Nos. 20-1199 & 21-707

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
UNIVERSITY OF NORTH CAROLINA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the First and Fourth Circuits

BRIEF OF *AMICI CURIAE* DEANS OF U.S. LAW SCHOOLS ON BEHALF OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The individuals who submit this brief as *amici curiae* are current and former deans of American law schools who have overseen admissions policies. As lawyers and law faculty, *amici* are deeply familiar with the constitutional law and history underpinning diversity admissions policies—including the special role that law schools have played in that history—and the importance of diversity to a law school's academic mission. Indeed, *amici* have all personally experienced the benefits of racial and ethnic diversity, both as members of a profession that requires deep engagement with every segment of our diverse society; and as classroom teachers, where the robust exchange of ideas that is essential to education—and to societal progress more generally—turns on the contributions of diverse participants in that exchange.[2]

They join in this brief to advance the argument that the diversity justification for considering race as a factor in admissions has deep roots in the history of the modern university and has since the early nineteenth century been tied to principles of academic freedom, university autonomy, desegregation, and inclusion. It was instrumental in opening the doors of white Protestant universities to Catholics and Jews, and later women, and Black, Asian, and Latin Americans.

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief through their blanket consents filed on the docket. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The views and opinions of these individuals are their own; their academic affiliations are listed for identification purposes only.

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INTRODUCTION AND SUMMARY OF ARGUMENT

When Justice Powell wrote the lead opinion for this Court in *Regents of the University of California v. Bakke*, he did not see it as a case about racial discrimination under either the Fourteenth Amendment or the 1964 Civil Rights Act.[3] Instead, he saw it as a case about academic freedom and a university's autonomy under the First Amendment. In so doing, he reached back nearly two hundred years to the great reforms of the German universities that marked the beginning of the modern era of academic freedom. Beginning in 1810 under the leadership of Wilhelm von Humboldt, those reforms embraced the value of diversity, including racial and religious diversity, and opened the university to previously excluded Catholics, Jews, and other minority groups.

As described herein, Humboldt began a conversation about diversity and education that continued in the work of John Stuart Mill, Charles Eliot, Oliver Wendell Holmes Jr., Learned Hand, Felix Frankfurter, Thurgood Marshall, Erwin Griswold, Archibald Cox, and others, and which led to the "Harvard Plan" for diversity admissions and Justice Powell's opinion in *Bakke*. This created a model used by many selective colleges and universities in the United States today.

John Stuart Mill's seminal work, *On Liberty* (1859), took up Humboldt's embrace of diversity—indeed, its epigraph is a quote from Humboldt extolling "the importance of human development in its richest diversity." Diversity, including point-of-view, religious, gender, class, and experience diversity, was central to

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[3] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (Powell, J.).

Mill's vision of how we learn, and thus how we become free. When Charles Eliot became President of Harvard College in 1867—a year before the Fourteenth Amendment was ratified—he put into effect Humboldt's and Mill's views on diversity: he opened Harvard to Catholic, Jewish, and Black Americans, founded a women's college, created graduate schools in the model of the German universities, and spoke of his pride in Harvard's racial, ethnic, religious, and class diversity. A few generations later, in the post-World War II period when most colleges and universities still excluded or severely limited the admission of Catholic, Jewish, and Black Americans, Harvard began actively recruiting Black students and re-opened its doors to Catholics and Jews in higher numbers.

Eliot's embrace of diversity was reflected in the views of two key Harvard faculty who went on to serve on this Court—Eliot's contemporary, Oliver Wendell Holmes Jr., and Holmes' protégé, Felix Frankfurter. In his seminal dissent in *Abrams v. United States*, 250 U.S. 616 (1919), Holmes, in part on Frankfurter's urging, endorsed Mill's idea that point-of-view diversity was essential to liberty and that it deserved protection under the First Amendment. Indeed, Holmes re-read *On Liberty* just months before writing the dissent in *Abrams*. In turn, Frankfurter led this Court in extending the role of diversity to include First Amendment protection for academic freedom, drawing on work directly linking academic freedom to university admissions policies favoring racial diversity.

Harvard law professor (and former Solicitor General) Archibald Cox wrote Harvard's policy favoring diversity, now called the "Harvard Plan," in the fall and winter of 1973-74. It first appeared in an *amicus* brief for Harvard College in *DeFunis v. Odegaard*, 416 U.S.

312 (1974), and described how diversity informed Harvard's admissions policies. (Among Cox's co-authors was then-Assistant Dean James Bierman, a co-author of this brief.)

Justice Powell then elevated the "Harvard Plan" to its position of prominence when he discussed it in his *Bakke* opinion and attached it in full to the opinion as an appendix. Although Justice Powell wrote over 500 opinions, when he was asked upon his retirement which was the most important, he answered without hesitation that it was *Bakke*.[4]

Today, the Harvard Plan elegantly captures the principles of academic freedom and its relationship to racial, religious, point-of-view, gender, experiential, and class diversity. Those principles, which began developing over 200 years ago, are central to the role of a university in making room for many voices and experiences. They played a critical role in an earlier time in opening universities around the world to Catholics, Jews, and women, and are critical today in ensuring that minority groups are among those who bring their diversity of experiences to the classroom.

We urge this Court to again re-affirm the legitimacy of the Harvard Plan as it has done each time when presented with the question over the past 44 years.

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[4] Linda Greenhouse, *Powell: Moderation amid Divisions*, N.Y. TIMES (June 27, 1987), https://www.nytimes.com/1987/06/27/us/powell-moderation-amid-divisions.html; *see also* David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 VA. J. SOC. POL'Y & L. 158, 160 (2018); David B. Oppenheimer, *The South African Sources of the Diversity Justification for U.S. Affirmative Action*, 13 UNIV. CAL. L. REV. ONLINE 32, 34 (2022) [hereinafter *South African Sources of the Diversity Justification*].

ARGUMENT

I. The History of the First and Fourteenth Amendments Reveals Diversity in Higher Education as a Compelling Interest

Over 40 years ago, Justice Powell wrote that "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978). "Grounding his analysis in the academic freedom that 'long has been viewed as a special concern of the First Amendment,'" Justice Powell emphasized that nothing less than 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." *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003) (quoting *Bakke,* 438 U.S. at 312).

Since *Bakke*, this Court has repeatedly "endorsed the precepts stated by Justice Powell." *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 308-09 (2013) ("*Fisher I*") (discussing *Grutter*, 539 U.S. at 325, and *Gratz v. Bollinger,* 539 U.S. 244 (2003)). In fact, because *Bakke* was a splintered vote, this Court considered the issue anew in *Grutter*, there assuming *arguendo* that Justice Powell's opinion was not controlling. *See Grutter*, 539 U.S. at 325. And yet, given the opportunity to go another way, the Court "reaffirmed his conclusion that obtaining the educational benefits of 'student body diversity is a compelling state interest that can justify the use of race in university admissions.'" *Fisher I*, 570 U.S. at 308-09 (quoting *Grutter*, 539 U.S. at 325). Indeed, this Court has endorsed Justice Powell's *Bakke* opinion on four separate occasions, including as recently as six years ago. *See Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 381

(2016) (holding that "the educational benefits that flow from student body diversity" constitute a "compelling interest that justifies consideration of race in college admissions" (quoting *Fisher I,* 570 U.S., at 310)) ("*Fisher II*").

Despite that robust precedent, Petitioner suggests that *Bakke*, *Grutter*, *Gratz*, *Fisher I*, and *Fisher II* were all wrong. Although the history of the First and Fourteenth Amendments is the same today as it was when those cases were decided, Petitioner suggests that the case law finds "no support in the Fourteenth Amendment's 'historical meaning.'" Pet. Br. 50 (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390 at 1405 (2020)).

This brief challenges that assertion. When Justice Powell observed that "[a]cademic freedom . . . long has been viewed as a special concern of the First Amendment," he was not exaggerating. *Bakke*, 438 U.S. at 312. That freedom, including "the right to select those students who will contribute the most to the 'robust exchange of ideas,'" *id*. at 313, traces back more than two centuries to educators and philosophers who shaped not only the American university, but also the U.S. Constitution. That "[t]he classroom is peculiarly the 'marketplace of ideas'" is a lesson from that history, as is our recognition that "[t]he 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 . . . .'" *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). Thus, a university's diversity admissions policy, unlike many other policies subject to Equal Protection scrutiny, "invokes a countervailing constitutional interest, that of the First Amendment. In this light, [the university] must be viewed as seeking to achieve a goal that is of

paramount importance in the fulfillment of [the university's] mission." *Bakke*, 438 U.S. at 313.

A. The Diversity Justification for Considering Race as a Factor in Admissions Is Rooted in Pre-Fourteenth Amendment Educational Reforms That Embraced Academic Freedom and University Autonomy

Because "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation," *Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)), the modern university depends on, and is defined by, university autonomy and academic freedom, including the freedom to inquire and debate.[5] Those defining characteristics are traceable to the great German philosopher, diplomat, and educator Wilhelm von Humboldt (1767-1835) whose writings catalyzed an academic revolution and cemented him as one of the shining figures of the enlightenment.[6] Over two centuries ago, Humboldt founded the University of

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[5] Robert C. Post, Dean and Sol & Lillian Goldman Professor of Law, Yale Law School, Academic Freedom and Legal Scholarship, Keynote Speech at the Association of American Law Schools (Jan. 4, 2015), https://www.jstor.org/stable/24716711.

[6] JOHAN OSTLING & LENA OLSSON, HUMBOLDT AND THE MODERN GERMAN UNIVERSITY: AN INTELLECTUAL HISTORY 8-10 (2018); *see also* EMILY J. LEVINE, ALLIES AND RIVALS: GERMAN-AMERICAN EXCHANGE AND THE RISE OF THE MODERN RESEARCH UNIVERSITY 15-19 (2021) (arguing that Humboldt's work engendered an academic revolution that ultimately gave rise to the modern university).

Berlin (today, Humboldt University)[7] and enacted a series of educational reforms that embraced diversity as a guiding principle, leading to the admission of Catholics and Jews who had previously been excluded.[8]

The great reforms of the German university were based on Humboldt's philosophy that "many layers of situations"—or "diversity" (as translated by Mill)—were essential to freedom of thought and inquiry.[9] He argued that diversity allowed people with different backgrounds, experiences, and points of view to learn from one another, creating an educational environment greater than its parts: that by "mutual cooperation of its different single members . . . each [was] enabled to participate in the rich collective resources of all the others."[10] As explained below, this idea—that a diverse student body of "many layers" allows for diversity of thought and inquiry essential to higher education—was foundational to the modern diversity justification for using race as a factor in admissions decisions.

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[7] OSTLING & OLSSON, *supra* note 6 at 226, 243; *see also* LEVINE, *supra* note 6, at 13-23 (discussing Humboldt and the University of Berlin and tracing their critical role in revolutionizing academia as well as Humboldt's lasting influence on the modern research university).

[8] Alfred Jospe, *Universities*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/universities (last visited June 30, 2022); *see also* OSTLING & OLSSON, *supra* note 6 at 52.

[9] WILHELM VON HUMBOLDT, THE LIMITS OF STATE ACTION 16 (J.W. Burrow et al. eds., 1969).

[10] *Id*. at 17.

1. Humboldt's Views on Diversity Inspired John Stuart Mill's *On Liberty* and Mill's Support for the Admission of Catholics and Jews to Oxford and Cambridge

Like Humboldt, John Stuart Mill (1806-1873) was also a staunch proponent of diversity in education. The leading political theorist of the nineteenth century and the father of traditional liberalism,[11] Mill is "generally acknowledged as one of the premier architects of our modern understanding of freedom of speech."[12] Indeed, "[n]o other thinker has so profoundly influenced our modern constitutional conceptions of liberty and rights . . . ."[13]

Although best known today for *On Liberty*'s defense of individual freedom, in his time, Mill was also known as an advocate for universal suffrage, full equality for women and people of color, proportional representation, and the value of diversity in education, speech, and society more generally. To read *On Liberty* while focusing on diversity is to appreciate how fully integrated the latter was into Mill's philosophy. Indeed, Mill described it as "a kind of philosophic text-book" on "the importance, to man and society, of a large variety in types of character, and of giving full freedom to human nature to expand itself in innumerable and conflicting directions."[14] It would have been

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[11] John Lawrence Hill, *The Father of Modern Constitutional Liberalism*, 27 WM. & MARY BILL RTS. J. 431, 432 (2018), https://scholarship.law.wm.edu/wmborj/vol27/iss2/5.

[12] *Id*. at 483.

[13] *Id.* at 433.

[14] JOHN STUART MILL, AUTOBIOGRAPHY OF JOHN STUART MILL 249 (1873).

appropriately titled *On Liberty and Diversity*, as diversity is a central theme.[15]

Not coincidentally, Humboldt appears throughout its pages, including in the book's epilogue:[16] "The grand leading principle, towards which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity."[17] Mill later credited Humboldt with articulating the book's "leading thought."[18]

Channeling Humboldt, Mill argued that the discovery of truth requires free and open debate among people with diverse experiences and perspectives. As Mill explained it, such point-of-view diversity produces clashes of ideas that help us find a way to truth:

> [T]he only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner.[19]

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[15] *See generally* JOHN STUART MILL, ON LIBERTY (1859) (extolling the importance of diversity 15 times).

[16] *Id*. at 5, 53-55, 67-68, 95-99.

[17] *Id.* at 5 (quoting Humboldt); *see also* HUMBOLDT, *supra* note 9 at vii.

[18] MILL, *supra* note 14 at 251-52.

[19] MILL, *supra* note 15 at 22.

But in Mill's view, the diversity necessary to attain truth could not be feigned. Socratic dialogue, for example, in which an interlocutor performs varied positions to test the strength of a proposition, could not replace genuine disagreement. As Mill explained it, that educational approach was

> not the way to do justice to the arguments, or bring them into real contact with [one's] own mind. [One] must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. [One] must know them in their most plausible and persuasive form; [one] must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of . . . .[20]

It was only when people of diverse backgrounds brought their lived experiences to the discussion that their arguments could be fully appreciated and most persuasively made. Although Mill did not use the term himself, the "marketplace of ideas" is now used to describe his view that the best ideas will eventually be recognized and adopted when we allow free, open, and vigorous debate.

Mill applied his views on diversity to college admissions, arguing that universities should admit individuals with unique backgrounds so that their ideas could grow as they learn from each other.[21] He advocated for the admission of Catholics, Jews, and members of other minority religions to Oxford and

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[20] *Id*. at 36.

[21] *Id*. at 20-24, 52-54, 63.

Cambridge,[22] which had for centuries been limited to members of the Anglican Church.[23] Indeed, Mill himself was a "nonconformist" and thus ineligible for admission because he would not swear fealty to the church.[24] Through his advocacy, Mill helped end the policy in 1871, thus fully opening Oxford and Cambridge to Catholics, Jews, and other nonconformists.[25]

It is noteworthy that *On Liberty* was not only an argument for diversity; it was also a product of diversity. Mill unequivocally attributed to his partner, Harriet Taylor Mill, an equal role in the book's creation:

> "[*On*] *Liberty* was more directly and literally our joint production than anything else which bears my name, for there was not a sentence of it that was not several times gone through by us together . . . . The whole mode of

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[22] *See generally id.*; Samuel Hollander, *John Stuart Mill and the Jewish Question: Broadening the Utilitarian Maximand*, *in* HAPPINESS AND UTILITY: ESSAYS PRESENTED TO FREDERICK ROSEN 257-59 (Georgios Varouxakis and Mark Philp, eds., 2009).

[23] *See* Stuart Jones, *The Abolition of Religious Tests: Some Historical Context*, UNIV. OF OXFORD (Aug. 6, 2021), https://openingoxford1871.web.ox.ac.uk/article/abolition-religious-tests-some-historical-context#.

[24] *See* NICHOLAS CAPALDI, JOHN STUART MILL: A BIOGRAPHY 33 (2005) ("But, alas, [Mill] couldn't have gone to the university and become a scholar at Oxford or Cambridge University, since he would not have taken Anglican orders.").

[25] *See Opening Oxford to the World*, UNIVERSITY OF OXFORD, https://openingoxford1871.web.ox.ac.uk/home; *see also* Jones, *supra* note 23.

> thinking of which the book was the expression, was emphatically hers."[26]

On Liberty's argument for diverse discourse, then, was the result of what at the time would have been as diverse a discussion as any—one between a man and a woman. Its enormous success and lasting impact on politics, education, and society is thus evidence of its own premise.

2. Harvard Likewise Opened Its Doors to Catholic, Jewish, and Black Students Based on the Importance of Diversity

Harvard's great transformative president Charles Eliot (1834-1926) laid the groundwork for the Harvard Plan. Eliot was influenced in his views on liberty and diversity by both Humboldt and Mill.[27] As they did, he saw diversity as central to the educational function of the university. In Eliot's Mill-inspired terms, Harvard offered its students and faculty the benefit of "a collision of views."[28]

Eliot was hired to bring a Humboldt-like vision to Harvard. Between 1863 and 1865, he lived in Germany and France, studying their universities and

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[26] MILL, *supra* note 14 at 248.

[27] Neil L. Rudenstine, *Diversity and Learning at Harvard*, *in* Pointing Our Thoughts: REFLECTIONS ON HARVARD AND HIGHER EDUCATION 19, 19-32 (2001); *see also* HENRY JAMES, CHARLES W. ELIOT, PRESIDENT OF HARVARD UNIVERSITY, 1869-1909, 136 (1930) (finding that Eliot's policy ideals reflected those of the German University following his 1864-5 trip to Germany).

[28] JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 45 (2005).

becoming well versed in the Humboldt reforms.[29] Soon after his return, he published an article in *The Atlantic Monthly* that argued for transforming American universities into research universities with undergraduate programs that emphasized learning by doing, graduate programs that emphasized the relationship between research and industry, and a commitment to universalism.[30] These were the reforms initiated by Humboldt now brought to America. Impressed by the article, the Harvard overseers appointed him president.[31]

Eliot served as Harvard's president from 1869 to 1909 and transformed it from a sleepy regional college to a great university. He pushed Harvard into a broader and deeper embrace of diversity, reflected years later in the Harvard Plan. In his inaugural speech, for example, he described Harvard as a place for the poor as well as the rich, the sons of professional men, traders, mechanics, and farmers.[32] Under his leadership, Harvard began admitting substantial numbers of Catholic and Jewish students, and—though in smaller numbers—Black students, and had the most generous scholarships of the time.[33] He scandalously invited a Catholic priest to deliver a sermon at the Harvard chapel.[34]

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[29] *See* JAMES, *supra* note 27 at xv, 159-69 (detailing the educational developments Eliot brought to Massachusetts Institute of Technology following his time studying German universities).

[30] Charles W. Eliot, *The New Education*, THE ATLANTIC MONTHLY, Feb. 1869 at 202-20.

[31] JAMES, *supra* note 27 at 169-70, 196.

[32] KARABEL, *supra* note 28 at 40.

[33] KARABEL, *supra* note 28 at 40, 45.

[34] JAMES, *supra* note 27 at 372-74.

By his last term as president, 45% of Harvard students came from public schools.[35] Nine percent were Catholic, and seven percent were Jewish.[36] Black and immigrant students attended class alongside white, American peers.[37] Harvard was "genuinely diverse, a place where the 'collision of views' that Eliot valued so highly was powerfully reinforced by the sheer variety of students."[38]

Two years after he stepped down as president, Eliot told the New York Times, "I cannot imagine greater diversity than there is in Harvard College. It is not superficial; it is deep. It is shown in the variety of races, religious [sic], households from richest to poorest, and in the mental gifts and ambitions [of our students and faculty]."[39]

3. Justice Holmes Incorporated Mill's Embrace of Diversity into His View of the First Amendment

Mill's argument that freedom is advanced by a diversity of experiences, backgrounds, and points of view transformed American constitutional law. Among other things, "Mill's ideas directly influenced Justice Oliver Wendell Holmes's 'marketplace of ideas'

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[35] KARABEL, *supra* note 28 at 45.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *No Equality in Our Institutions--Eliot: Tells Harvard Students Uniform Conditions Are Only Possible Under Despotism*, N.Y. TIMES, March 21, 1911, at 2, https://www.nytimes.com/1911/03/21/archives/no-equality-in-our-institutionseliot-tells-harvard-students-uniform.html.

conception of free speech . . . ."[40] Through Holmes' famous *Abrams* dissent, Mill's diversity argument became a defining feature of the First Amendment. Joined by Justice Brandeis (1856-1941), who was also heavily influenced by Mill,[41] Holmes described how a marketplace of ideas was encased in the First Amendment.[42]

Abrams represented a major shift for Holmes. Just a few months earlier, he had written the majority opinions in this Court's first three cases interpreting the First Amendment, and in each instance had taken a narrow approach.[43]

But Holmes changed course following a series of discussions with Judge Learned Hand (1872-1961) and two young Harvard Law professors, Harold Laski (1893-1950) and Felix Frankfurter (1892-1965).[44] Judge Hand had issued an opinion making a Mill-inspired reading of the First Amendment,[45] which he

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[40] Hill, *supra* note 11 at 435.

[41] Hill, *supra* note 11 at 460-61.

[42] *Abrams*, 250 U.S. 616 at 630 (Holmes, J. dissenting).

[43] *See generally Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (2019) (limiting free speech claims under the First Amendment).

[44] Letter from Oliver Wendell Holmes to Harold J. Laski (Feb. 28, 1919), *in* HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1925 187 (Mark DeWolfe Howe ed., 1953).

[45] *See Masses Publishing Co. v. Patten*, 244 F. 535, at 535, 539-540 (S.D.N.Y. 1917) (reflecting the views of Mill through Hand's opinion on the First Amendment); *see also* MILL, ON LIBERTY, *supra* note 15 at 9 (arguing that protection from governmental tyranny alone is insufficient, and thus that, "there needs protection also against the tyranny of the prevailing opinion and

discussed with Holmes at length. Laski urged Holmes to re-read *On Liberty*, which he did.[46] Holmes was persuaded. In *Abrams*, the fourth First Amendment case to reach this Court, Holmes issued his famous dissent. Adopting a Millian view, he wrote:

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[47]

The rest is history. Along with Justice Brandeis' concurring decision in *Whitney v. California*,[48] "the Holmes and Brandeis opinions comprise the seminal texts in the cannon . . . interpreting the core of the American free speech tradition."[49] As Justice Breyer recently put it, "[t]he First Amendment helps to

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feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them."); *see also* Vincent Blasi, *Learned Hand's Seven Other Ideas About the Freedom of Speech*, 50 ARIZ. ST. L.J. 717, 744 (2018) (relating Hand's analysis in Masses to Mill's views on political authority).

[46] THE BLACK BOOK OF JUSTICE HOLMES: TEXT TRANSCRIPT AND COMMENTARY 369 (Michael H. Hoeflich & Ross E. Davies eds., 2021) (documenting Holmes' self-report of books read in 1919, including Mill's *On Liberty*).

[47] *Abrams*, 250 U.S. at 630 (Holmes, J. dissenting).

[48] *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

[49] Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMM. L. & POL'Y 437, 438 (2019).

safeguard what Justice Holmes described as a marketplace of ideas."[50]

Just like *On Liberty*, moreover, Holmes' *Abrams* dissent was the product of an indisputably diverse dialogue. Holmes was a white New England Protestant, a lifelong Republican, and was well into his 70s when he wrote *Abrams*.[51] Hand, Frankfurter and Laski, by contrast, were between thirty and fifty years younger than Holmes, and Frankfurter and Laski were Jewish—indeed, they were two of the only five Jews on the Harvard Law faculty at the time.[52] Had it not been for the clash of diverse perspectives to which each contributed that summer of 1919, Justice Holmes might have instead joined the *Abrams* majority, and our democracy might be fundamentally different—and perhaps less free—as a result.

As Holmes was shaping the modern conception of the First Amendment in *Abrams*, Justice Frankfurter was watching closely. Just two days after *Abrams* was published, Frankfurter wrote to Holmes to express "the gratitude and, may I say it, the pride I have in your dissent. . . . [Y]ou lift the voice of the noble human spirit."[53] Frankfurter predicted that Holmes' words would "live as long as the Areopagitica."[54]

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[50] *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022) (Breyer, J., concurring) (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).

[51] THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 32 (2013).

[52] *Id.* at 17

[53] *Id*. at 219.

[54] *Id*. at 221.

Justice Frankfurter was prescient. More than 30 years later, then-Justice Frankfurter began using the groundwork laid by Holmes to establish greater protections for academic freedom. The germs of it were obvious as early as *Wieman v. Updegraff*, 344 U.S. 183 (1952), one of the Court's earliest "loyalty oath" cases. There, Frankfurter wrote that "[e]ducation is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view."[55] He described teachers "as the priests of our democracy," explaining that

> [i]t is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.[56]

As explained below, a few years later Frankfurter would formally announce academic freedom as a protected First Amendment right, relying on concepts that had come from Humboldt and Mill.

4. In the Twentieth Century, Harvard's Commitment to Racial Diversity Faltered, and was then Revived

In 1907 Charles Eliot stepped down after 40 years as Harvard's president and was succeeded by Abbott Lowell, an avowed racist.[57] Lowell expelled Harvard's

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[55] *Id*. at 197-98 (quoting Statement of Robert M. Hutchins, Associate Director of the Ford Foundation, November 25, 1952, in Hearings before the House Select Committee to Investigate Tax-exempt Foundations and Comparable Organizations, pursuant to H.Res. 561, 82d Cong., 2d Sess.).

[56] *Id.* at 197.

[57] James W. Johnson, *Attacks Harvard on Negro Question*, *reprinted in* BLACKS AT HARVARD AND RADCLIFFE 206 (Werner

Black students from the dorms and dining halls over Eliot's objections,[58] and helped lead the campaign against Louis Brandeis's appointment to the Supreme Court, a campaign widely understood to be anti-Semitic.[59] Among Lowell's most notable reforms at Harvard was the institution of the despicable Jewish quota, which reduced the number of Jewish students and faculty for a generation.[60]

The quota was lifted in the 1950s and 60s, as Harvard experienced an explosive rise in applications, which set off an existential debate on admissions among Harvard faculty. Some favored a quantitative/meritocracy-based approach, while others preferred a qualitative/diversity-based approach. The faculty reached a compromise: the very top SAT-scoring applicants would be favored, and there would be a reduction in private school and legacy admissions, but outside the very top applicants ("the 1%"), diversity would play an important role.[61] It was this debate and its

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Sollors et al. eds., 1993); *see also* Nell Painter, *Jim Crow at Harvard: 1923*, 44 THE NEW ENGLAND QUARTERLY 627, 630 (1971) (citing W.E.B. Du Bois, *Opinion of W.E.B. Du Bois*, CRISIS, Aug. 1922, at 153 (noting that Lowell did not acknowledge requests to condemn lynching in the South)).

[58] Raymond Wolters, *The New Negro on Campus*, *in* BLACKS AT HARVARD at 195; *see also* Painter, *supra* note 57 at 630; KARABEL, *supra* note 28 at 101 (noting that Harvard's decision in 1923 to end Lowell's policy of excluding African Americans from the freshmen dormitories was "[t]o Eliot's great satisfaction.").

[59] David G. Dalin, Jewish Justices of the Supreme Court 47–8 (2017).

[60] KARABEL, *supra* note 28 at 88-90, 132.

[61] KARABEL, *supra* note 28 at 263-93 (detailing the evolution of the Harvard admissions policy in the 1960's under an academic advisory committee); *see also* REPORT OF THE PRESIDENT OF HARVARD COLLEGE AND REPORTS OF DEPARTMENTS 1966-1967

resolution from which the diversity-based "Harvard Plan" emerged, including a commitment to end any continuing discrimination against Jewish applicants as part of a plan to promote greater diversity.[62]

As described in a 1960 Report by the Dean of Admissions,

> "[s]hould the ultimate goal of Harvard's admission effort be to come as close as possible to a student body all of whom would have outstanding academic ability, all of whom would be, as one member of the special faculty committee put it, in the top 1 percent, or even better, the top half of 1 percent, of American College students? . . . Or should we consciously aim for a student body with a somewhat broader range of academic ability, perhaps the top 5 percent of American college students, a student body deliberately selected within this range of ability to include a variety of personalities, talents, backgrounds and career goals?"[63]

(Oct. 31, 1968) (Report on Admissions 1960-1967 "The Glimp Report") *in* OFFICIAL REGISTER OF HARVARD UNIVERSITY 102, 104-15, https://iiif.lib.harvard.edu/manifests/view/drs:427268818$1i [hereinafter "The Glimp Report"] (reporting the updated approach to admissions and how the committee came to those updates).

[62] *See* Marcia G. Synnott, *The Half-Opened Door: Researching Admissions Discrimination at Harvard, Yale, and Princeton*, 45: 2 AMERICAN ARCHIVIST 175 (1982) (noting that as a result of the compromise, as Harvard "sought students who would rank intellectually in the top 5 to 10 percent of all American undergraduates, Jewish student representation at Harvard increased to about 25 percent").

[63] REPORT OF THE PRESIDENT OF HARVARD COLLEGE AND REPORTS OF DEPARTMENTS 1959-1960 (Dec. 28, 1961) (Report on

5. The Diversity Argument Contributed to US Desegregation Law

In the years leading up to this Court's decision in *Brown v. Board of Education*, its primary architects Thurgood Marshall (1908-1993) and Charles Houston (1895-1950), in concert with several prominent law faculty, devised a strategy in which one prong was litigation emphasizing the importance of racial diversity in the education of all Americans. For example, in 1948 in *Sipuel v. Oklahoma Board of Regents*, 332 U.S. 631 (1948), Marshall asked Erwin Griswold (1904-1994), Dean of Harvard Law School, to testify as an expert witness.[64] Griswold testified about the importance of diversity to legal education, explaining that

> students by themselves, not individually, but in groups of varying sizes, actually provide the largest amount of legal education . . . [and] that process is not possible without a student body of substantial size, containing

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Admission and Scholarship Committee 1959-1960 "The Bender Report") *in* OFFICIAL REGISTER OF HARVARD UNIVERSITY 216, 216-250 https://iiif.lib.harvard.edu/manifests/view/drs:427268804$218i [hereinafter "The Bender Report"]; Wilbur J. Bender, *The Top-One-Percent Policy: A Hard Look at the Dangers of an Academically Elite Harvard*, HARVARD ALUMNI BULLETIN at 21-25 (Sep. 1961). Bender's view carried over into the 1967 Glimp Report, also cited and relied on in the Harvard Plan.

[64] *See Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631 at 631 (1948); Transcript of Record, *Sipuel*, No. 14,807, 599 (Dist. Ct. Cleveland County, Okla. 1948); Letters between Thurgood Marshall & Erwin Griswold (Jun. 7, Jun. 10, Jun. 14 and Sep. 22, 1948) (on file with Library of Cong.).

> students from varying backgrounds and different elements in society.[65]

Griswold's testimony was the basis for the following assertion in an *amicus* brief filed in *Sipuel*:

> "[O]ne of the most important aspects of legal training is the opportunity for discussion, debate and exchange of ideas. This becomes meaningless unless a class or student body is composed of persons having different and varied backgrounds and divergent views and attitudes toward current affairs, politics and other subjects."[66]

Marshall's victory in *Sipuel* led to this Court's orders in *McLaurin v. Oklahoma Board of Regents*, 339 U.S. 637 (1950) desegregating the University of Oklahoma Law School, and in *Sweatt v. Painter*, 339 U.S. 629 (1950) desegregating the University of Texas Law School.[67] In the Texas case, Griswold co-authored an *amicus* brief with several other leading law faculty in which they argued for the importance of racial diversity in legal education:

> In classifying the students at the two schools by the test of color, Texas effectively eliminates much of the cross-fertilization of ideas. When a law student is forced to study and talk the shop talk of justice and equity with a segregated handful, he is circumscribed in the

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[65] Transcript of Record, *Sipuel*, No. 14,807 at 534.

[66] Brief *amicus curiae* for National Lawyers Guild at 10, *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631 (1948) (No. 369), 1948 WL 47425.

[67] *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S., 637, 639 (1950); *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).

> effort to achieve any real understanding of justice or equity.[68]

This Court agreed, writing that

> "[t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."[69]

6. The Embrace of Diversity as an Element of Academic Freedom by the South African Anti-Apartheid Movement Influenced Justice Powell's Opinion in *Bakke*

Perhaps improbably, a growing friendship between Justice Frankfurter, Dean Griswold, and the Chief Justice of South Africa led to the publication of a book, *The Open Universities in South Africa*, that argued that a university's right to academic freedom includes the right to admit a racially diverse student body. In turn, Justice Frankfurter relied on *Open Universities* to define the constitutional doctrine of academic freedom articulated by Justice Powell in *Bakke*.

In 1948, the pro-apartheid National Party came to power in South Africa with an agenda that included

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[68] Brief *amicus curiae* for Committee of Law Teachers Against Segregation in Legal Education at 45-46, *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44), 1950 WL 78683.

[69] *Sweatt*, 339 U.S. 629 at 634.

segregating all universities.[70] At that time, one of the two integrated universities in South Africa was the University of Cape Town.[71] Both the Principal (Dr. TB Davie (1895-1955)) and Chancellor (Albert van der Sandt Centlivres, South Africa's Chief Justice (1887-1966)) fiercely resisted the enforcement of apartheid at their university. Davie repeatedly argued that "[there are] four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[72]

Davie and Centlivres shared their views on diversity and academic freedom with educational leaders in the US.[73] In 1953, for example, Davie met Harvard's Dean Griswold and President Nathan Pusey to discuss the issue.[74] Centlivres had an active correspondence with Griswold and with Justice Frankfurter.[75] And Frankfurter, Griswold, and Archibald Cox spoke out

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[70] Encyclopedia Britannica: National Party of South Africa, britannica.com/topic/National-Party-political-party-South-Africa (last visited Jun. 22, 2022); HOWARD PHILLIPS, UCT UNDER APARTHEID: FROM ONSET TO SIT-IN: 1948-1968 (THE HISTORY OF UCT) 15 (2020).

[71] PHILLIPS, *supra* note 70 at 15-18.

[72] T.B. Davie, Address to New Students at the University of Cape Town (Feb. 28, 1953); *see also* ALBERT VAN DER SANDT CENTLIVRES & RICHARD FEETHAM, THE OPEN UNIVERSITIES IN SOUTH AFRICA 12 n.10 (1957).

[73] *See* T.B. Davie, Report on the Tour of Canadian & American Universities by the Principal of UCT Under The Auspices of the Carnegie Corporation of New York, September to December 1953, at 1 (on file with UCT Libraries, Special Collections Division).

[74] *See South African Sources of the Diversity Justification*, *supra* note 4 at 42-44.

[75] *Id.* at 45-47.

in support of Centlivres' courageous opposition to apartheid.[76]

From such exchanges, Centlivres' book *The Open Universities of South Africa* was born. As part of the University of Cape Town's resistance to apartheid, *Open Universities* set forth Davie's formulation on the four essential principles of academic freedom.[77] Notably, it espoused a markedly Millian philosophy, declaring as

> "almost axiomatic that a university should be more diverse in its membership than is the community in which it exists. This diversity itself contributes to the discovery of truth, for truth is hammered out in discussion, in the clash of ideas."[78]

Thus, the book concluded, "racial diversity within the university is essential to the ideal of a university in a multiracial society."[79] As soon as *Open Universities* was published, Centlivres sent a copy to his friend Justice Frankfurter.[80] A month later, this Court held oral argument in *Sweezy* to address whether University of New Hampshire professor Paul Sweezy was properly held in contempt for refusing to testify about colleagues suspected of being communists.[81]

In a concurring opinion, Justice Frankfurter agreed with the majority's decision to overturn Sweezy's

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[76] *Id.* at 47-49.

[77] *See* CENTLIVRES & FEETHAM, *supra* note 72 at iii.

[78] *Id.* at 14-15.

[79] *Id.* at 6.

[80] *See South African Sources of the Diversity Justification*, *supra* note 4 at 47.

[81] *See Sweezy*, 354 U.S. 234 at 238-41.

conviction but relied primarily on principles of academic freedom. He warned of "the dependence of a free society on free universities," and of "the grave harm resulting from governmental intrusion into the intellectual life of a university," which he argued "must be left as unfettered as possible . . . . This means the exclusion of governmental intervention . . . ."[82] For support, he quoted full paragraphs from *The Open Universities in South Africa*, which explained that "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation."[83] That "atmosphere," in turn, requires "'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[84]

And just like that, Justice Frankfurter defined the contours of a constitutional right to academic freedom that became a staple of this Court's First Amendment jurisprudence. And that contribution, like Mill's and Holmes's before it, was the product of a diverse dialogue—this time, among students, academics, and lawyers from all over the world.

If those seeds blossomed in *Bakke* (as discussed in the next Section), they took root in *Keyishian v. Board of Regents of Univ. of State of N.Y.*[85] There, this Court held that state-mandated loyalty oaths were unconstitutional as applied to university faculty, relying on precepts of academic freedom and diversity that

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[82] *Id.* at 261-62 (Frankfurter, J., concurring).

[83] *Id.* at 263.

[84] *Id.*; CENTLIVRES & FEETHAM, *supra* note 72 at 11-12.

[85] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 591-93 (1967) (Opinion of Brennan, J.).

combined the views of Humboldt, Mill, Holmes, Hand, and Frankfurter, among others. The Court declared, for example, that "[t]he classroom is peculiarly the 'marketplace of ideas. 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.'" (quoting Hand).[86] Thus, the Court concluded, "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and . . . . is therefore a special concern of the First Amendment . . . ."[87]

B. Two Hundred Years of History Culminated in the "Harvard Plan," Grounding the Quest for Diversity in University Autonomy and Academic Freedom

The foregoing all contributed to the drafting of the Harvard Plan that describes the ways in which Harvard College uses diversity, including racial and ethnic diversity, in its selection of applicants for admission. The Plan was initially drafted by a team led by former Solicitor General Archibald Cox (1912-2004) who had served on the Harvard faculty since 1945 and was himself a witness to the admissions debates of the 1950s and 60s that led to Harvard's diversity admissions policies.[88] In drafting the plan, Cox was assisted by members of Harvard's admissions

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[86] *Id.* at 603 (quoting *United States v. A.P.*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.)).

[87] *Id.*

[88] KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 61 (1997); *see also South African Sources of the Diversity Justification*, *supra* note 4 at 36-38.

offices[89] and general counsel's office. He consulted with many members of the Harvard community, incorporated the admissions reports from the faculty debates of the 1950s and 60s,[90] and was aided by Harvard's diversity policies reaching back to the presidency of Charles Eliot.

Cox initially drafted the description of Harvard's admissions policies as a portion of an *amicus* brief on behalf of The President and Fellows of Harvard College filed in the 1973-74 term in *DeFunis v. Odegaard*.[91] Mr. DeFunis challenged the admissions policies of the University of Washington law school, and the case attracted a good deal of attention and many *amicus* briefs but was ultimately dismissed as moot.[92]

The brief argued that Harvard's commitment to enrolling a diverse student body was central to its mission and was entitled to deference as part of the university's right to autonomy and academic freedom under the First Amendment. It cited *Sweezy* as authority, and tracked many of the arguments articulated by Humboldt, Mill, Eliot, Hand, Holmes, Centlivres, Marshall, Griswold, and Frankfurter

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[89] The only living co-author of the Cox brief is James Bierman, also a co-author of this brief, and an Assistant Dean for Admissions at Harvard Law School in 1973-75.

[90] *See* "The Glimp Report," *supra* note 61; *see also* "The Bender Report," *supra* note 63.

[91] Brief of the President and Fellows of Harvard College as *Amicus Curiae* Supporting Respondents, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

[92] *See DeFunis v. Odegaard*, 416 U.S. 312, 319-20 (1974) (dismissing case as moot).

(Cox's mentor).[93] Before the vote to dismiss the case as moot, Justice Powell had already taken note of the brief and had marked up the discussion of Harvard's diversity policies, along with news clippings describing Harvard's diversity argument.[94]

Four years later, when the *Bakke* case came before this Court, Harvard joined with Columbia, Stanford, and the University of Pennsylvania in again submitting an *amicus* brief in support of the university. The authors took the section of the Harvard *DeFunis* brief that described how Harvard's diversity-based admissions policies worked and appended it to the brief under the heading "Harvard College Admissions Program."[95] Justice Powell, having informed his clerk that he wanted to "use *DeFunis*"[96] in deciding the

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[93] *See generally* Brief of the President and Fellows of Harvard College as *Amicus Curiae* Supporting Respondents, *supra* note 91.

[94] *See* Justice Lewis Powell, *DeFunis v. Odegaard* Papers, in Lewis F. Powell Jr. Papers, 1921-1998, (on file with Lewis F. Powell, Jr. Archives, Washington and Lee University, Lexington, VA, Ms 001), https://law2.wlu.edu/deptimages/powell%20archives/73-235_DefunisOdegaard.pdf; *see id.* at 45 (collecting Anthony Lewis, *The Legality of Racial Quotas: Who Will Pay for the Injustice of the Past?*, N.Y. TIMES (Mar. 3, 1974), http://www.nytimes.com/1974/03/03/archives/the-legality-of-racial-quotas-tough-intellectual-issues.html?_r=0; *id.* at 67-68 (collecting Jerrold K. Footlick, *Justice: Racism in Reverse*, NEWSWEEK (1974)).

[95] Brief for Columbia University et al. as *Amici Curiae* Supporting Petitioner at 1A, *Regents of the University of California v. Allen Bakke*, 438 U.S. 265 (1978) (No. 76-811).

[96] Memo from Bob Comfort to Mr. Justice Powell at 58 (Oct. 29, 1977), *Regents v. Bakke* Papers, Lewis F. Powell Jr. Papers (on file with Harvard University and the author).

Bakke case, not only described and endorsed the *Bakke* brief appendix in his opinion, but appended it to his own opinion.[97] Thus the description from the *DeFunis* brief became what is now called the "Harvard Plan."

In the wake of the *Bakke* opinion and its progeny, the Harvard Plan became the model for admissions at many selective universities in the United States. Although it was drafted in the 1970s, it relies on the deep roots of promoting diversity—including racial/ethnic diversity—that have been central to the idea of a modern university since the nineteenth century.

[97] *Bakke*, 438 U.S. 265 at 321 (1978).

CONCLUSION

History matters, and the long and distinguished history linking diversity and academic freedom, which led to white Protestant universities in the United States and much of the western world lifting their barriers to admitting Catholic, Jewish, Black, Latin-American and Asian-American students and faculty, and to admitting women, should be celebrated—not abandoned.

The Court should affirm the judgments below.

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