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## Affirmative Action: Challenges and Opportunities

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# AFFIRMATIVE ACTION: CHALLENGES AND OPPORTUNITIES

## I. INTRODUCTION

Affirmative action, which is defined as “the notion that the government may utilize race and gender conscious programs to redress the continuing effects of past discrimination in this country,”<sup>1</sup> is a hot topic in American higher education. The current affirmative action controversy revolves around universities’ use of race in their admissions programs.<sup>2</sup> While supporters of affirmative action admissions programs argue that affirmative action policies are designed to ensure diversity, and thereby benefit all students, critics counter that such policies unconstitutionally discriminate against white students. In 2003, the United States Supreme Court considered both of these arguments in *Gratz v. Bollinger*<sup>3</sup> and *Grutter v. Bollinger*,<sup>4</sup> in which applicants to the University of Michigan challenged the university’s use of race in its undergraduate and law school admissions programs. The opinions from these two cases help to clarify how much weight, if any, colleges and universities can give to a student’s race, color, or ethnic background in their admissions process.

American universities want to do more than merely provide their students with an opportunity to master subjects or acquire skills. They want their students to achieve a higher level of education that comes from learning in an environment where “students come from very different places, and with widely different notions . . . , [with] much to generalize, much to adjust, much to eliminate, [and] there are inter-relations to be defined . . . .”<sup>5</sup> Affirmative action admissions programs are designed to achieve this higher level of education by attempting to ensure that college classrooms are composed of students from diverse backgrounds. While it is widely accepted that affirmative action

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1. Carla D. Pratt, *In the Wake of Hopwood: An Update on Affirmative Action in the Education Arena*, 42 *How. L.J.* 451, 451 (Spring 1999).

2. Mark R. Fletcher, *A Tale of Two Cases: Grutter, Gratz, and the Constitutional Limits of Affirmative Action in Higher Education*, 2002 *L. Rev. M.S.U.-D.C.L.* 965 (Winter 2002).

3. *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

4. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

5. John Henry Newman, *The Idea of a University*, 130 (I.T. Ker ed., 1976).

admissions programs help minority students by giving certain racial and ethnic groups a boost in the admissions process, this comment explores the issue of whether affirmative action programs also benefit non-minority students.

Part II of this comment sets the stage for the current affirmative action debate by describing the constitutional and statutory grounds on which non-minority students have challenged affirmative action admissions programs. Part II also describes a key U. S. Supreme Court decision, *Regents of the University of California v. Bakke*,<sup>6</sup> and its Supreme Court and federal circuit court progeny. Part II concludes with an analysis of *Gratz* and *Grutter*. Part III evaluates empirical data from three recent studies to show that the use of affirmative action policies in college admissions benefits both non-minority and minority students by creating diversity on American campuses. Part IV considers affirmative action alternatives that some states have used in the face of judicial scrutiny. Finally, Part V addresses how affirmative action programs benefit non-minority students because they create a diverse learning environment where minority and non-minority students come together to learn, exchange ideas, understand each other, and form opinions that they will carry with them after they leave college.

## II. AFFIRMATIVE ACTION BACKGROUND

### A. *Constitutional and Statutory Provisions*

Opponents to affirmative action have challenged the use of race in college admissions programs on the following grounds: (1) it violates the Equal Protection clause of the Fourteenth Amendment (“Equal Protection Clause”)<sup>7</sup> which guarantees a citizen’s right to the equal use of public facilities without discrimination based on race; (2) it violates 42 U.S.C. § 1981 (“Section 1981”)<sup>8</sup> which ensures that all persons within the

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6. *Regents of U. of Cal. v. Bakke*, 438 U.S. 265 (1978) (hereinafter *Bakke*).

7. See U.S. Const. amend. XIV, § 1. Section one of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

8. See 42 U.S.C. § 1981(a) (2003). Section 1981 reads:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

U.S. will enjoy the same rights as are “enjoyed by white citizens;” (3) it violates 42 U.S.C. § 1983 (“Section 1983”)<sup>9</sup> which creates a civil action against any person who deprives an individual of their civil rights under color of state law; and (4) it violates Title VI of the Civil Rights Act of 1964 (“Title VI”)<sup>10</sup> which prohibits race based discrimination by any organization receiving federal funds.<sup>11</sup>

Together, these constitutional and statutory provisions prohibit discrimination on the basis of race, color, or national origin, but do not address preferential treatment on the same grounds.<sup>12</sup> Consequently, the constitutionality of affirmative action programs, has been left entirely to the courts.<sup>13</sup>

## B. Case Law

### 1. Prior Supreme Court Rulings

In *Regents of the University of California v. Bakke*,<sup>14</sup> the seminal university admissions affirmative action case, the United States Supreme Court considered whether the special admissions program used by the Medical School of the University of California at Davis (“Davis”), which allocated 16 out of 100 seats in each year’s class to members of certain minority groups,<sup>15</sup> violated the California Constitution, Title VI, and the Equal Protection Clause.<sup>16</sup> The Supreme Court, without producing a majority opinion, found that a public university could give some consideration to race in its admissions process without violating the Equal Protection Clause or Title VI.<sup>17</sup> The Court also agreed with the

9. See 42 U.S.C. § 1983 (2003). Section 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable . . .

10. See 42 U.S.C. § 2000(d) (2003). This section, also known as Title VI, reads:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

11. See e.g. Fletcher, *supra* n. 2 at 968.

12. See *id.* at 969.

13. See *id.*

14. *Bakke*, 438 U.S. at 265.

15. *Id.* at 265–66.

16. *Id.* at 270.

17. *Id.* at 265.

California Supreme Court that Davis' use of a racial quota in its admissions program was unconstitutional because it was not narrowly tailored to achieve a compelling state interest.

The problem with the five-to-four *Bakke* decision is that the nine Justices disagreed on the complex issues presented by the case and, consequently, no majority emerged to set guidelines for a permissible use of racial preferences in college admissions.<sup>18</sup> Justice Powell, writing for the Court, included in his opinion that although Davis' race-based quota system was unconstitutional, achieving a diverse student body is a sufficiently compelling interest to justify the consideration of an applicant's race in the admissions process. Specifically, Justice Powell wrote that race can be used as a "plus" factor in admissions as long as there is a compelling state interest to do so,<sup>19</sup> and that the goal of a diverse student body constituted a compelling state interest.<sup>20</sup> However, no other Justice expressly endorsed Powell's so called "diversity rationale."<sup>21</sup>

In the wake of *Bakke*, the Supreme Court reiterated their holding from *Bakke* that a strict scrutiny standard be applied to affirmative action cases.<sup>22</sup> However, the Court was hesitant to clearly define what satisfied the compelling governmental interest prong of the strict scrutiny test. Given the Court's failure to clarify its position on Justice Powell's "diversity rationale," lower courts did their best to answer the question on their own.

## 2. Case Law from Federal Circuit Courts

Because of *Bakke's* failure to produce a majority opinion and the apparent lack of support from other Justices for Justice Powell's "diversity rationale," until the Supreme Court resolved the question in *Grutter* and *Gratz*, lower federal circuit courts disagreed over the question of whether the goal of obtaining a diverse student body satisfies the "compelling governmental interest" prong of the strict scrutiny test.

For example, in *Hopwood v. State of Texas*,<sup>23</sup> a white student who was denied admission to the University of Texas School of Law brought suit

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18. *Id.* at 320.

19. *Id.* at 318.

20. *Id.* at 311-12.

21. *Id.* at 328-421.

22. The strict scrutiny test consists of the following two prongs: (1) "any racial classification 'must be justified by a compelling governmental interest'" *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)); and (2) "the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Wygant*, 476 U.S. at 274 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980)).

23. *Hopwood v. St. of Tex.*, 78 F.3d 932 (5th Cir. 1996).

alleging that the school's admissions program, which considered the race of applicants to ensure campus diversity, violated the Equal Protection Clause and Title VI.<sup>24</sup> The Fifth Circuit struck down Texas' admissions program in its entirety because: (1) Justice Powell's "diversity rationale" in *Bakke* was merely the opinion of one Justice and, therefore, "not binding precedent on the issue[;]"<sup>25</sup> and (2) there was no evidence that the law school discriminated in the past.<sup>26</sup> The Supreme Court subsequently denied certiorari because the challenged admissions program no longer existed.<sup>27</sup>

A few years later in *Smith v. University of Washington Law School*,<sup>28</sup> several students brought suit against the law school alleging that its affirmative action admissions program, which ensured diversity, violated Sections 1981 and 1983, and Title VI.<sup>29</sup> In *Smith*, the Ninth Circuit recognized that although no other Justice explicitly agreed with Powell's opinion, "educational diversity is [nonetheless] a compelling governmental interest that meets the demands of strict scrutiny . . ."<sup>30</sup> To reach this conclusion, the court analyzed each of the concurring opinions in *Bakke* and determined that Justice Powell's analysis was the narrowest footing upon which a race conscious admissions program could stand. It then applied the *Marks v. United States*<sup>31</sup> analysis, which requires that "the holding of the Court may be viewed as that position taken by those Members who concurred in judgments on the narrowest grounds[,]" to conclude that the rationale that Powell used in *Bakke* represented the binding holding of the Court at the time.<sup>32</sup> The Ninth Circuit then wrote that because the Supreme Court had not returned to the question of the use of race in college admissions and had not indicated that Powell's approach had lost its validity in this area, Justice Powell's "diversity rationale" was a compelling state interest.<sup>33</sup> The Supreme Court denied certiorari without opinion in this case.<sup>34</sup>

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24. *Id.* at 938.

25. *Id.* at 944.

26. *Id.*

27. *Tex. v. Hopwood*, 518 U.S. 1033, 1034 (1996).

28. *Smith v. U. of Wash. L. Sch.*, 233 F.3d 1188 (9th Cir. 2000).

29. *Id.* at 1191.

30. *Id.* at 1200-01.

31. *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (recognizing that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"—which turns out to be Justice Powell's opinion) (*quoting* *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)).

32. *Smith*, 233 F.3d at 1199.

33. *Id.* at 1200-01.

34. *Smith v. U. of Wash. Law Sch.*, 532 U.S. 1051 (2001).

One year after *Smith*, in *Johnson v. Board of Regents of the University of Georgia*,<sup>35</sup> undergraduate students brought suit alleging that a racial preference policy implemented by the University of Georgia in its freshman admissions program “to foster student body diversity[,]”<sup>36</sup> was unconstitutional. The Eleventh Circuit held that even if Justice Powell’s opinion in *Bakke* was binding precedent, the University of Georgia’s admissions program still failed to satisfy the strict scrutiny standard and was, therefore, unconstitutional because it was not narrowly tailored to serve the compelling interest of fostering student body diversity.<sup>37</sup> The University of Georgia decided not to appeal the decision to the Supreme Court.

### 3. *The Michigan Cases*

The epitome of the *Bakke* split is found in two cases brought by non-minority applicants against the University of Michigan, which exemplify conflicting points of view surrounding Justice Powell’s suggestion/holding that the goal of campus diversity is a compelling state interest. In these two cases, *Gratz v. Bollinger*<sup>38</sup> and *Gutter v. Bollinger*,<sup>39</sup> applicants to the university’s undergraduate and law schools, respectively, attempted “to determine the validity of racial classifications in admissions programs at the same university. However, the holdings of these two cases are very different: the Eastern District Court of Michigan found one policy constitutional and found the other, similar program, unconstitutional.”<sup>40</sup>

#### a. *Gratz v. Bollinger*<sup>41</sup>

In *Gratz*, non-minority applicants brought suit against the University of Michigan’s undergraduate College of Literature, Science, and Arts (“LSA”) alleging that it violated the Equal Protection Clause and Title VI by utilizing a race conscious affirmative action program in admissions.<sup>42</sup> Looking to *Bakke*, the district court applied the strict scrutiny standard,<sup>43</sup> and determined that the goal of creating a diverse student body was “a

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35. *Johnson v. Bd. of Regents of the U. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

36. *Id.* at 1239.

37. *Id.* at 1245.

38. *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

39. *Gutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

40. Kathryn Raines, Student Author, *The Diversity and Remedial Interests in University Admissions Programs*, 91 Ky. L.J. 255, 270 (2002/2003).

41. *Gratz*, 122 F. Supp. 2d at 811.

42. *Id.* at 813–14.

43. *Id.* at 816 (quoting *Adarand Constr. Inc. v. Pena*, 515 U.S. 200, 227 (1995)).

compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process.”<sup>44</sup> The district court also distinguished the LSA admissions program from the admissions program at issue in *Bakke* in that the LSA program did not employ a rigid quota system, which Justice Powell had found to be impermissible in *Bakke*.<sup>45</sup> The court ultimately found that the LSA admissions policy satisfied the *Bakke* requirements and was, therefore, constitutional.<sup>46</sup>

*b. Grutter v. Bollinger*<sup>47</sup>

In *Grutter*, non-minority applicants brought suit against the University of Michigan Law School alleging that it violated the Equal Protection Clause, Title VI, and Section 1981 by using race as the prevailing factor in its admissions process.<sup>48</sup> The applicants argued that the use of race gave preferred minority applicants a much greater chance of being admitted than non-minority and non-preferred minority applicants with similar qualifications and, thus, violated the Constitution.<sup>49</sup> On the other hand, the law school argued that “[b]y enrolling a critical mass of [underrepresented] minority students, the Law School seeks to ensure their ability to make unique contributions to the character of the Law School.”<sup>50</sup> The law school defined “critical mass” as “meaningful numbers, or meaning representation” or, more specifically, as “numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.”<sup>51</sup>

In stark contrast to the district court’s decision in *Gratz*, the *Grutter* district court elected not to follow Justice Powell’s decision in *Bakke* when it held that a diverse student body in the University of Michigan’s Law School is not a compelling governmental interest.<sup>52</sup> “As in *Hopwood*, the *Grutter* [district] court believed that, due to the fragmented *Bakke* court, the *Bakke* opinion ‘did not hold that a state educational institution’s desire to assemble a racially diverse student body is a compelling government

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44. *Gratz*, 122 F. Supp. 2d at 820 n. 9 (“Recognizing that neither the Supreme Court nor the Sixth Circuit have definitively held that diversity can never be a compelling interest under strict scrutiny, this Court is satisfied that the University’s [diversity rationale] argument remains viable.”).

45. *Id.* at 827.

46. *Id.* at 831.

47. *Grutter*, 137 F. Supp. 2d at 821.

48. *Id.* at 824.

49. *Id.*

50. *Grutter*, 123 S. Ct. at 2332 (citations and quotation marks omitted).

51. *Id.* at 2334–35.

52. *Grutter*, 137 F. Supp. at 844.

interest’.”<sup>53</sup> Consequently, the *Grutter* district court granted plaintiff’s request for declaratory relief and enjoined the law school from using race as a factor in its admissions decisions.<sup>54</sup>

c. *Grutter and Gratz at the Sixth Circuit*

On appeal, the Sixth Circuit heard oral arguments for *Grutter* and *Gratz* simultaneously and delivered its decision on *Grutter* in the spring of 2002.<sup>55</sup> The Sixth Circuit elected to answer the *Gratz* appeal at a later date. Sitting *en banc*, the Sixth Circuit “reject[ed] the district court’s conclusion and [found] that the Law School [had] a compelling interest in achieving a diverse student body”<sup>56</sup> because (1) it considered Justice Powell’s opinion in *Bakke* as “binding on this court under *Marks*,<sup>57</sup> and because *Bakke* remains the law until the Supreme Court instructs otherwise[;]”<sup>58</sup> and (2) it found that “the Law School’s use of race was narrowly tailored because race was merely a potential plus factor . . . .”<sup>59</sup>

d. *Grutter and Gratz at the United States Supreme Court*

On December 2, 2002, the U. S. Supreme Court granted certiorari to hear *Grutter* and *Gratz*, “to resolve the disagreement among the Courts of Appeals on a question of national importance—whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.”<sup>60</sup> Note that the Supreme Court’s decision to “consider the undergraduate case, *Gratz v. Bollinger*, was highly unusual because the Sixth Circuit [had] yet to rule on the lawsuit.”<sup>61</sup>

On June 23, 2003, the Supreme Court delivered decisions on the issues identified in *Grutter*<sup>62</sup> and *Gratz*.<sup>63</sup> In *Grutter*, Justice O’Connor, writing for a five to four majority, “endorse[d] Justice Powell’s view that

53. Raines, 91 Ky. L.J. at 273 (italics added) (quoting *Bakke*, 137 F. Supp. 2d at 844).

54. *Grutter*, 137 F. Supp. 2d at 872.

55. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

56. *Id.* at 739.

57. *Marks*, 430 U.S. at 193.

58. *Grutter*, 288 F.3d at 739.

59. *Grutter*, 123 S. Ct. at 2335 (citing *Grutter*, 288 F.3d at 746–49) (quotation marks omitted).

60. *Id.* (citing *Grutter v. Bollinger*, 537 U.S. 1043 (2002)(granting certiorari)).

61. Peter Schmidt & Jeffrey Selingo, *A Supreme Court Showdown*, 49 Chron. of Higher Educ. A20 (Dec. 13, 2002). “The Supreme Court’s rules provide that the [J]ustices may hear a dispute before a circuit-court ruling ‘only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this court.’” *Id.* at A26 (quoting 28 U.S.C. § 2101(e) (2003)).

62. *Grutter*, 123 S. Ct. at 2325.

63. *Gratz*, 123 S. Ct. at 2411.

student body diversity is a compelling state interest that can justify the use of race in university admissions,”<sup>64</sup> and consequently, held that the law school has a compelling interest in attaining a critical mass of underrepresented students, which “is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”<sup>65</sup> Justice O’Connor adopted the law school’s “critical mass” standard as a constitutional use of affirmative action in the admission of underrepresented minority students because “critical mass is defined by reference to the educational benefits that diversity is designed to produce,” not by reference to the enrollment of “some specified percentage of a particular group merely because of its race or ethnic origin . . . [which] would amount to outright racial balancing, which is patently unconstitutional.”<sup>66</sup> Additionally, Justice O’Connor wrote that since the law school “engages in a highly individualized, holistic view of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment,”<sup>67</sup> the law school properly uses race as a “plus” factor, and the law school sufficiently considers workable race-neutral alternatives. In conclusion, the Court held that “the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”<sup>68</sup>

In *Gratz*, Chief Justice Rehnquist, writing for a six to three majority, ruled against Michigan’s undergraduate admission’s policy, but only because “the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”<sup>69</sup>

The *Grutter* and *Gratz* decisions implicitly give more power to Justice Powell’s “diversity rationale” but do not resolve all of the confusion generated by *Bakke*. As a result, a commentator recently alleged that “[t]he U.S. Supreme Court hardly ended the debate over race-conscious college admissions policies,”<sup>70</sup> and “these issues will have

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64. *Grutter*, 123 S. Ct. at 2337.

65. *Id.* at 2341.

66. *Id.* at 2339 (citations and quotation marks omitted).

67. *Id.* at 2343.

68. *Id.* at 2347.

69. *Gratz*, 123 S. Ct. at 2427–28.

70. Peter Schmidt, *Affirmative Action Survives, and So Does the Debate*, 49 Chron. of Higher Educ. S1 (July 4, 2003).

to be fought out school by school and state by state.”<sup>71</sup>

Furthermore, in *Grutter*, Justice O’Connor wrote that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race . . . [a]ccordingly, race-conscious admissions policies must be limited in time.”<sup>72</sup> As a result, Justice O’Connor wrote:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.<sup>73</sup>

Consequently, affirmative action programs in university admissions have not escaped the strict scrutiny standard and, over time, race conscious admissions programs will likely be struck down. However, the “diversity rationale” presented by Justice Powell in *Bakke* and approved by the Supreme Court in *Grutter* and *Gratz* must endure the test of time if universities want to create, or maintain, a learning environment where minority and non-minority students come together to learn, exchange ideas, understand each other, and form opinions that they will carry with them after they leave college. Ensuing debates over affirmative action programs in university admissions will undoubtedly include discussions about the beneficiaries of affirmative action programs and empirical evidence regarding the claim that both minority and non-minority students benefit from affirmative action policies. Therefore, this comment includes an analysis of affirmative action beneficiaries.

### III. AFFIRMATIVE ACTION BENEFICIARIES

Kristy Downing, a female African-American law student, is considered by many to be the face of affirmative action at the University of Michigan.<sup>74</sup> While she realizes that many of her peers see her as just another beneficiary of an affirmative action quota system, Downing maintains that: “[p]eople who didn’t want African-Americans to succeed in the first place will always see me as just an African-American. There’s nothing I can do to please them except feel bad about myself. It’s not

71. *Id.* (quoting Roger B. Clegg, general counsel for the Center for Equal Opportunity, which is a group that opposes race-conscious admissions policies).

72. *Grutter*, 123 S. Ct. at 2346 (citations omitted).

73. *Id.* at 2346–47 (citations omitted).

74. Richard Morgan, *At Michigan, Beneficiary of Affirmative Action Is Proud to Defend It*, 49 *Chron. of Higher Educ.* A22 (Dec. 13, 2002).

that they're racist—they just don't speak from a perspective that includes other viewpoints."<sup>75</sup> Downing's presence in the classroom and the opinions that she expresses from the perspective of an African-American woman are precisely why increased racial and ethnic diversity enhance the university learning experience to the benefit of both minority and non-minority students.

Notwithstanding, judges have become increasingly skeptical about the theoretical benefits of diversity in higher education.<sup>76</sup> To counter this, universities have been forced to produce strong empirical evidence that "demonstrates the positive educational value of diversity."<sup>77</sup> For this reason, the following three objective studies are discussed to support the argument that both minority and non-minority students are beneficiaries of diverse learning environments.<sup>78</sup>

#### A. *The Bok and Bowen Study*<sup>79</sup>

The first of these studies, compiled by Derek Bok and William Bowen,<sup>80</sup> considered and analyzed the experiences of tens of thousands of minority and non-minority students who entered twenty-eight of the nation's most prestigious universities in the fall of 1951, 1976, and 1989.<sup>81</sup> According to the study's preface, Bok and Bowen set out to provide "empirical evidence as to the effects of [race-sensitive admissions] policies and their consequences for the students involved."<sup>82</sup>

The study asked students questions about the admissions process, their experience of studying on a diverse campus, their overall college experience, and their post-college family and social experiences. After analyzing the responses, Bok and Bowen made the following observations: First, "[o]f the blacks who entered selective colleges in 1989, 88 percent report[ed] having known well two or more white classmates, while 56 percent of their white classmates say that they knew at least two black classmates well."<sup>83</sup> Second, as a rule, students who had extensive interaction with a diverse student body tended to maintain

75. *Id.* (emphasis added).

76. See Mark. R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 Cal. L. Rev. 1299, 1333 (Dec. 1999).

77. *Id.*

78. *Id.* at 1326.

79. See *id.* (citing Derek Bok & William G. Bowen, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton U. Press 1998)).

80. Killenbeck, *supra* n. 76 at 1326.

81. See *id.*; See Derek Bok & William G. Bowen, *Access to Success*, 85 ABA J. 62 (1999).

82. Killenbeck, *supra* n. 76 at 1326 (quoting Bok, 85 ABA J. at xxiv).

83. Bok, *supra* n. 81 at 63.

similar interactions with diverse groups after college as well.<sup>84</sup> Third, regarding post-college family and social experiences, white graduates of the selected institutions achieved meaningful employment, high earnings, considerable job satisfaction, and high levels of civic participation and satisfaction with life.<sup>85</sup> Fourth, “[a]lmost 80% of white graduates favor[ed] retaining their school’s current emphasis on diversity or emphasizing it even more.”<sup>86</sup>

### B. *The Gurin Study*<sup>87</sup>

The second study, compiled by Professor Patricia Gurin of the University of Michigan, was conducted as part of the University’s efforts to defend its admissions policies in the *Grutter* and *Gratz* litigation and to the general public.<sup>88</sup>

Using national and Michigan databases, the Gurin study, which is alleged to be one of the most comprehensive empirical analyses ever performed,<sup>89</sup> provides empirical evidence that diversity in higher education benefits both non-minority and minority students.<sup>90</sup> Specifically, it identifies three ways that students benefit from learning in a diverse learning environment. First, “[s]tudents learn more and think in deeper, more complex ways in a diverse educational environment.”<sup>91</sup> Second, the study shows that “[s]tudents educated in diverse settings are more motivated and better able to participate in an increasingly heterogeneous and complex democracy.”<sup>92</sup> Third, “patterns of racial segregation and separation historically rooted in our national life can be broken by diversity experiences in higher education.”<sup>93</sup>

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84. *Id.*

85. Bok, *supra* n. 79 at 118–92.

86. *Id.* at 193–217.

87. Killenbeck, *supra* n. 76 at 1327; See Patricia Gurin, *Expert Report of Patricia Gurin* <<http://www.umich.edu/~urel/admissions/legal/expert/gurintoc>> (last updated Sept. 4, 2003).

88. Killenbeck, *supra* n. 76 at 1327.

89. Gurin, *supra* n. 87 at <<http://www.umich.edu/~urel/admissions/legal/expert/info.html>>.

90. Gurin, *supra* n. 87 at <<http://www.umich.edu/~urel/admissions/legal/expert/summ.html>>.

91. *Id.*

92. *Id.*

93. *Id.*

C. *The Orfield and Whitla Study*<sup>94</sup>

The third study, compiled by Gary Orfield and Dean Whitla, analyzed “a narrower and potentially more significant question, the effect of a diverse learning environment on students enrolled in what the study aptly characterizes as ‘leading law schools.’”<sup>95</sup> This study is significant in that it attempts to provide empirical evidence to support Justice Powell’s opinion in *Bakke* that diversity is a compelling government interest and, therefore, a justification for race-conscious admission policies.<sup>96</sup>

By means of a Gallup Poll administered at Harvard and Michigan Law Schools, the study considered the impact of diversity by asking law students how it has influenced their educational experiences.<sup>97</sup> The findings include the following: First, “large majorities have experienced powerful educational experiences from interaction with students of other races.”<sup>98</sup> Second, “[w]hite students appear to have a particularly enriching experience, since they are by far the most likely to have grown up with little interracial contact.”<sup>99</sup> Ultimately, this study provides strong evidence for the conclusion that “[t]he values affirmed by Justice Powell . . . in the *Bakke* decision appear to be operating in the lives of law students today” because “most of today’s students find [diversity] so beneficial to their legal education and to understanding critical dimensions of their profession.”<sup>100</sup>

The empirical evidence generated by the aforementioned studies is of paramount importance because it supports a conclusion that diversity, achieved through race-conscious admissions programs, benefits both minority and non-minority students. These findings support the retention of admissions programs that increase diversity on university campuses because abandonment of such policies would harm not only those minority students who would otherwise be denied admission if race conscious admissions policies were eliminated, but also, as these studies demonstrate, the non-minority students who would take their places.

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94. Killenbeck, *supra* n. 76 at 1329 (citing Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools* <<http://www.law.harvard.edu/civilrights/publications/lawsurvey.html>>). The Orfield and Whitla Study has been moved to <<http://www.civilrightsproject.harvard.edu/research/lawmichigan/DiversityandLegalEducation.pdf>> (last updated Aug. 1999).

95. Killenbeck, *supra* n. 76 at 1329.

96. *Bakke*, 438 U.S. at 311–12.

97. Killenbeck, *supra* n. 76 at 1331 (citing Orfield, *supra* n. 94 at 143).

98. Orfield, *supra* n. 94 at 172.

99. *Id.*

100. *Id.*

## IV. AFFIRMATIVE ACTION ALTERNATIVES

Because the use of affirmative action programs in university admissions is still required to satisfy a strict scrutiny standard and, in some cases, may not survive such scrutiny, this section analyzes two affirmative action alternatives.

A. *Do Nothing*

Proponents of the “do nothing” alternative maintain “that blacks should, metaphorically, pull up their socks and get about the business of doing as well as whites do on tests.”<sup>101</sup> This argument is based on the premise that the challenge of having no preferential treatment will inspire minority students to score better on admissions test. This argument is countered by Dr. Stephen Raudenbush, an expert quoted in Justice O’Connor’s *Grutter* opinion, who testified that:

[A] race-blind admissions system would have a ‘very dramatic,’ negative effect on the underrepresented minority admissions . . . . [I]n 2000, 35 percent of underrepresented minority applicants were admitted . . . if race were not considered, only 10 percent of those applicants would have been admitted . . . . Under this scenario, underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.<sup>102</sup>

B. *Statutory Alternatives to Affirmative Action Programs in University Admissions*

Texas recently elected to ban affirmative action policies that the Fifth Circuit found unconstitutional in *Hopwood*.<sup>103</sup> The state enacted two alternative programs in an effort to retain diversity in its institutions of higher education. The first Texas statute, titled “Automatic Admission: All Institutions,” provides that “each institution in the [state’s] higher education system ‘shall admit an applicant . . . as an undergraduate student if the applicant graduated with a grade point average (GPA) in the top 10% of the student’s high school graduating class in one of the two school years’ preceding the year for which the applicant is applying for admission.”<sup>104</sup> The second statute, titled “Other Admissions,” provides for applicants who are not in the top 10% of their high school

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101. See Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 547 (May 2002).

102. *Grutter*, 123 S. Ct. at 2334 (citations and quotation marks omitted).

103. *Hopwood*, 78 F.3d at 932.

104. Greenberg, *supra* n. 101 at 538 (quoting Tex. Educ. Code Ann. § 51.803(a) (2002)).

class by stating that “[b]ecause of changing demographic trends, diversity, and population increases in the state,’ in addition to academic achievement, schools ‘shall also consider’ any or a combination of ‘socioeconomic’ factors.”<sup>105</sup> As a result of these two “alternative-to-affirmative-action” statutes, the University of Texas was able to restore its undergraduate black admission numbers to pre-*Hopwood* levels.<sup>106</sup> However, it should be noted that the automatic admissions programs described above cannot work for professional programs and, consequently, the University of Texas law school’s minority enrollment is well below pre-*Hopwood* levels.<sup>107</sup>

California also banned the use of affirmative action programs in university admissions.<sup>108</sup> In an attempt to preserve diversity in the state’s institutions of higher education, California enacted a top percentage plan similar to the one adopted in Texas, but capped it at 4 percent as opposed to Texas’ 10 percent. The California statute has produced dismal results. “Overall, in 2000 and 2001, the number of black students enrolling for the first time at the university’s undergraduate colleges stabilized at about 20% below the level at which it had been under affirmative action.”<sup>109</sup> The state has yet to remedy this problem.

## V. CONCLUSION

For decades Federal circuit courts have grappled over the constitutionality of affirmative action programs in university admissions. Then, in *Grutter* and *Gratz*, the U.S. Supreme Court implicitly gave more power to Justice Powell’s “diversity rationale.” As a result, affirmative action supporters thought that the debate had been settled once and for all. However, critics allege that the U.S. Supreme Court did not resolve the issue and that it will continue to be fought out school by school and state by state. Consequently, this paper concludes that Justice Powell’s diversity rationale satisfies the compelling governmental interest prong of the strict scrutiny test because empirical evidence shows that affirmative action programs benefit minority and non-minority students

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105. *Id.* at 539 (quoting Tex. Educ. Code Ann. § 51.805(b) (2002) (the statute includes a list of 18 factors that may be considered in the admission process)).

106. *Id.* at 539.

107. *Id.* at 540.

108. *Id.* at 541. Proposition 209, which banned the use of affirmative action in university admissions, was enacted in 1996. Proposition 209 states: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Cal. Const. art. I, § 31, cl. a.

109. Greenberg, *supra* n. 101 at 541.

by creating a diverse learning environment where minority and non-minority students come together to learn, exchange ideas, understand each other, and form opinions that they will carry with them after they leave college. Furthermore, this paper concludes that non-affirmative action alternatives should be considered if affirmative action programs are found to be unconstitutional and the compelling interest of a diverse student body is not satisfied.

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