From *Bakke* to *Grutter* and Beyond: Building Diversity and Inclusion

Address to the Cornell Institute for Public Affairs

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Good afternoon.

This past Tuesday, I stood before my television, watching Cornell Professor Steven Squyres explain why we can now say with confidence that there once was water on the planet Mars. He was able to draw this conclusion because of a remarkable venture supported by the United States government in which he led a team of scientists from many institutions. This finding means we can still entertain the possibility that some day scientists will say with confidence that there once was at least one species of life on the planet Mars.

This coming Tuesday, I will stand on the border between Jordan and Israel, representing Cornell at the establishment of the Bridging the Rift Center. The Center is a remarkable venture supported by the Jordanian and Israeli governments, in which scientists from Cornell and Stanford will lead a team of graduate students from Jordan and Israel. They will be developing a new databank that might allow us some day to describe with confidence the complex relationships among the 20 million species of life on the planet Earth.

Each of these events manifests the powerful human need to understand life. Each shows how, under the right circumstances, that need can lead people to cross boundaries and work together. Each shows how a great university like Cornell can be the catalyst for that kind of collective effort.

Great universities are special institutions in our world. They provide environments that are uniquely able to sustain a set of transcendent values, values that speak to our noblest aspirations as human beings. And, by immersing students in those unique environments for four or five or more years, they are able to offer our future leaders the kind of preparation that permits us to sustain hope for human progress.

I believe that to understand affirmative action in higher education, it is essential to appreciate this unique role of great universities. And I believe that to understand affirmative action in higher education, it is essential to appreciate the chemistry of a campus that allows that unique role to be performed.

In the first half of my talk this afternoon I will discuss the legal and historical context in which the cases of *Grutter* and *Gratz* reached the Supreme Court last year, and I will discuss the legal holdings of those cases. In the second half of my talk this afternoon, I will discuss some of the broader implications of those cases for Cornell. And then we'll have some time left for questions and answers.

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I would like to begin my discussion of *Grutter* and *Gratz* back in the year 1865. That is when Cornell University was founded. That is also when the United State Constitution was amended for the thirteenth time. The Thirteenth Amendment outlawed involuntary servitude throughout the United States. That amendment, adopted 139 years ago, brought to a close the 246-year-long period during which chattel slavery was a lawful element of American life.

Three years later, in 1868, Cornell University began to teach students. And in that year the United States Constitution was amended for the fourteenth time. The Fourteenth Amendment required all states and state institutions to guarantee all persons within their jurisdiction "the equal protection of the laws."

Ever since 1868, scholars have debated what the Equal Protection clause is all about when it comes to matters of race.

- Is it about colorblindness?

- Is it about outlawing segregation and promoting integration?
- Is it about ensuring that no one race is systematically subordinated to any other?

But until there was affirmative action, this often felt like a somewhat academic debate. For courts were never really required to choose among those three possibilities. By and large the Equal Protection cases that reached the courts were brought by members of ***minority*** races, challenging race-conscious policies that ***separated them out*** and ***subordinated them*** to the majority race. That was the model of modern civil rights litigation pioneered by the NAACP Legal Defense and Educational Fund, the litigation that culminated in *Brown v. Board of Education*.

But at least as far back as the *DeFunis* litigation in the 1960's, we started to see white plaintiffs invoking the Equal Protection Clause to challenge actions by governments and universities that were race-conscious. And suddenly the Courts were forced to answer the question, what does the Equal Protection Clause say about a policy that isn't colorblind, but that – instead of promoting segregation – promotes integration and that also – instead of benefiting the race that is on average materially better off in society – provides benefits to the races that are on average materially worse off in society?

In 1978, in the case of Alan *Bakke v. University of California at Davis*, the Court began to answer the question. Four Justices of the Court would have allowed the Davis program of affirmative action by strict numerical set-asides. Those four Justices argued that a university or governmental entity should be allowed to adopt race conscious programs "if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large."

But the position of those four Justices did not prevail. Five Justices held that it does not matter whether the purpose of a program is to respond to the effects of past discrimination. Five Justices said that ***any*** race conscious program must be evaluated under the legal standard known as ***strict scrutiny***. Under that standard, race conscious programs

are presumptively unconstitutional, no matter whether they are designed to benefit a majority race or a minority race. They may be sustained only if two hurdles are cleared.

First, it must be shown that the use of the classification promotes a ***compelling societal interest***.

Second, it must be shown that race isn't used more than necessary – the racial classification must be ***narrowly tailored*** to promote the compelling interest.

What counts as a compelling interest? The controlling opinion in the *Bakke* case was written by Justice Powell. And Justice Powell wrote that a university's interest in teaching as well as it possibly can could constitute such an interest. Universities are preparing their students to live in an integrated society, their interest in providing that preparation in the best way possible is compelling, the preparation for an integrated society will be best if the campus is integrated, and therefore universities have a compelling pedagogic interest in having a racially diverse student body.

Justice Powell went on to say that an admissions policy could be narrowly tailored to promote such a compelling pedagogic interest only if it did not rely on rigid quotas but instead considered race as one aspect of a candidate's application file, to be balanced on a case-by-case basis along with other aspects of the file.

After *Bakke*, the University of Michigan adopted two different approaches to admissions. In the Law School, I was a member of a committee that drafted a policy that closely tracked Justice Powell's opinion in *Bakke*. The Law School policy explained the pedagogic benefits of having students learn the law in an environment where there was a critical mass of students from minority groups – more than token representation, so that minority students would be seen as individuals with different perspectives, rather than as so-called spokespersons for their races. And it instructed the admissions office to consider that interest as a factor in admissions decisions, but to consider that interest on a case-by-case basis as part of the overall interest in having a classroom that reflects both individual excellence on the part of each student and group diversity along every dimension that might enhance the study of law. To be sure, the

interest was limited – important though it might be, it could never be used to justify admitting a student who was not fully prepared to succeed in an exceptionally competitive law school environment and to be seen as a true peer of her or his fellow students in that environment.

In the undergraduate admissions process, the interest in having a racially integrated campus was pursued differently. Every student's application was evaluated using a so-called point system. Students received points for undergraduate grades – 20 times their high school GPA. They received points for test scores, for being the children of alumni, for residing in the state of Michigan. And they could also receive 20 points if they were members of underrepresented minority groups or were recruited athletes or were socioeconomically disadvantaged. In this last category, they couldn't double dip – a socioeconomically deprived Hispanic athlete could only get 20 points, the same as a middle class white athlete or a socioeconomically deprived white non-athlete or a middle class Native American non-athlete.

Last year, in the *Grutter* and *Gratz* cases, the Supreme Court brought five-and-a-half years of litigation about those two policies to a close. In *Grutter*, the Court upheld the Law School policy. In *Gratz*, the Court struck down the undergraduate policy.

What are the implications of those decisions? Before I describe them, you need to know about one more case. That case was not a Supreme Court case. It was a 1996 decision of the United States Court of Appeals for the Fifth Circuit in *Hopwood v. University of Texas*. In *Hopwood*, the Court of Appeals had surprised most lawyers by announcing that it no longer believed Justice Powell's *Bakke* decision to be controlling law. The *Hopwood* Court said that any consideration of race in admissions was unlawful – the standard was absolute, rigid colorblindness.

The most important result of the University of Michigan cases is that the *Hopwood* standard of unflinching colorblindness was rejected. The Court held that under some circumstances an interest in having a diverse campus could be compelling, and moreover that the University of Michigan Law School had demonstrated that it is possible to promote that interest in a narrowly tailored, lawful, race conscious fashion.

That result – the *Grutter* holding that *Hopwood* was wrong and that affirmative action can be lawful – led to a widespread sense of relief among universities. But that sense of relief was also tempered. For the *Gratz* case ruled against the University of Michigan, holding that some approaches that universities in good faith ***believed*** were permissible are now clearly ***im***permissible. Some ***techniques*** for pursuing racial diversity are no longer available.

Of course, ever since 1978 we have known that not ***every*** technique is available. To take an example that everyone knows, *Bakke* outlawed quotas.

But *Gratz* didn't involve a quota and it was still struck down. It was struck down because, in the Court's view, race was being used in ways that felt too mechanistic, too formulaic. Even though it wasn't the whole admissions policy, a ***part*** of the undergraduate admissions policy created, from the Court's perspective, a valuable benefit: 20 points in the admissions formula. And one of the mechanical, automatic ways to get that clear, precise, valuable benefit was to be a member of one of several specified racial groups. The *Gratz* opinion held that it wasn't enough that the policy applied to several groups. And it wasn't enough that there were ***other*** mechanical, automatic ways to get the 20 points. You can no longer make race an automatic trigger for the award of a substantial benefit.

Now since the Michigan cases were decided some opponents of affirmative action have tried to persuade universities that they really can't do ***anything*** race conscious. These advocates have attempted to resurrect the *Hopwood* test of rigid colorblindness. And others have argued that universities can't do anything race conscious unless they prove to a scientific certainty that absolutely no race neutral alternative exists. Indeed, I am told that even some representatives of the Justice Department have pressed these kinds of positions in their conversations with other universities.

And I want to say this afternoon that it is vitally important that universities push back against such arguments. They are clear mis-readings of the Michigan cases. In the *Grutter* case the Supreme Court approved

a Law School policy that was explicitly race conscious. And while the Law School faculty knew in good faith that no race neutral alternative existed, they could not prove it to a scientific certainty. Universities must constantly be asking themselves whether affirmative action remains necessary, whether diversity might be obtained through colorblind methods instead. But if they know in good faith that colorblind methods are inadequate, they may be race conscious in their pursuit of diversity, as long as the methods they use do not award a substantial benefit in a mechanical, automatic way.

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Those are the legal consequences of the University of Michigan cases. They are important. They are the ground rules that determine what we may and may not do.

But as important as those legal consequences may be, they are not the only lessons that we should draw from the cases. For me, the implications to be drawn and the lessons to be learned go much farther. The *Grutter* and *Gratz* litigation, at least as I experienced it, offers larger messages for Cornell. Larger messages for our entire society. And during the remainder of my talk, I would like to explore four of those messages.

I will begin autobiographically, discussing how my own way of speaking about the issues presented in these cases evolved over the course of years of debate.

I will then generalize from my particular experience to a more general explanation of why an integrated, diverse university is truly a compelling interest of our society.

I will then use that general explanation to motivate a description of some of the idealized behavioral norms that might be implied by this vision of the university.

And I will conclude with some observations about the kinds of additional steps we might take to ensure that Cornell continues to evolve towards this idealized state.

What did the experience of this litigation teach me about how to speak about affirmative action? And how did I learn from the experience?

Let's recognize first that there are many different ways to articulate a justification for affirmative action. You can say it is necessary to offset elements of today's world that are indefensibly unjust. You can say that it is necessary to make up for the persisting consequences of injustices from the past. Or you can take a different angle, as Justice Powell suggested in *Bakke*, and note that affirmative action promotes good pedagogy – it allows universities to do a better job of teaching.

There are elements of truth in each of these ways of talking. Today's world is not scrupulously fair. The enduring legacy of past oppression is real. And students really do learn better in diverse environments.

In the early days of the litigation, in my role as dean of the Law School, I explored each of these vocabularies. And I found that none of them was sufficient to help people who wanted to be sympathetic but who felt ambivalent about what we were doing. Time and again, I found myself in conversations with people who said, in effect, "Yes, I believe you are pursuing good ends, but I can't get past the feeling that by being race conscious you are employing a bad, even dangerous means to get to that end."

And over time I learned two things. First, I learned that in describing the ends that were promoted by affirmative action, the form of expression that resonated most broadly and deeply was not the language of diversity, but rather the language of integration. People who were unsure about whether they accepted the idea that this was an appropriate means to pursue goals of compensatory justice were much more willing to accept the idea that great universities must be racially integrated. Racially integrated in order that all their students would be better prepared for life in a racially integrated society. And racially integrated in order that the slow process of integrating that society would not be stalled.

And second, I learned that it was important to begin the conversation by recognizing that affirmative action compromised important values of colorblindness in order to achieve meaningful levels of integration. Oth-

er things being equal, we all would rather see large institutions like universities acting in a colorblind fashion. But the conditions that shape our applicant pools are not within our control. And those conditions mean that, at least for now, we cannot be both honestly colorblind and meaningfully integrated. If we are rigidly colorblind, we will lack meaningful levels of integration. And so it is appropriate to make the departures that allow us to have a meaningfully integrated class where every student is prepared to do the work and be respected as a peer and colleague by other students.

This form of argument recognizes two different aspects of the value of having an integrated campus, each of which is associated with the unique role that universities play in our world. The first is the familiar value of learning in a diverse environment – the notion that carried so much weight with Justice Powell in *Bakke*. Justice Powell had said that affirmative action could be justified by the pedagogic interest in diversity – the idea that people will receive a better education if they study in racially integrated environments than they will receive if they study in racially homogeneous environments. The interest was about professors' effectiveness as teachers and about students' abilities to learn.

There is a deep truth to this value. It is a reflection of the fact that many of the most important intellectual breakthroughs occur when people are able to see a problem from a new perspective and then are able to integrate that perspective into a deeper and more complex understanding of a problem. And part of what it means to live in an integrated environment is that one has the opportunity to interact with other people whose life experiences or training have given them different perspectives than one's own.

Indeed, in a kind of self-referential way, my own experiences in talking about affirmative action were an example of the phenomenon I was discussing. By confronting and acknowledging others who saw the issues differently, it became possible to recognize the tragic fact that history has left us all in a position where two values are in irreconcilable conflict.

But there is also a second aspect to the value of having integrated campuses. In her opinion for a majority of the Court in *Grutter*, Justice O'Connor described that aspect in the following way. She said:

> ***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***. As we have recognized, law schools 'cannot be effective in isolation from the individuals and institutions with which the law interacts.' Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

Justice O'Connor's message is terribly important. She is saying that it is appropriate for universities to consider their own missions as entailing more than simply the nourishment of student minds and character. They may understand themselves as important institutional actors in the sustenance of a society that is open to all, in which any young child may find reason to hope that he or she might have access to the opportunities that this nation offers, regardless of his or her parents' race, religion, or wealth.

Universities look inward and they look outward. When they look inward, they reflect upon what it takes for them to do the very best research and teaching possible. Integration has a vital role to play in that endeavor.

And when universities look outward they find themselves playing unique roles in the world. They play those roles because they are neither governments nor profit motivated, because they are driven by transcendent and universally shared desires to understand our world. For that reason, universities can catalyze collective, collaborative efforts that other

entities cannot sustain. At Cornell we see that in the Bridging the Rift project. And we see that in the integration of our campuses.

Critically, that outward aspect – the ability to catalyze political, social, or economic change in the larger world – cannot be an end in itself. It must always be linked with, dependent on, and subordinated to the inward aspect. It is appropriate to recognize the contributions we can make to societal integration or to bridging geopolitical rifts. But those cannot be primary ends. The primary ends must always be the pursuit of deeper intellectual understanding, and the preparation of our students for lives of insight, leadership, and contribution.

What does this vision of the university say about how we ought to conduct ourselves? First, it means that we ought to construct ourselves as a diverse community of peers. The diversity should be as broad as possible – racial and ethnic diversity, ideological diversity, sexual orientation diversity, religious diversity, gender diversity, political diversity, socioeconomic diversity, geographic diversity, temperamental diversity, a diversity of talents and tastes. All of these differences describe dimensions along which differences of perspective might be framed.

The commitment to being a true community of peers must be strong. Commonalities must be recognized and differences respected. We must ask those who come from outside our community and want to interact with us, including potential employers, to respect our identity as a true community of peers.

Within our community, we must tolerate and even be grateful for differences of perspective. Life at Cornell is a crucible in which a particular intellectual quality is forged. The poet John Keats had a name for that quality. He called it "negative capability": the ability to "luxuriate in uncertainties and doubts, entertaining two opposing ideas without irritable reaching after fact and reason."

That implies that when we encounter a different perspective, even one that we find incomprehensible or perhaps odious, we must resist the impulse to crush it. And we must resist the impulse to ignore it or avoid it. We must push ourselves to do the work of understanding it as the view of a peer. And we must attempt to engage it, to entertain it along with its

opposite without pushing for closure too quickly. In that way, even if at the end we might still reject it, we will obtain a deeper, subtler, more nuanced understanding of how and why we do.

And that implies that we must push ourselves outward to be with people who are different from ourselves. We must engage them if we are to grow.

In that vein, sometimes people who criticize our efforts to be diverse communities ask us, "Why do all the Black students sit together in the cafeteria?" And I have two observations to make about that.

If the implication of the question is that as a campus we must be colorblind, so that every table would reflect a racially randomized draw of students, the question misses the point of integration. Cornell is not a raceless society. We do not pretend that race does not exist. Rather, we are a multiracial society. A society where our students develop a complex, multidimensional identity, in which race is one element, and learn how to express that identity in an open, tolerant community that includes people of all races.

So part of how we develop our own identities is by finding communities of people who are like ourselves. Within those communities we can feel safe. And we can explore internal issues more deeply. And it is reasonable to see us to spending part of our time on campus in those communities.

But we must also stretch. Our days must include an ebb and flow, a movement back and forth between activities that press us to encounter different perspectives and activities that do not simply mirror our own perspectives and activities.

So if the implication of the question is that our campus is not a single campus but several balkanized, non-intersecting campuses, that would be a severe criticism of how we function. For it would mean we are missing an important part of the opportunity that Cornell offers. And so we must ask ourselves whether the balance is right. Whether as individuals and as a community we are stretching ourselves enough.

And let me observe that as we stretch ourselves out to absorb new perspectives, we must be willing to be more than passive consumers of others' perspectives. We must be willing to contribute our own to the mix, so that others can be challenged and broadened. We must take the chance of putting our own ideas out into public, where they will be engaged and explored and challenged. And we must do so openly, in our own names and not anonymously.

Indeed, it might be said that anonymous speech is contrary to our central mission as a university. Part of what defines this special community is that it is a collective activity of individual mortal beings who are struggling together to understand. That means we do not speak ***ex cathedra***, and we do not speak from behind a screen. We say what we believe to fellow members of our community, knowing that they will be expected to listen with respect, as fellow participants in a common enterprise.

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How are we doing at all of this? How close are we to being a true diverse community of peers? My impression from my first eight months back is that we are doing reasonably well. The campus community is generally diverse, and the discourse is broad ranging. For the most part it is respectful and engaged. For most people, daily life does include some ebb and flow between environments where people are mostly the same and environments characterized by broad differences. I have seen many, many examples of students stretching. Of students reaching out across boundaries of race and religion, across boundaries of ethnicity and sexual orientation. I see it in individual friendships. And I see it in remarkable collaborations among student groups, collaborations that lead to events like the Iftaar banquet at the end of Ramadan last fall.

But I also believe that we can do more. For example, I believe we have the opportunity to do more to enhance the diversity of our applicant pool. The newspapers have, of late, noted how some of the tools that were once available to universities to promote a diverse campus environment are no longer available after the University of Michigan cases. But the newspapers have not paid much attention to the broad array of

tools that are still available, and to the opportunities that exist for developing new tools. I believe that this is yet another area where Cornell can lead the way.

The Cornell experience is a rare and special opportunity. Our founder's aspiration to create an institution where any person can find instruction in any study established a new model of openness and inclusion in the nineteenth century. And today, in a world where unequal K-12 education and persistent residential segregation can hide opportunity from some of our most talented young people, Cornell can be a renewed beacon of hope, illuminating the path of success.

To fulfill that potential, however, we need to do more. We must find new ways to help prospective students appreciate all that Cornell has to offer. We must expand the group of young people who can envision themselves at Cornell, thriving in a diverse community of peers.

Toward that end, Provost Martin and I are working closely with Associate Provost for Admissions and Enrollment Doris Davis in an effort to seize the opportunity that the Supreme Court decisions offer us. I have asked Provost Martin and Associate Provost Davis to consider what we need to do to make Cornell the school of choice for the best and brightest of all races. I have the given the go-ahead to Provost Martin and Associate Provost Davis to develop an idea that they have brought forward to create a new Middle Schools Partnership Program. Through such a program, we could reach young members of underrepresented minority groups even earlier in their pre-college careers. We could help them to understand what they need to do be on an effective road to college. And by integrating such a program into an invigorated portfolio of high school programs, we could make that road a four-lane highway to Ithaca, New York.

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Last November, the NAACP Legal Defense and Educational Fund was kind enough to honor me for my role in the litigation. And during my remarks accepting the award, I offered a caution that I would like to reiterate this afternoon.

The *Grutter* case affirmed the ability of universities to use affirmative action to build an integrated community. But as important as that decision was, it was in a larger sense an admission of defeat. It was an admission that, notwithstanding the tremendous progress our society has made over the past half century, we are not yet to the point where racial integration happens by accident.

The long-term goal is not to be a society where affirmative action is lawful. It is to be a society where affirmative action is unnecessary.

That means becoming a society where residential segregation, school isolation, socioeconomic disadvantage, and crippling racial stereotypes are things of the past. It means becoming a society where genuine opportunity within an open and integrated community is the true birthright of every child.

It is a daunting task. But no more daunting than the tasks of understanding the potential history of life on Mars and understanding the actual complexity of life on Earth. It will take time, it will take patience, it will take a broad collaborative effort. And I know that Cornell University, and Cornellians everywhere, will be leaders in the quest.