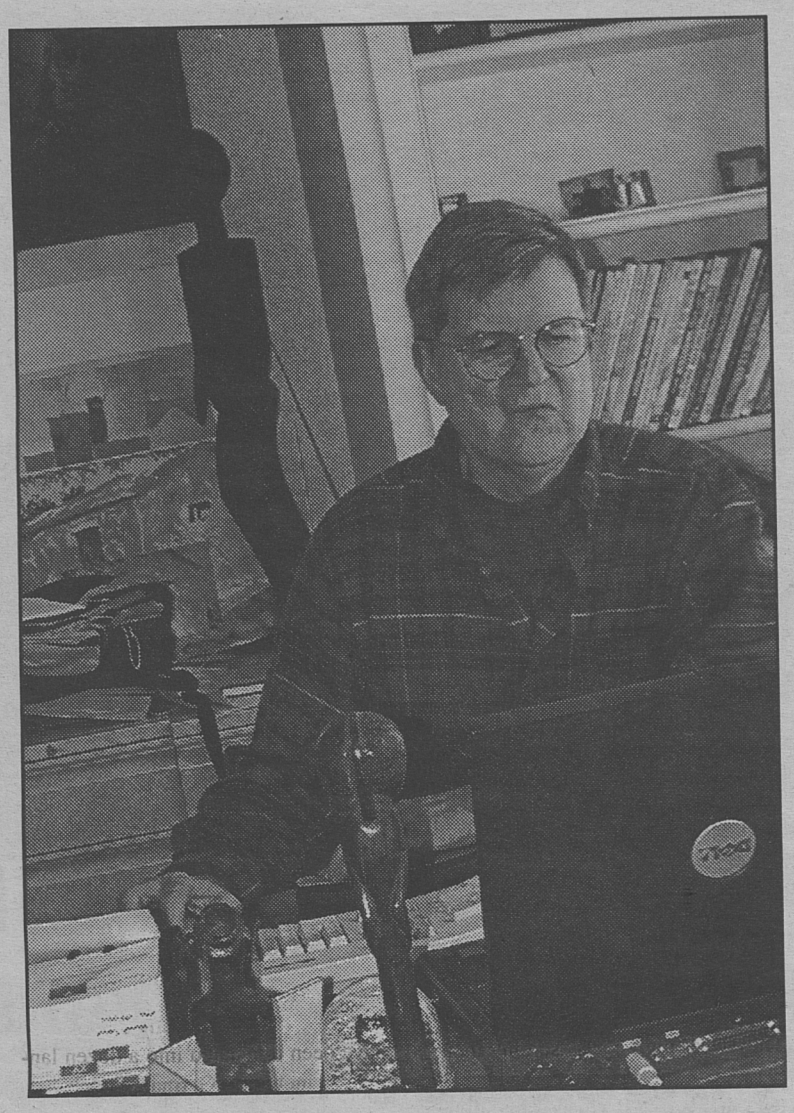
feature

Beyond Bakke:
University of Michigan Law School Makes Its Case for Saving 'Race-Conscious' Admissions



Above, retired University of Michigan Law School Professor David Chambers at work in Hartford, VT.

By Euan Bear

As *OITM* hits the streets, retired University of Michigan Law School Professor David Chambers will be glued to news reports. On April 1, the Supreme Court of the United States hears oral arguments on one of the most hotly contested cases it has handled in the last 25 years: affirmative action. And among the stacks of *amicus curiae* briefs in the case (more than 70 at last count) will be one that out gay professor David Chambers helped to write.

Chambers graciously agreed last month to discuss the case and his part in one of the many *amicus* briefs in an interview at his home in Hartford Vermont.

The Supreme Court case Grutter v. Bollinger examines the University of Michigan's law school admissions policies. Barbara Grutter, a white mother of two in her 40s, applied to the University of Michigan Law School with the goal of specializing in healthcare issues. Although Ms. Grutter was "an A student in college who scored in the 86th percentile on the Law School Admission Test," according to a report in *The New York Times*, her application was not accepted in June of 1997. Michigan's other public university law school at Wayne State welcomed her as a student, but she chose not to matriculate there because its concentration in healthcare law was not as extensive.

Grutter, along with two students who had unsuccessfully applied to the University of Michigan as undergraduates, answered an ad placed by several Republican state legislators and the Center for Individual Rights (CIR) looking for plaintiffs who would help them challenge the concept of race-conscious admissions policies. CIR filed suit against the law school in December, 1997, claiming that the University of Michigan's admissions process violates the Equal Protection clause and Title 6 of the 1964 Civil Rights Act.

The other name on the case belongs to Lee Bollinger, president of the university and former dean of the law school.

According to the *amicus curiae* (friend of the court) brief filed by the Michigan Black Law Alumni Society, the issues in the case come down to whether racial diversity in a student body "serves a 'compelling' state interest," and whether the admissions system currently in question is "properly 'tailored' to advancing such interest." The brief in which Chambers played a part argues yes on both counts.

David Chambers began teaching at Michigan Law in 1969. "A few years before that, there was just one black student among the thousands of white faces," he remembers. "There were more blacks in the 1930s in the law school than there were in the 60s. The faculty saw that there was something wrong with this picture and began to take steps to remedy it."

The first step was an aggressive recruiting campaign among seniors at what are now called "historically black colleges." But, Chambers said, "recruiting alone wouldn't make enough difference. … We began a formal program to admit larger numbers of minority students, and that meant giving some students a break on the numbers," the scores they had achieved on standardized tests and their grade point averages.

"In the mid-70s, there were 20 black students per year admitted to the law school. By the time of the litigation [1997], there had been 1000 black students, a few Latinos, and 60 Native Americans. Our position is that lawyers need to reflect the population they serve," Chambers explained.

The Grutter case is the latest in a series of attempts to overturn a previous Supreme Court ruling in 1978 in the case of the *Regents of the University of California v. Bakke*. In that case, four Justices supported the argument that race could be considered in admissions in order to balance the lingering effects of discrimination. "Only Justice Powell, writing for himself, argued that race could be used only to achieve a diverse student body," recalled Chambers. Powell's "very narrow" ruling – disallowing quotas but allowing diversity as a goal – became the de facto standard with which "virtually all elite universities, selective colleges, law schools, and medical schools complied." said Chambers

"The *Bakke* ruling has been under attack on three fronts: First, Powell's opinion was not the majority opinion. Second, there is no definition of 'quota' in Powell's opinion. Third, it did not address affirmative action programs addressed to other groups, such as Latinos, Native Americans, Italian-Americans, Irish-Americans." Chambers suggested that the attacks on *Bakke* have come primarily from conservatives, who say the standard should be "race-blind."

A federal circuit court in Texas ruled that the *Bakke* ruling should be "held in abeyance, that it was not 'good law.'" In California, first the university regents eliminated affirmative action programs, then voters ratified the decision. The number of minority students in those schools dropped drastically.

Two lawsuits have been brought against the University of Michigan, one for the undergraduate university and one for the law school. The law school lost its initial trial in 2001. "The judge held that *Bakke* was not good law, and anyway, the admissions program was in effect a quota," Chambers said. In 2002, a federal appeals court reversed that ruling and upheld the law school's admissions program as permissible. "They said that *Bakke* was still controlling until the Supreme Court rules otherwise."

Which brings us to the present, and the oral arguments in the case April 1, with a ruling expected in late June.

Basically, if two people – one white and one minority – with the same LSAT scores, grade point averages, outside interests, and leadership activities, apply to the University of Michigan Law School, the minority applicant is more likely to be accepted than the white applicant. And, says Chambers, that has to be okay, until race truly doesn't matter any more and there are as many minority lawyers, judges, doctors, and MBAs as there are minority people in society. "Right now, 15 percent of our students are Black, Latino or Native American. Without affirmative action it would be two percent."

David Chambers became involved in the Supreme Court case by way of a study he helped plan and conduct of all living law school minority graduates. "We were planning this study two years before the litigation," explained Chambers.

According to the written brief, Chambers and two colleagues mailed a seven-page Professional Development Survey to more than a thousand minority law school alumni from the years 1970 through 1996. Another 935 white graduates from the same years also received the survey.

The study results showed that both minority and white graduates believe in the importance of ethnic and racial diversity in their classroom experience. The percentage of white graduates who held that belief increased as the numbers of minority students on campus increased.

Perhaps more importantly, the study showed that both white and minority graduates achieved similar career accomplishments from clerkships to partnerships, and satisfaction with their careers. The finding counters the argument that affirmative action results in "less able" or "less successful" professionals.

In addition, more minority graduates volunteered their services to their communities on nonprofit boards or in politics. Minority graduates performed more hours of pro-bono legal work than white graduates.

And, finally, the study showed that minority graduates had among their caseloads a higher proportion of nonwhite clients than white graduates did, serving the state's "compelling interest" in "improving the delivery of legal services to historically under-represented minority groups."

As of last month, a dozen or so *amicus* briefs had been filed supporting the suit of the Center for Individual Rights and Barbara Grutter. Perhaps 60 had been filed supporting the law school, ranging from law students, Fortune 500 companies, the United Auto Workers, other universities, and even a group of retired generals – including Norman Schwartzkopf and John Shalikashvili.

"What's at stake," Chambers summarized, "is affirmative action at all public and private institutions. If affirmative action ends in law schools, there will be a decline by 70 percent in the numbers of minority students.

"I'm scared. I don't know whether we'll win. Three members of the Supreme Court are likely to be hostile – the Chief Justice [William Rehnquist], [Antonin] Scalia, and [Clarence] Thomas. Four might be sympathetic – [John Paul] Stevens, [David] Souter, [Stephen] Breyer, and [Ruth Bader] Ginsberg. Two are probably undecided – [Sandra Day] O'Connor and [Anthony] Kennedy. The problem will be how to reach O'Connor, since Kennedy is most likely leaning the other way," he mused.

"I had dinner last week with [a friend] and her two sons. One son, who is liberal politically, was troubled by the idea that he could have the same grades and SAT scores as a minority student, and the minority student would be chosen instead of him. He felt that *merit* should count, not race. It's a moral argument that has some force.

"In the oral arguments," he added, the plaintiffs will expand on that theme and "probably offer the personal circumstances of Barbara Grutter."

Asked about whether this case has relevance for the gay, lesbian, bisexual, and transgender communities, Chambers said no. "There are no affirmative action policies with regard to sexual orientation – there's no real need to give gay men or lesbians a break on the numbers. And being a gay activist is considered a positive factor, an indication of leadership."

But having said that, he added, "Gay students see that what's at stake is white male supremacy – and the creation of a diverse multicultural society in which difference is welcome. Oppression based on race is the most flagrant and harmful that our society has known. Even with all that has been done to gays and lesbians, we haven't been slaves or treated as intellectually inferior."

In the final analysis, David Chambers concluded, "Irrational discrimination is always wrong." ▼