

# *Bakke, Grutter, and the Principle of Subsidiarity*

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## **Introduction**

In his 1931 encyclical, *Quadragesimo anno*, Pius XI provided the following statement of the principle of subsidiarity, which, he said, “remains fixed and unshaken in social philosophy”:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.<sup>1</sup>

In a recent article on the principle of subsidiarity, Robert K. Vischer observes that while this principle owes its origin and development to papal encyclicals and Catholic social theorists, it has become a matter of analysis, argument, and application deployed as well by non-Catholic thinkers and institutions.<sup>2</sup> In Vischer’s account, subsidiarity “is a principled tendency toward solving problems at the local level and empowering individuals, families, and voluntary associations to act more efficaciously in their own lives.”<sup>3</sup> Accordingly, “[o]nly when the lower bodies prove ineffective should the federal government [in the American context] become involved.”<sup>4</sup>

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1. Pius XI, *Quadragesimo anno*, § 79 (1931).

2. Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 *IND. L. REV.* 103, 107-108 (2001).

3. *Id.* at 116.

4. *Id.* at 103.

In European politics, the principle is embodied in the German Constitution,<sup>5</sup> and as Vischer notes, subsidiarity “is a founding principle of the European Union and has been cited as a factor in the Eastern European freedom movements of the 1980s.”<sup>6</sup> As Vischer also observes, in the United States the subsidiarity principle “underlies a wide variety of current legislative actions” and has been invoked, largely by conservatives, in a number of public policy debates, ranging over such issues as poverty programs, environmental law, and campaign finance reform.<sup>7</sup>

The status of subsidiarity in the American constitutional order and in American politics has in the recent past been subject to differing interpretations prompted by different inquiries. George A. Bermann has conducted a thoroughgoing analysis of the extent to which the subsidiarity principle as embodied in European Community law is reflected in constitutional or other legal restraints on the exercise of the power of the federal government in the United States.<sup>8</sup> Accordingly, he focuses on subsidiarity as reflected in Article 3b of the Treaty Establishing the European Economic Community: “In areas which do not fall within its exclusive province, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”<sup>9</sup>

The scope of subsidiarity in this form is the relationship of a federal government and member states – and so, not including non-political communities – with respect to matters of shared competence. The principle’s injunction is that “federal action should be taken in areas of shared competence only if the goal in question cannot be

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5. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 n.17 (1994).

6. Vischer, *supra* note 2, at 104. For the role of subsidiarity in the founding of the European Union, see Bermann, *supra* note 5, at 344-348.

7. Vischer, *supra* note 2, at 104-105. Senator Rick Santorum is among those conservatives who have employed arguments based on subsidiarity. See Rick Santorum, *A Compassionate Conservative Agenda: Addressing Poverty for the Next Millennium*, 26 J. LEGIS. 93 (2000) and RICK SANTORUM, *IT TAKES A FAMILY: CONSERVATISM AND THE COMMON GOOD* (2005) (especially Chapter VIII). Vischer argues that liberal policies are consistent with the subsidiarity principle. See Vischer, *supra* note 2, Part IV.

8. Bermann, *supra* note 5, at 403-448.

9. *Id.* at 345-346 (quoting Article 3b).

adequately achieved by action at the state level or below.”<sup>10</sup> Bermann argues that subsidiarity as thus defined is operationally and analytically distinct from United States federalism because the latter “places greater emphasis on the presence of an overall balance of power between the federal government and the states than on respect for any single rule for allocating competences among the different levels of government.”<sup>11</sup> He concludes that while there is some evidence of concern for subsidiarity expressed in some congressional legislation,<sup>12</sup> Supreme Court decisions,<sup>13</sup> and executive orders,<sup>14</sup> “the U.S. system offers few political or legal guarantees that the federal government will act only when persuaded that the states cannot or will not do so on their own.”<sup>15</sup>

Other writers have advanced a more favorable view of the role of subsidiarity in the American constitutional order. David P. Currie has argued that “subsidiarity is the guiding principle of federalism in the United States.”<sup>16</sup> Currie contends that the Virginia Plan proposed by Edmund Randolph would have made the subsidiarity principle (similar in form to that in the European Community) an explicit part of the American Constitution.<sup>17</sup> Currie acknowledges that as a result of the replacement of Randolph’s principle with a list of enumerated powers that, after some modification, became Section 8 of Article I,

10. *Id.* at 452.

11. *Id.* at 450.

12. *Id.* at 414-416.

13. *Id.* at 418-421. Of interest, given this paper’s attention to Justice O’Connor’s opinion in *Grutter v. Bollinger*, is Bermann’s statement that “Justice O’Connor has been a strong advocate of greater political autonomy for the states.” *Id.* at 405 n.290; *see also id.* at 420 n.340 (“[I]t is Justice O’Connor’s dissent in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)] that is most sympathetic to the idea of enforcing subsidiarity through the Tenth Amendment.”).

14. *Id.* at 436-447.

15. *Id.* at 403.

16. David P. Currie, *Subsidiarity*, 1 GREEN BAG 2d 359 (1998). *See also* Vischer, *supra* note 2, at 123 (“From executive orders requiring that a proposed federal action be weighed against the efficacy of state action, to congressional restraint in areas of state regulatory competence, to judicial enforcement of state-federal boundaries, much of this country’s political and legal landscape comports fully with subsidiarity’s ideal.” (footnotes omitted)).

17. Currie, *supra* note 16, at 359-360. The Virginia Plan contained the provision that “the National Legislature ought to be impowered [sic] to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the several States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation .” *Id.* at 360 (quoting Max Farrand, 1 Records of the Federal Convention 21 (Yale, rev. ed. 1937)).

“it is neither necessary nor sufficient, in contesting the validity of a federal statute, to argue that the matter might as well have been left to the states.”<sup>18</sup> Currie contends nevertheless that Article I, section 8 of the Constitution “is a concretization of the subsidiarity principle,” and he provides examples of congressional action that he thinks have been influenced by the subsidiarity principle.<sup>19</sup> He concludes that “[i]n the United States the Constitution says nothing about subsidiarity, but it is widely followed in practice.”<sup>20</sup>

While Currie focuses on congressional practice,<sup>21</sup> other authors have found the subsidiarity principle reflected in, or helpful in interpreting, certain Supreme Court opinions. Kirk A. Kennedy has argued that “[i]n key cases addressing issues of federalism and the parameters of congressional power, [Justice Clarence] Thomas has consistently adhered to a position that mirrors the natural law doctrine of subsidiarity.”<sup>22</sup> Kennedy points in particular to Justice Thomas’s dissenting opinion in *U.S. Term Limits, Inc. v. Thornton*,<sup>23</sup> as “implicitly yet perfectly reflect[ing] the natural law’s inherent principle of subsidiarity.”<sup>24</sup> And relying on a broader view of subsidiarity that encompasses non-political communities such as the family,<sup>25</sup> Richard W. Garnett has argued that subsidiarity supplies an important reason why the Supreme Court’s decision in *Pierce v. Society of Sisters*<sup>26</sup> was correct<sup>27</sup> and provides a basis for understanding

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18. *Id.* at 360. Currie also acknowledges that “[t]he Civil War Amendments represent an exception to [the subsidiarity] principle.” *Id.* at 360 n.4.

19. *Id.* at 360-363.

20. *Id.* at 364.

21. In an interesting article on the American situation that is broad in scope, Stephen Gardbaum has proposed a model of constitutional federalism in the American context that, in his view, “has close affinities” with the structure of the European Union in light of the latter’s incorporation of the subsidiarity principle. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 831 (1996).

22. Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 82 (1997).

23. 54 U.S. 779, 845 (1995) (Thomas, J., dissenting).

24. *Id.* at 79. Kennedy finds further support for Justice Thomas’s adherence to subsidiarity in Thomas’s concurring opinion in *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) and in Thomas’s joining the majority opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

25. For this broader view of subsidiarity, see the quotation from *Quadragesimo anno*, *supra* note 1, the quotation from Vischer, *supra* note 2, and Section I, below.

26. 268 U.S. 510 (1925).

27. Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 143-146 (2000).

why school choice plans can be constitutionally permissible.<sup>28</sup>

In light of the interest reflected in the articles discussed above in the question of the status of the principle of subsidiarity in American law, I want explore this matter further, albeit in a very limited context. My interest is not to argue for some broad and significant import of the subsidiarity principle in American law. Rather, I wish to explore the possibility that two Supreme Court opinions dealing with universities can be understood as significantly reflecting considerations grounded in the principle of subsidiarity. I will argue in particular that Justice Powell's opinion in *Bakke* and the Supreme Court's decision in *Grutter* both engage in analyses and offer conclusions that reflect important subsidiarity concepts and concerns. It is important to state at the outset that I am not arguing that either Justice Powell's opinion or the *Grutter* Court's decision was correct as a matter of constitutional law. Nor am I arguing that either explicitly invoked the principle of subsidiarity (they clearly do not). I will simply argue that Justice Powell's opinion and the *Grutter* majority's opinion undertake analyses and arrive at certain conclusions that reflect key subsidiarity concepts.

Part I examines the traditional meaning of subsidiarity as presented in certain papal documents and in the writings of the Catholic natural law philosopher, John Finnis. I call this the "traditional" meaning of subsidiarity because it rests on Catholic teaching and philosophical exposition advanced prior to the adoption of subsidiarity as a constitutional principle of the European Community. This traditional meaning is broader in scope in that it is grounded in the good of the individual and includes respect for sub-political communities such as – of particular importance here – educational institutions. The traditional principle cautions against actions by higher authorities that might stifle initiatives undertaken by individuals and communities, particularly where a community or institution has a recognized mission that serves the common good.

Part II prepares the way for a subsidiarity-sensitive examination of Justice Powell's opinion in *Bakke* and of the Supreme Court's decision in *Grutter*. Employing concepts developed in Part I, I explore what a Supreme Court decision reflecting subsidiarity concerns might look like in a case in which the Court has to interpret a constitutional provision that restricts the activities of subsidiary institutions. If the Court were to interpret the constitutional

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28. Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 *CARDOZO L. REV.* 1281, 1311-1312 (2002).

provision in such a way that allows scope for the initiative of a subsidiary institution such as a university, and if this allowance reflected subsidiarity concerns, the Court's opinion would likely recognize that the university has a mission that serves the common good and would accord some deference to the educational judgment of the university.

Part III reviews Justice Powell's *Bakke* opinion and finds that subsidiarity themes play significant roles in the opinion. Most important is the concept of the University of California at Davis's ("the University's") mission. In its briefs, the University did not devote any explicit attention to this concept, nor did it present an argument that its race-conscious admissions program was central to its mission. Justice Powell makes use of the concept of the academic mission in his review of the purposes the University offered for its special admissions program. He rejects the University's goal of redressing the effects of societal discrimination (upon which the University had placed great emphasis in its brief) because this goal is beyond the scope of the University's educational mission. On the other hand – and of great significance for *Bakke* and subsequently for *Grutter* – he finds that the University's goal of seeking a diverse student body is of paramount importance to its mission. Justice Powell grounds this positive conclusion about the University's mission in the First Amendment's special concern for academic freedom – a grounding, again, not argued for by the University in its briefs. Especially important for this paper is the fact that this resort to the First Amendment, rather than removing the evaluation of the University's admissions program from subsidiarity concerns, is used to support another subsidiarity concept, the contribution to the common good – here made possible by academic freedom and fostered by the University's mission.

Shifting attention to *Grutter*, Part IV examines the University of Michigan Law School's ("the Law School's") brief in that case to explore the arguments the Law School employed to justify its race-conscious admissions program. These arguments invoke several subsidiarity concerns. Most importantly, the Law School adopted the prominence Justice Powell gave to the concept of the academic mission, and the Law School argued that its diversity admissions program was central to its educational mission in service to the common good. The Law School's brief implicitly accepts that Justice Powell's Opinion outlined a harmonization of the academic interest in diversity admissions and constitutional mandates. The brief tracks Justice Powell's opinion in many respects – including his employment

of subsidiarity themes. But the Law School declined to follow Justice Powell's lead in one important respect. In support of its mission, the Law School did not rely on an argument grounded in the First Amendment. Instead, the Law School argued the need for flexibility in applying the Equal Protection Clause and for deference to its educational mission as a subsidiary institution – without resort to grounding this mission in the First Amendment. Also of great importance was the fact that the Law School argued that its particular educational mission includes both diversity and selectivity as an elite institution. Selectivity became an issue in the *Grutter* litigation but was not given explicit consideration in Justice Powell's *Bakke* opinion. Nevertheless, the Law School, on the basis provided by Justice Powell, was able to argue that its dual interest in diversity and selectivity served the common good.

Pursuing further the academy's deployment of subsidiarity-style arguments, Part V examines certain amicus briefs filed in support of the Law School.<sup>29</sup> Attention is focused on three briefs filed by academic groups employing subsidiarity concepts and concerns. The amicus brief of a self-selected group of law school deans is of special interest because, perhaps more than any other brief filed in the case, it presents the most concentrated set of arguments employing a broad range of the subsidiarity themes outlined in Part II. And of particular importance in the context of the *Grutter* litigation, this brief follows Justice Powell's lead and departs from the Law School's brief in arguing for the First Amendment as protective of academic autonomy. As we will see, the *Grutter* Court relies, in part, on such an argument in deciding in favor of the Law School.

Also considered in Part V are the amicus briefs filed by Amherst College (in conjunction with a group of other highly selective academic institutions) and by the American Law Deans Association. Amherst's brief is of interest because, as did the Law School, Amherst argued for selectivity in admissions as important to the mission of elite academic institutions in service to the common good. Amherst also argued that judicial deference to the educational judgment of selective academic institutions supports reaffirmation of Justice Powell's conclusion that diversity constitutes a compelling interest. The brief of the American Law Deans Association is of

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29. See Robert P. George, *Gratz and Grutter: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1635 (2003) (“The list of *amici curiae* urging the Court to uphold racial and ethnic preference policies was extraordinary. . . . The Establishment left the Justices in no doubt as to where the mainstream of elite opinion stood on the matter.”).

interest because while it too argued for selectivity, unlike the Law School it argued that selectivity in admissions constitutes a separate compelling interest (in addition to diversity) under equal protection analysis. This is noteworthy because some of the dissenters in *Grutter* argued that the Court should have determined whether the Law School's interest in selectivity (which the Law School argued was integral to its mission) constituted a compelling interest. The Deans Association also argued that selective law schools have a compelling interest in avoiding resegregation that would result from a decision adverse to the Law School. The Association predicted that, in such an event, law schools would lose legitimacy because the public would view law schools as segregated. While the *Grutter* Court does not accept avoidance-of-resegregation as a separate compelling interest, the Court does rely importantly on the legitimacy point in accepting diversity as a compelling interest.

Part VI examines the Supreme Court's opinion in *Grutter* in light of the subsidiarity arguments reflected in Justice Powell's *Bakke* opinion and in the briefs of the Law School and its amici. The *Grutter* Court agrees with the importance Justice Powell attributed to the academic mission and adopts his conclusion that diversity constitutes a compelling interest in the context of university admissions. The Court also follows Justice Powell in grounding academic autonomy in the First Amendment (in accord with the argument of the deans who signed the Brief of Amici Curiae Judith Areen et al., ("the Individual Deans")). But as in Justice Powell's opinion, the *Grutter* Court's invocation of the First Amendment does not preclude the Court from addressing subsidiarity concerns. Most importantly, the Court goes on to consider the contributions that the academy renders to the common good. In this regard, the Court takes into account an element of the academic mission (selectivity) that was not explicit in Justice Powell's Opinion. The Court finds that the Law School's dual mission of diversity and selectivity serves the common good in important ways, which include (as suggested by the Law School and by the American Law Deans Association) public perception of the legitimacy of selective institutions that provide an educational pathway to leadership positions.

### **I. The Traditional Meaning Of Subsidiarity**

According to the philosopher John Finnis, the principle of subsidiarity has its source in the fact that "[h]uman good requires not only that one *receive* and *experience* benefits or desirable states; it requires that one *do* certain things, that one should *act*, with integrity

and authenticity; if one can obtain the desirable objects and experiences through one's own action, so much the better."<sup>30</sup> Because of the danger that the political order or intermediary associations may stifle individual self-constitution, the principle

. . . affirms that the proper function of association is to help the participants in the association to help themselves or, more precisely, to constitute themselves through the individual initiatives of choosing commitments (including commitments to friendship and other forms of association) and of realizing these commitments through personal inventiveness and effort in projects (many of which will, of course, be co-operative in execution and even communal in purpose)."<sup>31</sup>

Subsidiarity informs not only the relationship between an individual and an association of which he may be a member. In the context of multiple layers of larger and smaller associations, the subsidiarity principle, as stated by John Paul II in the encyclical *Centesimus annus*, requires that "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good."<sup>32</sup> Accordingly, "neither the state nor any larger society should substitute itself for the initiative and responsibility of individuals and intermediary bodies."<sup>33</sup>

John Paul II's reference to the common good is significant. In the political order, we are dealing, in Finnis' words, with "the most complex common good, which (subject to the principle of subsidiarity) excludes no aspect of individual well-being and is potentially affected by every aspect of every life-plan."<sup>34</sup> Unanimity here is a practical impossibility.<sup>35</sup> As a result, in order to respect the initiative and responsibility of individuals and intermediary associations, subsidiarity "sets limits for state intervention" and, where possible, "aims at harmonizing the relationships between

30. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 147 (1980) (emphasis in original). "[O]ne who is never more than a cog in big wheels turned by others is denied participation in one important aspect of human well-being." *Id.*

31. *Id.* at 146.

32. Catechism of the Catholic Church, para. 1883 (2000) (quoting *Centesimus annus* 48 § 4).

33. *Id.* at para. 1894.

34. FINNIS, *supra* note 30, at 233.

35. *Id.*

individuals and societies.”<sup>36</sup>

Respect is particularly due where a subsidiary body such as the family or a university takes the initiative and assumes responsibility for an undertaking pursuant to its “mission.” John Paul II has stated that education is a mission entrusted in the first place to parents but that parents “share their educational *mission* with other individuals or institutions, such as the Church and the State.”<sup>37</sup> Nevertheless, despite the fact that the family does not have exclusive responsibility for education, John Paul II cautions that “the mission of education must always be carried out in accordance with a proper application of the principle of subsidiarity.”<sup>38</sup> As Finnis explains, “individuals and particular groups (this family, this firm, this *university*, this government department . . .) should have a certain *autonomy*, a certain prior concern and *responsibility* for their own particular good, their own particular interests or *specialty*.”<sup>39</sup>

Nevertheless, as stated in *Centesimus annus*, subsidiarity applies “always with a view to the common good.”<sup>40</sup> Accordingly, subsidiarity does not issue a blank check to individuals and intermediary associations. One must always be wary, as Finnis observes, that “intelligence and dedication to the common good [may be] mixed with selfishness and folly.”<sup>41</sup> Thus, it must be kept in mind that the “concern of particular persons and groups for individual goods, for particular common goods and for particular aspects of the over-all common good, will enhance the over-all common good only if the resulting particular options are subject to some degree of coordination.”<sup>42</sup> Accordingly, subsidiarity does not eliminate the responsibility of the political order to achieve proper coordination. Indeed, “the law may, for good reasons, *nullify*” the acts of individuals and associations consistent with its “moulding, *subsidiary* function” of assisting them in promoting the common good.<sup>43</sup>

36. Catechism of the Catholic Church, para. 1885.

37. John Paul II, *Letter to Families* § 16 (emphasis added).

38. *Id.* (emphasis omitted).

39. FINNIS, *supra* note 30, at 233 (ellipsis in original, emphasis added).

40. Catechism of the Catholic Church, *supra* note 32.

41. FINNIS, *supra* note 30, at 233.

42. *Id.*

43. *Id.* at 292 n.3. With respect to this cautionary point, it must be noted further that in Finnis' view, much of what is often termed individual “rights” are not a counterweight to, but part of the common good. Indeed, as noted above, the subsidiarity principle is grounded in the fundamental need to respect the integrity and authenticity of individual self-constitution. *Id.* at 147. As Finnis says, “[a]n attempt, for the sake of the

In sum, the principle of subsidiarity requires due respect for sub-political communities in the exercise of their proper functions when they take the initiative and assume responsibility in pursuit of the self-constitution of their members, “particular common goods and for particular aspects of the over-all common good.”<sup>44</sup> In this respect, communities such as universities “should have a certain autonomy, a certain prior concern and responsibility for their own particular good, their own particular interests or specialty.”<sup>45</sup> Higher authorities should avoid interfering in communities exercising their functions and should assist communities and attempt to harmonize their activities with a view to the common good. But even where the activity of communities is based on a concern “for particular aspects of the over-all common good,” this activity will be subject to the subsidiary, coordinating function of law.

## II. Subsidiarity and the Courts in the American Constitutional Context

As we have seen, subsidiarity is typically discussed in the literature as a principle intended to inform the actions of a law-making authority such as a legislature when confronted with the impact its contemplated action may have on institutions subject to its authority. In such a case, the subsidiarity principle counsels that a higher-order legislature ought not to impose a mandate that, while within this legislature’s authority, nevertheless significantly disables a subsidiary body (lower-order legislature or other institution or community) from using its expertise or knowledge in service to the common good.

My interest here, however, is in subsidiarity as a consideration and constraint reflected in court opinions. In the United States context, subsidiarity might be embodied – at least to some degree – in an explicit provision of the Constitution. A likely candidate for such a role would be the Tenth Amendment, which states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>46</sup> In the article discussed above, Professor Bermann

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common good, to absorb the individual altogether into common enterprises would . . . be disastrous for the common good, however much the common enterprises might prosper.” *Id.* at 168. Thus, the common good cannot be evaluated apart from individual rights, with the latter constituting only a factor to be subtracted or weighed, in some purported utilitarian calculus. *Id.* at 210-18.

44. *Id.* at 233.

45. *Id.*

46. U.S. CONST. amend. X.

has argued that while certain Supreme Court opinions reflect some evidence of subsidiarity concerns,<sup>47</sup> neither the Tenth Amendment's text, nor the overall import of its interpretation by the Supreme Court provides strong support for the Amendment as an embodiment of subsidiarity.<sup>48</sup>

Bermann's argument seems persuasive,<sup>49</sup> and in any event, I have no interest in challenging it here or in examining the extent to which explicit provisions of the United States Constitution may embody or reflect subsidiarity concerns. The main point I want to argue is that the Supreme Court's decisions in *Regents of the University of California v. Bakke*<sup>50</sup> and in *Grutter v. Bollinger*<sup>51</sup> reflect the subsidiarity principle. In this section, I will explore what a judicial concern for subsidiarity in the traditional sense (and not restricted to Bermann's focus on the form of the principle as embodied in European Community law) would look like in cases not governed by a constitutional provision that arguably embodies the subsidiarity principle, and in which a court must apply a constitutional provision that explicitly limits a subsidiary institution, as in *Bakke* and *Grutter*., In such a situation, subsidiarity, if it applies, cautions that a court, in interpreting a broad constitutional provision<sup>52</sup> should avoid interpreting the constitutional provision in a way that intrudes upon a subsidiary body's ability to utilize its experience and knowledge in limited areas covered by the provision – at least where there are convincing reasons against rigid enforcement of the provision in a context within the subsidiary body's expertise.

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47. Bermann, *supra* note 5, at 418-21.

48. *Id.* at 418-23. *But see* Kennedy, *supra* note 22, at 79 (arguing that Justice Thomas's dissent in *U.S. Term Limits, Inc. v. Thornton* embodied a view of the Tenth Amendment that reflects the principle of subsidiarity).

49. *See* Gardbaum, *supra* note 21, at 835 (concluding that “[i]n a straightforward sense, Bermann is obviously correct that subsidiarity is not a recognizable principle of constitutional law in the United States, in that congressional exercise of concurrent powers is not currently understood to be subject to legal constraint on federalism grounds”). But Gardbaum argues for a new model of federalism whose constitutional grounding would be in the Necessary and Proper Clause, rather than in the Tenth Amendment or in a restrictive interpretation of the Commerce Clause, the latter two being the options explored by Bermann. *Id.* at 836.

50. 438 U.S. 265 (1978).

51. 539 U.S. 306 (2003).

52. *See* Gomillion v. Lightfoot, 364 U.S. 339, 343-44 (1960) (emphasis added) (“[I]n dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.”).

However, it is important to acknowledge a difference in the rights and responsibilities between a legislature and a court in these two situations. A legislature could choose not to impose a mandate at all when persuaded that doing so would stultify subsidiary bodies with little or no net benefit to the end served by the proposed law.<sup>53</sup> Or the legislature could provide an exemption for, or otherwise accommodate, subsidiary bodies.<sup>54</sup> In the constitutional context, on the other hand, the constitutional provision is already enacted. A court's discretion is thus much more limited than the legislature's. Confronted with a case brought before it, the court's duty is to apply the law.<sup>55</sup> The problem is particularly serious where the law explicitly restricts subsidiary institutions (such as state governments) in order to prevent misuse of institutional power that harms the constitutional rights of individual persons.<sup>56</sup> Any relief granted to the subsidiary must be harmonized<sup>57</sup> in some way with individual rights. Thus, where – as is the case in the subject of this paper – a court must interpret a constitutional provision that restricts state power to protect individual rights, the court's ability to accord deference to a subsidiary body subject to such restriction will be greatly limited.

If the subsidiarity principle is to be acknowledged in such a situation, a convincing case would first have to be made that the subsidiary body has an important work or mission that serves the common good in a way that bears on the constitutional provision. The case for some form of accommodation would be strengthened if the subsidiary body is an institution whose members have acknowledged expertise as to how this mission is to be achieved. And this mission and expertise must bear upon the matter to be

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53. See Bermann, *supra* note 5, at 414; Currie, *supra* note 16, at 361. James L. Buckley, a judge on the D.C. Circuit Court of Appeals, has said that when he was a member of the United States Senate, he “would consciously apply the rule of subsidiarity, which predates the Constitution, in deciding whether a particular responsibility was appropriate for the federal government.” James L. Buckley, *Reflections on Law & Public Life*, 1 GREEN BAG 391, 396 (1998).

54. See Currie, *supra* note 16, at 362-363. See also Bermann, *supra* note 5, at 414 (exploring such self-imposed Congressional restraints).

55. See Buckley, *supra* note 53, at 396 (noting that while, in accordance with the subsidiarity principle, he “favor[s] returning to the states exclusive authority over all matters that can be effectively handled at a state or local level,” he is bound by the Supreme Court's Commerce Clause jurisprudence, which precludes a lower court from enacting the subsidiarity principle).

56. As for example and of particular interest below, through the Fourteenth Amendment's restriction against State violation of the equal protection of the laws. The academic institutions involved in *Bakke* and *Grutter* are state institutions.

57. See FINNIS *supra* at note 35.

adjudicated. In a court opinion acknowledging this, one would expect to see the court invoking a principle of constitutional interpretation that “context” is important in applying the law to the subsidiary body.<sup>58</sup> One would also expect to see an argument that space must be accorded for the subsidiary to exercise some appropriate “discretion” in the way in which its mission will be accomplished. And one would expect a court to show concern about judicial “interference” in the work of the subsidiary body or about “rigid” application of the constitutional provision that would “force” the subsidiary to abandon its own judgment. Nevertheless, because the constitution explicitly limits the authority of the subsidiary and protects individual rights, one would expect that any deference accorded to the subsidiary would not be absolute but would be conditional in nature and subject to some form of court scrutiny.

The case in favor of deference would, of course, be greatly strengthened if the court could invoke a constitutional provision, aside from the one primarily at issue, that was protective of the subsidiary body. The force of this other constitutional law would be “countervailing” to the law restricting the subsidiary.<sup>59</sup> Nonetheless, for the reasons noted immediately above, one would expect that any protection or “autonomy” accorded to the subsidiary by this other constitutional law would not be unconditional.

Given the above, what we would expect to see in *Bakke* and *Grutter*, if the Court followed such an approach, would be that the Court, in interpreting the Equal Protection Clause, would be sensitive to applying the Clause in the higher education context where educational authorities had taken the initiative to act in accordance with their mission and in good faith attempted to comply with the law. The Court would acknowledge the mission and expertise of the institution and accord deference, where appropriate, with respect to the institution’s judgment relating to matters within its mission and expertise. It would also be helpful, of course, if the Court could invoke another constitutional law protective of the university, but because of the concerns mentioned above, this help will not be in the form of a blank check. As we will see, this pattern is reflected in Justice Powell’s opinion in *Bakke* and in the majority opinion in *Grutter*.

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58. See *Gomillion*, *supra* note 52.

59. As we will see below, the Supreme Court in *Bakke* and *Grutter* found the First Amendment’s Freedom of Speech Clause to constitute such a countervailing principle in the context of the litigation in those cases.

### III. Justice Powell's Opinion in *Bakke*

In the words of a Justice who participated in the Supreme Court's decision in the case, *Bakke* "aroused more interest in the Nation, the press, and the Bar than any I have seen in my [ ] terms on the Court."<sup>60</sup> The case "raised the most important question of race relations since *Brown v. Board of Education* and the most divisive."<sup>61</sup> The Supreme Court's decision would "fix[] the future of racial preferences, and [Justice] Powell's was the decisive view."<sup>62</sup> At issue in *Bakke* was the special admissions program of the medical school of the University of California at Davis ("the University"), which sought to reserve sixteen of the 100 places in the first year class to certain designated minorities, including African-Americans.<sup>63</sup> Allan Bakke, a white applicant denied admission to the medical school, challenged the school's admissions program in California state court on the ground that it discriminated against non-minority applicants in violation of the federal Equal Protection Clause, Title VI of the 1964 Civil Rights Act, and the California State Constitution.<sup>64</sup> The trial court ruled that the program violated Title VI and the federal and state constitutions and that the University could not take race into account in its admissions decisions.<sup>65</sup> That court also found, however, that Bakke had not shown that he would have been admitted but for discriminatory admissions procedure and so it denied his plea for admission.<sup>66</sup> On appeal, the California Supreme Court held that the University's special admission program violated the Equal Protection Clause (without deciding on the Title VI or state constitutional claims), and the court enjoined the University from considering race in the future in its admissions programs.<sup>67</sup> Upon the University's concession that it could not meet the burden the California Supreme Court set for it to prove, that Bakke would not have been admitted even in the absence of the University's special admissions program,

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60. BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT 1* (1988) (brackets in original). The Justice quoted remains anonymous in Prof. Schwartz's account.

61. JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL: A BIOGRAPHY* 456 (1994).

62. *Id.* at 456-57.

63. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 275 (1978).

64. *Id.* at 277-78.

65. *Id.* at 279.

66. *Id.*

67. *Id.* at 279-80.

the court ordered Bakke to be admitted.<sup>68</sup> This order was stayed by the U.S. Supreme Court pending its review of the case.<sup>69</sup>

The United States Supreme Court accepted the appeal but was unable to form a single majority on all issues before it.<sup>70</sup> Justice Powell agreed with the University on the general point that student body diversity could constitute a compelling interest supporting an admissions program.<sup>71</sup> But he found the University's special admissions program unconstitutional because it excluded from consideration non-favored applicants, even if they possessed the potential to contribute to educational diversity, from competing for the positions in the special admissions program.<sup>72</sup> Justice Powell disagreed, however, with the California Supreme Court's judgment that the University could not consider race as a factor in its admissions decisions in the future.<sup>73</sup> Justices Brennan, White, Marshall, and Blackmun found the University's admissions program permissible under the Constitution and Title VI on the ground that the government can take race into account to "remedy disadvantages cast on minorities by past racial prejudice."<sup>74</sup> They joined Justice Powell to form a five-vote majority reversing the California Supreme Court's injunction forbidding the University from taking race into account in future admissions programs.<sup>75</sup> Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist found that the admissions program violated Title VI of the 1964 Civil Rights Act.<sup>76</sup> These Justices joined with Justice Powell to form a five-vote majority striking down the University's special admissions program. Thus, although Justice Powell was in a minority of one in rejecting the special admissions program on a narrower basis than those joining him in this rejection and in approving race consideration on a narrower basis than those who joined him in such approval, his opinion was the decisive opinion in the case.<sup>77</sup>

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68. *Id.* at 280-81.

69. 429 U.S. 953 (1976).

70. For an account of Justice Brennan's opposition to accepting the appeal (in which view he was joined by Chief Justice Burger and Justices Marshall and Blackmun), see SCHWARTZ, *supra* note 60, at 41-42.

71. *Bakke*, 438 U.S. at 314.

72. *Id.* at 319-20.

73. *Id.* at 320.

74. *Id.* at 325-26.

75. *Id.* at 326.

76. *Id.* at 421.

77. Justice Powell considered his opinion in *Bakke* the most important of his

### A. The University's Justification of Its Special Admissions Program

According to the account provided in Justice Powell's opinion, the University offered four purposes in support of its special admissions program.<sup>78</sup> The first purpose, "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,"<sup>79</sup> was construed by Justice Powell as an attempt by the University "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin."<sup>80</sup> So construed, this purpose was tersely dismissed by Justice Powell as "facially invalid" because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake" forbidden by the Constitution.<sup>81</sup> This goal presumably would be forbidden to any governmental body or institution, whether subsidiary or not.

Justice Powell's analysis of the other two goals he rejected is of particular importance here because his analysis relies on limitations on a subsidiary body as defined by its particular mission. The University argued that its program was needed to counter the effects of "societal discrimination."<sup>82</sup> Justice Powell first observes that "'societal discrimination' [is] an amorphous concept of injury that may be ageless in its reach into the past."<sup>83</sup> More significantly for present concerns, Justice Powell insists that remedying discrimination is only a legitimate goal when proper findings of violations of law have been made by governmental entities having authority to do so.<sup>84</sup> The Supreme Court, Justice Powell states, has "never approved a

opinions. SCHWARTZ, *supra* note 60, at 1; JEFFRIES, *supra* note 61, at 456.

78. *Bakke*, 438 U.S. at 305-06.

79. *Id.* at 306 (quoting the Brief for Pet'r [the University], *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811) (June 7, 1977), 1977 WL 189474, at 32).

80. *Id.* at 307.

81. *Id.*; *see also* *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (stating that Justice Powell rejected this interest as, in the *Grutter* majority's words, "an unlawful interest in racial balancing.").

82. *Id.* at 306. In its brief, the University placed heavy emphasis on the goal of redressing societal discrimination and its lingering effects. The University's brief twice uses the phrase "societal discrimination," Brief for Pet'r, 1977 WL 189474, at 3 and 21, and argues for the need to counter "generations of pervasive discrimination," *id.* at 2, "the legacy of past racial discrimination," *id.* at 9, "previous pervasive discrimination," *id.* at 13, "the legacy of past discrimination," *id.* at 19, "the persistent effects of past discrimination," *id.* at 28, "the lingering effects of past discrimination," *id.* at 59, "lingering and negative color awareness," *id.* at 60, and "the effects of past discrimination," *id.* at 78.

83. *Id.* at 307.

84. *Id.*

classification that aids persons as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”<sup>85</sup> This is not simply an historical accident of the cases that have come before the Court because there are compelling reasons why such action by authorized bodies is necessary.<sup>86</sup> After articulating these reasons, Justice Powell concludes that the University was “in no position to make[] such findings.”<sup>87</sup>

In this context, Justice Powell makes his first reference to the University’s “mission,” which as we have seen can be an important concept in subsidiarity analysis. While he will go on to refer this mission in a more positive manner,<sup>88</sup> here his reference to mission is restrictive. The University, Justice Powell says, was not competent to make the necessary findings because “[i]ts broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality.”<sup>89</sup> Such tasks are reserved to appropriate governmental bodies; “isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.”<sup>90</sup> “To hold otherwise,” Justice Powell says, “would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.”<sup>91</sup> Thus, as a subsidiary body whose mission is education, the University lacked “the authority and capability” to enact, adjudicate, and enforce the remedial goal it invoked.<sup>92</sup>

The University had also invoked the goal of increasing the number of physicians who would practice in underserved

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85. *Id.* (citations omitted).

86. *Id.* at 307-09.

87. *Id.* at 309.

88. *Id.* at 313.

89. *Id.* at 309.

90. *Id.*

91. *Id.* at 310; *see also* the *Grutter* majority’s observation that “Justice Powell rejected an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties ‘who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.’” 539 U.S. at 323-24 (quoting 438 U.S. at 310).

92. *Id.* at 309-10.

communities.<sup>93</sup> Unlike his categorical rejection of the remedial goal, Justice Powell did not reject this goal as outside the competence of the University and beyond the scope of its mission as an educational institution.<sup>94</sup> Instead, he agreed with the California Supreme Court's judgment that "there are more precise and reliable ways" than racial classification of applicants that the University could have employed "to identify applicants who are genuinely interested in the medical problems of minorities."<sup>95</sup> He concluded that the University "has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens."<sup>96</sup> Nor, in fact, did it show that "its preferential classification is likely to have any significant effect on the problem."<sup>97</sup> So here, the problem was not with the goal that the subsidiary institution sought to promote. Justice Powell did not suggest that this goal was beyond the scope of the University's mission or its competence. Rather, the University simply failed to show that the means it chose was necessary – or even effective – in achieving that goal.<sup>98</sup>

Of greatest significance for this paper and for the subsequent case of *Grutter v. Bollinger* was the University's reliance on student body diversity as a goal of its special admissions program.<sup>99</sup> The treatment of this goal in *Bakke* is noteworthy. By contrast, while Justice Powell did not dismiss as such the goal of aiding underserved communities, he did not discuss this goal extensively or draw any conclusions about its constitutional significance, finding simply that the University had not shown that racial classification was necessary

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93. *Id.* at 306. For the University's argument, see Brief for Pet'r, 1977 WL at 25: "many forces, including economics, idealism, and continuing patterns of discrimination, commonly bring minority physicians back into minority communities." See also *id.* at 33: "the Davis program may prompt more white physicians to practice in minority communities."

94. See the *Grutter* majority's observation that Justice Powell "conclud[ed] that even if such an interest could be compelling in some circumstances the program under review was 'not geared to promote that goal.'" 539 U.S. at 324 (quoting 438 U.S. at 310).

95. *Bakke*, 438 U.S. at 311 (quoting the California Supreme Court's opinion, 18 Cal. 3d 34, 56 (1976)).

96. *Id.* at 311.

97. *Id.*

98. *Id.* at 310-11.

99. See the *Grutter* majority's observation that "Justice Powell approved the university's use of race to further only one interest: 'the attainment of a diverse student body.'" 539 U.S. at 324 (quoting 438 U.S. at 311).

to promote it.<sup>100</sup> Although he will also find that the manner chosen by the University to promote diversity was deficient,<sup>101</sup> he nevertheless engages in an extended discussion affirming that diversity – properly understood – is not only an institutionally appropriate goal for the University but can constitute a compelling governmental interest.<sup>102</sup> In the course of conducting this analysis, Justice Powell enunciated principles that are crucial to the arguments briefed in *Grutter* and to the *Grutter* opinion.

### *B. The Diversity Goal and Subsidiarity*

Justice Powell's discussion of student body diversity sounds several of the themes identified in Parts I and II, above, on the role of a subsidiary institution. Of these, the concepts relied on in the opinion are the University's "mission"<sup>103</sup> (phrased also as the "business" of the University),<sup>104</sup> its service to the common good,<sup>105</sup> the proper "context" for assessing the meaning of equal protection,<sup>106</sup> the appropriate "discretion" to be accorded to the subsidiary institution,<sup>107</sup> and the concern to avoid "judicial interference" in the work of the subsidiary institution.<sup>108</sup> There is also reliance on another constitutional principle (the First Amendment) protective of the subsidiary institution.<sup>109</sup>

Justice Powell's description of the diversity goal is stated in a way that places it squarely within the responsibility, competence, and expertise of an educational institution. This goal is identified in Justice Powell's opinion as "obtaining the educational benefits that flow from an ethnically diverse student body."<sup>110</sup> But Justice Powell

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100. *Bakke*, 438 U.S. at 311.

101. *Id.* at 320.

102. *Id.* at 314.

103. *Id.* at 313.

104. *Id.* at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring)).

105. *Id.* at 312, 314.

106. *Id.* at 314.

107. *Id.*

108. *Id.* at 319, n.53.

109. *Id.* at 312-14.

110. *Id.* at 306. The University's brief on this point reads: "obtaining the educational and societal benefits that flow from racial and ethnic diversity in a medical school student body." Brief for the Pet'r, *Bakke*, 438 U.S. 265 (1978) (No. 78-811), 1977 WL 189474, at 32. Note that Justice Powell drops from the University's brief the references to "racial diversity" and to "societal benefits." These omissions may be due to Justice Powell's effort to make race merely one component of diversity and to focus on the university's

does not rest with a mere statement of the propriety of this goal for an educational institution (as he might have done were he simply applying the subsidiarity principle). Instead, he immediately resorts for support to the First Amendment's Freedom of Speech Clause as protective of "academic freedom" and states that "though not a specifically enumerated constitutional right," academic freedom "long has been viewed as a special concern of the First Amendment."<sup>111</sup> Justice Powell immediately follows this with the statement that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."<sup>112</sup>

In support of this claim about academic freedom, Justice Powell quotes Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*.<sup>113</sup> In the passage quoted, Justice Frankfurter himself quoted a passage from a text entitled "The Open Universities in South Africa," which refers to the mission ("the business") of a university as providing an "atmosphere which is most conducive to speculation, experiment and creation."<sup>114</sup> According to the authors quoted, this atmosphere is constituted by the presence of a university's "four essential freedoms,"<sup>115</sup> which recognize the initiative and responsibility of a university "to determine for itself on academic grounds . . . who may be admitted to study."<sup>116</sup> Of course, Justice Powell will go on to state that although diversity is an "academic ground" that admission committees may consider, a university's First-Amendment based freedom to use diversity in determining who may be admitted to study is not absolute.<sup>117</sup> Nevertheless, through his invocation of Justice Frankfurter's concurring opinion in *Sweezy*,

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educational mission, rather than its societal goals.

111. *Bakke*, 438 U.S. at 312. In a prior draft circulated as a memorandum to the other Justices, Justice Powell appends to this reference to academic freedom the clause "though not a constitutional right in itself." SCHWARTZ, *supra* note 60, at 217. This clause is replaced in the final draft by the clause "though not a specifically enumerated constitutional right." The change appears to reflect a concern to state that academic freedom *is* a constitutional right, although not a specifically enumerated one.

112. *Bakke*, 438 U.S. at 312.

113. *Id.*

114. *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1967)). Justice Powell puts internal quotation marks around the passage that Justice Frankfurter quotes, but he does not mention the source of this internal quote.

115. This phrase is an internal quote (source not identified) in the passage from The Open Universities text quoted by Justice Frankfurter.

116. *Id.*

117. *Id.* at 319-20.

Justice Powell has placed a university's admissions decisions in the context of a First Amendment freedom.<sup>118</sup>

It is especially noteworthy that Justice Powell's resort to the First Amendment – which because of its constitutional significance as protective of liberty, could conceivably have resolved the diversity issue without further discussion – does not lead him to conclude in short order in favor of the University. Of particular importance for present concerns, the argument that he goes on to articulate relies on points that are significant for subsidiarity. Most importantly, Justice Powell's discussion of the constitutional "concern" for academic freedom is notable for its emphasis on the contribution that universities make to the common good. Already present in the quotation Justice Powell reproduces from Justice Frankfurter, which Justice Powell invests with First Amendment authority, is the suggestion that academic freedom is not valued for its own sake but because it contributes to goods fostered by free discussion such as "speculation, experiment, and creation." This suggestion gains force when Justice Powell follows it with a quotation from the Court's opinion in *Keyshian v. Board of Regents*,<sup>119</sup> in which Justice Brennan for the Court says that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."<sup>120</sup> In other words, it is *because* of this "transcendent value to all of us" that "[academic] freedom is therefore a special concern of the First Amendment."<sup>121</sup> This value to the nation is given specific meaning as Justice Powell continues the quote from *Keyshian*: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"<sup>122</sup>

Immediately following the above quote, Justice Powell adopts

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118. For an analysis and criticism of Justice Powell's use of Justice Frankfurter's concurring opinion in *Sweezy*, see Richard H. Hiers, *Institutional Academic Freedom – A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531, 533-40 (2004). For a more favorable view and analysis of the Supreme Court's cases invoking the First Amendment to protect academic freedom, see J. Peter Byrne, *Academic Freedom: A "Special Concern" of the First Amendment*, 99 YALE L.J. 251 (1989).

119. 385 U.S. 589 (1967).

120. *Id.* at 312 (quoting *Keyshian*, 385 U.S. at 603).

121. *Id.*

122. *Keyshian*, 385 U.S. at 603 (quoting *United States v. Associated Press, D.C.*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

part of the language of *Keyshian* and adds a modification with application to the matter before him, stating that “the nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>123</sup> From this proposition, he concludes that in arguing for the right to select students who will contribute “the most to the ‘robust exchange of ideas,’”<sup>124</sup> the University invoked “a countervailing constitutional interest, that of the First Amendment.”<sup>125</sup> Justice Powell immediately adds that in seeking to admit students who will contribute the most to the exchange of ideas valued by the First Amendment, the University “must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its *mission*.”<sup>126</sup>

Further occasion for emphasizing academic freedom’s contribution to the common good is provided to Justice Powell when he next considers a possible counterargument to his conclusion. Confronting an argument that a university’s First Amendment interest may have less force with respect to graduate education where professional competence arguably takes precedence over the robust exchange of ideas, Justice Powell responds that the diverse backgrounds of professional school students continues to contribute to the common good served by professional schools. He quotes from the Court’s opinion in *Sweatt v. Painter*,<sup>127</sup> where access to law school education was at issue, to support his conclusion that “even at the graduate level, our tradition and experience lend support to the view that the *contribution* of diversity is substantial.”<sup>128</sup> Because physicians serve a heterogeneous community, a diverse student body in medical school may “better equip its graduates to render with understanding their vital service to humanity.”<sup>129</sup> And “[g]raduate admissions decisions, like those at the undergraduate level, are concerned with

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123. *Bakke*, 438 U.S. at 312 (emphasis added) (quoting *Keyshian*, 385 U.S. at 603). Hiers, *supra* note 118, at 540, notes that “*Keyshian*, which Justice Powell cited as authority, had nothing to say about student admissions programs or practices.”

124. *Id.* at 313 (quoting *Keyshian*, 385 U.S. at 603).

125. *Id.* As noted below, in its briefs the University did not make a First Amendment-based argument relating to the “robust exchange of ideas.” It did argue that “[a]s a result of integrated education made possible by the Davis program, white students will develop an enhanced awareness of the medical concerns of minorities and of the difficulties of effective delivery of health care services in minority communities.” Brief for the Petitioner, *Bakke*, 438 U.S. 265 (1978) (No. 78-811), 1977 WL 189474, at 33.

126. *Bakke*, 438 U.S. at 313 (emphasis added).

127. 339 U.S. 629 (1950).

128. *Bakke*, 438 U.S. at 313 (emphasis added) (citing *Sweatt*, 339 U.S. at 634).

129. *Id.* at 314.

‘assessing the potential contributions to the society of each individual candidate following his or her graduation – contributions defined in the broadest way to include the doctor and the poet, the most active participant in business or governmental affairs and the keenest critic of all things organized, the solitary scholar and the concerned parent.’”<sup>130</sup>

### C. Justice Powell's Invocation of the First Amendment

Occasion must be taken here to remark on Justice Powell's invocation of the First Amendment as protective of academic freedom. If the University's freedom of speech was all that was involved in this case, Justice Powell, upon invoking the First Amendment, might well have concluded forthwith in favor of the University without further exploration of the University's mission and its contributions to society.<sup>131</sup> Instead, Justice Powell appears to view the import of the First Amendment in this case not primarily as a shield protecting the University against judicial or other outside scrutiny but as supportive of values that are judicially cognizable and that the academic world has promoted through its contributions to the common good.<sup>132</sup> Also noteworthy is that the First Amendment is called upon to protect a government entity against an individual complaining that his constitutional right has been violated.<sup>133</sup> Moreover, by virtue of the cases he quotes for support, Justice Powell's invocation of the First Amendment nationalizes the common good that universities serve. This is seen, for example, in his use of the quotations from *Keyshian*, which state that “[o]ur Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us . . .” and that “[t]he Nation's future depends upon leaders trained through wide exposure to [the] robust exchange of ideas . . .”<sup>134</sup> As a result of this “nationalization,” a state university's contributions need not be focused on state or local

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130. *Id.* at 314 n.49 (quoting William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Wkly., Sept. 26, 1977, at 7, 10).

131. It is noteworthy that none of the other Justices participating in *Bakke* invoked the First Amendment.

132. On this point, the reader should note Finnis's caution that the common good ought not to be considered as a matter separate from protection of individual rights. See *supra* note 30.

133. See Hiers, *supra* note 118, at 531 (noting, in criticism of Justice Powell, that “[t]he First Amendment generally protects citizens from the actions of government, not government from its citizens.”)

134. *Bakke*, 438 U.S. at 312 (quoting *Keyshian*, 385 U.S. at 603).

matters, but can extend to the common good of the nation.<sup>135</sup> This national focus and the Court precedents Justice Powell cites facilitate judicial acknowledgement of the contributions of the academic community and also facilitates a potential justification of affirmative action that can be appreciated by the nation.

Still another reason why this invocation is noteworthy is that nowhere in its brief, reply brief, or supplemental brief did the University mention the First Amendment or mount an argument based on constitutional protection of academic freedom.<sup>136</sup> Indeed, nowhere in its brief or reply brief does the University mention “academic freedom.” The single explicit reference to “academic freedom” in the University’s briefs occurs in its supplemental brief devoted to the issue of whether Title VI of the 1964 Civil Rights Act forbids the University’s admissions program.<sup>137</sup> That reference is not grounded in any reference to the First Amendment and occurs toward the mid-way point of the supplemental brief where the University asserts that a reading of Title VI that would “*compel* the *mandatory* establishment of preferential admissions . . . . would cut wide and deep into the freedom of the States to manage the affairs of their institutions, and also into the *academic freedom* of all colleges and universities whether privately endowed or State supported.”<sup>138</sup> So the University’s sole explicit reference to “academic freedom” is made in support of the point that academic freedom is a barrier to mandatory affirmative action.

The University’s supplemental brief does invoke the “freedom” and “autonomy” of states and academic institutions to voluntarily adopt race-conscious remedial programs, but it invokes these values in the context of arguing that neither Title VI nor the Equal Protection Clause, in word or spirit, prohibits such programs. The University argued that in interpreting Title VI, it must be kept in mind that “[t]he Equal Protection Clause leaves State universities and professional schools free, like private institutions, to adopt remedial race-conscious admissions policies affording minorities more nearly

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135. This nationalization will be especially important in *Grutter*, where the Court will acknowledge the Law School’s training of national leaders.

136. Rather than relying on autonomy, the University’s principal emphasis was on the need to redress the effects of past discrimination. *See supra* note 79.

137. The Supreme Court requested supplementary briefing on the statutory issue. *Bakke*, 438 U.S. at 281 (citing *Regents of Univ. of Cal. v. Bakke* 434 U.S. 900 (1977)).

138. Supplemental Brief for Petitioner at 37, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811) (November 16, 1977) (emphasis added), 1977 WL 187997, at 37.

equal access to higher education and the learned professions.”<sup>139</sup> The University cautioned that “[f]or the Court to read subordinate requirements relating to the details of admissions programs into Title VI would impair the autonomy of educational institutions and of the States in dealing with matters properly within their provinces and thereby eliminate one of the great virtues of federalism as a source of creativity in dealing with complex and subtle problems.”<sup>140</sup> In other words, the University’s argument was that this freedom exists because the prohibitory scope of Title VI was not intended by Congress to extend to educational affirmative action programs – not that the First Amendment affirmatively protects such programs.

Nevertheless, the reference in the just-quoted statement to “the autonomy of educational institutions and of the States in dealing with matters properly within their provinces” does sound in subsidiarity concerns. And in its opening brief, the University did make several arguments grounded in subsidiarity. Most prominently, the University argued that it and other academic institutions had voluntarily taken the initiative to address a matter of social concern – the effects of discrimination – by creating diversity admissions programs.<sup>141</sup> Invoking the common good, the University argued that these initiatives “flow[ed] from a broadened view of the public needs” arising from the nation’s history of discrimination.<sup>142</sup> The brief asserted that these efforts were made pursuant to the educational responsibilities of these institutions “in the exercise of their appointed roles” and in accordance with their educational judgment.<sup>143</sup> The efforts arose from the experience and expertise of “educators [who] have repeatedly been at the center of this country’s efforts to grapple with the disabilities historically imposed on persons because of their color or ancestry.”<sup>144</sup> Further, the University sought acknowledgment of the “wide scope of discretion”<sup>145</sup> that “the Fourteenth Amendment leaves to the states in the realm of education.”<sup>146</sup> And the University

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139. *Id.* at 5.

140. *Id.* at 9.

141. Brief for Petitioner, at 9-11, 33-34, 42, *Bakke*, 438 U.S. 265 (1978) (No. 76-811) (June 7, 1977), 1977 WL 187977.

142. Reply Brief for Petitioner, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No.76-811) (October 3, 1977), 1977 WL 187980, at 4. *See also id.* at 9. (“State universities serve social purposes.”)

143. For example, Brief for Petitioner, *supra* note 141 at 9, 40-42 and 43 n.53, 52, 76.

144. *Id.* at 41.

145. *Id.* at 75 (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)).

146. *Id.* at 75. *See also* Brief for Petitioner, *supra* note 143 at 63 (quoting *Swann v.*

decried “judicial interventionism in the name of the federal Constitution” by which the California Supreme Court “denied the Davis faculty the right to pursue the ends of its choice.”<sup>147</sup> But in its briefs, the University did not make any argument explicitly based on academic freedom as purportedly grounded in the First Amendment.<sup>148</sup> The University’s opening brief also does not rely on an academic “autonomy” argument, although, in presenting its argument grounded in the voluntary initiatives taken by academic institutions, the University notes in passing that these initiatives “sprang from a broad range of independent and *autonomous* sources” and that “[n]o central authority directed this effort.”<sup>149</sup>

Perhaps related to the University’s omission of an argument based on the First Amendment is another omission in its briefs. Nowhere in its opening brief, reply brief, or supplemental brief does the University make an explicit, focused argument that its special admissions program is central to its *mission*.<sup>150</sup> In light of what Justice

Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 16 (1971)) (“School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.”).

147. *Id.* at 83. See also *id.* at 13, where the University argues that reversal of the opinion below would “allow educators, rather than lawyers and judges, to deal with intractable matters of educational policy.” And see *id.* at 14, where the University asserts that the court below “exceeded the judicial function in substituting its judgment for that of educators and for that reason alone must be reversed.” And *id.* at 16 (Affirming the court below “would certainly bring to the courts a continuous burden of supervision of the admissions processes of the nation’s professional schools.”). And *id.* at 76 (“Intrusive judicial review interferes drastically with the process of democratic government.”). And in its supplemental brief on the Title VI issue, the University asserted that “both wisdom and inherited tradition caution against substituting a nationwide judge-made rule for pluralistic decision-making through the educational self-government of both State and private institutions, subject to revision by the political process if the people deem their interest to require such revision.” 1977 WL 187997, at 55.

148. The University’s opening brief does quote Justice Frankfurter’s concurring opinion in *Sweezy* twice, the first time to support the proposition that “it is . . . irrelevant to this Court how California chooses to distribute its governmental authority,” *id.* at 76 (quoting *Sweezy*, 354 U.S. at 256 (Frankfurter, J., concurring)) and the second time for Justice Frankfurter’s statement about “the business of a university.” *Id.* (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

149. *Id.* at 9 (emphasis added). As noted above, *supra* note 147, in its Supplemental Brief the University did invoke state and university “autonomy” as an area of freedom not prohibited by Title VI.

150. There are no references to the academic mission in the University’s Supplemental Brief or Reply Brief, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (9178) (No.76-811) (October 3, 1977), 1977 WL 187980. There are three references to one or more of a

Powell says about the academic mission, these two omissions may be seen as related. Only after he himself establishes the First Amendment as a “countervailing constitutional interest” in favor of the University does Justice Powell state that the University’s diversity admissions goal<sup>151</sup> is “of paramount importance in fulfillment of its mission.” Thus, Justice Powell’s invocation of the First Amendment provides the ground on which he makes prominent the University’s “mission,” in a way that the University itself had not attempted.

Justice Powell’s discussion of the First Amendment is also notable because of the changes he made in a prior draft of his opinion relating to this matter.<sup>152</sup> While most of the references discussed above are also present in this prior draft, there are two interesting changes, both of which strengthen the import of academic freedom. In the draft, Justice Powell appends to his opening reference to “academic freedom” the clause “though not a constitutional right in itself.”<sup>153</sup> In the opinion, this clause is replaced by the clause “though not a specifically enumerated constitutional right.”<sup>154</sup> While the prior draft could be read as stating that academic freedom is not a constitutional right, the final version suggests that it is, albeit not specifically enumerated. Second, the opinion includes a two-sentence paragraph that does not appear in the prior draft. This new paragraph has (1) a sentence referring to academic freedom as “a countervailing constitutional interest, that of the First Amendment” and (2) a sentence that explicitly links this First Amendment interest to the University’s “mission”:

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the “robust exchange of ideas,” petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.<sup>155</sup>

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medical school’s manifold missions in its opening brief, but none of these is made to support an argument that the special admissions program is crucial to the University’s academic mission. See Brief for Petitioner, 1977 WL 189474, at 30, 39, and 47.

151. Which he construes as selecting students who will “contribute the most to ‘the robust exchange of ideas’” valued by the First Amendment. *Bakke*, 438 U.S. at 313.

152. For the prior draft, see SCHWARTZ, *supra* note 60, APPENDIX C 195-223.

153. SCHWARTZ, *supra* note 60, at 217.

154. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 312.

155. *Id.* at 313.

#### *D. Other Subsidiarity Themes*

The final draft of Justice Powell's opinion thus presents an argument that university decisions such as admissions decisions seeking a diverse student body enjoy some strong degree of First Amendment protection accorded to the academic mission. His argument to this point relates to the issue of the governmental interest in a diversity admissions program. In the course of transitioning to constitutional scrutiny of the means used to promote this interest, Justice Powell sounds two subsidiarity themes discussed in Parts I and II, above. The reference to both is made in clauses that while acknowledging their importance, at the same time bespeak limitation. He states that "[a]lthough a university must have wide *discretion* in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded."<sup>156</sup> And in addition to the importance of discretion, Justice Powell also mentions the matter of context. "As the interest of diversity is compelling in the *context* of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest."<sup>157</sup> These statements acknowledge the importance of the school's discretion and of context in constitutional interpretation, while noting that neither absolves the program at issue from judicial scrutiny.

The limited import of context and of a university's discretion was also suggested by what Justice Powell had said earlier in his opinion. When rebutting the argument that the level of equal protection scrutiny should vary in accordance with the race or ethnicity of the person challenging a racially sensitive admissions program, Justice Powell insisted that "[t]he guarantees of the Fourteenth Amendment extend to all persons" regardless of race or ethnicity<sup>158</sup> and that "[r]acial distinctions of any sort are inherently suspect and thus call

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156. *Id.* at 314 (emphasis added). As we have seen, the University's brief also argued for the importance of discretion. 1977 WL 189474, at 75. In its amicus brief in support of the University, the Law School Admission Council also argued for judicial deference to academic judgment: "[T]he basic values at stake [in the litigation] are educational, and the responsibility rests with the educators to exercise their entrusted discretion reasonably and fairly. . . . This extended analysis and debate [on affirmative action] has produced a broad consensus among experts in legal education, reflecting a collective judgment worthy of deference." Brief Amicus Curiae of the Law School Admission Council at 34-35, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (9178) (No. 76-811) (June 7, 1977), 1977 WL 188017. Note that this passage also invokes the themes of expertise and of initiative and responsibility.

157. *Bakke*, 438 U.S. at 314-15 (emphasis added).

158. *Id.* at 289.

for the most exacting judicial examination.”<sup>159</sup> Justice Powell stated that to hold otherwise would be to “hitch[] the meaning of the Equal Protection Clause to . . . transitory considerations” and to “hold[], as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces.”<sup>160</sup> This, according to Justice Powell, is improper because “the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of coherent interpretation.”<sup>161</sup>

This insistence on the importance of a consistent constitutional standard in the face of “shifting political and social judgments” undoubtedly puts limits on the role of context and discretion and might also be thought to preclude the ability of a subsidiary institution to make decisions that do not conform rigidly to the constitutional standard. But Justice Powell goes on to state that “[p]olitical judgments regarding the necessity for the particular classification may be weighed in the constitutional balance.”<sup>162</sup> In other words, while the constitutional standard remains the same, the facts and judgments to which the standard applies may indeed be “shifting.” This proposition allows space to a university to employ (time-bound) judgments with respect to a diversity admissions program. Context and university discretion will be acknowledged, but because the standard remains the same, university discretion will remain subject to scrutiny.

Finally, when subsequently applying the second prong of equal protection scrutiny, another subsidiarity theme is sounded when Justice Powell expresses sensitivity to the issue of “judicial interference” in the work of a university.<sup>163</sup> This concern is consistent with the fact that universities have taken the initiative and assumed the responsibility to educate students in ways that contribute to the common good.<sup>164</sup> After discussing what he considers as

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159. *Id.* at 291.

160. *Id.* at 298.

161. *Id.* at 299 (citations omitted).

162. *Id.* (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

163. *Id.* at 319 n.53. As we have seen, the University also cautioned against “judicial interventionism.” Brief for Petitioner, 1977 WL 189474, at 83; *see also Bakke*, 438 U.S. at 76.

164. As we have seen, the University’s brief also seeks acknowledgment of the initiative and responsibility that it and other academic institutions have assumed in addressing discrimination’s impact on education. *See, e.g.*, Brief for Petitioner, 1977 WL

constitutionally permissible forms of diversity-based admissions programs, Justice Powell states with respect to racially sensitive admissions decisions that “[s]o long as the university proceeds on an individualized case-by-case basis, there is no warrant for judicial interference in the academic process.”<sup>165</sup> Universities that employ such individualized considerations will enjoy a “presumption of legality,” thus reducing their exposure to judicial interference.<sup>166</sup>

### *E. Conclusion*

In conclusion, in Justice Powell’s opinion the University is presented as what may fairly be described as a subsidiary institution entitled to judicial cognizance of its educational mission in service to the common good. Justice Powell finds that the First Amendment provides some freedom for the University’s admissions decisions. This “countervailing constitutional interest” creates a context in which the requirements of the Equal Protection clause must be interpreted. Nevertheless, invocation of the First Amendment does not prevent Justice Powell from conducting an analysis that relies on certain concepts central to the principle of subsidiarity – most importantly, the University’s educational mission. Accordingly, and responsive to subsidiarity concerns, the University’s discretion is recognized, and judicial interference in University admissions decisions is to be avoided when possible. But the University’s acknowledged mission does not create a blank check, and the First Amendment protection is not absolute. Where a constitutional mandate is implicated, the University’s admissions goals will be examined for consistency with that mandate. Goals that are outside the competence of the university cannot support an admissions policy that challenges constitutional mandates. Goals that are appropriate for the University’s mission will be accorded proper deference, but these goals will still be subject to some judicial scrutiny.

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189474, at 9-11, 33-34, 40-42 and 43 n.53.

165. *Bakke*, 438 U.S. at 319 n.53.

166. *Id.* In light of what will be discussed below in *Grutter*, it should be noted that Justice Powell does not devote any special attention to the University’s interest in the selectivity of the university’s admissions policies. Any issue as to selectivity would appear to be encompassed with Justice Powell’s quotation of the passage Justice Frankfurter quotes in his concurring opinion in *Sweezy*, which mentions the university’s freedom “to determine for itself on academic grounds . . . who may be admitted to study.” *Bakke*, 438 U.S. at 312. Thus, for Justice Powell – by way of his adoption of Frankfurter’s *Sweezy* concurring opinion – selectivity would appear to be an interest protected by the First Amendment. This interest in selectivity does not appear to be an interest whose constitutional weight (compelling or not) Justice Powell thinks needs to be recalculated in the Equal Protection context.

#### IV. The University of Michigan Law School's Brief in *Grutter v. Bollinger*<sup>167</sup>

At issue in *Grutter v. Bollinger*, was a challenge to the race-conscious admissions program of the University of Michigan Law School ("the Law School"). In support of this program, the Law School's brief invokes several of the subsidiarity themes outlined in Parts I and II, above, and mentioned in Justice Powell's *Bakke* opinion. The principal subsidiarity theme in the brief – and the one most often and importantly relied on – is that the Law School has taken the initiative and responsibility to assume an educational *mission* in service to the common good.<sup>168</sup> The Law School argues throughout its brief that crucial to its mission is a variety of educational benefits flowing from a racially diverse student body.<sup>169</sup>

As noted above, this theme plays a central role in Justice Powell's opinion. It provided the basis for his conclusion that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education."<sup>170</sup> But in Justice Powell's view, the University's subsidiary position also precluded it from pursuing goals that were outside the scope of its mission and competence.<sup>171</sup> The Law School's brief closely tracks Justice Powell's conclusions in this regard and implicitly accepts that Justice Powell's opinion has outlined a proper coordination of the interest in diversity admissions with constitutional mandates.<sup>172</sup> The Law School accepts that "racial balancing" is an improper goal for a university.<sup>173</sup> Following the tenor of Justice Powell's opinion, the Law School acknowledges that a diverse student body must have educational benefits for its students;<sup>174</sup> admission of unprepared

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167. Brief for the Respondent, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236.

168. The Law School's brief refers to the academic mission twenty times. *Id.* at \*1, \*2 (twice), \*3, \*4, \*5, \*13, \*25 (twice), \*28 (thrice), \*29, \*30 (twice), \*33, \*36, \*37, and \*50 (twice).

169. See especially Part I.C of the brief, where the Law School argues that these benefits include teaching students "to bridge racial divides, work sensitively and effectively with people of different races, and simply overcome the initial discomfort of interacting with people visibly different from themselves . . ." *Id.* at \*25.

170. *Bakke*, 438 U.S. at 311-12.

171. *Id.* at 309-310.

172. The Law School also makes an argument for reliance on *Bakke* based on the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). See Brief for the Respondent, *supra* note 167, at \*17-19.

173. *Id.* at \*32.

174. *Id.* at \*31-32.

minority students for the sake of mere balancing would be inconsistent with this purpose and thus with its educational mission.<sup>175</sup>

Again following Justice Powell's lead, the Law School also explicitly declines to assert an interest in remedying "societal discrimination,"<sup>176</sup> accepting that such an interest is improper for a subsidiary institution because, in light of the breadth of the goal and the limited scope of a subsidiary's authority, "no individual employer or educational institution could hope to actually remedy societal discrimination."<sup>177</sup> This mirrors (somewhat imperfectly) Justice Powell's statement that "isolated segments of our vast governmental structures are not competent to make [remedial] decisions, at least in the absence of legislative mandates and legislatively determined criteria,"<sup>178</sup> although it omits the point Justice Powell made about the need for findings by appropriate governmental bodies.

The other interest advanced by the University that Justice Powell rejected as a constitutional justification for its admissions program was the interest in educating physicians to serve underserved communities.<sup>179</sup> The Law School did not offer an equivalent interest with respect to lawyers as an independent constitutional justification of its admissions program. But the Law School did argue generally that educating minority lawyers was important for the nation as part of its argument that an elite professional school's diversity program

175. *Id.* at \*32.

176. Lee Bollinger, President of the University of Michigan at the time of the litigation, has acknowledged the constraint on the University's litigation strategy created by Justice Powell's *Bakke* opinion (which, in Bollinger's words, "specifically precluded any justification of using race and ethnicity as factors in admissions as a 'remedy' for past societal discrimination"), while noting the difficulty "for higher education . . . that no one really believed that the past could or should be ignored or that the present society is by any means free of discrimination." Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1590-91 (2003). At one point in its brief, the Law School in arguing for diversity speaks of "the elephant in the room – that . . . America remains both highly segregated by race and profoundly and constantly aware of its significance in our society." Brief for the Respondent, *supra* note 167, at \*22-23.

177. Brief for the Respondent, *supra* note 167, at \*31. At trial, the Chairperson of the faculty committee that drafted the Law School's admissions policy testified that the policy's "special reference to the inclusion of students from groups which have been historically discriminated against" was based on an interest in the perspective of such students and did not imply a goal of remedying past discrimination. *See Grutter*, 539 U.S. at 319. And in its brief, the Law School argued that "America remains . . . highly segregated by race," and that there is still "widespread racial discrimination." Brief for the Respondent, *supra* note 167, at \*23.

178. *Bakke*, 438 U.S. at 309.

179. *Id.* at 310-11.

serves the common good.<sup>180</sup> In its brief, the Law School repeatedly argued that if its diversity admissions program were invalidated and it chose not to lower its standards, “resegregation” of the school would result.<sup>181</sup> And the Law School asserted that “a decision to overrule *Bakke* would cut the minority lawyers currently being trained by half or three-quarters, resulting in the near-complete absence of minority students . . . that train most of our federal judges, prosecutors and law clerks (to say nothing of the new lawyers at our country’s leading law firms).”<sup>182</sup>

Despite citing such facts, the Law School did not argue that its program was necessary to provide lawyers for underserved communities. Instead, the Law School argued that “public confidence in law enforcement and legal institutions . . . will be difficult to maintain if the segments of the bench and bar currently filled by graduates of [elite law schools] again become a preserve for white graduates, trained in isolation from the communities they will serve.”<sup>183</sup> Thus, what UC Davis argued surfaces to some extent, not as an independent justification, but as part of the Law School’s argument that its admissions program benefits the common good in ways that would be lost through an adverse ruling by the Court.

On the positive side, the Law School took to heart the prominence Justice Powell gave to the concept of the academic mission and reasserted his conclusion that diversity was a constitutionally permissible goal for an institution of higher education in service to the common good. Accordingly, the Law School argued in its brief that its diversity admissions program was an integral part of its mission and that a diverse student body contributes in significant ways to the common good.<sup>184</sup> On the one hand, the Law School argued that admitting a diverse student body serves important educational goals that would be realized for all its students – whether minority or non-minority – while at school, such as breaking down stereotypes and making students aware of the experiences and viewpoints of their fellow students.<sup>185</sup> Here, the Law School again emphasized that these goals are not adventitious but are part of its

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180. *Id.* at 312.

181. Brief for the Respondent, *supra* note 167 at \*1, \*13, \*19-20.

182. *Id.* at \*20.

183. *Id.* at \*20-21.

184. *See, e.g., id.* at \*2, \*8-9, \*13, \*25.

185. *See, e.g., id.* at \*26, \*30.

mission as an educational institution.<sup>186</sup> This is so because “[t]he Law School values the presence of minority students because they will have direct, personal experiences that white students cannot – experiences which are relevant to the Law School’s mission.”<sup>187</sup> This is important because “breaking down [racial] stereotypes is a crucial part of its mission.”<sup>188</sup> In addition, diversity in an elite (highly selective) professional school would serve the common good after graduation by preparing minority students – and non-minority students educated in understanding the experiences of minority students – to serve as lawyers and leaders of society and “the Nation.”<sup>189</sup> The training of leaders of society through a highly selective admissions program is “a core part of [the Law School’s] mission.”<sup>190</sup>

This last mentioned point relating to the Law School’s elite status and its preparation of leaders for the nation requires special note. The Law School’s brief explicitly introduces an element of its admissions program that was at most implicit in Justice Powell’s consideration of the UC Davis program.<sup>191</sup> This is the element of selectivity in admissions that the Law School as an academically elite institution sought to preserve. Selectivity became an explicit issue in the *Grutter* litigation because petitioner Grutter and the Solicitor General, while acknowledging the legitimacy and educational benefits of diversity, argued that to accord with the requirements of equal protection, diversity must be achieved through alternative admissions plans that arguably would have the effect of further relaxation of the Law School’s admissions standards.<sup>192</sup> These arguments challenged the school to justify its admissions program in light of its choice to be an elite institution.

Because of these challenges, when the Law School in its brief first mentions the diversity goal, it conjoins it with selectivity, asserting that these goals are inextricably linked in its mission. Thus, in the brief’s statement of the case the Law School asserts that

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186. “The presence of minority students,” the brief asserts, is “essential to the Law School’s educational mission.” *Id.* at \*25.

187. Brief for the Respondent, *supra* note 167, at \*30.

188. *Id.*

189. *Id.* at \*2, \*12, \*20-21, \*24-25.

190. *Id.* at \*36.

191. *See id.* at \*6.

192. This is the interpretation put on the arguments of Petitioner and the United States by the Law School, *see id.* at \*33-36, and by the *Grutter* Court, *see* 539 U.S. at 339-40.

“academic selectivity *and* student body diversity, including racial diversity, are both *integral* to the educational *mission* of the Law School.”<sup>193</sup> And in the summary of argument section, the Law School repeats that it “firmly believes that high academic standards *and* a diverse student body are both *integral* to effective pursuit of its chosen educational *mission*.”<sup>194</sup> Throughout its brief, the Law School repeatedly claims that invalidation of its admissions program will “force” the school to choose between these goals, with adverse consequences for its educational mission.<sup>195</sup> Nevertheless, while stressing the importance of selectivity as part of its mission, when the brief offers an interest for the Court to find “compelling” for Equal Protection review, it describes this interest in a unitary fashion as “the limited, competitive consideration of race in admissions to secure the educational benefits that flow from student body diversity.”<sup>196</sup>

In addition to the emphasis on its educational mission serving the common good, the Law School sounds other subsidiarity themes in its brief. Particularly noteworthy is the caution expressed in the Law School’s brief against *judicial interference* in the academic mission. This term is explicitly mentioned only once in the brief when the Law School quotes Justice Powell’s awareness of the problem of “judicial interference in the academic process,”<sup>197</sup> but the context is significant. This reference occurs when the Law School addresses “[t]he difficulty of measuring the precise weight given to race versus other diversity factors.”<sup>198</sup> This theme is also stressed when, as noted above, the Law School repeatedly asserts that judicial invalidation of its admissions program will interfere in the Law School’s academic judgment by “forcing” the School to choose between the goals of selectivity and diversity (both of which it argues are integral to its mission) and raising the prospect of “resegregation” of elite universities.<sup>199</sup> Indeed, the Law School argued that racial diversity was “vitaly important” to its “*core mission*,” thus emphasizing the severe disruptive effect of an

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193. Brief for the Respondent, *supra* note 167, at \*1 (emphasis added).

194. *Id.* at \*13 (emphasis added); *see also id.* at \*8-9, \*49.

195. *Id.* at \*1, \*6, \*13, \*19-20, \*33-38.

196. *Id.* at \*14. (The quotation is from the first subheading in the brief’s Argument section.) In another references to this “compelling” interest, the brief describes it as the “important educational benefits – for students and for the wider society – associated with a diverse, racially integrated student body.” *Id.* at \*12.

197. *Id.* at \*49 (quoting *Bakke*, 438 U.S. at 319 n.53).

198. *Id.* at \*49.

199. *See supra* note 195.

adverse judicial decision.<sup>200</sup>

Related to the theme of judicial interference is the theme of *context* in constitutional interpretation as opposed to *rigid* application of constitutional law. As noted above, Justice Powell stated that “the interest of diversity is compelling in the *context* of a university’s admissions program.”<sup>201</sup> In opposition to the proposition that the only interest that could justify a university’s race-sensitive admissions program was remedying the university’s own past discrimination, the Law School argued that the Supreme Court “has steadfastly refused to embrace a *rigid* interpretation of the Equal Protection Clause.”<sup>202</sup> The Law School pointed to situations in which the *context* clearly indicates that a race-based choice of an employee would clearly be justifiable, such as when an undercover law enforcement officer was needed “to infiltrate a racially homogeneous terrorist cell.”<sup>203</sup>

Another important subsidiarity theme present in the Law School’s brief is the argument for judicial recognition of university *autonomy and discretion*. As with the theme of judicial interference, however, this theme is only explicitly mentioned once. The reference occurs towards the end of a section of the brief in which the Law School argues that the Supreme Court’s precedents, congressional findings, and social science research confirm that racial diversity has educational benefits.<sup>204</sup> The brief asserts that the congressional findings “reflect the longstanding conviction of the United States government on a set of critically important issues of fact and national policy.”<sup>205</sup> The brief cites findings to support the propositions that “America remains both highly segregated by race and profoundly and constantly aware of its significance in our society” and that there are significant differences in the lived experience of white and minority students.<sup>206</sup> The brief goes on to cite testimony that for the “classroom dynamic” with respect to racial issues, there is no substitute for the presence of minority students.<sup>207</sup>

“Against this backdrop,” the brief asserts, “law schools need the

200. *Id.* at \*28-29 (emphasis added).

201. *Bakke*, 438 U.S. at 314-15 (emphasis added).

202. Brief for the Respondent, *supra* note 167, at \*27 (emphasis added).

203. *Id.* (citing *Richmond v. Croson*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring)).

204. *Id.* at \*21-25. In this passage, the brief does not cite the First Amendment or a First Amendment case.

205. *Id.* at \*22.

206. *Id.* at \*23.

207. *Id.* at \*24.

*autonomy and discretion* to decide that teaching about the role of race in our society and legal system, and preparing their students to function effectively as leaders after graduation, are critically important aspects of their institutional missions.”<sup>208</sup> The Law School’s right to teach students about the role of race and prepare students for leadership was not challenged in the litigation. However, presumably relying on the “classroom dynamic” point mentioned immediately above, the Law School builds on this premise to conclude that “pursuit of those goals is greatly enhanced by the presence of meaningful racial diversity among the law school’s student body.”<sup>209</sup> And the brief goes on to assert that “the presence of minority students is also essential to the Law School’s educational mission” of “training lawyers and leaders” for American society.<sup>210</sup>

Thus, the Law School’s reference to “autonomy” starts with a premise about one of its teaching goals – a goal that implicitly appeals to academic freedom and the First Amendment (but see the following paragraph). On this premise it constructs an argument for a diverse student body as supporting that goal and for serving the common good through outcomes (training leaders for a multi-racial society) that are part of “national policy.”

Although, as we have seen, the Law School relies on several of the subsidiarity themes found in Justice Powell’s opinion, there is one important respect in which it declines to follow Justice Powell’s lead. Despite the fact that at one point in its brief the Law School quotes part of the passages from *Keyshian* and from Justice Frankfurter’s concurring opinion in *Sweezy* that Justice Powell quoted in *Bakke*,<sup>211</sup> unlike Justice Powell the Law School does not call attention to the fact that these cases invoked the First Amendment.<sup>212</sup> Also, as noted above, when the Law School makes its only explicit argument for university “autonomy,” it does not cite the First Amendment or any

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208. *Id.* at \*25 (emphasis added).

209. *Id.*

210. *Id.*

211. *Id.* at \*28. The Law School’s quote from *Sweezy* does not mention that the quote is from Justice Frankfurter’s concurring opinion. See also *id.* at \*29 n.44.

212. In neither of the passages from the Law School’s brief referenced in the preceding note does the Law School refer to the First Amendment or to Freedom of Speech. The context of the first passage in which *Keyshian* and Justice Frankfurter’s *Sweezy* concurrence is mentioned is an argument that diversity is essential to the Law School’s “mission.” The reference to *Keyshian* and the *Sweezy* concurrence in footnote 44 of the Law School’s brief is made to support the proposition that the Supreme Court “has recognized that universities have an unparalleled need for pluralism that is essential to the vitality of our society.” *Id.* at \*29.

First Amendment case in support.<sup>213</sup>

Indeed, nowhere in its brief does the Law School explicitly rely on an argument grounded in the First Amendment or in academic freedom. In fact, in a footnote the Law School cites favorably two cases in which a First Amendment Freedom of Speech Clause challenge was raised *against* a university.<sup>214</sup> The brief cites a post-*Bakke* case, *Board of Regents v. Southworth*,<sup>215</sup> in which University of Wisconsin students argued that the university's compulsory student activity fee forced them, in violation of their free speech rights, to provide financial support to student groups whose expressive activities they found repugnant.<sup>216</sup> The Supreme Court substantially denied the challenge, holding that the university's allocation of funding was viewpoint neutral.<sup>217</sup> The Law School's brief also cites *Healy v. James*,<sup>218</sup> in which students brought a freedom-of-speech challenge against Central Connecticut State College when the school denied their petition for official campus recognition of a local chapter of the Students for a Democratic Society.<sup>219</sup>

It would seem that in citing these cases, the Law School decided to forego a First Amendment argument in favor of academic freedom and chose instead to emphasize an argument in favor of context and flexibility in the application of constitutional provisions. The brief introduces these cases by stating that the Supreme Court "has frequently held that constitutional doctrines must be *flexible* enough to accommodate the unique needs of the educational environment."<sup>220</sup> The brief's parenthetical for the *Southworth* case reads as follows: "First Amendment compelled-speech / funding doctrines modified for academic environments."<sup>221</sup> The brief's parenthetical for the *Healy*

213. See Hiers, *supra* note 118, at 571 (noting that the Law School's argument for academic freedom was based on policy grounds and not on the First Amendment), 573 ("The Law School had not claimed any First Amendment or academic freedom interest . . .").

214. Brief for the Respondent, *supra* note 167, at \*29 n.43.

215. 529 U.S. 217 (2000).

216. *Id.* at 226-27.

217. *Id.* at 233-34.

218. 408 U.S. 169 (1972).

219. The Court reversed the lower federal court's decision in favor of the University and remanded for further consideration. *Id.* at 194.

220. Brief for the Respondent, *supra* note 167, at \*29 n.43 (emphasis added).

221. *Id.* The parenthetical's reference to the First Amendment is the only explicit mention of the First Amendment in the brief, and it occurs in a context in which the Amendment is employed against a university.

case reads “student speech rights limited by ‘the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process.’”<sup>222</sup> Thus, both cases are cited for the point that a court should not rigidly apply a constitutional provision where the context – especially one involving a university – suggests that flexibility is appropriate. As discussed in Part II, above, this adumbrates a cautious application of the subsidiarity principle in the constitutional context. And because the constitutional law in question is the Freedom of Speech Clause, that clause is not available for support as a “countervailing constitutional interest” in the way Justice Powell employed it in *Bakke*. So, the Law School’s argument here is, in effect, a naked reliance (unsupported by a “countervailing constitutional interest”) on the university as a subsidiary institution serving the common good, but with an appeal to the need for flexibility in constitutional enforcement.

The Law School may have decided to rely on *Southworth* because in that case the Court makes repeated favorable reference to the academic mission,<sup>223</sup> the subsidiarity concept on which the Law School makes its principal reliance. And the *Southworth* Court acknowledges that deference is due to a university’s judgment in pursuit of its mission.<sup>224</sup> The Court states, for example, that in considering the students’ First Amendment challenge, “recognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech.”<sup>225</sup> The Court adds that “[i]t is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning,”<sup>226</sup> and that “[t]he University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.”<sup>227</sup> The Law School may also have determined that reliance on *Healy* was beneficial because the Court, despite holding that the College “failed to accord due recognition to First Amendment principles,” remanded the case for further consideration and stated

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222. *Id.*

223. 529 U.S. at 221 (twice), 223, 233.

224. *Id.* at 232, 233.

225. *Id.* at 231.

226. *Id.* at 232.

227. *Id.* at 233.

that “First Amendment rights must always be applied ‘in light of the special characteristics of the . . . environment’ in the particular case.”<sup>228</sup>

Thus, with respect to subsidiarity issues, the Law School placed its greatest emphasis on its educational mission, which, it argued, included both diversity and selectivity. And it argued that its pursuit of this dual mission served the national common good in many ways, perhaps most prominently, by training future national leaders. But confronted with the option, on the one hand, of an encumbered invocation of First Amendment protection of academic freedom and, on the other hand, an argument for context and flexibility relying in part on cases raising First Amendment challenges against a university, the Law School chose the latter course.<sup>229</sup> In making this choice, the Law School implicitly pursued a course resting on the freedom of a university as a subsidiary institution without support from a “countervailing constitutional interest.” It implicitly invited the *Grutter* Court to take the same approach, emphasizing subsidiarity without need for support from the First Amendment.<sup>230</sup>

## V. Amicus Briefs in Support of the Law School in *Grutter*

### A. Brief of Amici Curiae Judith Areen et al. (“*The Individual Deans’ Brief*”)<sup>231</sup>

The Individual Deans’ brief merits special attention because perhaps more than any brief filed in *Grutter*, it makes the most extensive and concentrated arguments invoking the subsidiarity themes outlined in Part II and because it emphasizes a subsidiarity theme not stressed by the Law School on which the *Grutter* Court relied. Right at the outset of the brief, the Deans state their fundamental thesis in a way that relies on several subsidiarity themes: “universities and law schools should have the *freedom* to resolve [the

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228. 408 U.S. at 194; *id.* at 180 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

229. See Hiers, *supra* note 118.

230. As we will see, the Court declined this invitation. Neither *Southworth* nor *Healy* are cited by the *Grutter* Court.

231. Brief for Judith Areen et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 554398 (hereinafter *Individual Deans’ Brief*). This brief was signed by ten law school deans in their individual capacities. The law schools were Georgetown, Duke, Pennsylvania, Yale, Columbia, Chicago, New York University, Stanford, Cornell, and Northwestern. I refer to it here as “the Individual Deans’ Brief” to contrast it with the amicus brief filed by the American Law Deans Association, discussed below.

difficult and complex issues raised by the *Grutter* case] in ways that they believe are most consistent with the academic and social *missions* of their schools -- and not through *rigid constitutionalization* of the admissions process by *federal courts*.<sup>232</sup> This sentence announces the major subsidiary themes presented in the brief: (1) universities enjoy constitutionally grounded freedom (autonomy) and discretion to use their judgment and expertise on matters within the scope of their mission; (2) the mission of universities, as the brief will argue, serves the common good;<sup>233</sup> (3) academic freedom is threatened by judicial interference in the academic process and mission; and, relatedly, (4) the judiciary ought not to interpret constitutional law in a rigid way that is insensitive to context and, as the brief will argue, disrupts justified reliance on judicial precedent. And as implied in the Law School's brief, the Individual Deans' brief argues that Justice Powell's *Bakke* opinion sets forth an appropriate framework for coordinating and harmonizing the activities of universities and the requirements of the Constitution.<sup>234</sup>

As the above summary indicates, the Deans emphasize the major subsidiarity theme advanced in the Law School's brief: that universities and law schools have a "mission" that serves the common good.<sup>235</sup> And the Deans agree that Justice Powell's *Bakke* opinion sets forth a proper coordination of academic diversity programs and constitutional mandates. As discussed below, there is one major difference, however. Unlike the Law School's brief, the Deans' brief makes academic autonomy salient, emphasizes its purported constitutional basis, and repeatedly decries the danger posed to autonomy by judicial interference.<sup>236</sup>

In pursuing these themes, the Deans divide their argument into two parts. The first part argues that Justice Powell's major conclusions in *Bakke* legitimize the Michigan Law School's admissions program and should be reaffirmed.<sup>237</sup> The second part argues that reaffirmation of *Bakke* is especially appropriate because of the constitutional protection of university autonomy.<sup>238</sup>

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232. *Id.* at \*2 (emphasis added).

233. Still in the argument summary, the brief says that "academic autonomy . . . not only furthers the education of students, but also benefits society as a whole." *Id.* at \*3.

234. *Id.* at \*4-7.

235. The Individual Deans' Brief makes eleven references to the academic mission (often speaking of an "educational and social mission"). *Id.* at \*2, \*3 (twice), \*5 (quoting the amicus brief of the United States), \*7, \*11 n.6, \*17 (twice, once quoting John Yoo), \*19, \*20, \*22.

236. *Id.* at \*3, \*4, \*5, \*17, \*19, \*20, \*21, \*22, \*24, \*26.

237. *Id.* at \*4-19.

238. *Id.* at \*19-26.

## 1. Part I of the Brief.

The major thesis of the first part of the brief is that *Bakke* has given rise to social expectations that “strongly militate against reversal of [*Bakke*’s] instructions to universities.”<sup>239</sup> The argument here is that in *Bakke*, Justice Powell outlined a coordination of constitutional mandates with university admissions programs that is reasonable and properly subject to reliance. The brief argues that, on the one hand, Justice Powell properly rejected the use by universities of “rigid race-based classifications” because they offend the Constitution and do “not further either diversity or educational interests more generally.”<sup>240</sup> Thus, rigid racial classifications are inconsistent not only with constitutional law but with the academic mission.<sup>241</sup> On the other hand, the brief applauds Justice Powell’s approval of the use of race as a “consideration.”<sup>242</sup> The Deans argue that this approval allows universities to foster racial diversity in the classroom in accordance with their professional judgment about their academic mission.<sup>243</sup> Thus, the Deans imply that Justice Powell’s opinion achieved a proper harmonization of constitutional law and the academic mission of universities.

In support of this position, the Deans invoke several subsidiarity themes in arguing that a diversity admissions program of the sort approved by Justice Powell serves the common good; that the Deans, in the exercise of their professional judgment and responsibility have for years employed such a program; that academic institutions should be accorded the freedom to employ such programs in pursuit of their educational mission; and that it would accordingly be inappropriate for the judiciary to pressure universities to abandon such programs.

In this first part of their argument, the Deans emphasize that a racially sensitive admissions program in law school serves the common good by “enhancing learning, improving the profession, and furthering the progress of this Nation.”<sup>244</sup> Seeking acknowledgement

239. *Id.* at \*4.

240. *Id.* at \*6.

241. *Id.* at \*7 (“[A] rigid quota . . . could lead the school to admit unqualified students, which would undermine the school’s educational mission [and] could also hamper a university’s ability to admit non-racially diverse students.”).

242. *Id.*

243. *See, e.g., id.* at \*4, \*5, \*11, \*12, \*16.

244. *Id.* at \*4. The contribution to the common good achieved by race-conscious admissions in law school is the principal theme of the amicus brief of the Association of American Law Schools. The AALS argued that affirmative action programs like the one under challenge “are essential if law schools are to play their vital social role of producing

and deference for their initiative and responsibility, the Deans assert that they and other academic professionals have employed admissions practices “forged over years of experience and carefully crafted to adhere to Justice Powell’s opinion in *Bakke*.”<sup>245</sup> Indeed, the Deans assert that “[a] diverse student body is nothing less than fundamental to enabling the Law School Deans to fulfill their high responsibility as educators.”<sup>246</sup> Accordingly, they contend that “each academic institution should be free to decide how best to further its educational and social missions.”<sup>247</sup>

Faced with the threat of judicial interference with admissions standards forged by academic professionals “over years of experience” in attempted compliance with *Bakke*, the Deans state that it would be “inappropriate for federal courts to determine for [academic] institutions the weight that should be accorded such standards during the admissions process.”<sup>248</sup> The Deans express their belief that “any judicial pressure to adopt a race-blind admissions process will threaten the quality and diversity of their student bodies, as well as a profession that is dedicated to serving society as a whole.”<sup>249</sup> Accordingly, they conclude that “this Court should not use the judicial power to deprive universities of the freedom to take race into account as one factor” in a diversity admissions program.<sup>250</sup> The Deans assert that in the twenty-five years since *Bakke* “[n]ot only have universities extensively relied on [the *Bakke*] decision, but thousands of students have been schooled against its backdrop.”<sup>251</sup> As did the Law School, the Deans invoke the plurality opinion in

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lawyers, judges, and public servants for an increasingly multiracial and multiethnic society.” Brief for Ass’n of Am. Law Schs. as Amicus Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 399076, at \*2.

245. Individual Deans’ Brief, *supra* note 231, at \*16.

246. *Id.* at \*11.

247. *Id.* at \*17.

248. *Id.* at \*16.

249. *Id.* at \*4 (“Forcing universities to adopt such an admissions process would cause a dramatic change in social practice and would frustrate expectations that, while different from school to school, have crystallized around Justice Powell’s opinion in *Bakke*, and have become firmly engrained in universities today.”).

250. *Id.* at \*18.

251. *Id.* The academy’s reliance on *Bakke* is a common theme of several of the law school’s amici. See, e.g., Brief for Ass’n of Am. Law Schs., *supra* note 244, at \*21-30; Brief for Amherst Coll. et al. as Amicus Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 399075, at \*27-29; Brief for Am. Law Deans Ass’n as Amicus Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 399070, at \*30; and Brief for the Society of Am. Law Teachers as Amicus Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-242), 2003 WL 399060, at \*24-26.

*Planned Parenthood v. Casey*<sup>252</sup> for several reliance points, including the assertion that during the decades since *Bakke*, “‘people have organized’ their educational decisions” based on that decision.<sup>253</sup> They conclude that *Bakke* is “one of the few cases that has so completely *ordered* American education.”<sup>254</sup>

This reference to *Bakke*’s ordering of American education emphasizes the point, important to subsidiarity concerns, that *Bakke* has achieved a coordination and harmonization of constitutional law and the activities of universities and professional schools. The Deans argue that overturning *Bakke* would disappoint long-standing academic reliance on that decision and disrupt the coordination it achieved. “It would be a wrenching tear in the fabric of the law schools’ operations to undo that reliance,” the brief asserts.<sup>255</sup> Echoing a point made in the Law School’s brief, the Deans assert that if *Bakke* were overturned, “a sharp re-segregation of higher education would inevitably occur.”<sup>256</sup> Given the implications for federally funded private schools, the Deans state dramatically that “[t]he resultant social upheaval – affecting millions of students, thousands of institutions of higher education, the legal profession, and society at large – would be immense and irreparable.”<sup>257</sup>

## 2. Part II of the Brief

In Part II of their brief, the Deans argue that acknowledgment of university autonomy requires re-affirmation of *Bakke*. As we have seen, the Law School’s brief makes only one explicit reference to university “autonomy.”<sup>258</sup> Linking academic autonomy and discretion with educational mission, the Law School starts with an unchallenged premise that “law schools need the autonomy and discretion to decide that teaching about the role of race in our society and legal system, and preparing their students to function effectively as leaders after graduation, are critically important aspects of their educational

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252. 505 U.S. 833 (1992) (plurality).

253. Individual Deans’ Brief, *supra* note 231, at \*18.

254. *Id.* at \*19 (emphasis added).

255. *Id.*

256. *Id.*

257. *Id.* Perhaps implicitly alluding to the issue of durational limits on race-conscious admissions programs, the Deans state that “[a]s societal patterns change, it is to be expected that law schools will change their practices accordingly.” *Id.* at \*18.

258. Brief for the Respondent, *supra* note 167, at \*25.

missions.”<sup>259</sup> On this premise, the Law School builds its conclusion that “pursuit of those goals is greatly enhanced by the presence of meaningful diversity among the law school’s student body.”<sup>260</sup> And the Law School did not argue for the First Amendment as a constitutional basis for academic autonomy.

In stark contrast, the Deans announce at the outset of their argument that “[a]t stake in this case is *the very freedom of academic institutions* to act within reasonable bounds to further their academic and social missions.”<sup>261</sup> They devote Part II of their argument entirely to academic autonomy as a reason for reaffirming *Bakke* and the Sixth Circuit’s judgment, warning that “[a]cademic autonomy is at the heart of this challenge to the University of Michigan’s admissions process. . . .”<sup>262</sup> In this Part, the Deans repeatedly invoke autonomy<sup>263</sup> and provide an extended discussion of Supreme Court case law grounding academic autonomy in purported constitutional interests.<sup>264</sup>

In addition to quoting the passages from the Supreme Court’s opinion in *Keyshian* and Justice Frankfurter’s concurring opinion in *Sweezy* quoted in Justice Powell’s *Bakke* opinion – both of which explicitly rely on the First Amendment – the Deans rely heavily on the post-*Bakke* case of *Regents of University of Michigan v. Ewing*,<sup>265</sup> in which the Court invokes academic autonomy to support the University of Michigan against a due process challenge.<sup>266</sup> In addition to citing *Keyshian* and other cases for the Supreme Court’s recognition of “the strong First Amendment interest in *deferring* to universities in the academic setting,”<sup>267</sup> the Deans quote *Ewing* for the point that “‘autonomous decision making by the academy itself’ is necessary for [academic] freedom to thrive.”<sup>268</sup>

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259. *Id.*

260. *Id.*

261. Individual Deans’ Brief, *supra* note 231, at \*3 (emphasis added).

262. *Id.* at \*21 (emphasis added).

263. *Id.* at \*19, \*20, \*21, \*22, \*24, \*26.

264. *Id.* at \*19-24.

265. 474 U.S. 214 (1985).

266. *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985); 2003 WL 554398, at \*3, \*19, \*21-22.

267. *Id.* at \*20 (emphasis added).

268. *Id.* at \*21-22 (quoting *Ewing*, 474 U.S. at 226 n.12). The Law School’s brief mentioned *Ewing* only once in a footnote in support of the proposition that “[t]his Court has frequently held that constitutional doctrines must be flexible enough to accommodate the unique needs of the educational environment.” Brief for the Respondent, *supra* note 167, at \*29 n.43.

Having set forth this broad constitutional basis for academic freedom, the Deans repeatedly warn against purported dangers of judicial interference in the academic process. Linking, as did the Law School, academic autonomy with the academic mission,<sup>269</sup> the Deans assert that “admissions officials should have the freedom, *without fear of federal judicial intervention*, to review and consider an applicant’s entire accomplishments and background in admitting a class that will further their schools’ *mission*.”<sup>270</sup> The Deans conclude that “[a] decision by this Court to *force* ‘race neutrality’ in the admissions process would be inconsistent with *Bakke*, inconsistent with the principles of *stare decisis*, and inconsistent with the principles of academic autonomy.”<sup>271</sup>

In conclusion, it should be noted that in making their autonomy argument, the Deans put forward an additional argument that was not made by the Law School. The Deans rely on the fact that the Michigan Constitution makes the University of Michigan “constitutionally autonomous from the [state] government.”<sup>272</sup> Thus, in the Deans’ view, “[f]ederal court interference would be an even more drastic interference as it would pit the power of the federal judiciary against a state actor with special constitutional significance, the University of Michigan.”<sup>273</sup> Thus, the Deans assert, “[v]ital principles of federalism are therefore at stake,”<sup>274</sup> and the Supreme Court “should accord substantial *deference* to the University of Michigan’s decisions” with respect to the authority conferred on it by the people of Michigan.<sup>275</sup>

### B. *The Amherst Brief*<sup>276</sup>

Amherst and the colleges and universities joining in its brief describe themselves as “highly selective” and make the issue of selectivity in admissions prominent in their brief.<sup>277</sup> Amherst follows Justice Powell’s lead in emphasizing the importance of the academic

269. *Id.* at \*25.

270. Individual Deans’ Brief, *supra* note 231, at \*20 (emphasis added).

271. *Id.* at \*26 (emphasis added).

272. *Id.* at \*24.

273. *Id.*

274. *Id.*

275. *Id.* at \*25 (emphasis added).

276. Brief for Amherst Coll. et al., as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (Nos. 02-241 & 02-516), 2003 WL 399075. Twenty-seven other colleges and universities joined Amherst’s amicus brief.

277. *See, e.g., id.* at \*1-3, \*5.

mission<sup>278</sup> and, as did the Law School, Amherst links diversity and selectivity as components of its academic mission. The brief argues that the decision of highly selective colleges to employ diversity admissions programs is based on their educational experience and expertise<sup>279</sup> and serves their educational mission.<sup>280</sup>

As did the Individual Deans, Amherst argues that Justice Powell's *Bakke* opinion outlined a harmonization of academic interest in diversity admissions and constitutional law upon which the academic world has relied.<sup>281</sup> Amherst argues that in the *Grutter* case, "the beginning of wisdom is to recognize, as Justice Powell and a majority of the Court did in [*Bakke*], that *educators* have set the relevant policies," and they have done so for "sound *educational* reasons."<sup>282</sup> "[U]pending the world that *Bakke* created"<sup>283</sup> and disrupting diversity admissions programs at highly selective colleges would have adverse consequences for the common good, "seriously impeding the goal of preparing the ablest minority leaders for society and the professions."<sup>284</sup> Continuing the theme of the common good, Amherst supports the Law School's admissions program by arguing that no alternatives for diversity admissions suggested by petitioner will come close to achieving the educational and social benefits realized by policies that embrace diversity while maintaining high educational standards.<sup>285</sup>

Accordingly, Amherst argues that judicial "[d]eference to the colleges' educational judgments that diversity is a core component of the education they are seeking to provide is plainly called for."<sup>286</sup>

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278. As did the Law School and the Individual Deans, Amherst particularly emphasizes the role of the academic "mission." See, e.g., *id.* at \*2, \*7, \*19-21.

279. See, e.g., *id.* at \*2, \*4-5, \*7.

280. See, e.g., *id.* at \*19-21.

281. For example, Amherst praises "the central insights underlying the sharp distinction Justice Powell drew in *Bakke*" between quota-based diversity admissions and the Harvard College approach; "the former could fairly be said to deny the equal protection of law, while the latter could not." *Id.* at \*16 (referencing 438 U.S. at 318).

282. *Id.* at \*4-5; see also *id.* at \*7 ("the relevant judgments are *educational* judgments, made by educators and those responsible for educational institutions.").

283. *Id.* at \*28.

284. *Id.* at \*15 (quoting WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 51 (1998)).

285. *Id.* at \*13-16. The Association of American Law Schools also argued that "none of the proposed alternatives is feasible for *selective* law schools." Brief for Ass'n of Am. Law Schs. *supra* note 244, at \*3 (emphasis added).

286. *Id.* at \*26-27. The need for judicial deference is strongly emphasized in the brief:

Amherst links this appeal to judicial deference to an appeal for re-affirmation of *Bakke*: “The judicial deference owed to colleges and universities, joined to the wise policy of *stare decisis*, counsels against any resolution of these cases that would interfere with the powers of colleges and universities generally . . . to experiment and pursue their own judgments as to how to best use their resources for educational and charitable purposes . . . .”<sup>287</sup>

*C. The Brief of the American Law Deans Association*<sup>288</sup>

Most notable in the Deans Association’s brief is that it argues for *four* compelling interests supporting race-conscious admissions programs.<sup>289</sup> The first of these is “[t]he [i]nterest in [a]voiding [r]esegregation.”<sup>290</sup> In arguing for this interest, the Association asserts that “highly selective admission standards are central to the *mission* of most law schools”<sup>291</sup> and that a race-conscious admissions policy “is the one successful method that has enabled selective schools to satisfy” the interest in avoiding resegregation of their student bodies.<sup>292</sup> The Association argues that “[t]his marginal consideration of race is essential to negate the segregative impact of highly selective admission standards.”<sup>293</sup> Race-blind admissions, in the Association’s view, would dramatically reduce minority enrollment in selective law schools, which would then be perceived as segregative “in the court of public opinion.”<sup>294</sup> The Association concludes that “all law schools have a compelling interest in avoiding the appearance of deliberate

“Displacement of a college or university’s core prerogatives . . . would be an extraordinary departure from the deference that courts have long shown to institutions of higher education generally, and particularly private institutions.” *Id.* at \*27; *see also id.* at \*26, \*29.

287. *Id.* at \*29-30. As in the Individual Deans’ brief, Amherst’s principal case for judicial deference is *Ewing*. *Id.* at \*3, \*25-27.

288. Brief for Am. Law Deans Ass’n as Amicus Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 399070.

289. The Deans Association also endorses a fifth interest – “the compelling interest in diverse experiences and perspectives in the classroom” – argued in the law school’s brief, but the Association states that its brief will not repeat that argument. *Id.* at \*4.

290. *Id.*

291. *Id.* at \*5 (emphasis added). As did the Law School and Amherst, the Association follows Justice Powell’s lead in stressing the concept of the academic mission. The Association’s brief makes ten references to this mission. *Id.* at \*1, \*2, \*5, \*8, \*9 (four times), \*11, \*12.

292. *Id.* at \*6.

293. *Id.*

294. *Id.*

racial exclusion.”<sup>295</sup>

Thus, as did Amherst, the Association makes selectivity an important factor in its argument. But the Association goes further. In contrast to the other briefs we have considered, the Association identifies (as a second compelling interest) “the interest in selective admissions standards.”<sup>296</sup> The Association argues that “[l]aw schools have a compelling interest in not abandoning the pursuit of academic excellence or other components of their respective missions” and that “[c]onsideration of race has preserved these interests.”<sup>297</sup> Relying on “statistical studies and faculty experience,” the Association concludes that “the end of affirmative action would create inexorable pressure to distort or reduce [admission] standards.”<sup>298</sup>

The other compelling interests advanced by the Association are the interest, particularly of public law schools, in “serving the whole state”<sup>299</sup> and “the interest in remedying past and present discrimination in public education.”<sup>300</sup> With respect to the former, the Association asserts that “law schools . . . train a disproportionate share of the future political leadership of the state and nation” and argues that “[f]ailure to educate a leadership class among disadvantaged minority populations would be a permanent threat to equality and social stability.”<sup>301</sup> With respect to the remedial interest, the Association argues<sup>302</sup> that this interest “is not a response to mere ‘societal discrimination’” because “law schools are parts of educational systems” and “cannot ignore the unequal output of the earlier stages of the systems of which they are a part.”<sup>303</sup>

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295. *Id.* at \*7.

296. *Id.*

297. *Id.* at \*9. *See also* Brief for Ass’n of Am. Law Schs., *supra* note 244, at \*5-10 (proffering evidence that “law schools, particularly ones with highly selective admissions processes, produce a significant proportion of high public officials.”).

298. *Id.* at \*7.

299. *Id.* at \*12.

300. *Id.* at \*14.

301. *Id.* at \*12.

302. Obviously with a view to Justice Powell’s rejection of an interest in remedying “societal discrimination.” *See Bakke*, 438 U.S. at 307-309.

303. Brief for Ass’n of Am. Law Schs., *supra* note 244, at \*15. The Society of American Law Teachers also argued that “the necessity of remedying past and present discrimination provides a compelling interest sufficient to justify the inclusion of race as a factor in the admission process.” Brief for the Society of Am. Law Teachers as Amicus Curiae Supporting Respondents, *Gutter*, 539 U.S. 306 (No. 02-241), 2003 WL 399060 at \*3. As did the Deans Association, the Society documents a history of discrimination in primary education (the Society’s brief focuses exclusively on discrimination within the

## VI. The Supreme Court's Decision in *Grutter*

At issue in *Grutter v. Bollinger* was the University of Michigan Law School's admissions program, which sought to admit a "critical mass of underrepresented minority students . . . so as to realize the educational benefits of a diverse student body."<sup>304</sup> This program was challenged as racially discriminatory in violation of the Equal Protection Clause and Title VI of the 1964 Civil Rights Act.<sup>305</sup> Trial was conducted in federal district court, which held the University's admissions program unconstitutional and ordered the University not to use race as a factor in its admissions decisions.<sup>306</sup> On appeal, the Sixth Circuit, *en banc*, reversed, concluding that Justice Powell's *Bakke* opinion was binding precedent establishing diversity as a compelling state interest and that the University's admissions program survived strict judicial scrutiny.<sup>307</sup> The U.S. Supreme Court granted certiorari to determine "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."<sup>308</sup>

Because the Court had not addressed race-conscious admissions programs in more than twenty-five years since *Bakke*<sup>309</sup> and because of the importance of Justice Powell's *Bakke* opinion as argued in briefs submitted by the Law School and its amici,<sup>310</sup> the *Grutter* Court reviewed Justice Powell's opinion prior to conducting its constitutional analysis of the Law School's admissions program.<sup>311</sup> The Court cites in particular the amicus briefs filed by the Individual Deans and Amherst College in expressing the Court's acknowledgment that in the ensuing years academic institutions have

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state of Michigan) and argues that "affirmative action at the higher education level is necessary to provide a full remedy for discrimination in the lower grade levels." *Id.* at \*14. And as did the Deans Association, the Society argued that the discrimination it identifies is not merely "what [the Supreme Court] has defined as societal discrimination." *Id.* at \*2.

304. *Grutter*, 539 U.S. at 318 (reporting on the district court testimony of the Law School's Director of Admissions explaining the meaning of "critical mass.").

305. *Id.* at 317.

306. *Id.* at 321.

307. *Id.*

308. *Id.* at 322 (noting a Circuit split on this issue).

309. *Id.*

310. *See id.* at 323.

311. This is done in Part II.A of the Court's Opinion. *Id.* at 322-26. Part I.A gives a (favorable) preliminary account of the Law School's admissions policy. *Id.* at 312-16. Part I.B provides a prior history of the litigation, with a discussion of key testimony in the district court. *Id.* at 316-22. Part II.B discusses the strict scrutiny test for Equal Protection Clause analysis, while noting the importance of context for such analysis. *Id.* at 326-27.

acted in accordance with Justice Powell's opinion: "Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."<sup>312</sup> The Court states that because of this modeling, it will discuss Justice Powell's opinion "in some detail."<sup>313</sup> After briefly reviewing Justice Powell's reasons for rejecting three of the purposes offered by UC Davis in support of its special admissions program,<sup>314</sup> the Court states that the only one of Davis' purposes that Justice Powell "approved" was "the attainment of a diverse student body."<sup>315</sup> Of significance for its subsequent constitutional analysis of the Law School's admissions program, the Court further states that, in support of this approval, "Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment."<sup>316</sup> The Court notes Justice Powell's emphasis on the statement he quoted from *Keyshian* to support the proposition about the common good that the nation depends on leaders who have benefited from educational diversity.<sup>317</sup> And, in its first reference to the academic "mission," the Court quotes Justice Powell's statement that in arguing that it had the right to seek students who will contribute to what Justice Brennan in *Keyshian* refers to as "the robust exchange of ideas," UC Davis was "seeking to achieve a goal that is of paramount importance in the fulfillment of its mission."<sup>318</sup>

After this review, the Court states that it need not decide an issue that was contested by the parties as to whether Justice Powell's opinion constitutes binding precedent because it "endorse[s] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>319</sup> Adopting

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312. *Id.* at 323. Note that the Court avoids, here and elsewhere in its opinion, saying that the Law School or other academic institutions have "relied" on Justice Powell's *Bakke* opinion. The Court "endorse[s] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions," *id.* at 325, and so it does not need to employ a *Casey*-based argument on reliance.

313. *Id.*

314. *Id.* at 323-324.

315. *Id.* at 324 (quoting *Bakke*, 438 U.S. at 311).

316. *Id.* (quoting 438 U.S. at 312). The Court does not include in this quote the clause Justice Powell inserted stating that academic freedom is "not a specifically enumerated constitutional right." As noted above, *see supra* note 111, this clause in Justice Powell's opinion replaced a clause in a prior draft by Justice Powell that read: "though not a constitutional right in itself."]

317. *Id.* at 324 (quoting 438 U.S. at 313).

318. *Id.*

319. *Id.* at 325.

Justice Powell's opinion also made it unnecessary for the Court to employ a reliance argument, based on the plurality opinion in *Casey*, offered by the Law School and by the Individual Deans. Instead, the Court's endorsement of Justice Powell's conclusions implicitly accepts the argument, also suggested by the Law School and by Amherst, that Justice Powell's opinion established a viable harmonization of the academic interest in diversity and the requirements of equal protection.<sup>320</sup>

When the Court turns (in Part III of its opinion) to constitutional scrutiny of the Law School's admissions program, its opinion reflects six subsidiarity themes that are crucial to its conclusion in favor of the Law School. These concepts are "context," "deference,"<sup>321</sup> "mission," institutional expertise, "autonomy," and service to the common good. The broadest of these in scope (and the first to be mentioned in Part III) is context. The Court notes at the outset that the Law School asserted only an interest in diversity as a justification of its admissions program<sup>322</sup> and that the Law School asked the Court to recognize this interest as compelling "in the context of higher education."<sup>323</sup> In its discussion of strict scrutiny in Part II.B of its opinion, the Court established the ground for this point by stating that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."<sup>324</sup> The Court explained that "strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in [the] particular context."<sup>325</sup>

320. Much of the *Grutter* Court's analysis purporting to show the harmonization of the Law School's admissions program with constitutional rights is presented in Part III.B of its Opinion on the second prong of Equal Protection analysis, which I do not discuss in this paper. 539 U.S. at 357-61.

321. For a survey of cases in which courts have given deference to educators, see Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, As Shown By Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583 (2004). The authors state that "[i]t is an honor for college administrators that the Supreme Court has selected higher education as the one unique community in our society eligible for such judicial deference." *Id.* at 617. For another article exploring the appropriateness of such deference, see Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691 (2004).

322. The Court finds the diversity interest to be compelling and does not invoke any of the four additional interests asserted to be compelling in the amicus brief of the American Law Deans Association. *See supra* note 288.

323. *Grutter*, 539 U.S. at 328 (emphasis added).

324. *Id.* at 327 (citing *Gomillion*, 364 U.S. at 343-44, and quoting the passage from *Gomillion* reproduced above). *See supra* note 52.

325. *Id.*

Having prepared the way with this acknowledgment of the importance of context, the Court introduces its conclusion in support of the Law School's diversity goal by linking three of the other subsidiarity themes: "The Law School's *educational judgment* that such diversity is essential to its educational *mission* is one to which we *defer*."<sup>326</sup> The Court follows this pronouncement by invoking another subsidiarity theme, academic autonomy.<sup>327</sup> Thus, as did Justice Powell, the *Grutter* Court places at the outset of its analysis recognition of "a constitutional dimension, grounded in the First Amendment, of educational autonomy."<sup>328</sup> The Court links autonomy to the academic mission by quoting Justice Powell's conclusion that by invoking a First Amendment autonomy interest a university "must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission."<sup>329</sup> Quoting a statement from Justice Powell in support of deference, the Court concludes that diversity is a compelling interest because "attaining a diverse student body is at the heart of the Law School's proper institutional mission and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"<sup>330</sup>

Perhaps the heaviest work in the *Grutter* Court's opinion supporting the Law School is done through the concept of the Law School's mission and the related concept of service to the common good. As noted above, the Law School argued that "academic selectivity and student body diversity, including racial diversity, are both integral to [its] educational mission."<sup>331</sup> The question must be asked: what does the Court take to be the Law School's mission? In Part I.A of its opinion, the Court noted that "[s]eeking to 'admit a

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326. *Id.* at 328 (emphasis added). With respect to deference, the Court states that "[o]ur holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Id.* at 328-329 (citing *Ewing*, *Bakke*, and *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978)). In his dissenting opinion, Justice Thomas criticizes the Court for "its unprecedented deference to the Law School – a deference antithetical to strict scrutiny – on an idea of 'educational autonomy' grounded in the First Amendment." 539 U.S. at 362 (Thomas, J., dissenting). Justice Thomas went on to critique the Court's use of *Keyshian* and of Justice Frankfurter's concurring opinion in *Sweezy*. *Id.* at 362-364.

327. *Id.* at 329. As we have seen, the Law School did not emphasize the autonomy argument. See Brief for the Respondent, *supra* note 167. But this argument was stressed in the Individual Deans' Brief. See Individual Deans' Brief, *supra* note 231, at \*25.

328. *Id.*

329. *Id.* (quoting *Bakke*, 438 U.S. at 313).

330. *Id.* (quoting *Bakke*, 438 U.S. at 318-319).

331. Brief for the Respondent, *supra* note 167, at \*1.

group of students who individually and collectively are among the most capable,' the Law School looks for individuals with 'substantial promise for success in law school' and 'a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others.'<sup>332</sup> Adumbrated here is the interest in selectivity – that the Law School's mission is the education of an elite. This interest in selectivity is not focused on in conjunction with diversity<sup>333</sup> until later in the opinion when the Court quotes from an amicus brief filed by "high-ranking retired officers and civilian leaders of the United States military" for the point that "[t]o fulfill its mission, the military 'must be *selective* in admissions for training and education and it must train and educate a highly qualified, *racially diverse* officer corps in a *racially diverse* setting.'" <sup>334</sup> The Court states its agreement with the brief's suggestion that "[i]t requires only a small step from this analysis to conclude that our country's other most *selective* institutions must remain *both diverse and selective*.'" <sup>335</sup>

Shortly after favorably quoting this amicus brief,<sup>336</sup> the Court again links the mission of the Law School as a selective institution with its service to the national common good.<sup>337</sup> The Court states that

332. *Grutter*, 539 U.S. at 312 (quoting the Appendix at 110).

333. In the context of evaluating the Law School's notion of "critical mass," the Court alluded to the conjunction of selectivity and diversity by referring to the Law School's goal of "assembling a class that is both exceptionally academically qualified and broadly diverse." *Id.* at 329.

334. *Id.* at 331 (quoting Brief for Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (Nos. 02-241 & 02-516), 2003 WL 1787554, at \*27) (emphasis added, except for "and" which was emphasized in the amicus brief). For Law School President Bollinger's comment on this brief, see Bollinger, *supra* note 81, at 1594.

335. *Id.* (quoting Brief for Julius Becton, Jr. et al., *supra* note 334, at \*27).

336. Just before quoting from the Becton Brief, the Court cited two amicus briefs filed by corporations in support of the Law School to buttress the Court's statement that the benefits of educational diversity "are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330-331 (citing Brief for 3M et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 01-1447), 2001 WL 34624918, at \*5; and Brief for General Motors Corp. as Amicus Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 01-1447), 2001 WL 34624915, at \*3-4). For Law School President Bollinger's appreciation of the General Motors Brief, see Bollinger, *supra* note 81, at 1594.

337. In Part II.A (in which the Court reviews Justice Powell's Opinion), the Court quoted Justice Powell's statement about "the nation's future" with the partial quotation from *Keyshian*: "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 324 (quoting *Bakke*, 438 U.S. at 313 (quoting *Keyshian*, 385 U.S. at 603)).

“universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders.”<sup>338</sup> The Court then notes that more than half of the members of the U.S. Senate and more than a third of the members of the House of Representatives are law school graduates.<sup>339</sup> Emphasizing the selectivity point, the Court next mentions that graduates of “a handful” of “highly selective law schools” account for 25 U.S. Senators, 74 U.S. Court of Appeals judges, and “nearly 200 of the more than 600 United States District Court judges.”<sup>340</sup>

Thus, the Court appears to accept the Law School’s argument that both selectivity and diversity are integral to its mission.<sup>341</sup> That the Court so understands the Law School’s mission becomes clear when the Court considers certain suggestions made by petitioner Grutter and by the United States that the Law School, consistently with the Equal Protection Clause, could achieve diversity by relaxing its academic standards through one or another mechanisms. The Court holds that the Law School need not accept such options, stating that compliance with the second prong of equal protection scrutiny “does not require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”<sup>342</sup> The suggestion that the Law School lower its admissions standards, the Court says, “would require the Law School to become a much different institution and sacrifice a vital component of its educational mission.”<sup>343</sup> Suggestions for other plans that would diminish the elite status of the Law School “may preclude the university from . . . assembl[ing] a student body that is not just diverse, but diverse along all the qualities valued by the university.”<sup>344</sup> Emphasizing again that selectivity is vital to the Law School’s mission, the Court concludes that the School has no constitutional obligation to adopt alternative plans that would “forc[e] the Law School to abandon the academic

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338. *Id.* at 332 (citing *Sweatt*, 339 U.S. 629 (1950)).

339. *Id.* (citing Brief for Ass’n of Am. Law Schs., *supra* note 244, at \*5-6).

340. *Id.* (citing Brief for Ass’n of Am. Law Schs., *supra* note 244, at \*6).

341. *See, e.g.*, Brief for the Respondent, *supra* note 167, at \*25 (“[L]aw schools need the autonomy and discretion to decide that teaching about the role of race in our society and legal system, and preparing their students to function effectively as leaders after graduation, are critically important aspects of their institutional missions.”).

342. *Grutter*, 539 U.S. at 339 (citing cases).

343. *Id.* at 340.

344. *Id.*

selectivity that is the cornerstone of its educational mission.”<sup>345</sup>

A potential problem must be noted at this point. Acceptance of the proposition that a highly selective law school may relax its standards to a limited degree in order to admit members of racial minorities while still maintaining its elite status might give rise to an objection that the goal of the diversity program is in fact to remedy the effects of past discrimination in order to assist minority graduates in assuming leadership positions from which they otherwise might be excluded.<sup>346</sup> The Court implicitly addresses this objection by casting the selectivity component of the Law School’s mission in the context of equality of opportunity. This argument was adumbrated to some extent in the Law School’s brief when the Law School argued that overruling *Bakke* would lead to “a chilling prospect.”<sup>347</sup> Explaining this prediction, the Law School asserted that “[a]s our country becomes increasingly racially diverse, the public confidence in law enforcement and legal institutions so essential to the coherence and stability of our society will be difficult to maintain if the segments of the bench and bar . . . again become the preserve for white graduates, trained in isolation from the communities they serve.”<sup>348</sup>

Perhaps picking up on the Law School’s suggestion,<sup>349</sup> the Court

345. *Id.* This point reflects the argument stressed by the Individual Deans against judicial interference that would “force” law schools to suppress their educational judgment and distort the academic mission. See Individual Deans’ Brief, *supra* note 231, at \*2.

346. Both Justice Scalia and Justice Thomas criticized the Court majority for implicitly accepting without justification that the Law School has a compelling interest in remaining a highly selective institution. See 539 U.S. 361 (Scalia, J., dissenting; Thomas, J., dissenting). Unlike the Law School, the American Law Deans Association made an independent argument that law schools have a compelling interest in selective admissions standards. See Brief for Am. Law Deans Ass’n, *supra* note 288, at \*3-16. The *Grutter* Court declined the invitation of the Deans Association to establish selectivity as a compelling interest and instead followed the Law School’s approach, which argued only for diversity as a compelling interest, while yoking selectivity to diversity as integral to its mission.

347. Brief for the Respondent, *supra* note 167, at \*20. In addition, the Law School quotes from the amicus brief of the United States for the proposition that “keeping undergraduate and graduate institutions open to ‘people of all races and ethnicities’ is ‘a paramount government objective.’” *Id.* at \*22 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner, (No. 02-241), 2003 WL 176635, at \*13).

348. *Id.* at \*20-21. It should be noted here that the Law School’s point about the country becoming “increasingly racially diverse” might suggest a temporally limitless extension of affirmative action admissions. Despite this suggestion, the Law School argued that it “of course, recognizes that race-conscious programs must have reasonable durational limits.” *Id.* at \*32. The Court accepted the latter point. *Grutter*, 539 U.S. at 342 (“[R]ace-conscious admissions policies must be limited in time.”).

349. Or perhaps on a statement in the amicus brief of the United States. See *supra*

asserts that “the diffusion of knowledge *and opportunity* through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”<sup>350</sup> After citing the statistics on elite law school graduates in leadership positions,<sup>351</sup> the Court states:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.<sup>352</sup>

This move by the *Grutter* Court takes a key subsidiarity theme (service to the common good) and construes it in a way that constitutes a new argument for diversity admissions that was not emphasized by Justice Powell. Construing the contribution of a law school’s selective admissions program as opening the educational path to leadership to all rather than as an attempt to remedy societal discrimination<sup>353</sup> or to increase the number of minority lawyers establishes a new argument that defers to educational judgment while acknowledging that such judgment serves a constitutional concern for equality of opportunity.

In sum, the *Grutter* Court’s opinion relies crucially on several themes that sound in subsidiarity. The Court states that in enforcing constitutional mandates a court must be sensitive to context – the context here being higher education. It relies on the concept articulated by Justice Powell that academic institutions have an important mission that serves the common good. As did Justice Powell, the Court invokes the First Amendment as protective of academic autonomy but this invocation does not prevent the Court from elaborating on subsidiarity themes. The Court states that it will

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note 235, at \*. The American Law Deans Association also argued that rejection of race-conscious admissions programs would reduce minority enrollment in selective law schools, which would then be perceived as segregated “in the court of public opinion.” Brief for Am. Law Deans, *supra* note 288, at \*6.

350. *Grutter*, 539 U.S. at 331 (emphasis added).

351. *Id.* at 332 (citing Brief for Ass’n of Am. Law Schs., *supra* note 244).

352. *Id.* In another reference to public perception (pointing in a contrary direction), the Court insists that racial preferences must have a durational limit that “assure[s] all citizens that the norm of equal treatment of all racial and ethnic groups is a temporary matter . . .” *Id.* at 342 (quoting *Croson*, 488 U.S. at 510 (plurality opinion)).

353. The Court implicitly accepts Justice Powell’s view that remedying societal discrimination is not a compelling interest. The Law School declined to assert such an interest, but the American Law Deans Association did so, *see supra* note 231, without success.

defer to the Law School's institutional expertise and educational judgment regarding its mission. Of particular importance in this case, the Court accepts the Law School's argument that its mission includes both diversity and selectivity. The Court finds that the dual nature of the Law School's mission has important benefits for the national common good. Of great importance in this regard, the Court finds that such a dual mission contributes to the public perception of the legitimacy of elite educational institutions and serves the goal of equality of opportunity.

### Conclusion

Neither Justice Powell's *Bakke* opinion nor the *Grutter* Court's majority opinion explicitly invokes the subsidiarity principle, yet both can be seen to employ subsidiarity concepts and concerns at important turns in their arguments. Focusing on these concepts is heuristically beneficial in bringing to light crucial points in Justice Powell's opinion and the later acceptance and development of these points in the *Grutter* litigation by the Law School, its amici, and the Court.

The most important subsidiarity concept deployed by Justice Powell is the concept of the academic mission. In its briefs, UC Davis invoked a number of purposes (including diversity) in support of its special admissions program, but in arguing for diversity it did not offer an argument that explicitly linked diversity to any of its various "missions." Nor did it propose an argument grounding any of its missions in the First Amendment. But, relying on Court precedents, Justice Powell made the First Amendment prominent as protective of the University, and on this basis he constructed a concept of a unitary academic mission whose educational goal required a robust exchange of ideas valued by the First Amendment. This provided Justice Powell with a basis for concluding that an admissions program premised on the value of student exposure to the diverse viewpoints of their fellows was "of paramount importance" to the academic "mission."<sup>354</sup> In light of UC Davis's omission of such arguments, Justice Powell's opinion must be seen as an original contribution in the development of constitutional arguments involving the academy.

Of great interest in *Bakke* as well is the fact that Justice Powell's invocation of the First Amendment in support of the University did not prevent him from extending his analysis in ways that articulate

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<sup>354</sup> *Bakke*, 438 U.S. at 312.

other subsidiarity concepts and concerns. Most importantly, Justice Powell, in accord with the Court precedents he cites, uses the First Amendment, not to close further inquiry but as a means for articulating the service to the national common good that universities provide through their exercise of academic freedom. This development of a concept of the academic mission in service to the common good provides a reason for acknowledging the importance of context in the application of a constitutional provision restraining a subsidiary institution. Justice Powell's analysis also provides a reason for recognizing the discretion of university administrators and for cautioning against judicial interference in the academic mission.

In the *Grutter* litigation, the Law School and its amici (as represented by those amici discussed above) rely heavily on Justice Powell's *Bakke* opinion and argue that Justice Powell outlined a proper harmonization of the academic interest in diversity with equal protection concerns. The Law School and its amici seize on the prominence Justice Powell gave to this subsidiarity concept and stress its importance to the Law School's interest in diversity. And because selectivity in admissions had been raised as an issue in the *Grutter* litigation, the Law School and some of its amici argued that selectivity was also an integral component of the Law School's mission. Despite the fact that Justice Powell had not given explicit consideration to selectivity, his opinion established the conditions for the success of such an argument by emphasizing the contributions to the national common good achieved by universities in training leaders of the nation.

In its decision in favor of the Law School's race-conscious admissions program, the *Grutter* Court follows Justice Powell in relying on subsidiarity concepts and concerns. It agrees with Justice Powell's establishment of the First Amendment as a support for recognition of the academic mission and for concluding that a diversity admissions program serves this mission. But as in Justice Powell's opinion, the Court's invocation of a First Amendment interest in favor of the academy does not prevent it from extending its analysis in ways that rely on further subsidiarity concerns. The Court looks for and finds, in the briefs of the Law School's amici, support for the proposition that a race-conscious admissions program substantially serves the common good.

With respect to the new issue in the *Grutter* litigation (selectivity), the Court agrees with the Law School and its amici that the broad academic interest that Justice Powell recognized, in serving the national common good through education of potential national

leaders, justifies inclusion of selectivity as an integral component of the Law School's academic mission. And in what may be its major original contribution to the subsidiarity arguments set forth by Justice Powell, the *Grutter* Court (in accord with suggestions by the Law School and one of its amici) casts the common good argument as an argument for equality of opportunity and the legitimacy of elite academic institutions. In light of all these conclusions, the Court implicitly invokes other subsidiarity concerns in stating that context is important in applying constitutional mandates and that it will defer to the Law School's educational judgment that diversity and selectivity are essential to its educational mission.

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