (No. 76-811); Brief of Law School Admissions Council, supra note 40, Bakke (No. 76-811).

See Bakke, 438 U.S. at 309.

See 34 C.F.R. § 100.3(b)(6)(ii) (2003) (stating that, even in the absence of prior discrimination, an aid recipient administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of particular race, color, or national origin). See also, e.g., Fed. Reg. 58,509, 58,510 (Oct. 10, 1979) (the Department of Education implemented Bakke through binding regulations and policy guidance statements confirming the legality of admissions and financial aid policies that consider race “to attain a diverse student body” in a manner consistent with Justice Powell’s opinion in Bakke).

See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), reh’g en banc denied, 84 F.3d 720, cert. denied, 518 U.S. 1033 (1996) (holding that Justice Powell’s diversity rationale in Bakke was not governing law).

Id. at 944.

See generally J.R. Alger, Unfinished Homework for Universities: Making the Case for Affirmative Action, 54 WASH. U. URB. & CONTEMP. L. 73 (1998) (discussing the need for educational institutions to develop a solid evidentiary basis to support the diversity rationale).


See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312-14 (1978). Justice Powell noted that:

An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.
YOU'VE GOT TO HAVE FRIENDS: LESSONS LEARNED FROM..., 30 J.C. & U.L. 503

Id. at 314.

See, e.g., Brief of Columbia University, supra note 33, at 36-37, Bakke, (No. 76-811); Brief of Amici Curiae for the National Urban League et al. at 23, Bakke (No. 76-811).

See generally Brief of Columbia University, supra note 33, Bakke (No. 76-811).

See Patricia Gurin, Evidence for the Educational Benefits of Diversity in Higher Education, (2001) available at http://www.umich.edu/~ urel/admissions/research (Gurin's work was cited by the University of Michigan's Brief for Respondents at 28, Gratz (No. 02-516)).

See, e.g., Brief of the American Educational Research Association, supra note 56, Grutter (No. 02-241) and Gratz (No. 02-516) (citing to several authorities who had conducted research on the educational benefits of diversity in higher education).


See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 265 (1978) (Justice Powell's opinion citing the Harvard College model relied primarily on Brief of Columbia University, supra note 33, Bakke (No. 76-811)).

See Brief of the American Educational Research Association, supra note 56, at 6, Gratz (No. 02-516). A full discussion of the social science evidence presented in the Michigan cases is beyond the scope of this article. For a more complete discussion, see, e.g., the briefs filed by the AERA et al. in Gratz and Grutter, as well as PATRICIA GURIN, JEFFREY S. LEHMAN, & EARL LEWIS, DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN (2004).

Id. at 4.

See, e.g., Brief for Amicus Curiae National Association of Scholars in Support of Petitioners, Grutter (No. 02-241), Gratz (No. 02-516) (attacking the validity of the educational research).

See Gurin, supra note 60 (discussing the lack of contrary evidence presented by opponents of the University of Michigan's admissions policies).

See Grutter, 539 U.S. at __, 123 S. Ct. at 2346-47 (Justice O'Connor noting the expectation that consideration of race will not be necessary in twenty-five years).

See, e.g., Brief of Carnegie Mellon and 37 Fellow Private Colleges and Universities as Amicus Curiae in Support of Respondents at 10a-13a, Grutter (No. 02-241) and Gratz (No. 02-516) (Dickinson College describes the breadth of its race-conscious programs).


See, e.g., Brief of the Association of American Medical Colleges, et al., as Amici Curiae in Support of Respondents at 4, Grutter (No. 02-241) (stating that race-conscious admissions programs are only part of academic medicine's efforts to address minority under-representation in medicine).


See, e.g., Brief of Columbia University, supra note 33, at 13-14, Bakke (No. 76-811); Brief of Association of American Law Schools, supra note 30, at 2-14, Grutter (No. 02-241).
YOU’VE GOT TO HAVE FRIENDS: LESSONS LEARNED FROM..., 30 J.C. & U.L. 503

74 See Brief of Association of American Law Schools, supra note 30, at 10, Grutter (No. 02-241).
75 See generally Bakke, 438 U.S. 265; Grutter, 539 U.S. 306, 123 S. Ct. 2325; Gratz, 539 U.S. 244, 123 S.Ct. 2411.
77 See, e.g., Brief of Harvard University, supra note 30, at 2, Grutter (No. 02-241) and Gratz (No. 02-516) (stating that private universities receiving federal aid will be affected by the Court’s decision in the Michigan cases).
78 See Brief of Columbia University, supra note 33, at app. A, Bakke (No. 76-811).
79 See, e.g., Brief of Amherst College et al., Amici Curiae, Supporting Respondents at 10, Grutter (No. 02-241) and Gratz (No. 02-516).
80 Brief for the United States as Amicus Curiae Supporting Petitioner, Gratz (No. 02-516).
81 See id. at 14-15.
82 See Brief of the American Educational Research Association, supra note 56, at 27-30, Gratz (No. 02-516) (criticizing percent plan alternative).
83 See id. at 28-29.
85 See generally Brief of American Council on Education, supra note 33, Gratz (No. 02-516) (recounting the Court’s historic deference to institutions of higher education).
86 See, e.g., Petition for Writ of Certiorari, Gratz (No. 02-516).
88 See Brief of American Council on Education, supra note 33, at 4, Gratz (No. 02-516).
89 Grutter, 539 U.S. at ___, 123 S. Ct. at 2327.
90 See id. at 2340.
91 Brief of General Motors Corporation as Amicus Curiae in Support of Respondents at 2, Grutter (No. 02-241) and Gratz (No. 02-516).
92 Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 2, Grutter (No. 02-241) and Gratz (No. 02-516).
93 Brief of Amici Curiae Massachusetts Institute of Technology et al. in Support of Respondents, Grutter (No. 02-241) and Gratz (No. 02-516).
95 Brief of American Subcontractors Association, Amicus Curiae in Support of Respondent at 4, Bakke (No. 76-811).
96 Brief of the Chamber of Commerce, supra note 94, Bakke (No. 76-811).
97 The changing demographics of the United States undoubtedly influenced this attitude. Additionally, the globalization of American business has played a role. See, e.g., Tora K. Bikson & Sally Ann Law, Rand Report on Global Preparedness
and Human Resources: College and Corporate Perspectives (1994) (discussing the role diversity now plays in American corporations).

Brief of the American Federation of Teachers, Amicus Curiae, Bakke, (No. 76-811).

Brief Amici Curiae of Anti-Defamation League of B’hai B’rith et al. at 7-8, Bakke, (No. 76-811).

Brief Amici Curiae for the Fraternal Order of Police et al., Bakke (No. 76-811).

See, e.g., Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm’n, 482 F.2d 1333 (2d Cir. 1973).


See Brief of AFL-CIO, supra note 102, at 2, Grutter (No. 02-241) and Gratz (No. 02-516).

Id. at 19.

Brief of National Education Association, supra note 102, at 3, Grutter (No. 02-241) and Gratz (No. 02-516).

The Equal Employment Advisory Council (“EEAC”), a consortium of employers, filing in support of neither party in the Michigan cases, underlined the importance of diversity on business’ “bottom line.” Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Neither Party at 15, Grutter (No. 02-241) and Gratz (No. 02-516). The EEAC asked the Court not to interfere with voluntary affirmative action plans (involving mostly recruitment, outreach, and workplace climate programs). Furthermore, the EEAC urged that if affirmative action programs were deemed constitutional, that the applicability to voluntary affirmative action employment contexts be clearly spelled out. Id. at 25 (stating that the legal contours of affirmative action are unclear since United Steel Workers v. Weber, 443 U.S. 193 (1979) and Johnson v. Transp. Agency, 480 U.S. 616 (1987), the last Supreme Court holdings on topic in employment context). The Supreme Court clearly declined to step into that area, although some have suggested that the Michigan cases may provide some rough guidance.

See Grutter, 539 U.S. at ___, 123 S. Ct. at 2340.

See also Charles Lane, Stevens Gives Rare Glimpse of High Court’s ‘Conference,’ WASH. POST, Oct. 19, 2003, at A3. Justice Stevens argued that the Court should defer to the accumulated wisdom of the country’s leaders (referring to the amicus briefs filed by corporate, educational and military leaders) in deciding the University of Michigan cases. Id.

See Brief for the United States, supra note 80, at 13-14, Gratz (No. 02-516); Brief for the United States, supra note 80, at 10, Grutter (No. 02-241).

See Brief for the United States, supra note 80, at 15, Gratz (No. 02-516); Brief for the United States, supra note 80, at 11, Grutter (No. 02-241).

Brief for the United States, supra note 80, at 17, Gratz (No. 02-516).


Transcript of Oral Argument, supra note 42, at 6.
YOU'VE GOT TO HAVE FRIENDS: LESSONS LEARNED FROM..., 30 J.C. & U.L. 503


Id. at 26.

Id. at 63 (brief advocated a remand for further proceedings).

At that time, however, the strategy of coordinating multiple state amicus briefs had not emerged. See Thomas R. Morris, States Before the U.S. Supreme Court, 70 JUDICATURE 298, 300 (1987).


The other states represented were Arizona, California, Colorado, Connecticut, Illinois, Iowa, Maine, Massachusetts, Minnesota, Montana, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Vermont, Washington, West Virginia, Wisconsin, and the U.S. Virgin Islands (three states who joined the amici urging for certiorari also joined the brief urging affirmance: Oklahoma, Oregon, and West Virginia).

Brief of the States of Maryland et al. as Amici Curiae in Support of Respondents at 13-15, 19-26, Grutter (No. 02-241) and Gratz (No. 02-516).

See id. at 5-9.

See generally Grutter v. Bollinger, 288 F.3d 732, 773-814 (6th Cir. 2002) (Boggs, J., dissenting) (arguing that the University of Michigan’s admissions policy injured Asians and other minorities who were not underrepresented in the admissions process). See also Brief of the Asian American Legal Foundation as Amicus Curiae in Support of Petitioners at 2, Grutter (No. 02-241) and Gratz (No. 02-516) (stating that diversity-based admissions schemes are almost always used to exclude Asian-Americans from educational institutions). But see, e.g., WILLIAM G. BOWEN & DEREK BOK, SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1995) (stating that eliminating affirmative action would increase the chances of majority students, including white and Asian-American students, of being admitted only from approximately 24% to 25%).


Id. at 52.

Brief Amici Curiae of American Jewish Committee et al. in Support of Respondents at 13, 22, Grutter (No. 02-241) and Gratz (No. 02-516).

Id. at 12.

Id. at 15.

Brief Amicus Curiae of Anti-Defamation League in Support of Neither Party at 15, Grutter (No. 02-241) and Gratz (No. 02-516).

See id.
YOU'VE GOT TO HAVE FRIENDS: LESSONS LEARNED FROM..., 30 J.C. & U.L. 503

133 Compare NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION (1979) with Brief of Social Scientists et al. in Support of Respondents, Grutter (No. 02-241) and Gratz (No. 02-516) (illustrating a transformation of one prominent Jewish neo-conservative thinker on this issue).


137 Brief of Amici Curiae for National Asian Pacific American Legal Consortium et al. in Support of Respondents, Grutter (No. 02-241) and Gratz (No. 02-516).

138 Id. at 14.

139 Id. at 14.

139 Brief of the Asian American Legal Foundation, supra note 124, at 8-10, Grutter (No. 02-241) and Gratz (No. 02-516).


142 Id.

143 Consolidated Brief for Lt. Gen. Julius W. Becton et al. as Amici Curiae in Support of Respondents at 8, Grutter (No. 02-241) and Gratz (No. 02-516).

144 See id. at 10.

145 See id. at 10.

145 See Transcript of Oral Arguments in Grutter v. Bollinger, supra note 42.

146 See id. at 20-21.

147 Id. at 21. Solicitor General Olson stated: “We haven’t examined whether the service academies' race-conscious practices are constitutional] and we haven't presented a brief with respect to the specifics of each individual academy. And we would want to take into consideration any potential impact suggested by the Court in the Rostker case.” Id. at 8 (citing Rostker v. Goldberg, 453 U.S. 57 (1981) (holding military exclusion of women from the draft was justified by national security and deference to military judgment)).

148 The annual recruiting budget of the Department of Defense was approaching four billion annually, with $592 million spent on advertising alone, in fiscal year 2003. The total recruiting investment per recruit was approximately $13,300 during the same year. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE SENATE AND HOUSE COMMITTEES ON ARMED SERVICES, MILITARY RECRUITING: DOD NEEDS TO ESTABLISH OBJECTIVES AND MEASURES TO BETTER EVALUATE ADVERTISING'S EFFECTIVENESS (Sept. 2003), available at http://www.gao.gov/new.items/d031065.pdf. See also 32 C.F.R. § 216.4(e)(3) (2003) (withdrawing federal funding from any educational institution denying on-campus military recruitment).

149 Grutter, 539 U.S. at ___, 123 S. Ct. at 2340.

Petitioners did not respond to the military amicus in their reply brief, nor did any other amici address the military-related issues. See Petitioners' Reply Brief, Grutter (No. 02-241) and Gratz (No. 02-516). See also Dennis C. Blair & Joe R. Reeder, A Multicultural Military, WASH. POST, Mar. 22, 2003, at A17 (arguing that a racially diverse officer corps is combat imperative); but see Bruce Fleming, Not Affirmative Sir: A Well-Meaning Admissions Board's Absurd Reality, WASH. POST, Feb. 16, 2003, at B2 (arguing that the U.S. Naval Academy should no longer use racial preferences). On the impact of the military amicus, see, e.g., Charles Lane, Stevens Gives Rare Glimpse of High Court's 'Conference,' Justice Details His Thoughts on Affirmative Action Case in Michigan, WASH. POST, Oct. 19, 2003, at A03 (Justice Stevens called the military amicus brief “very powerful”).

Brief of the American Bar Association, Amicus Curiae, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) (while the ABA's Bakke brief did draw on the need to compensate for inferior secondary education and other forms of discrimination, as well as the need to provide role models, it also discussed the positive value of diversity).

See generally Grutter, 539 U.S. at ___, 123 S. Ct. at 2341.

Brief of the National Medical Association, Inc. et al. Amici Curiae at 55, Bakke (No. 76-811).

See Bakke, 438 U.S. at 309-10.

See, e.g., Brief of Amici Curiae Lawyers' Committee for Civil Rights Under Law et al. in Support of Respondents at 23-28, Gratz (No. 02-516).

See Grutter, 539 U.S. at ___, 123 S. Ct. at 2341.

Id.

Id. at 2329.


See Michael Klarman, Are Landmark Court Decisions All That Important? CHRON. OF HIGHER EDUC. Aug. 8, 2003, at B10 (referring to the Michigan cases, the author argues that “[t]he court's racial jurisprudence confirms the importance of historical context to constitutional interpretation”). See also KPIX (San Francisco), Supreme Court Justice Visits Stanford for Diversity Conference (May 10, 2003), at http://cbs5.com/news/ecn/2004/05/10/HeadlineNews/BREYER-TALKS.html [hereinafter Supreme Court Justice Visits Stanford].


Id.

See Lane, supra note 151, at A03.

Stephen Breyer, Our Democratic Constitution, The Fall 2001 James Madison Lecture, 77 N.Y.U. L. REV. 245, 249 (2001). See also Supreme Court Justice Visits Stanford, supra note 161 (noting that Justice Breyer indicated to a Stanford University audience that he “paid close attention to [amicus] briefs filed by the military, labor unions, businesses and other groups that said affirmative action was essential to their operations”).

See Lane, supra note 152 (Justice Stevens comments on the significance of the Michigan amicus brief from former military leaders in particular).

See infra Section 1.

other justices as part of the Bakke deliberations regarding the continuing impact of racial injustice on educational opportunity and equality at the time of Bakke).

169 See, e.g., Frank Wu, The Other Michigan Cases, 33 THE BLACK SCHOLAR 29, 29-31 (2003) (arguing that the University of Michigan's legal argument was aided by the legal arguments and social science data of other institutions).

30 JCU L 503