To Mom and Dad who have always taken an interest in my academic pursuits and have never doubted my abilities—your love, patience and faith in me have provided the impetus for my success.
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<tr>
<td>Academic Freedom</td>
<td>Right to teach as one sees fit, but not necessarily the right to teach evil. The term encompasses much more than teaching-related speech rights.</td>
</tr>
<tr>
<td>Affirm</td>
<td>To ratify, uphold, approve, confirm; to affirm a judgment, Decree, or order, is to declare that it is valid and right and must stand as rendered previously.</td>
</tr>
<tr>
<td>Affirmative Action Policy</td>
<td>Policies of governments and other institutions, private and public, intended to promote employment, contracting, educational, and other opportunities for members of historically disadvantaged groups.</td>
</tr>
<tr>
<td>Amicus curiae</td>
<td>Literally means friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, on behalf of a party but actually to suggest a rationale consistent with its own views.</td>
</tr>
<tr>
<td>Appeal</td>
<td>Resort to a superior (i.e., appellate) court to review the decision of an inferior (i.e., trial) court or administrative agency.</td>
</tr>
<tr>
<td>Appellate court</td>
<td>A court having jurisdiction of appeal and review; a court to which causes are removable by appeal, certiorari, error or report.</td>
</tr>
<tr>
<td>Bill of Rights</td>
<td>First ten Amendments to the U.S. Constitution providing for individual rights, freedoms, and protections.</td>
</tr>
<tr>
<td>Brief</td>
<td>A written statement prepared by the counsel arguing a case in court. It contains a summary of the facts of the case, the pertinent laws and an argument of how the law applies to the facts supporting counsel’s position.</td>
</tr>
<tr>
<td>Case Law</td>
<td>The law of a particular subject as evidences or formed by the adjudged cases, in distinction to statutes and other sources of law.</td>
</tr>
<tr>
<td>Certiorari</td>
<td>From Latin to be informed of. A writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine</td>
</tr>
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</table>
whether there have been any irregularities. It is most commonly used to refer to the Supreme Court of the United States, which uses the write of certiorari as a discretionary device to choose the cases it wishes to hear.

Chief Justice
The presiding, most senior, or principal judge of a court.

Civil Rights
Personal, natural rights guaranteed and protected by the U.S. Constitution.

Compelling state interest
One which the states is forced or obliged to protect. The term is used to uphold state action in the face of attack grounded on Equal Protection or First Amendment rights because of serious need for such state action.

Concur
To agree; in the practice of appellate courts, a “concurring opinion” is one filed by one of the judges or justices, in which he agrees with the conclusions or the result of another opinion filed in the case.

Constitutional
Consistent with the constitution; authorized by the constitution; not conflicting with any provision of the constitution or fundamental law of the state.

Courts of Appeals
Any court (state or federal) that hears appeals from trial courts or lower appeals courts. The court of appeals is usually the intermediate courts in most jurisdictions -- that is the courts positioned between trial courts and the courts of last appeal (usually the supreme court). The U.S. is divided into thirteen federal judicial circuits in each of which there is established a court of appeals known as the United States Court of Appeals for the circuit.

Critical Mass
A term that emerged from the Gratz v. Bollinger¹ Grutter v. Bollinger² to describe the amount of students needed to obtain the educational benefits that diversity is designed to produce.

Dissent
An opinion from a judge that does not agree with the majority decision.

District Court
Each states is comprised of one or more federal judicial districts, and in each district there is a district court. The

¹ 539 U.S. 244 (2003).
United States district courts are the trial courts with general Federal jurisdiction over cases involving federal laws or offenses and actions between citizens of different states.

**Doctrine**

A rule, principle, theory or tenet of the law.

**Equal Protection Clause**

The constitutional guarantee of “equal protection of the laws” means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property and in their pursuit of happiness.

**Executive Order**

A declaration by the president or a governor which has the force of law, usually based on existing statutory powers, and requiring no action by the Congress or state legislature.

**First Amendment**

Amendment to the U.S. Constitution guaranteeing basic freedoms of speech, religion, press, and assembly and the right to petition the government for redress of grievances.

**Fourteenth Amendment**

The Fourteenth Amendment of the Constitution of the United States recognizes a citizenship of the U.S., as distinct from that of the states; forbids the making or enforcement by any state of any law abridging the privileges and immunities of citizens of the U.S.; secures all “persons” against any state action which results in either deprivation of life, liberty or property without due process of law, or, in denial of the equal protection of the laws.

**Freedom of Speech**

Right guaranteed by First Amendment of the U.S. Constitution to express one’s thoughts and views without governmental restrictions.

**Harvard Plus Plan**

An admissions plan that gained notoriety from the *Bakke* decision in which Harvard College considered race as one of many ‘plus’ factors in determining criteria for admission.

**Holding**

Any ruling or decision of a court. The legal principle to be drawn from the opinion (decision) of the court.

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<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Holistic review</td>
<td>A concept emerging out of the <em>Grutter</em> decision in which the Court alluded to an individualized review of an applicant’s file during the admissions process.</td>
</tr>
<tr>
<td>Judgment</td>
<td>The official decision of a court of justice upon the respective rights and claims of the parties to an action or suit litigated and submitted to its determination.</td>
</tr>
<tr>
<td>Judicial Review</td>
<td>Power of the courts to review decisions of another department or level of government.</td>
</tr>
<tr>
<td>Jurisprudence</td>
<td>The philosophy of law; the science of the law of which its function serves to ascertain the principles on which legal rules are based.</td>
</tr>
<tr>
<td>Legislation</td>
<td>The act of giving or enacting laws; the power to make laws.</td>
</tr>
<tr>
<td>Narrowly Tailored</td>
<td>A concept related to the strict scrutiny standard, as a statute must meet this criteria in order to pass the test in determining whether the government has a compelling interest in creating the law. To be narrowly tailored is to be specific to the purpose of the implementation of the law and to not be overly broad in its implementation.</td>
</tr>
<tr>
<td>Opinion</td>
<td>A statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based. A <em>majority</em> opinion represents the principles of law which a majority of the court deem operative in a given decision; a <em>concurring</em> opinion agrees with the result reached by the majority, but disagrees with the precise reasoning leading to that result. A <em>dissenting</em> opinion disagrees with the result reached by the majority and thus disagrees with the reasoning and/or the principles of law used by the majority in deciding the case; a <em>plurality</em> opinion is agreed to by less than a majority as to the reasoning of the decision about is agreed to by a majority as to the result.</td>
</tr>
<tr>
<td>Plaintiff</td>
<td>A person who brings an action; the party who complains or sues in a civil action.</td>
</tr>
<tr>
<td>Precedent</td>
<td>An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law.</td>
</tr>
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<table>
<thead>
<tr>
<th>Term</th>
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<tbody>
<tr>
<td>Public Policy</td>
<td>Community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like.</td>
</tr>
<tr>
<td>Quota</td>
<td>A proportional part or share; an assigned goal.</td>
</tr>
<tr>
<td>Rationale</td>
<td>The reasoning behind the ruling or decision of a case. The explanation of how the court came to the judgment.</td>
</tr>
<tr>
<td>Reverse</td>
<td>To overthrow, vacate, set aside, make void.</td>
</tr>
<tr>
<td>Ruling</td>
<td>A judicial or administrative interpretation of a provision of a statute, order, regulation, or ordinance.</td>
</tr>
<tr>
<td>Statute</td>
<td>A formal written enactment of a legislative body, whether federal, state, city, or county.</td>
</tr>
<tr>
<td>Strict Scrutiny</td>
<td>Under this test for determining if there has been a denial of equal protection, burden is on government to establish necessity of the statutory classification. Measure which is found to affect adversely a fundamental right will be subject to the “strict scrutiny” test which requires the state/government establish that it has a compelling interest justifying the law and that distinctions created by law are necessary to further some governmental purpose.</td>
</tr>
<tr>
<td>Supreme Court</td>
<td>The U.S. Supreme Court comprises the Chief Justice of the United States and such number of Associate Justices as may be fixed by Congress. Currently, the number of Associate Justices is 8 and with the one Chief Justice, the U.S. S. Ct. is comprised of 9 Justices.</td>
</tr>
<tr>
<td>Civil Rights Act of 1964</td>
<td>A federal law that prohibits discrimination on the basis of race, color, national origin, sex (including pregnancy), and religion in employment, education, and access to public facilities and public accommodations, such as restaurants and hotels.</td>
</tr>
<tr>
<td>U.S. Constitution</td>
<td>The organic and fundamental law of the nation, establishing the character and conception of the government, laying the basic principles to which its internal life is to be formed.</td>
</tr>
</tbody>
</table>
Despite the precedent established in the University of California Board of Regents v. Bakke, that race may be used as a factor in admissions policies at state institutions of higher education, state and federal court decisions were divided over whether the use of race in admissions decisions was a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and how such policies should be designed and implemented. In the absence of a more recent Supreme Court decision affirming the Bakke decision, and without a uniform standard of what an acceptable affirmative action policy looked like, courts were providing inconsistent signals to policymakers concerning what constituted an acceptable policy design and whether such policies violated individual rights. In Gratz v. Bollinger and Grutter v. Bollinger, the U.S. Supreme Court, affirmed that race-based affirmative action policies were not a violation of the Equal Protection Clause of the Fourteenth Amendment and that such policies survive strict scrutiny because obtaining a diverse student body is a compelling purpose for establishing such policy.

The purpose of this study was to conduct an examination of the effects of the Gratz v. Bollinger and Grutter v. Bollinger decisions regarding affirmative action policies
at highly selective public institutions of higher education. The study highlighted policy trends to determine the ideology behind these policies. The research summarized the U.S. Supreme Court Equal Protection standards with respect to the implementation and types of race-based affirmative action policies within higher education. A review of litigation was presented pertaining to race-based affirmative action policies since the *Bakke* decision that led up to the U.S. Supreme Court decisions in *Gratz* and *Grutter* and an extensive evaluation of the *Gratz* and *Grutter* decisions was completed. The study reviewed public policy pertaining to race-based affirmative action since the *Gratz* and *Grutter* decisions to determine that these most recent decisions have not had a significant impact on this public policy. These issues were analyzed using traditional legal research methods and the significance of this research was determined using a comparative analysis of current policy trends since the *Gratz* and *Grutter* decisions.
CHAPTER 1
INTRODUCTION

Affirmative action policies can be best understood as an outgrowth of a national effort to remedy past discrimination to certain groups of citizens, namely women, African-Americans, Hispanics, and Asians.¹ Public policies of affirmative action are those in which an institution or organization attempts an active effort to provide employment or educational opportunities of members of minority groups or women.² The U.S. Commission on Civil Rights defines affirmative action as “any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future.” ³ The American Psychological Association defines it as a remedy for both past and continuing discrimination based on race, ethnicity, and gender. Affirmative action plans seek to put in place voluntary and mandatory efforts by federal, state, and local governments, private employers, and schools to combat discrimination and foster fair hiring and advancement of qualified individuals.⁴


These plans and programs are typically used to increase the “process of achieving equality between the sexes and among the races.” At the same time, these plans are usually based on an analysis of how well underrepresented members of society are represented in targeted areas, such as employment settings, and the percentage of qualified individuals from specified, particular backgrounds who are part of the larger pool of potential employees and students. However, the main point of these plans is to “create opportunity and eliminate both conscious and inadvertent discrimination.”

For most of the nation’s history, racial and ethnic minorities and women were faced with legal and social isolation with racial and ethnic minorities segregated into low wage occupations and women forbidden by law from entering into certain occupations. There appeared to be a change in social equity during World War II with increasing employment opportunities for women and African Americans who were needed for the labor shortages. However, after World War II, the opportunities gained by women and African Americans were lost as returning soldiers returned from the War to reclaim their jobs. Despite efforts to curtail discrimination in the federal government and by war industries with President Roosevelt’s Executive Order barring discrimination, racial segregation continued well into the 1950s as the nation continued following the legal precedence of Plessy v. Ferguson.

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8 Exec. Order No. 8802, 3 C.F.R. 957 (1938-43 Comp.)

9 163 U.S. 537 (1896).
However, there appeared to be some hope for the end of segregation with the *Brown v. Board of Education* decision in 1954.\(^\text{10}\) The *Brown* decision seemed to provide the impetus for further civil rights statutes and legislation as well as the growth of the civil rights movement with the beginning of the integration of the public school system.

**History of Affirmative Action**

Despite the civil rights movement, segregation continued its proliferation in the 1960s and in an attempt to improve conditions, President John F. Kennedy issued Executive Order 10925 which used the term affirmative action for the first time as it instructed federal contractors to take ‘affirmative action’ to ensure that applicants were treated equally without regard to race, color, religion, sex, or national origin.\(^\text{11}\) Civil Rights Legislation continued to grow with the signing of the landmark legislation of the Civil Rights Act of 1964 which prohibited employment discrimination by large employers whether they had government contracts.\(^\text{12}\) In this same year, President Lyndon B. Johnson gave a speech that outlined the ideas and principles behind the public policy of affirmative action:

> You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, ‘you are free to compete with all the others,’ and still justly believe you have been completely fair…This is the next and more profound state of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory, but equality as a fact as a result.\(^\text{13}\)

\(^\text{10}\) 347 U.S. 483 (1954).


Later that same year, President Johnson signed an Executive Order\textsuperscript{14} requiring government contractors to ‘take affirmative action’ to expand job opportunities for minorities which furthered affirmative action as a public policy.\textsuperscript{15} Then in 1967, E.O. 11246 was amended to include affirmative action for women.\textsuperscript{16}

The Johnson Administration went one step further in requiring construction contractors to set goals and timetables that would implement E.O. 11246 through the Labor Department Office of Federal Contract Compliance (OFCCP).\textsuperscript{17} However, this program was soon dismantled until it was brought back by President Nixon in 1969 with the issuance of the Philadelphia Order which outlined hiring and training minority workers in several of the construction trades in Philadelphia.\textsuperscript{18} As stated by the Assistant Labor Secretary Arthur Fletcher:

Equal employment opportunity in these trades in the Philadelphia area is still far from a reality. The unions in these trades still have only about 1.6% minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few negroes being referred for employment. We find, therefore, that special measures are required to provide equal employment opportunity in these seven trades.\textsuperscript{19}

\textsuperscript{14} Exec. Order No. 11246, 3 C.F.R. 339 (1965).

\textsuperscript{15} Exec. Order No. 11246, 3 C.F.R. 339 (1965). Established the Office of Federal Contract Compliance in the Department of Labor which required all government contractors and subcontractors to take affirmative action to expand job opportunities for minorities.

\textsuperscript{16} Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967). Required federal contractors to make good-faith efforts to expand employment opportunities for women and minorities.

\textsuperscript{17} “Affirmative Action: History and Rationale,” \url{http://www.policyalmanac.org/culture/archive/affirmative_action_history.shtml}.


\textsuperscript{19} “Affirmative Action: History and Rationale,” \url{http://www.policyalmanac.org/culture/archive/affirmative_action_history.shtml}.
President Nixon also determined that:

A good job is as basic and important a civil right as a good education...I felt that the plan Shultz devised, which would require such affirmative action (emphasis added) by law, was both necessary and right. We would not impose quotas, but would require federal contractors to show affirmative action to meet the goals of increasing minority employment.\(^{20}\)

The context within affirmative action policies in employment law is important and the background information is essential as it provides the understanding of how affirmative action policies emerged. The civil rights movement was provided an impetus through *Brown*,\(^{21}\) a case emerging out of education, yet most of the cases pertaining to affirmative action arise out of employment opportunities. The importance of affirmative action in education was emphasized as advocates argued it was needed in order for those affected and for those who would benefit by affirmative action policies would be better prepared for the industries that were looking for employees to admit to the profession if provided the essential education.

**Affirmative Action in Higher Education**

Although the issue of discrimination in education was the original target of the first major civil rights cases, public school and overall public segregation continued to be widely used into the 1960s. During this time, the civil rights campaign was in full-force with President Kennedy's proposal of a civil rights bill in July of 1963 that would later become the Civil Rights Act of 1964.\(^{22}\) Conditions were changing with the passage of this Act and numerous other civil rights statutes in the 1950s and 1960s with the


passage of Title VII of the Civil Rights Act as it sought to end discrimination by large private employers whether they had government contracts.\textsuperscript{23} However, in 1955, only 4.9\% of college students between 18-24 were African-American\textsuperscript{24} and despite a rise to 6.5\% by 1960, by 1965, the number decreased to 4.9\%. At the same time, 1\% of law students and 2\% of all medical students in the country were African American in 1965.\textsuperscript{25} At the nation’s highly selective institutions, the numbers were even lower.\textsuperscript{26} It was not until the establishment of affirmative action policies in the late 1960s and 1970s that the percentage of African-American college students began to gradually climb.\textsuperscript{27}

**The Affirmative Action Debate**

These policies began the debate regarding affirmative action within higher education. Specifically, the debate surrounds the higher education admissions process and the concept of using race as a factor for making admissions decisions about particular candidates.

Justifications for affirmative action policies vary, but there are some very common arguments. For example, one argument favoring affirmative action policies is the assertion that affirmative action policies are needed to remedy the negative effects of past and present discrimination for the group in question. Another argument includes that there are benefits to society, the institution of higher education and the student


\textsuperscript{24} “Affirmative Action: History and Rationale,” http://www.policyalmanac.org/culture/archive/affirmative_action_history.shtml

\textsuperscript{25} DeCesare, http://ecs.org/clearinghouse/32/15/3215.htm

\textsuperscript{26} DeCesare, http://ecs.org/clearinghouse/32/15/3215.htm

\textsuperscript{27} “Affirmative Action: History and Rationale,” http://www.policyalmanac.org/culture/archive/affirmative_action_history.shtml
body at the institution when affirmative action policies are used to create a diverse student body. Finally, many argue that racially based affirmative action policies do not differ from other policies that have been used by institutions to provide benefits or to favor specific applicant groups.\textsuperscript{28}

On the opposing sides, critics of affirmative action argue that affirmative action policies can amplify racial prejudice and inhibit the country’s movement toward a race-neutral society. They also assert that affirmative action is morally and ethically wrong to exclude Caucasian or male students with high grade point averages and standardized test scores while accepting minority or underrepresented students with lower corresponding grades and scores. Furthermore, they argue that unqualified students admitted to an institution based on their membership in a particular racial or gender class can be demoralized and stigmatized by having to compete with more qualified classmates who have greater academic ability.\textsuperscript{29}

**State Affirmative Action Policies**

The arguments for and against the policy may vary greatly, however, the use of these policies remains a highly emotional and controversial topic, with many arguing and believing that these types of programs are no longer essential or even appropriate. In fact, many state legislatures have already passed laws or taken executive action to eliminate affirmative action within the state’s higher education institutions.

For instance, in 1996, California’s voters passed Proposition 209. This amended the state’s constitution to prohibit the state, local governments, districts, public

\begin{flushright}
\textsuperscript{28} DeCesare, http://ecs.org/clearinghouse/32/15/3215.htm
\end{flushright}

\begin{flushright}
\textsuperscript{29} DeCesare, http://ecs.org/clearinghouse/32/15/3215.htm
\end{flushright}
universities, colleges, and schools, and other government instrumentalities from giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.\(^{30}\) Next, in 1998, Washington State voters passed Initiative 200, otherwise known as the Washington State Civil Rights Initiative.\(^{31}\) It was similar to California’s Prop 209 in that it prohibited the state from discriminating against or granting 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.\(^{32}\) Then, in 1999, Florida’s then Governor, Jeb Bush signed Executive Order 99-281, which prohibited any state agency from the use of racial or gender set-asides, preferences or quotas in admissions to all Florida institutions of Higher Education.\(^{33}\) Finally, the most recent state action in reference to prohibiting affirmative action policies was passed by Michigan voters with the Michigan Civil Rights Initiative, which prohibited any public college or university from discriminating against or granting preferential treatment to any individual or group “on the basis of race, sex, color, ethnicity, or national origin…”\(^{34}\)

**Affirmative Action in the Courts**

Despite the more recent emergence of policies prohibiting affirmative action in certain states, the legality of affirmative action policies have traditionally been based in the courts and the Supreme Court decided the constitutionality of race-based affirmative

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\(^{30}\) CAL. CONST. art. 1, § 31 (a), (1996).

\(^{31}\) WASH. REV. CODE title 49, chapter 49.60, §49.60.401, (2000).

\(^{32}\) WASH. REV. CODE title 49, chapter 49.60, §49.60.401, (2000).

\(^{33}\) FLA. ADMIN. CODE ANN. 99-281, §3 (b), (1999).

\(^{34}\) MICH. CONST. art 1 §26 (1), (2006).
action just over thirty years ago in the landmark *University of California Board of Regents v. Bakke* decision. The *Bakke* decision is important as it established that the use of race in admissions policies at institutions of higher education was constitutional. However, the decision also placed restraints on how institutions could utilize race in admissions through its ruling that the use of racial quotas was prohibited as it constituted a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Since the *Bakke* decision was decided over twenty-five years ago, there had not been a case pertaining to affirmative action within higher education that has reached the high Court until *Gratz v. Bollinger*, and *Grutter v. Bollinger* in 2003.

**Statement of the Problem**

For over twenty-five years, the decision established in *Bakke* that race may be used as a factor in admissions policies at state institutions of higher education had been maintained as the established law. The meaning of this decision was that the use of race in admissions policies was not a violation of the Equal Protection Clause of the Fourteenth Amendment. The rationale for this decision provided that diversity was a compelling reason to implement such policies. Despite the approval of the use of race in admissions policies, the *Bakke* decision also established limitations to the use of race

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36 U.S. CONST. amend. XIV
37 539 U.S. 244 (2003).
40 Id. at 311-312.
in admissions decisions in that it prohibited the use of quotas\textsuperscript{41} and it provided that although race could be a deciding factor in the admissions decision, it should not be the dominate factor with all other qualities considered equally.\textsuperscript{42} This had been the national standard although there remained a fine line as far as what constituted a violation of Equal Protection within a specific race-based admissions policy and what constituted an acceptable public policy. *Bakke* had simply established that race-based affirmative action was an acceptable public policy as long as there was no established formal quota system within the implemented admissions policy.\textsuperscript{43} Through twenty-five years, the *Bakke* decision was acceptable and had not been challenged in the Court.

Therefore, there was considerable attention given to the *Gratz*\textsuperscript{44} and *Grutter*\textsuperscript{45} cases as it was the first time since the *Bakke*\textsuperscript{46} decision that the Supreme Court decided to hear a case based on race-based affirmative action policies within higher education. There had been other cases at the state level, but the high court had declined to hear them.\textsuperscript{47} At the same time, there was a magnified attention to these cases because of the perceived implications both for a decision affirming race-based affirmative action as well as a decision striking down the policy within public institutions of higher education. If the Court struck down the use of race as a criterion in admissions policies, the policy

\textsuperscript{41} Id. at 307.
\textsuperscript{42} Id. at 317.
\textsuperscript{43} Id.
\textsuperscript{44} *Gratz v. Bollinger*, 539 U.S. 244 (2003)
\textsuperscript{47} *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), *cert.denied*, 518 U.S. 1033 (1996).
of affirmative action in higher education would have reached a final resolution. In contrast, with the Court’s support of race-based affirmative action policies in higher education, there remained the possibility of a significant impact as policy-makers of individual states and institutions may decide to look at the idea more closely and experiment and implement their own race-based affirmative action admissions policies.

With the *Gratz & Grutter* decisions, the U.S. Supreme Court once again determined that race-based affirmative action policies were not a violation of the Equal Protection Clause of the Fourteenth Amendment and that such policies survive strict scrutiny because obtaining a diverse student body is a compelling purpose for establishing such policy.\(^{48}\) As a result of these decisions, public institutions of higher education were provided with the continued Constitutional approval of the use of race-based affirmative action policies to be used during the admissions process. The significance of these cases remains that the Court once again determined that obtaining a diverse student body was an important public policy or compelling reason for the continued use of race as a factor in admissions.\(^{49}\) The Court also expanded on the procedural aspect of admissions decisions with the idea that the means chosen, ‘fit’ within the unique issues or mission of the institution.\(^{50}\) The Court’s rationale concluded that it was an important public policy to ensure access of a diverse population into institutions of higher education that provided for the sharing of viewpoints and ideas to prepare students for the heterogeneous society in which they


\(^{49}\) Id. at 306.

\(^{50}\) Id. at 333.
would live and contribute.\textsuperscript{51} However, it was also important that the criteria through which the student body was selected should fit within the institutional mission.\textsuperscript{52}

These decisions were anticipated by public institutions of higher education, yet, these decisions affirming the public policy issue of race-based affirmative action do not require state legislatures to implement such policies into public state institutions. The decisions simply confirm that there is no violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. At the same time, the decisions re-affirmed that public state institutions may implement such policies with discretion as long as the institutions remain within the guidelines of the non-establishment of quotas in obtaining a diverse student body and are receptive to different interpretations of what constitutes diversity. Since these decisions were handed down in 2003, there has not been a significant increase of highly selective state institutions of higher education implementing this public policy of race-based affirmative action. At the same time, rather than individual highly selective state institutions determining whether these policies are implemented, individuals policy makers in state legislatures seem to be determining whether such policies are actually prescribed public policy and thus implemented within the state.

\textbf{Purpose of the Study}

The purpose of this study was to conduct an examination of the effects of the \textit{Grutter v. Bollinger} and \textit{Gratz v. Bollinger} decisions regarding affirmative action policies at highly selective public institutions of higher education. First, policy trends favoring race-based affirmative action were examined in order to determine the ideology behind

\textsuperscript{51} Id.

\textsuperscript{52} Id. at 331.
the policies that meet the strict standard of the Supreme Court that determined the
*Gratz* and *Grutter* decisions. Then, this research examines the standards for the Equal
Protection Clause with regard to affirmative action policies at state public institutions
that the Court found compelling. Next, a review of the litigation pertaining to affirmative
action policies within public institutions of higher education was presented. Finally, this
research examines the actual policies and what the Court deems acceptable from an
equal protection viewpoint and a narrowly tailored standard.

**Significance of the Study**

Much has been written about the *Gratz* and *Grutter* decisions, yet, despite the
Supreme Court’s continued support for the use of race-based affirmative action in
higher education admissions policies, there has been no significant impact or any far-
reaching implications on the implementation of such policies at highly selective public
institutions since these decisions were handed down several years ago. This analysis
purports to demonstrate that there has been no significant public policy impact on state
institutions of higher education since the *Gratz* and *Grutter* decisions as there has not
been a large shift toward the implementation of race-based affirmative action policies.
The only impacts that may be seen are those at highly selective institutions where
admissions officers may implement these public policies in order to achieve a diverse
student body. The other impact may be seen at the state level in the state legislatures
as they control the implementation of these public policies for state institutions. At the
state level, the impacts are minimal as the legislatures control the public policy and may
or may not choose to implement these affirmative action policies. Most state
legislatures have remained silent on the issue, while a few have acted but have acted in contrast to the public policy affirmed in the *Gratz* and *Grutter* decisions.

**Method of the Study**

In determining the constitutional provisions that the U.S. Supreme Court has applied in determining affirmative action policies within higher education, legal research was utilized by examining the landmark decision of *Bakke* which established precedence for this issue. In addition to *Bakke*, other landmark cases that led to the *Gratz* and *Grutter* decisions in the summer of 2003, were analyzed to develop an understanding of the issue and what is permissible and not permissible in employing such a policy.

Legal research can best be described as an analysis of primary and secondary sources in order to identify core legal elements and theories that provide an understanding of the facts presented and therefore the law. Primary sources are those which state the law and can be found in cases, statutes, regulations, or decisions of administrative bodies. Secondary sources are those which describe, explain, or analyze the law such as law review articles, scholarly journals, encyclopedias, and textbooks. Legal sources are further divided into mandatory authority and persuasive authority. Mandatory authority is described as a binding source of evidence which must be followed in a particular jurisdiction. Whether a law, statute or regulation is mandatory

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often depends on the facts involved in the case. The mandatory case law may also depend on the identical status of the facts and legal issues involved in addition to the level of the court that hears the case and issues the opinion. A lower court is mandated to follow the ruling of a higher court on the same issue; however, a higher court is not required to follow the ruling of a lower court although the reasoning of the lower court may be used as persuasive authority.\textsuperscript{55}

Persuasive authority is understood as information that may be used to convince a court to apply the law in a certain manner. Elements that should be considered in persuasive authority are the similarity of key facts and legal issues found in the authority as well as the reasoning of the court and the level of authority from the court issuing the ruling. At the same time, decisions from higher courts are more persuasive than decisions of lower courts and arguments found in highly recognized law reviews and journals are more persuasive than those in lesser recognized law reviews and journals.\textsuperscript{56}

Data Analysis

To determine the significance of this research, there was an investigation made of the legal issues and laws surrounding affirmative action within higher education.

Relevant U.S. Supreme Court decisions, federal and state law were analyzed to

\textsuperscript{55} “Research Methodology: Explanation of Terms,”
http://www.law.harvard.edu/library/services/research/guides/united_states/basics/research_method_terms.php

\textsuperscript{56} “Research Methodology: Explanation of Terms,”
determine established precedence. From here, a comparative analysis was conducted to discover if the continued precedence had an influence on current policy trends of affirmative action policies in higher education admissions. The purpose was to show that despite established precedence, current policy trends show that states and highly selective public institutions are engaged in policies that analyze or look at applicants on an individual basis. That is, highly selective institutions are not simply looking at race as a 'plus' factor in making admissions decisions. Rather, these institutions are evaluating the applicants' individual characteristics that enhance their overall application and thus their potential contribution to the class and institution. Finally, policy trends show that policy makers are not implementing these policies at the state level and are actually implementing policy banning affirmative action policies within individual states when then impact public institutions of higher education.

The Limitations

The scope of this study focused on the effects of the Gratz and Grutter decisions on affirmative action policies with regard to public highly selective institutions of higher education. This research analyzed only pertinent case law which described the issues affecting the constitutionality of the policy as it is applied to public institutions of higher education.

The study was also limited to examining the policy enacted and the litigation that led to and resulted from this policy and the implications it has for state legislatures and its state agencies. It was beyond the scope of this dissertation to determine the effectiveness of affirmative action policies on increasing racial diversity in public institutions of higher education.
The Delimitations

The delimitation of this study is that in researching existing public policy of affirmative action within institutions of higher education, there was no effort to examine open enrollment institutions as they are not affected by policies such as affirmative action since typical policy is to admit any and all who apply. At the same time, no attempt was made to examine private institutions of higher education because they exist outside of the public policy discussion with regard to public institutions of higher education as they do use tax dollars to maintain existence and do not fall under the direct influence of the federal, state, and local policymakers.

Organization of the Study

The opening chapter introduced affirmative action as a public policy and showed how it developed into an educational policy. It also presented the organization and methodology used in this legal policy analysis. Chapter Two examined current policy trends behind affirmative action policies in public institutions of higher education as well as supporting and opposing views of the policy as to its constitutionality with regard to the use of race as a ‘plus’ factor in making admissions decisions. Chapter Three provided a history of affirmative action jurisprudence and a background to the understanding of how and why it emerged as a public policy within higher education. Chapter Four described the University of Michigan Undergraduate Admissions policy and the University of Michigan School of Law’s Admissions policy by tracing the *Gratz v. Bollinger*[^57] and *Grutter v. Bollinger*[^58] opinions and summarized the rationale that resulted from the U.S. Supreme Court opinions on these particular cases. Chapter

[^57]: 539 U.S. 244 (2003).
Five, the concluding chapter, briefly reviewed affirmative action policies at the state level since the *Gratz* and *Grutter* decisions. The final chapter also indicated that affirmative action as an educational policy is a state issue whose responsibility lies with the state legislatures. Finally, further recommendations for future studies based on the research were made.
CHAPTER 2
AFFIRMATIVE ACTION AS PUBLIC POLICY

Introduction

According to Fullinwider, affirmative action means “positive steps taken to increase the representation of women and minorities in areas of employment, education, and business from which they have been historically excluded.”\(^1\) Race-conscious affirmative action policies in higher education have existed since the 1960s with the burgeoning Civil Rights Movement.\(^2\) With these “positive steps” have come preferential treatment which has generated controversy\(^3\) and these policies have been attacked for what many perceive as inequity.\(^4\) Thus, what was first begun as an effort to correct past societal discrimination, and an effort for increasing civil rights has emerged a wide debate often claiming reverse discrimination.

This chapter examined literature on affirmative action with the continuing debate of the use of the ‘plus’ factor in making admissions decisions as well as the debate over the continued justification for the use of affirmative action as a way to create a diverse student body. It provides a brief historical perspective of the federal government’s efforts for providing opportunities for minorities to advance in society and Court decisions that supported these actions. In addition, current educational trends regarding affirmative action policies at highly selective institutions are included in the

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\(^3\) Fullinwider, <http://plato.stanford.edu/entries/affirmative-action/>

\(^4\) Garrison-Wade, <http://findarticles/p/articles/mi_qa3955/is_200407/ai_n9424270/print>
literature. Finally, a review of the literature supporting affirmative action and the literature opposing affirmative action as a public policy is presented.

**Historical Perspective**

Since the inception of affirmative action policies, the objective has been to provide opportunities for minority advancement in society and in 1954 with the U.S. Supreme Court decision of *Brown v. Board of Education*, educational opportunities drastically changed.\(^5\) The Court’s decision in *Brown*\(^6\) found that segregated educational facilities were not necessarily equal, and that such policies violated the Equal Protection Clause of the Fourteenth Amendment. As a result of this decision, the Court then ordered the desegregation of public schools in the United States. This decision overturned the 1896 *Plessy v. Ferguson*\(^7\) decision which established the “separate but equal” doctrine as it pertained to public facilities for minorities. Then in 1965, President Johnson spoke on affirmative action by indicating that “you do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, ‘you are free to compete with all the others,’” and still justly believe you have been completely fair.”\(^8\) With that said, Johnson then signed Executive Order 11246\(^9\) which called for government contractors to take “affirmative action,” in aspects of hiring and employing minorities.\(^10\) As a result of the *Brown* decision and Johnson’s Executive

\(^5\) Garrison-Wade, [http://findarticles/p/articles/mi_qa3955/is_200407/ai_n9424270/print](http://findarticles/p/articles/mi_qa3955/is_200407/ai_n9424270/print)


\(^7\) 163 U.S. 537 (1896).

\(^8\) Garrison-Wade, [http://findarticles/p/articles/mi_qa3955/is_200407/ai_n9424270/print](http://findarticles/p/articles/mi_qa3955/is_200407/ai_n9424270/print)


\(^10\) Garrison-Wade, [http://findarticles/p/articles/mi_qa3955/is_200407/ai_n9424270/print](http://findarticles/p/articles/mi_qa3955/is_200407/ai_n9424270/print)
Order, many administrators from colleges and professional schools began recruiting minority candidates as a part of their overall educational mission, which ultimately led to race-sensitive policies which increased admission for African-Americans and Hispanics at predominantly Caucasian institutions. In the 1970s, as administrators within higher education institutions examined how to increase the number of women and minority faculty members, they also tried to determine how they could devise a plan to increase minority representation on campus. Very selective institutions needed plans and policies that focused on admitting these students since very few African-American and Hispanic students had high enough test scores and grades that made them eligible for admission. With this in mind, administrators at these selective institutions could retain the current admissions criteria and face the result of few African-Americans and Hispanics on campus or a plan or policy could be devised which would provide them with more representation. Ultimately, administrators created policies that would increase minority representation. While these policies opened up opportunities for minorities, they were not without controversy as many saw and continue to see such policies as reverse discrimination. Through this debate, affirmative action has proceeded along two different paths. One of which has been the legal and administrative path as courts, legislatures and executive branches of government have

11 Garrison-Wade, http://findarticles/p/articles/mi_qa3955/is_200407/ai_n9424270/print
13 Ibid., http://plato.stanford.edu/entries/affirmative-action/
14 Ibid., http://plato.stanford.edu/entries/affirmative-action/
created and mandated or struck down affirmative action policies.\textsuperscript{15} The other path has been that of public debate which has generated a large amount of literature both for and against this public policy.\textsuperscript{16}

\textbf{Plus-Factor}

The ‘plus factor’ in the affirmative action policies within higher education gained recognition with \textit{Bakke}\textsuperscript{17} when Justice Powell cited Harvard University’s admissions plan which used race as one of the considerations for admission. This plan ideally allowed for a multi-faceted review of applicants based on numerous factors such as race, ethnicity, life experience, talents and many other characteristics that could potentially add to the quality of the student body. In it, Powell indicated that racial or ethnic background might be deemed a ‘plus’ in an applicant’s file, ‘yet it does not insulate the individual from comparison with all other candidates for the available seats.’\textsuperscript{18} Test scores and undergraduate grade point averages were no longer the only factors considered for admission, although they were still considered important aspects in the process.

\textit{After Bakke}, many administrators at colleges and graduate schools modified their admissions policies to make them more like the Harvard Plan and less like the University of California—Davis Medical School plan which had set-aside seats for underrepresented applicants and established quotas for the student body.

\textsuperscript{15} Fullinwider, \url{http://plato.stanford.edu/entries/affirmative-action/}

\textsuperscript{16} Ibid, \url{http://plato.stanford.edu/entries/affirmative-action/}

\textsuperscript{17} \textit{University of California Board of Regents v. Bakke}, 438 U.S. 265 (1978).

\textsuperscript{18} Id. at 317.
Despite the alteration in the policies, controversies still arose as the interpretation of what constituted as a ‘plus factor’ varied in addition to how significant the ‘plus factor’ should be in making admissions decisions. For example, before the Eleventh Circuit struck down the plan, the University of Georgia’s ‘plus factor’ affirmative action plan used a fixed numerical value that was added to every minority application.\(^\text{19}\) In doing so, the University of Georgia made the plan inflexible since non-minorities were unable to compete for these points as they did not meet the criteria to qualify as a minority candidate. Thus, the automatic awarding of points to a minority candidate can be seen as a policy that is not quite narrowly tailored enough for the Court’s satisfaction.

Typically, other ‘plus’ plans allowed for the person reviewing the application to consider race to the extent that he or she saw fit.\(^\text{20}\) Furthermore, *Grutter* emphasized the individualized review of applicants with the idea that “an admissions program must be ‘flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”\(^\text{21}\)

**Diverse Student Body**

‘Plus factor’ affirmative action plans are often accompanied with the rationale that such plans are needed in order to create a diverse student body which will be beneficial to all members of the college or university community. This rationale is currently the

\(^{19}\) *Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234 (11th Cir. 2001).


\(^{21}\) *Grutter* 539 U.S. at 334.
only rationale that has been accepted by the Court to justify the use for race-based admissions policies as it was endorsed by Justice Powell in Bakke\textsuperscript{22} and reemphasized and endorsed by Justice O’Connor’s opinion in Grutter\textsuperscript{23} that the diversity viewpoint was a compelling state interest that could justify the use of race as a criteria for admission. Thus, the idea is that in creating a diverse student body, administrators at colleges and universities will better prepare its students to succeed and interact in society as it already exists in its diverse nature.

However, it should also be noted that diversity for diversity’s sake would most likely not meet the standards of the Court and instead must meet the educational mission of the institution in order to be acceptable.\textsuperscript{24} At the same time, as indicated by Coleman and Palmer\textsuperscript{25} institutions should have sufficient evidence to support an indicated interest in educational diversity and the interest in achieving a diverse racial and ethnic student body must be directly related to the institution’s mission in furthering its stated goals.\textsuperscript{26}

However, even with this decision, what constitutes as diversity is open to interpretation as Justice O’Connor’s opinion in Grutter\textsuperscript{27} asserted that the Law School’s policy did not restrict the types of diversity that may be considered for weight in

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\textsuperscript{22} Regents of the University of California v. Bakke, 438 U.S. 265 (1978).


\textsuperscript{25} Ibid., 14.

\textsuperscript{26} Ibid., 12.

admissions, rather, it merely emphasized the Law School’s commitment to racial and ethnic diversity.\textsuperscript{28} Thus, as indicated earlier, other factors such as life experiences, socio-economic status and other characteristics may be considered as aspects of diversity. Yet, despite its apparent openness to interpretation, and in maintaining Coleman and Palmer’s suggestions, administrators at colleges and universities should specifically define their diversity goals in reference to the educational interests of the institution.\textsuperscript{29}

In spite of this openness for interpretation or perhaps because of its openness for interpretation, the diversity argument has become the standard for admissions policies within higher education institutions and in \textit{Grutter} it gained additional support as the Court accepted evidence findings from one of the University of Michigan’s psychology professors, Patricia Gurin, as she stated the following:

Students learn better in a diverse educational environment, an they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting…students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.\textsuperscript{30}

Furthermore, in response to the Court’s opinion in \textit{Gratz} and \textit{Grutter}, according to Coleman and Palmer, an institution must show that its stated interest in educational diversity is not merely a ruse for racial or ethnic balancing and the institution should

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\textsuperscript{28} Id. at 337.
\textsuperscript{29} Coleman and Palmer, 13.
\textsuperscript{30} Fullinwider, \url{http://plato.stanford.edu/entries/affirmative-action/}
\end{flushleft}
provide evidence that diversity in the student body, which may include racial and ethnic diversity, does result in the educational benefits as expressed by the institution.\textsuperscript{31}

**Current Educational Trends: Percent Plans**

Despite the Court’s approval of race-based affirmative action policies, policymakers in three of the country’s largest state—Texas, California, and Florida—have abandoned traditional race-based policies and have focused their energies on a more race-neutral approach. State policies and court decisions have influenced these decisions as the *Hopwood*\textsuperscript{32} decision from the Fifth Circuit in 1996, the Board of Regents referendum in California, confirmed by Proposition 209,\textsuperscript{33} and the Executive Order of Jeb Bush, then Governor of Florida, which implemented the One Florida Initiative,\textsuperscript{34} have ended the ability of these state institutions to use race or ethnicity as a consideration in the admissions process.\textsuperscript{35}

In Texas, following the *Hopwood* decision, a task force was set in place to create an alternative for admissions decisions that could be put into legislation.\textsuperscript{36} As a result, a draft of a bill which provided for a three-part admission process, including the automatic admission of each student in the top 10% of each accredited public or private high school as a first-time freshman to the public “general academic teaching institution”

\textsuperscript{31} Coleman and Palmer, 14-15.

\textsuperscript{32} *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

\textsuperscript{33} CAL. CONST. art. 1, § 31 (a), (1996).

\textsuperscript{34} FLA. ADMIN. CODE ANN. 99-281, §3 (b), (1999).


\textsuperscript{36} Ibid., 16.
of his or her choice;\textsuperscript{37} the option for universities to extend the automatic admission threshold to the top 25%; and a list of numerous other factors that included academic record, socioeconomic background, first-generation college student status, that schools might consider in admissions.\textsuperscript{38} In 1997, House Bill 588\textsuperscript{39} was signed into law by then Governor George W. Bush, and passed by the 75\textsuperscript{th} Texas Legislature, creating a policy for automatic admission for all students in the top 10\% of their graduating class, regardless of standardized test score, to any public university in Texas.\textsuperscript{40}

California faced a similar challenge in its admissions programs with the passage of Proposition 209, which amended the California Constitution and established a ban on public institutions from discriminating on the basis of race, color, ethnicity, sex, or national origin.\textsuperscript{41} In response to this, then Governor Gray Davis, suggested that each public and private high school graduate in the state of California finishing in the top 4\% of his or her class receive guaranteed admission to the University of California system.\textsuperscript{42} Despite concerns that such a plan would harm the quality and reputation of the University of California schools in addition to the concern that due to the reputation of the University of California system there was less likelihood that such a percentage plan would help alleviate the loss of race-conscious affirmative action on the highly selective

\begin{footnotesize}
\begin{enumerate}
\item Ibid., 16.
\item Ibid., 17.
\item TEX. EDUC.CODE §51.803 (1997).
\item Horn and Flores, 17.
\item Ibid., 17.
\item Ibid., 17.
\end{enumerate}
\end{footnotesize}
campsuses, the University of California Board of Regents voted 13 to 1 to implement the policy. As a result, the university system created the automatic admissions plan, known as Eligibility in Local Context (ELC), which guaranteed admission to a system school to the top 4% of each high school’s graduates, in hopes of advancing numerous goals.

The percent plan policy continued in Florida after then Governor Jeb Bush implemented the “One Florida” plan in 1999, which eliminated the use of race or gender based decisions in government employment, state contracting and higher education. Despite this plan, race consciousness was still permitted in awarding scholarships, conducting outreach, or developing pre-college summer programs. As One Florida was being implemented, Governor Bush started the “Talented 20” policy to the Florida State University System (SUS). This plan guaranteed only system admission—not necessarily to the school of choice—to public high school graduates who finished in the top 20% of their class and had completed the required coursework and it went into effect in July of 2000.

All percent plans are not created the same and it is important to note that there are several differences in the percent plans mentioned from Texas, California, and

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43 Ibid., 18.
44 Ibid., 18.
46 FLA. ADMIN. CODE ANN. 99-281, §3 (b), (1999).
47 Horn and Flores, 19.
48 Ibid., 19.
According to Horn and Flores, which students are eligible varies greatly and is constantly changed even as plans are executed. For example, public and private students in Texas and California may be eligible under these states’ plans; whereas only public school students in Florida are eligible under that state’s plan. At the same time, California and Florida promise only access to the state university system whereas Texas promises access to the state’s premier institutions. There are other numerous differences, yet, it is important to simply note that percent plans no matter where they may be situated are not the same in how they are structured and in what they deliver as they are dependent on individual states and the actions of state legislatures.

Civil Rights, Equal Protection and Individual Rights

Perhaps the greatest controversy within educational policy as it pertains to affirmative action in higher education is that of balancing the issues of civil rights and equal protection. Civil rights or civil liberties can be defined as an enforceable right or privilege, which if interfered with by another gives rise to an action for injury. These personal, natural rights are guaranteed and protected by the Constitution and include such examples as freedom of speech, press and freedom from discrimination. What is seen as the most important addition to civil rights in the United States was the ratification of the Thirteenth and Fourteenth Amendments which, respectively,

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49 Ibid., 22.

50 Ibid., 22.


53 U.S. CONST. amend. XIII
abolished slavery and ensured that no state “shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States…or deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection (emphasis added) of the laws.”

The Civil Rights Movement along with this concept of equal protection helped initiate affirmative action and, in fact, discrimination in education was the target of the original breakthrough civil rights cases. The movement’s aim was to provide equal opportunities for minorities to advance in society and in providing these equal opportunities, preferential treatment was given to certain groups of minorities in the hopes of increasing representation within our nation’s institutions of higher education.

Yet, the argument is often made that this preferential treatment is unfair and that it actually amounts to nothing more than reverse discrimination, thus assailing individual rights and equal protection of the laws. At the same time, according to Gerber, Justice Clarence Thomas, the only African-American member of the Court, who also dissented in the *Grutter* case, believed that the group-based classifications at issue in these programs contradict the individual rights principles of the Declaration of

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54 U.S. CONST. amend. XIV


Independence, which states that “all men are created equal, that they are endowed by their creator with certain unalienable rights.”

In addition to Justice Thomas, one can look at Justice Harlan’s dissenting opinion in *Plessy v. Ferguson* as many affirmative action opponents point to in justifying the inappropriateness of the policy. In the dissent, Harlan articulated:

> In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

Affirmative action proponents would argue that ideally, citizens are equal as Harlan states, however, proponents argue that affirmative action is still needed to correct continued exclusion and ‘marginalization.’ In addition, proponents argue that greater diversity and inclusion of underrepresented minorities are needed in our institutions of higher education, and that the use of affirmative action policies are essential in creating this diverse atmosphere at institutions that provide for these educational benefits.

Countering this argument, affirmative action opponents would argue that affirmative action is simply reverse discrimination that is in contradiction to the equal protection of the law and in contradiction to the Civil Rights Act of 1964 which prohibits

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58 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

59 163 U.S. 537 (1896).

60 id at 560.

discrimination based on race, color, religion, sex or national origin and was originally enacted to help advance the opportunities of women and minorities. Opponents argue that by providing preferential treatment to minorities, in effect, discriminates against those who are not benefited from the policy. This would in turn, violate an individual’s ‘inalienable rights.’

**Race-Based Affirmative Action Proponents**

Proponents for affirmative action policies within education can typically categorize their arguments into many categories that include the following arguments: the need to remedy past discrimination and to integrate society; the idea that universities have a First Amendment Right to Free Speech, and therefore, academic freedom; the idea that creating a diverse student body is beneficial to the entire institution; and the idea that affirmative action corrects against biased criteria such as standardized test scores. Although the argument to remedy past discrimination is not seen as a valid argument with the Court unless it can be proven that a specific institution has a history of discrimination in the past, one or more of these other arguments are usually provided by proponents of affirmative action to persuade others that the policy is essential.

Lee C. Bollinger, former President of the University of Michigan, indicated that the Supreme Court’s decisions that resulted from the litigation in *Gratz* and *Grutter* ‘definitively resolved’ the issue of the constitutionality of affirmative action in American higher education for the next generation and as a result, allowed for the continuation of what had been the practice in ‘highly selective’ colleges and universities. Had the

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Court decided otherwise, Bollinger argued that the quality of public institutions would have been diminished over time as they use an alternative to affirmative action—percent admissions plans used by several states—by forcing them into open admissions policies without doing anything with regards to diversity. He also argued that if the Court had struck down affirmative action, this would have led to a shift away from the idea of integrating society and freeing it from discrimination, which Bollinger pointed out was taken from the decision in *Brown v. Board of Education*, some fifty years ago. Thus, Bollinger’s main premise indicated that if affirmative action were struck down by the Supreme Court, our country would have experienced a set-back with integrating society and from freeing it from “the scourges of slavery and discrimination.”

He also discussed the issues faced by the University of Michigan and all of higher education in defending these lawsuits and the significance of maintaining the policy. The first of these reasons, indicated that Powell’s opinion in *Bakke* ‘precluded’ the use of race or ethnicity in admissions policy as a remedy for past societal discrimination. Instead, the purpose of achieving diversity as an educational mission, was the approved rationale from *Bakke*. This posed a challenge to higher education, according to Bollinger, since he claimed no one really believed that the past could or should be ignored or that society was free from discrimination. He argued that the

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64 347 U.S. 483 (1954)
66 Ibid., 1590.
67 Ibid., 1591.
main reason why administrators at colleges and university have embraced the concept of diversity for educational purposes is because society is still segregated which causes for misconceptions and confusion. Therefore, Bollinger stated that the significant idea is that affirmative action admissions policies are grounded in the educational mission of an institution and not some kind of “social engineering” project separated from any educational purpose.\textsuperscript{68}

Bollinger’s second reason as to why the lawsuits posed problems for higher education pertains to what Bollinger called the ‘broad social purpose and meaning,’ as these issues were both legislative and constitutional matters. At the same time, the lawsuits elevated our awareness concerning race and ethnicity, the public trust, and the roles of higher education.\textsuperscript{69} Thus, ultimately, the lawsuits brought affirmative action to the public spectrum and engaged debate among the people and provided more openness about the entire process. In illustrating this point, Bollinger pointed to the fact that those in higher education had been reluctant to disclose the ways in which admissions policies worked and the rationale behind how decisions were made, including the consideration of race and ethnicity.\textsuperscript{70} He explained that institutions were hesitant to release credentials of groups and individuals due to the desire for institutions to preserve privacy and to provide for the opportunity of individuals to ‘excel over our past performances,’ without having everyone scrutinize their abilities. Yet, Bollinger sees a positive aspect to disclosing information regarding the admissions process since

\textsuperscript{68} Ibid., 1591.

\textsuperscript{69} Ibid., 1592.

\textsuperscript{70} Ibid., 1592.
it allowed for the public to finally see all of the elements that go into the selection of applicants at highly selective colleges and universities.\textsuperscript{71} Bollinger then indicated that the lawsuits were significant as they illuminated how separate our society remains even after \textit{Brown} and how significant a role our institutions of higher education can play in assisting with this integration.\textsuperscript{72}

Finally, Bollinger found these lawsuits significant as they triggered public debate about affirmative action because he saw the public’s failure in viewing the issue as not only a state issue but an issue affecting higher education, its policies, practices, and attitudes.\textsuperscript{73} In doing so, Bollinger stated that as an educator, this demonstrated the importance of conveying the ideas and actions that formed the rationale and the purpose behind certain actions. As a result, Bollinger felt that what \textit{Brown} had established in our country had been nearly lost.\textsuperscript{74}

Jack Greenberg’s article addressed the issue of affirmative action with the idea that affirmative action in higher education is a \textit{condition} of society that has had the most significant impact on the African-American American population who he informs has been constantly isolated from all aspects of society.\textsuperscript{75} He concluded that affirmative action has been a major factor in creating an African-American middle class and leadership class and provided for a hope and opportunity that their condition of isolation

\textsuperscript{71} Ibid., 1592.
\textsuperscript{72} Ibid., 1593.
\textsuperscript{73} Ibid., 1593.
\textsuperscript{74} Ibid., 1595.
did not have to continue indefinitely. Thus, ultimately, he indicated that affirmative action alleviated this condition of isolation.\footnote{Ibid., 1611.} He also offered the idea that Justice O’Connor’s opinion in the \textit{Grutter} case also indicated this result by pointing out that O’Connor emphasized the importance of maintaining open access to positions in the military, politics, the law and other professions in which selective schools are often the pathways.\footnote{Ibid., 1611.} Therefore, Greenberg asserted that higher education is one way in which African-Americans can emerge from isolation from these types of professions.

In support of his argument of the need for affirmative action Greenberg pointed to evidence that Caucasian students score significantly higher on Scholastic Assessment Tests (SAT) and that there has been a widening gap over the years.\footnote{Ibid., 1612.} Since institutions use the test as one of the main factors in admissions, Greenberg indicated that without affirmative action, African-American enrollment in higher education would drop significantly.\footnote{Ibid., 1612.} In fact, he provided that in the absence of affirmative action, less than 1\% of African-Americans who took the test would place within the highest percentiles required for most applicants for admission into one of the nation’s most selective institutions.\footnote{Ibid., 1613.} He then pointed out that as a result of prohibiting affirmative action in Florida, Georgia, Texas, and California, there has been a decline in African-American enrollment at the public state schools in these states. Therefore, Greenberg asserted
that with the African-American-Caucasian test score gap, without affirmative action, very few African-Americans would be admitted to selective institutions.\textsuperscript{81}

Finally, as he concluded why administrators at colleges and universities employ affirmative action policies, Greenberg touched on the diversity justification given by such institutions and agrees that diversity on campus is important to universities, yet the main reason he indicated such policies are used is because the country needs African-American participation in a range of activities for which administrators at these institutions prepare their graduates.\textsuperscript{82} In doing so, Greenberg indicated that O’Connor recognized this role of universities in preparing African-Americans for participation in these range of activities as he asserted that administrators at colleges and universities understand that along with benefiting African-Americans, through admission to their institutions, the country must eliminate the subordinate status of African-Americans across the social spectrum. Greenberg then turned back to his statement of African-American isolation and asserted that there is a ‘social interest’ in correcting these historic wrongs which university affirmative action programs have succeeded in doing.\textsuperscript{83} As a result, Greenberg believed that African-American graduates from selective institutions are increasingly becoming a part of the higher ranks of various professions that are also associated with more power, prestige and income.\textsuperscript{84}

Greenberg then conceded that the constitutional justification of affirmative action in higher education has been limited to serving the purpose of diversity as outlined by

\textsuperscript{81} Ibid., 1615.
\textsuperscript{82} Ibid., 1616.
\textsuperscript{83} Ibid., 1618.
\textsuperscript{84} Ibid., 1618.
Powell in *Bakke.* Unless universities can prove past discrimination that is related to the current status of current students and applicants, then the Court is unwilling to look at the possibility of this justification or implementing affirmative action. Therefore, Greenberg asserted that the diversity justification is easier to accept since it appeals to the idea of academic freedom and the First Amendment which has been accepted as the main idea behind institutions using affirmative action policies in admissions. At the same time, through her approval of diversity, Greenberg reminded us that O’Connor indicates that student body diversity “better prepares students for an increasingly diverse workforce and society,” which ultimately prepares students for the society beyond graduation.

Finally, Greenberg indicated another reason for affirmative action that was related to O’Connor’s argument about societal effects, as he pointed out that a large number of African Americans have not applied to colleges and universities and if they were to see other African-Americans admitted into selective institutions, graduate, and move up in society then this could motivate others to try to attend. Greenberg pointed to the idea that the achievements of other African-Americans could provide hope to others in emerging out of the isolation he alludes to throughout his article, however, much of the success of these other African-Americans would not have been possible without affirmative action as they would not have been admitted to these selective institutions without such a policy.

86 Ibid., 1618.
87 Ibid., 1619.
88 Ibid., 1620.
In concluding his arguments for affirmative action and its importance, Greenberg reminded us that O’Connor’s reasoning was focused on social conditions and not societal discrimination and what affirmative action can accomplish in order to fix them. For this, Greenberg agreed with O’Connor and asserted that the major force behind affirmative action has been to make our country better and that if given more time to develop, the decision from *Grutter* truly identified the meaning of affirmative action.  

Some of the most vocal affirmative action proponents are educators and administrators at institutions of higher education. They believe in the policy because they are typically those who are creating it for their specific institutions. One collective group in particular, who wrote an amicus brief for the *Gratz* case was the American Council on Education (ACE). In the brief presented to the Court, representatives from the American Council on Education espoused their support for affirmative action using the diversity argument that has come to be accepted within these cases in higher education. The group indicated that a broad range of higher education constituencies have come to realize the importance and value of having a diverse student population and institution. In particular, the brief indicated that “diversity is basic to higher education’s main purposes: to enable students to lead the examined life; to ready them

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89 Ibid., 1621.


to maintain the robust democracy in which we live; and to prepare them to function in the national and global economy."^92

Furthermore, the ACE^93 mentioned that the Court has generally given institutions of higher education, “forbearance with respect to educational judgment,” as it discussed academic freedom and the *Sweezy*^94 ruling in which Justice Warren stated that “to impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."^95 Furthermore, Justice Frankfurter in a concurring opinion in *Sweezy*, discussed 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."^96

Continuing the support for affirmative action were William G. Bowen, President of the Andrew W. Mellon Foundation and former President of Princeton University, and Derek Bok, former President of Harvard University and former Dean of the Harvard Law School, in their book, “The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions.”^97 During his deposition in *Gratz*,^98 Bowen discussed the findings in their study which focused on Caucasian and African-American students from selective public and private institutions which were

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^95 Id at 250.

^96 Id at 263.


^98 539 U.S. 244 (2003).
selected based on the standardized test scores in incoming freshmen. In the book, they estimated that if selection for these institutions were race-neutral, then top-tier schools would lose three-fourths of African-American students, and African-American enrollment would also decline in the second and third-tier schools. Therefore, Bowen emphasized the importance of academic freedom and the importance of a university to have the freedom to decide which students it will admit and which criteria it will use in its admissions. Furthermore, one of the major arguments Bowen emphasized during his testimony related to the importance of diversity and asserted that if a university were unable to take into account the race of applicants, it would be difficult to carefully consider the make up of an entering class that would provide for a “rich” educational experience to all of its members. He went on to say that these data in their study provide what he had experienced—“that diversity is valued and that ‘learning through diversity’ actually occurs. Our study indicates that diversity is a benefit for all students, minorities and non-minorities alike.”

In addition to the argument of academic freedom and the value of diversity, many supporters of affirmative action policies point to the unfairness of the use of standardized test scores in making admissions decisions. Sturm and Guinier feel that the focus on affirmative action should be placed on the system of selection as they point out that the current system measures value based on scores on ‘paper-and-pencil’ tests

99 Bowen and Bok, 41.


101 Ibid., http://www.debatingracialpreference.org/Bowen.htm

102 Ibid., http://www.debatingracialpreference.org/Bowen.htm
and that this process is ‘fundamentally’ unfair. They elaborated with the assertion that this type of evaluation restricted the opportunities of many poor and working-class Americans of all colors and genders. At the same time, they stated that standardized tests do not fulfill the asserted indicated function since they do not reliably identify applicants who will succeed in college or later in life; nor do they consistently predict those who are most likely to perform well in the jobs they select. Furthermore, by relying on these test indicators, institutions are focusing on immediate success—in school and a short time-frame between taking the test and demonstrating success. Yet, individuals who excel based on these short-term measures may not necessarily excel in the long-term. For example, they cite a study of graduates of the University of Michigan Law School found a negative relationship between high LSAT scores and subsequent community leadership or community service. Therefore, Sturm and Guinier asserted that standardized tests may compromise an institution’s ability to find what it truly values in the selection process of its students and that they are ultimately inadequate measures of merit and that these practices put democratic opportunity at risk.

Affirmative Action Opponents

Opponents of affirmative action policies within education counter-argue the ideas and positions presented by those supporting these policies. In response to the need to remedy past discrimination, many people would argue that we are a “color-blind” society

104 Ibid., http://bostonreview.net/BR25.6/sturm.html
105 Ibid., http://bostonreview.net/BR25.6/sturm.html
106 Ibid., http://bostonreview.net/BR25.6/sturm.html
and that these types of public policies are no longer essential and that reparations have been made to correct the injustices of the past. As for the argument for a university’s First Amendment Right to Free Speech, opponents would argue that race-based initiatives or policies that select individuals or provide preferential treatment based solely on race violate the Equal Protection Clause of the Fourteenth Amendment. Finally, the argument that a diverse student body supports positive outcomes for the student body is contested by opponents of the policy as they assert that there is no valid data or at least conclusive data to support this assertion.

At the same time, in addition to counter-arguments for those supporting affirmative action, opponents also impose the idea that affirmative action is reverse discrimination and thus considered immoral. Opponents also indicate that the affirmative action invalidates the merit principle since it awards something based on the subjective criteria of race. Finally, another argument espoused is that affirmative action actually harms, rather than helps the intended recipients.

In response to Strum and Lani’s assertions,\textsuperscript{107} Ward Connerly, a former member of the Board of Regents in California and Chairman of the American Civil Rights Institute, applauded their proposal to shift the debate, but then turned to criticize their plan as it amounted to open admissions, which are typically reserved for our nation’s community colleges and not our nation’s four-year colleges and universities.\textsuperscript{108} Connerly pointed out that this plan was used as an experiment in 1970 with the City College of New York and that the results of this experiment highlighted the problems in

\textsuperscript{107} Ibid., \url{http://bostonreview.net/BR25.6/sturm.html}

“sacrificing merit on the altar of race.” As a result of the experiment, Connerly indicated that those students who were admitted based on their prior academic performance succeeded, while those admitted for open admissions struggled through remedial math, writing, reading and “College Skills” classes.\textsuperscript{109} He indicated that Sturm and Guinier ignore this reality and that by emphasizing race, they renew the worst in our nation's history.\textsuperscript{110}

Connerly then stated that the significance of skin color is no longer noticed as much as it was in the past. Furthermore, he pointed out that even the Census Bureau is discovering the insignificance of skin color as individuals identifying their race on federal forms can check as many race boxes that apply. Therefore, Connerly called for the elimination of the boxes as the preservation of racial categories are “on the wrong side of history.”\textsuperscript{111} In concluding his response to Sturm and Guinier, he indicated that it is time to move the debate forward and that America’s future lies in embracing individuals rather than color-coding them and placing them in to categories.\textsuperscript{112}

In another essay, Ward Connerly discussed the general idea of affirmative action and touched upon its history in his explanation that it had ‘roots in the passion for fairness,’ however, it was meant to be temporary. It was a moral decision meant to provide a running start for equal opportunity for individuals and it was intended to expire

\textsuperscript{109} Ibid., http://bostonreveiw.net/BR25.6/connerly.html

\textsuperscript{110} Ibid., http://bostonreveiw.net/BR25.6/connerly.html

\textsuperscript{111} Ibid., http://bostonreveiw.net/BR25.6/connerly.html

\textsuperscript{112} Ibid., http://bostonreveiw.net/BR25.6/connerly.html
when our nation developed an immunity to prejudice and discrimination.\textsuperscript{113}

Furthermore, Connerly asserted that it was not meant to be a system of preferences that harmed innocent people. In looking back, he laments that affirmative action has become a permanent matter of public policy that operates as if the old order were still in place when Caucasians were the majority and African-Americans were the oppressed minority instead of operating in the landscape in which a whole new set of racial configurations have emerged. He then challenges an end to the “corrosive system” of racial preferences that has the potential to “damage the fundamental values of our democracy…” Connerly then pointed out that “as individuals, none of our rights are secure when the fruits of our society are allocated on the basis of group allotments.” In concluding, he stated:

We can continue down the path of numerical parity, racial preferences, and a continuing preoccupation with the concept of race. We can continue perpetuating the outdated premise on which racial preferences are based: that African-Americans, women, and other minorities are incapable of competing without a handicap. Or we can return to the fundamentals of our democracy: the supremacy of the one individual, equal opportunity for the individual, and zero tolerance for discrimination.\textsuperscript{114}

Finally, in a review and response to Bok and Bowen’s “The Shape of the River,” Curtis Crawford provided a synopsis of the book in addition to a critique of its research and data.\textsuperscript{115} Even as Bok and Bowen claimed the benefits to those applicants who


\textsuperscript{114} Ibid., http://www.heritage.org/Research/PoliticalPhilosophy/HL560.cfm

enter through racial preference, Crawford pointed out that one must also weigh the losses to those who are not admitted because of the racial preferences.\textsuperscript{116} Crawford also criticized the racial diversity argument by pointing out that although Bok and Bowen indicated that without racial preferences the number of African-American students at the selective institutions and thus the educational opportunities that go along with them would decline, they fail to mention that the applicants who would be turned away would be admitted by less selective institutions, whereby the number of African-Americans and the opportunity for African-American/Caucasian interactions would increase.\textsuperscript{117} Furthermore, Crawford stated that Bok and Bowen emphasized the educational benefits of Caucasian students interacting with African-American students yet they failed to discuss the issue of ending racial preferences and thereby adding African-American applicants to less selective schools in favor of retaining the preferences to keep African-American students in the more selective institutions.\textsuperscript{118} Finally, Crawford conceded that it is not easy to assess whether there is any net educational benefit to other students by using preferential treatment to shift African-American students from less to more selective schools, yet, he concluded that the authors considered and documented advantages without considering the related disadvantages.\textsuperscript{119}

**Summary**

Since the inception of such public policy, affirmative action policies have been controversial and they continue to be more controversial as they continue with many

\textsuperscript{116} Ibid., http://www.debatingracialpreference.org/CConBowen.htm

\textsuperscript{117} Ibid., http://www.debatingracialpreference.org/CConBowen.htm

\textsuperscript{118} Ibid., http://www.debatingracialpreference.org/CConBowen.htm

\textsuperscript{119} Ibid., http://www.debatingracialpreference.org/CConBowen.htm
people questioning how much longer they are needed in our society to fulfill the original purpose for which policy-makers implemented them. Even the Court, in the most recent decision on the matter could not help but pose the scenario that there will be an end date to such policies.\textsuperscript{120} This chapter traced the course of affirmative action from its inception as a public policy to help increase minority and women representation in society to its transformation into a policy adopted by highly selective institutions of higher education that claimed an academic benefit for having Caucasian students exposed to minority students. The current policy trends on race-based affirmative action provide insight into the arguments for and against this controversial public policy. This study focused on the use of race-based preferences in affirmative action policies at selective public institutions after the \textit{Gratz} and \textit{Grutter} decisions and the effects these decisions have made on these institutions. It also focused on the many constitutional and legislative issues that have surrounded affirmative action from the beginning. However, to truly understand the controversies surrounding affirmative action policies, it was necessary to discuss the public policy of race-based affirmative action within the context of higher education and the rationale supporting them and refuting them.

Numerous arguments exist in support of and in opposition of race-based affirmative action policies and social values and ideology are often behind both sides of the arguments. It is important that the policymakers at these institutions adhere to the current Court’s guidelines in addition to their individual state policies regarding the matter. However, with the Court’s past deference and continuing deference to institutions of higher education with regards to academic policy, and of course affirmative action, it is important that the political process and the public be aware of the

policies of institutions, the mission and rationale of the administrators at these institutions to ensure that the policies are truly in the best interest of the public and that they are consistent to the institutional mission.

Policymakers and the general public oppose or support race-based affirmative action policies for a number of reasons. Clearly with the most recent Court decisions, there is no one fact or criterion that resolves this issue and debate. Furthermore, since affirmative action policies continue to exist so many years after policy-makers first implemented them, it seems that fuel has been added to the debate over the controversial policy. Political, legal and philosophical arguments continue to influence the debate surrounding affirmative action and they continue to shape the arguments of whether they are still needed. At the same time, these arguments also help influence the design and implementation of policies surrounding them. The debate over affirmative action policies deal with the hope of providing equal opportunity for individuals benefiting from the policy in addition to the fear of failing to provide equal opportunity for those not benefited by the policy and it continues with the conflict between a person’s individual rights and diversifying the culture of higher education.

The affirmative action debate reflects the extreme conflict between the public and policymakers at these state-sponsored institutions who have Court supported academic freedom in implementing policies that are based on mission-driven diversity related educational goals. However, despite the academic freedom of these institutions, several state legislatures, and in one instance the state governor, have found a way around these policies by passing legislation banning preferential treatment to any
individual or group based on their race, sex, color, ethnicity, or national origin. Yet, the debate continues despite the limitations that have been placed on the implementation of affirmative action policies as arguments continue over traditional admissions policies and their fairness or lack thereof to underrepresented minorities in addition to the skepticism as to the validity of the argument that affirmative action assists in providing diversity to an institution which meets an educational benefit to students and to the overall campus culture. There is no clear answer or solution as individuals, politicians and policymakers continue their own form of Free Speech in asserting their opinions in the hopes of increasing or eradicating the policy. Policy-makers in several state legislatures have eradicated the policy from their states in an attempt to return to the norm of equal treatment of all of its citizens, yet, since the Court has continued its support, there is hope for supporters that this is not an issue that should be so easily forgotten or abandoned. Despite the Court’s support in *Gratz* and *Grutter*, it did indicate that race-conscious affirmative action policies should be limited in time and even the Court was hopeful that society would one day find affirmative action no longer necessary.

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CHAPTER 3
AFFIRMATIVE ACTION JURISPRUDENCE

Introduction

Affirmative Action is one of the most controversial public policies that exists in our society today. Debate surrounds it with countless arguments for and against a policy that uses race as a determinant for employment, admission, or selection. As such, any law that discriminates on the basis of race requires the standard of “strict scrutiny” of the specific policy. This is based on the concept that the Fourteenth Amendment\(^1\) protects individuals not groups, thus, any governmental action based on race “should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.”\(^2\)

However, the strict scrutiny standard has been in existence since World War II, prior to affirmative action policies that were put into place in the 1960s and 1970s with Executive Orders. *Korematsu v. United States*\(^3\) was the Supreme Court case which established the strict scrutiny standard. In this case, a Japanese-American challenged the policy of removing individuals of Japanese descent to internment camps during World War II. The Court decided that the unusual demands of wartime security justified the military orders. However, the Court also determined that in coming to this conclusion that “distinctions in law and practice based on race are inherently suspect,” and must therefore withstand “strict scrutiny” of the courts.\(^4\)

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\(^1\) U.S. CONST. amend. XIV.


\(^3\) 323 U.S. 214 (1944).

\(^4\) Id.
Strict scrutiny means that a law or policy that classifies on the basis of race, national origin, or some other fundamental First Amendment right such as freedom of speech or religion should be examined very closely by the courts. Furthermore, in order for a policy to withstand the scrutiny of the courts, the government must show that it has a “compelling interest” for treating people differently on one of these qualities. At the same time, the government must also show that its actions were the “least restrictive means” in achieving this compelling purpose and that the policy was narrowly tailored to advance it.\(^5\) The strict scrutiny standard is the highest standard of review by the courts and within the context of higher education cases, the Court first looks at whether promoting diversity in higher education is a “compelling governmental interest,” and then the Court examines whether the race-based admissions program is “narrowly tailored” to its purpose. In order for the policy to be determined constitutional, the racial classification must meet both criteria.\(^6\)

**Doctrinal Background**

In policies involving race-based admissions, the critical provision of the U.S. Constitution involves the Equal Protection Clause of the Fourteenth Amendment, which states “No state shall….deny to any person within its jurisdiction the equal protection of the laws.”\(^7\) A review of the Equal Protection Clause of the Fourteenth Amendment is necessary as it helps explain the basis behind the affirmative action case law within the

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\(^7\) U.S. CONST. amend. XIV
context of higher education as the foundation for a claim was established supported by the concept of equality. This chapter relies on relevant case law and narrative and opinion excerpts to show how the U.S. Supreme Court has interpreted the Constitution with regards to affirmative action policies in higher education.

Equal Protection Clause issues in the realm of public institutions of higher education concern the extent to which higher education institutions may provide preferential treatment to certain, specified groups without harming or causing damage to those groups who are not eligible for or who are not receiving the preferential treatment. It is important to note that rulings from the case law are extremely fact-specific and should not be generalized to other cases. When applying the standards that result from established case law to another fact situation, the analysis should be completed cautiously as any difference in the facts of another case can easily result in a different decision from the established one.

The Court has attempted to define the criteria used and required for a race-based affirmative action policy to be used in public higher education as permitted under the Equal Protection Clause of the Fourteenth Amendment.\(^8\) The Equal Protection Clause which indicates that “No state shall….deny to any person within its jurisdiction the equal protection of the laws,”\(^9\) has been the legal basis for affirmative action case law. The Equal Protection Clause prohibits a State from denying to any person within its jurisdiction the equal protection of the laws. This means that the clause requires that people under similar circumstances be provided equal protection in the “enjoyment of

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\(^8\) U.S. CONST. amend. XIV

\(^9\) U.S. CONST. amend. XIV
personal rights and the prevention and redress of wrongs.”¹⁰ This Constitutional
guarantee of equal protection of the laws means that no person or class of individuals
shall be denied the same protection of the laws which is enjoyed by other individuals or
other classes in like circumstances in their lives, liberty, property, and in their pursuit of
happiness.¹¹

**Academic Freedom**

Just as Equal Protection is a significant piece in understanding affirmative action
policies and what the Court looks for in determining whether a policy is valid, it is also
important to recognize the role of academic freedom in response to the Court’s rulings
concerning higher education. Academic freedom is generally defined as the “right to
teach as one sees fit, but not necessarily the right to teach evil.”¹² In 1940, following a
series of joint conferences begun in 1934, members of the American Association of
University Professors and of the Association of American Colleges (now the Association
of American Colleges and Universities) agreed upon a restatement of principles set
forth in the 1925 *Conference Statement on Academic Freedom and Tenure*.¹³ As a
result of this agreement, academic freedom has been specifically outlined in detail by
the 1940 Statement of Principles on Academic Freedom and Tenure, with the assertion
that:


¹¹ Ibid., 537.

¹² Ibid., 11.

¹³ “1940 Statement of Principles on Academic Freedom and Tenure,” American Association of University
Professors (AAUP Policy 10th Ed. 2, 16 October 2006), available from <http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-
The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.\textsuperscript{14}

Since this time, the 1940 \textit{Statement of Principles} has been endorsed by more than 200 scholarly and education groups, including the Association of American Law Schools and the American Psychological Association.\textsuperscript{15}

However, academic freedom has also come to encompass more than First Amendment speech rights as they pertain to teaching. In the age of affirmative action academic freedom has come to be seen as a means of addressing and regulating rights within the educational contexts of teaching, learning, and research both within and outside the classroom setting, especially as it pertains to who an institution admits. All Supreme Court decisions on affirmative action concerning institutions of higher education have discussed the issue of academic freedom and have actually alluded to the idea that the decision is very heavily based on this concept which was grounded in earlier cases such as \textit{Sweezy v. New Hampshire}\textsuperscript{16} and \textit{Keyishian v. Board of Regents}.

\textsuperscript{14} Ibid., http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf


\textsuperscript{16} 354 U.S. 234 (1957).

\textsuperscript{17} 385 U.S. 589 (1967).
In *Sweezy*, the Supreme Court recognized that academic freedoms were constitutional rights grounded in both the Bill of Rights, specifically the First Amendment, and the Fourteenth Amendment. In the *Sweezy* opinion, Chief Justice Warren articulated a philosophy of academic freedom as he stated:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Furthermore, in a concurring opinion, Justice Frankfurter asserted that:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘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.

The Court extended its support to academic freedom with the *Keyshian* decision in 1957 in its reflection to *Sweezy* and its elaboration that “our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special

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19 Id.
20 Id. at 260.
21 385 U.S. 589, 603 (1967).
concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”  

Thus, the idea that administrators at institutions of higher education have a wide range of freedom in their actions as they pertain to matters within academics and admissions has been given a continuing endorsement from the Court as the Court views administrators at these institutions as having the requisite expertise to make such important decisions as they pertain to the ‘four essential freedoms’ of the university.  

**Past Discrimination**

There are numerous reasons why public institutions have asserted race-based affirmative action admissions policies are needed. One of the earliest rationales provided was the use of affirmative action as a remedy for past discrimination. That is, affirmative action policies were essential in order to make up for past societal discrimination since it was argued that this past discriminatory action resulted in the effect of fewer numbers of minorities within higher education. In fact, educational institutions which have acted discriminatory in the past must take affirmative action as a remedy if they are recipients of federal funds. Furthermore, many saw the major issue in *Bakke* as hinging on this ‘remedial interest’ argument. In *Bakke*, one group of Justices, the “Brennan Group” (Justices Brennan, White, Marshall and Blackmun) argued that the medical school’s purpose of remedying the effects of past societal discrimination needs affirmative action.  

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22 Id.

23 Id.

24 34 C.F.R. §100.3

25 Eckes, [http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print](http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print)
discrimination was significant enough to rationalize the use of race in its admissions program. They based their argument on Title VI of the 1964 Civil Rights Act to show that to obtain minority participation in previously underrepresented areas of public life, Congress may require race-conscious programs for those who were likely disadvantaged by past societal discrimination. The group also relied on previous case law that state governments may adopt race-conscious programs if the purpose of the program were to remove a disparate racial effect from past practices. At the same time, an opposing set of justices, the “Burger Group” (Justices Burger, Steward, Rehnquist, and Stevens) struck down the idea of a race-conscious affirmative action program as it violated Title VI of the 1964 Civil Rights Act.

With these two split group of justices, Justice Powell was the one who joined in with the Brennan Group that race could be considered in admissions, however, he relied on a different rationale than either group. At the same time, Powell’s decision that the medical school’s program in at University of California—Davis was essentially a quota system allowed the other group of justices to gain a vote that held the University of California—Davis program as unconstitutional. As mentioned before, Justice Powell relied on a different rationale for supporting the use of race in admissions, and his reliance on the diversity rationale is what provided the crucial vote in favor of the use of race.

26 Ibid., http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
28 Eckes, http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
29 Ibid., http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
30 Ibid., http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
Diversity

The other Justices chose to focus mainly on the issue of remedying the effects of past discrimination, however, Justice Powell looked at something else within the facts of the case. Powell looked at the diversity rationale as an argument that affirmative action policies were appropriate. In doing so, however, he had to look at whether diversity was a compelling purpose for the state to implement such a program since the classification involved race and required the use of the strict scrutiny standard of review. In his review, Powell determined that diversity was a compelling government interest but he also determined that the medical school’s specific admissions policy was not “narrowly tailored” enough to survive the strict scrutiny Equal Protection Clause standard. If a program or policy could be narrowly tailored enough to pass this scrutiny, then, Powell reasoned, it would be appropriate as he saw student body diversity as of paramount importance to the fulfillment of its mission.

Quota

Despite Powell’s endorsement of the diversity rationale, he did not agree with how administrators at the medical school at the University of California—Davis implemented their plan to increase diversity. Since Powell reasoned that the policy was not narrowly tailored enough because minority students were segregated from the rest of the applicants and because a specified number of seats were saved for minority candidates, Powell determined that the school’s ‘quota system’ did not further the goal.

31 Ibid., http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
32 Ibid., http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
of diversity since Powell looked at diversity as encompassing other characteristics other than race. Therefore, quota systems were not deemed appropriate and would not meet the strict scrutiny analysis and would as a result be in violation of the Equal Protection Clause since individuals were not placed in the same, similar situation and provided the same opportunities with the set aside seats. Yet, as Powell determined in Bakke, “the race of an applicant may tip the balance in favor just as geographic origin or a life spent on a farm may tip the balance in other candidates’ case.” Thus, it could be a factor that helps determine admission and it could actually be a deciding factor, however, it should not be the dominant factor that tips the scale with all things considered equally.

Harvard ‘Plus’ Plan

What Powell did envision as part of the diversity rationale was what has come to be known as the ‘Harvard’ plan which had originally been adopted by Harvard College. This plan considers race as one of many ‘plus’ factors in determining criteria for admission. This meant that the plan did not allocate any specific number of admissions spots to students based solely on race. In doing so, the number of minority students admitted each year was not pre-established and instead varied, depending upon how many underrepresented minority applicants met the college’s admissions standards,

33 Ibid., http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
35 Eckes, http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
36 Ibid., http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
with or without the 'plus' factor.\textsuperscript{38} Thus, \textit{Bakke} helped set a standard and a 'modernization' of university and graduate school affirmative action plans.\textsuperscript{39} In doing so, after the decision, many administrators at colleges and graduate schools modified their affirmative action plans to align them more with the Harvard Plan and eliminated the rigid quota plans and set-aside seats.\textsuperscript{40} Many administrators replaced their plans with a wide array of factors for analysis which provided for those who were reviewing admissions files to consider racial or ethnic diversity along with other subjective factors such as geographical diversity, ‘legacy’ status, life experience, talents and ideological perspectives.\textsuperscript{41}

\textbf{Diverging Court Opinions}

Despite the endorsement of the Harvard ‘plus’ plan in \textit{Bakke},\textsuperscript{42} there had been a mixed review with some federal circuits accepting this ‘plus’ factor while others have rejected the concept. For example, in 1996, the Fifth Circuit in \textit{Hopwood}\textsuperscript{43} rejected the plus factor by indicating that it was not clear if anyone else on the Court had agreed with Justice Powell and with this in mind, the Fifth Circuit determined that there were no binding majority decisions that these types of plans were constitutional.\textsuperscript{44} In coming to

\begin{footnotesize}
\begin{enumerate}
\item 438 U.S. 265 (1978).
\item \textit{Hopwood v. Texas}, 78 F.3d 932, 944 (5th Cir.), (1996).
\end{enumerate}
\end{footnotesize}
this conclusion, the Fifth Circuit held that ‘any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. In 1996, the U.S. Supreme Court denied certiorari in the Hopwood case indicating that “while the use of race or national origin as a factor in its admissions process is an issue of great national importance…this record is inadequate to assess definitively the constitutionality of the law school’s current consideration of race in its admissions process.”

Next in a 2000 decision, the Ninth Circuit in Smith v. University of Washington held that Powell’s opinion in Bakke was ‘good law.’ It reaffirmed a lower court’s decision that diversity was a constitutionally permissible goal. It also indicated that given the support of the several Justices from Bakke who were supportive of the remedial justification, the court in the Ninth Circuit would have accepted an even more expansive use of racial factors than that elaborated in Justice Powell’s opinion.

Then in 2001, the Eleventh Circuit in Johnson v. Board of Regents struck down the University of Georgia’s ‘plus factor’ affirmative action plan in which a fixed numerical value was added to every minority application. In this instance, the University

45 Eckes, http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
47 233 F.3d 1188, 1200-01 (9th Cir. 2000).
49 Eckes, http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
50 263 F.3d 1234 (11th Cir. 2001).
implemented an admissions policy that first considered test scores and GPA; in the second round of application evaluation, a point system was used that included many factors including race. The Eleventh Circuit held that the University’s affirmative action program was unconstitutional because it “mechanically awards an arbitrary ‘diversity’ bonus to each and every non-Caucasian applicant… and severely limits the range of other factors relevant to diversity.” The court did not strike down the concept of diversity as a compelling state interest; instead it struck down the policy as not being narrowly tailored. Then, just as the Fifth Circuit in Hopwood had determined, the Eleventh Circuit asserted that Powell’s opinion in Bakke was not the holding of the Supreme Court.

Finally, out of the Sixth Circuit emerged Gratz and Grutter, where the district court had upheld the University of Michigan undergraduate race-conscious admissions policy, and a few months later had struck down a similar race-conscious admissions policy at the University of Michigan Law School. The Sixth Circuit Court of Appeals reversed Grutter, thus upholding the race-conscious admissions program. Afterward, both cases were appealed to the Supreme Court, where they were granted certiorari. This was significant since before the Gratz & Grutter decisions, the only other Supreme

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52 Eckes, http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
53 Johnson v. Board of Regents of University of Georgia, 263 F.3d 1234 (11th Cir. 2001).
54 Eckes, http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
57 Eckes, http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print
Court case based on affirmative action within higher education was Bakke. The controversy had been brewing for years as demonstrated with the many Circuit Court cases and the differing opinions and rationales. Now that another case had reached this point, many hoped that some clarification regarding affirmative action in higher education was in order.

**Early Cases: Landmark Bakke and Progeny**

When it was first presented in 1977, *Regents of the University of California v. Bakke* was the first case presented to the United States Supreme Court in regard to affirmative action and admissions within higher education. This case challenged the admissions procedures used at the Medical School of the University of California at Davis.

When the medical school first opened in 1968, the entering class consisted of fifty students and there was no special admissions program for disadvantaged or minority students. This first class contained three Asians, no African-Americans, no Mexican-Americans, and no American Indians. However, over the next few years, the entering class increased to 100 students, and the faculty created a special admissions program to increase the representation of ‘disadvantaged’ students within the medical school. This program included a separate admissions system operating along with the regular admissions process. Under the regular admissions procedure, the admissions committee screened each application to select candidates for further consideration.

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59 Id.

60 Id at 272.

61 Id at 273.
Applicants whose overall undergraduate grade point averages fell below a 2.5 on a 4.0 scale were simply rejected.\textsuperscript{62} Approximately one out of six applicants was invited for a personal interview after which each applicant was rated on a scale of one to 100 by the interviewers and the other members of the admissions committee.\textsuperscript{63} The rating received by each applicant consisted of the interviewers’ summaries, the applicant’s overall grade point average, grade point average in science courses, the scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical information. The addition of all of these ratings helped the committee arrive at a ‘benchmark’ score for each applicant. In 1973, there were five committee members rating each candidate with a possible perfect score of 500; in 1974, there were six committee members with a possible perfect score of 600.\textsuperscript{64} Once this benchmark score was determined, the entire committee reviewed the applicant’s file and scores and made offers of a ‘rolling’ admission based on this criteria.\textsuperscript{65} At this time, the chairman of the committee was responsible for placing applicants on the waiting list and it was the chairman who had the discretion to include applicants with ‘special skills.’\textsuperscript{66}

In contrast, the special admissions program functioned separately from the regular admissions committee and this committee was comprised largely of members of minority groups. On the 1973 application to the medical school, applicants were able to

\textsuperscript{62} Id.
\textsuperscript{63} Id at 274.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
indicate whether they wanted to be considered as ‘economically and/or educationally disadvantaged,’ and on the 1974 application form, the question was modified to ask whether applicants wished to be considered as members of a ‘minority group.’ At the time of these applications, the medical school considered ‘African-Americans,’ ‘Chicano,’ ‘Asians,’ and ‘American Indians’ members of minority groups. If an applicant indicated that he or she was a member of a minority group or was a member of the disadvantaged group, the application was forwarded to the special admissions committee.

Once the applicant’s file was forwarded to the special admissions committee, the application was rated by the committee in a similar process as to the regular admissions procedure. However, applicants in the special admissions committee did not have to meet the 2.5 grade point average minimum required of regular applicants and approximately one-fifth of the total number of special applicants were granted interviews in 1973 and 1974. After interviews, each applicant was assigned a benchmark score—like that of the regular applicants—by the special committee. The special committee then presented their top choice applicants to the general admissions committee. It is particularly noteworthy that the special candidates were never rated or compared against the regular applicants. The special committee recommended special applicants until a pre-determined set number of such applicants were admitted. In 1973 and 1974 when the entering class size was 100, this number was at sixteen.

67 Id.
68 Id at 275.
69 Id.
70 Id.
From the time the class size reached 100—1971-1974—the special program produced a total of sixty-three minority students including twenty-one African-American students, thirty Mexican American students, and twelve Asian students. In contrast, the regular admissions program produced forty-four minority students that included one African-American, six Mexican Americans, and thirty-seven Asians. At the same time, even though large numbers of Caucasian students indicated a disadvantage, none received an offer of admission through the special admissions program. In fact, in 1974, the special admissions committee only considered ‘disadvantaged’ applicants who were also a part of a minority group. This now brought us to Allan Bakke, who was a Caucasian male who applied to the University of California—Davis Medical School in 1973 and 1974. In both years, Bakke’s application was considered under the regular admissions program, and in both years, he received interviews. In 1973, he had a strong benchmark score of 468 out of 500, yet he was still rejected as his application has come in late and no applicants from the regular admissions process with scores below 470 were accepted at the time Bakke’s application was considered. However, there were four special admission slots available at the time of Bakke’s application, for which he was not considered. After his rejection, Bakke complained to the Associate Dean and Chairman of the Admissions Committee that the special admissions program operated as a racial and ethnic quota.

71 Id.
72 Id. at 276.
73 Id.
74 Id.
75 Id.
In 1974, Bakke’s application was completed early in the year and he was given positive reviews by his student interviewer. At the same time, his faculty interviewer, the same chairman of the admissions committee, to whom Bakke had complained after his rejection in 1973, gave Bakke the lowest of the six ratings, which gave him a benchmark score of 549 out 600. Bakke was rejected once again. In neither year, the chairman did not exercise his discretion to place Bakke on the waiting list and in both years, applicants were admitted under the special admissions program with significantly lower grade point averages, MCAT scores, and benchmark scores than Bakke. After his second rejection, Bakke filed suit in the Superior Court of California, arguing that the Medical School’s admissions program at the University of California at Davis excluded him from the school on the basis of his race which was in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, the California Constitution, and Title VI of the Civil Rights Act of 1964.

The trial court found in favor of Bakke stating that the University could not consider race in making admissions decisions and that by doing so was in violation of the Federal Constitution, the State Constitution, and Title VI. However, the court did refuse to order Bakke’s admission as he had not carried the burden of proving that he would have been admitted but for the existence of the special program.

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76 Id. at 277.
77 Id.
78 Id.
79 Id. at 279.
Bakke appealed the trial court’s decision not to admit him and the University appealed the decision that its special admissions program was unlawful in addition to the order that enjoined the University from using race as a basis of admission. The Supreme Court of California transferred the case directly from the trial court due to ‘the importance of the issues involved,’ and accepted the findings of the trial court with respect to the University’s special admissions program.80 Since the special admissions program involved a racial classification, the California Supreme Court was bound to apply the strict scrutiny standard in reviewing the case.81

The California court then looked at the goals the University presented for justifying the special admissions program. The court agreed that the ideas of joining together member of various racial and ethnic groups in addition to increasing the number of minority physicians that could serve members of minority groups were ‘compelling state interests,’ but it determined that the special admissions program was not the ‘least intrusive means’ of reaching those goals.82 Furthermore, the California Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment required that “no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race.”83

The California court then determined that since Bakke had established that the University had discriminated against him on the basis of his race, the burden then shifted to the University to show that Bakke would not have been admitted even without

80 Id.
81 Id.
82 Id.
83 Id. at 280.
the special admissions program.\textsuperscript{84} Since the University was unable to sustain this burden, the California court entered judgment for the trial court to order Bakke’s admission to the Medical School.\textsuperscript{85} This order was stayed upon the appeal to the United States Supreme Court, which granted certiorari to ‘consider the important constitutional issue.’\textsuperscript{86}

At first blush, the Supreme Court found it unnecessary to resolve the question of whether there was a right of action for private parties under Title VI since this concept was neither argued nor decided in either the trial court or the California Supreme Court.\textsuperscript{87} It also determined that the University did not disagree that decisions based on race or ethnic origin by faculty and administers of state universities were reviewable under the Fourteenth Amendment, which grants states the same rights as the Fifth Amendment does for the Federal government. At the same time, the Court determined that Bakke did not argue that all racial and ethnic classifications were ‘per se invalid.’ Therefore, the Court turned to the question of the level of judicial scrutiny to be applied to the special admissions program as the parties disagreed on this aspect.\textsuperscript{88} The University argued that strict scrutiny was not the correct standard of review as this standard should be reserved for classifications that disadvantage ‘discrete and insular minorities.’\textsuperscript{89} In this case, the administrators of the University argued that their

\begin{footnotes}
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id. at 281
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id. at 283.
\item \textsuperscript{88} Id. at 287.
\item \textsuperscript{89} Id. at 288.
\end{footnotes}
classification was not harming a member of the minority classes. In other words, the administrators felt that the degree of judicial scrutiny given to a particular racial or ethnic classification was dependant upon membership within a specific ‘discrete and insular minority’.

Since *Bakke* was not a ‘discrete and insular minority’ he should not be afforded this standard of review. However, the Court determined that the special admissions program was clearly a classification based on race and ethnic background and that the limitation imposed upon the number of seats for which Caucasian applicants could compete, was a distinction drawn on the basis of race and ethnic status.

The Court elaborated that the rights guaranteed by the Fourteenth Amendment extend to all people with its explicit language: “No state shall…deny to any person within its jurisdiction the equal protection of the laws.” Furthermore, “it is settled beyond question that the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.” Therefore, “the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”

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90 Id.
91 Id.
92 Id. at 289.
93 Id.
94 Id.
95 Id. at 290.
The Court elaborated that non-status as a minority did not preclude protection from a political process or that membership in a minority group was a prerequisite to submitting racial or ethnic distinctions to strict scrutiny.\(^96\) Instead, the Court determined that racial and ethnic classifications are open to 'stringent examination' without regard to additional characteristics.\(^97\) The Court relied on previous cases where racial distinctions were found as suspect: "Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality."\(^98\) And "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."\(^99\) Therefore, the Court reaffirmed that "racial and ethnic distinctions of any sort are inherently suspect, and thus call for the most exacting judicial examination."\(^100\) Furthermore, the Court continued that the guarantees of equal protection “are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."\(^101\)

The Court elaborated further that even though many framers of the Fourteenth Amendment aimed to bridge a gap between the African-American race and the

\(^{96}\) Id.

\(^{97}\) Id.

\(^{98}\) Id., quoting Hirabayashi, 320 U.S. at 100 (1943).

\(^{99}\) Id. at 291 quoting Korematsu, 323 U.S. at 216 (1944).

\(^{100}\) Id. at 291

\(^{101}\) Id. at 293, quoting Yick Wo, 118 U.S. at 369 (1886).
Caucasian ‘majority,’ the Amendment was actually framed in universal terms without regard to ‘color, ethnic origin, or condition of prior servitude.’\textsuperscript{102} Moreover, the Court stated that due to the precedence set by previous cases, it was far too late to begin arguing that the guarantee of equal protection to all people allowed for certain individuals were entitled to a greater degree of protection than that afforded to others.\textsuperscript{103}

As the Court continued, it indicated that the Constitution does not support the idea that individuals be asked to suffer forbidden burdens so as to improve the societal position of certain ethnic groups. At the same time, the Court went on to say that preferential programs may perpetuate stereotypes that certain groups are unable to obtain success without protection and the assistance of preferential programs. Finally, the Court pointed out that there was some inequality in forcing individuals such as Bakke to maintain the burden of correcting a wrongdoing for which he was not responsible.\textsuperscript{104}

The Court went on to say that when certain judgments and actions affect an individual’s race or ethnic background, then that individual is entitled to a judicial determination that the burden he is asked to withstand on that basis is specifically designed ‘to serve a compelling governmental interest.’\textsuperscript{105} “The Constitution guarantees that right to every person regardless of background.”\textsuperscript{106} Furthermore, the Court reiterated that when a classification denies opportunities to an individual based solely

\textsuperscript{102} Id. at 293
\textsuperscript{103} Id. at 295
\textsuperscript{104} Id. at 298.
\textsuperscript{105} Id. at 299
\textsuperscript{106} Id. quoting Shelley v. Kraemer, 334 U.S. at 22 (1948).
on his race or ethnic background, the classification must be treated as suspect. As such, in order for a suspect classification to pass muster, “a State must show that its purpose or interests is both constitutionally permissible and substantial, and that its use of the classification is 'necessary…to the accomplishment' of its purpose or the safeguarding of its interest.”

Therefore, the administrators at the University retained the burden of justifying its special admissions program. In doing so, the administrators were charged with proving that the purpose(s) served a necessary and compelling governmental purpose. In its brief, representatives from the University indicated the aims of its special admissions program: (i) “reduce the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession;” (ii) to reverse the effects of past discrimination; (iii) to increase the number of physicians who may practice in areas that were underserved; (iv) and to obtain educational benefits that come from an ethnically diverse student body.

The Court was very concise in its decision on the first purpose of the special admissions program as it ruled that if the University’s purpose was to ensure that the student body contained a specified percentage of a particular group based on race or ethnic origin, then this purpose must be rejected as “facially invalid.” The Court elaborated that the Constitution forbids the preferential treatment of members of a

\[^{107}\text{Id. at 305.}\]
\[^{108}\text{Id.}\]
\[^{109}\text{Id. at 306.}\]
\[^{110}\text{Id. at 307.}\]
particular class if for no other reason than their membership within a certain race or ethnic group.\textsuperscript{111}

Next, the Court addressed the purpose of remedying past “societal discrimination.” The Court agreed that the State did have a “legitimate and substantial interest” in eliminating harmful effects of past, identifiable discrimination.\textsuperscript{112} However, to meet the burden, the Court indicated that in order for the Medical School to create this classification, there must be a finding that the classification was in response to an identified specific act of discrimination.\textsuperscript{113} That is, the Medical School must demonstrate that it had previously discriminated against a class or classes of individuals and that its special program was created in order to rectify and alleviate the effects of this specifically identified past discrimination. In this case, the Medical School could not meet this burden. The Court concluded this aspect of the argument that helping certain groups at the Medical School who faculty classified as “victims” was not an appropriate means to correct a situation when it caused an undue burden and harm to Bakke, who had no responsibility to any harm suffered by those receiving the advantages of the special admissions program.\textsuperscript{114}

Then, the Court addressed the purpose of increasing the number of minority physicians who could potentially treat “underrepresented” communities. Since the University could not present any proof that minority physicians who entered their program would actually go out and practice in these areas, or that these minority physicians could .

\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 309.
\textsuperscript{114} Id. at 310.
physicians would better serve underrepresented communities simply on the basis of their race or ethnicity, the Court concluded that the University did not meet its burden in this respect.\textsuperscript{115}

Finally, the Court arrived at the University's purpose for the attainment of a diverse student body. The Court immediately ruled that this purpose was a "clearly permissible goal" for an institution of higher education.\textsuperscript{116} Furthermore, the Court reasoned that this purpose was a permissible goal due to the tenets of academic freedom which the Court pointed out had been a recognized concern of the First Amendment and that a university's freedoms in education included making its own judgments with regard to its own student body.\textsuperscript{117} In addition, the Court noted that the four essential freedoms that constitute academic freedom were summed up by Justice Frankfurter in \textit{Sweezy v. New Hampshire}:\textsuperscript{118}

\begin{quote}
It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "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.\textsuperscript{119}

The Court continued that the essential "atmosphere of 'speculation, experiment and creation'" was believed to be promoted by a diverse student body, which the University in the instant case promoted. At the same time, the Court fell back on the
\end{quote}

\begin{footnotes}
\item[115] Id. at 311.
\item[116] Id. at 311-312.
\item[117] Id. at 312.
\item[118] 354 U.S. 234 (1957).
\end{footnotes}
decision in *Keyishian*,\(^{120}\) which found that, “Our Nation is deeply committed to safeguarding academic freedom...The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth...”\(^{121}\)

Thus, the University’s argument that it had a right to select its own students for the attainment of a diverse student body that would also contribute to a “robust exchange of ideas,” met the criteria of the Court as it sought a goal that was of great importance towards the fulfillment of its overall mission for the Medical School.\(^{122}\) Although this was a slight victory for the University, the Court continued to explain that ethnic diversity is merely “one element in a range of factors” a university may appropriately use in achieving a diverse student body.\(^{123}\) It was also left to be seen if the University’s own specific program was necessary to achieve this goal. Therefore, even though the Court determined that diversity is a compelling reason for using race and ethnicity as a factor for admissions, the Court still had to determine if the University’s special admissions program’s racial classification was necessary to promote the interest of diversity.\(^{124}\)

In addressing this question, the Court pointed out that the University’s belief that reserving a specific number of seats in each entering class for members of a specific ethnic group would help obtain an acceptable amount of diversity in the student body

\(^{120}\) *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).


\(^{123}\) Id. at 314.

\(^{124}\) Id.
was “seriously flawed.”\textsuperscript{125} The Court indicated that it was not as simple as guaranteeing admission to a specific number of members of a selected ethnic group. Rather, “the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single, though important, element.”\textsuperscript{126} In fact, the Court further explained that the University’s program would actually prevent the attainment of diversity since it focused solely on race and ethnicity.\textsuperscript{127} Furthermore, the Court determined that the reservation of a set number of places for members of minority groups within a class was not a necessary means toward the achievement of a diverse student body.\textsuperscript{128} However, this did not negate the idea of diversity as a compelling governmental purpose. Rather, it negated the idea that quota systems were acceptable for achieving this goal.

To illustrate what would be an appropriate admissions program for achieving a diverse student body, the Court turned to the Harvard College program which had expanded the notion of diversity to include students from disadvantaged economic, racial and ethnic groups.\textsuperscript{129} In doing so, when the Harvard College admissions Committee reviewed applicants who were considered capable of providing sufficient work in their studies, the race of an applicant could potentially “tip the balance” in his favor just as his geographic origin or life experiences could tip the balance in the favor

\textsuperscript{125} Id. at 315.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 316.
of another candidate.\textsuperscript{130} What was important in this explanation was that the Harvard College Admissions committee had no set target quotas for members of minority groups.\textsuperscript{131} Instead, the Committee paid attention to a number of criteria as well as the distribution among the many types and categories of students.\textsuperscript{132} In doing so, the “critical criteria are often individual qualities or experiences not dependent upon race but are sometimes associated with it.”\textsuperscript{133}

Therefore, a program such as this demonstrates that race or ethnic background may be considered a “plus” factor for a particular applicant’s file, yet, it does not prevent the comparison of this candidate from the rest of the applicant pool.\textsuperscript{134} This program would be flexible enough to consider all kinds of different criteria that could be considered diverse with different criteria receiving a different weight as to importance depending upon the mixture of the student body. That is, from year to year, different qualities may be deemed more valuable depending on their scarcity and their importance to the mixture of diversity.\textsuperscript{135} The Court found that this type of program treated each applicant as an individual and placed each applicant on equal footing from the start.

In contrast, the University’s program did not meet this standard. Instead, the administrators used a blatant racial classification that told applicants who were not

\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 317.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 317.
members of the determined group of minorities that they were completely excluded from consideration for a specific number of seats in the entering class no matter how strong they were academically, no matter how strong they were with regards to extracurricular activities, and no matter how much they could contribute to the overall educational diversity.\footnote{Id. at 319.} At the same time, the program not only denied certain applicants the ability to compete for a certain number of set-aside seats, but it also allowed for members of the preferred class to compete for every seat of the class.\footnote{Id at 320.} In doing so, the Court concluded that the University maintained a complete disregard to the guaranteed Fourteenth Amendment individual rights of Bakke and others like him and therefore ruled the program invalid.\footnote{Id.}

_Bakke_ was significant in many respects as it set precedence for the approval of affirmative action within higher education. It also reemphasized the importance and support of the major four elements of academic freedom for institutions of higher education, one of which was the selection of its own student body. Through its continued support and reference to this freedom, the Court continued its deference to those in academia as it determined that the university “knows best” when it comes to determining who shall be admitted. By continuing with this concept of academic freedom, the Court was able to reach the conclusion that the attainment of a diverse student body was a compelling purpose for the use of race and ethnicity in making a determination for admission. This met the strict scrutiny standard required by the Court as an individual personal right was at stake. Yet, the Court placed limits on the use of

\footnote{Id. at 319.}

\footnote{Id at 320.}

\footnote{Id.}
race as it emphasized that this use must be a ‘plus’ factor rather than a determinative factor. It also stressed that there should not be a pre-determined fixed number, or quota, of seats for particular groups of minorities.

**Hopwood**

In 1996, the United States Court of Appeals of the Fifth Circuit had to determine if the Fourteenth Amendment permitted the University of Texas School of Law to provide racial preferences in its admissions program to African-Americans and Mexican Americans in order to increase the enrollment of certain preferred classes of minority students.\(^{139}\) Ultimately, the court found that the Fourteenth Amendment did not allow for the Law School to provide racial preferences as the Law School did not provide a ‘compelling justification’ under the Fourteenth Amendment or Supreme Court precedent that allowed for it to provide racial preferences and promote certain races over others even if it was for the purpose of correcting a perceived racial imbalance in the student body.\(^{140}\) In *Hopwood*, the admissions policy of the University of Texas School of Law was brought to the forefront on the debate over affirmative action. The School of Law was considered one of the nation’s leading law schools and it was considered extremely competitive with over 4,000 applicants a year competing for approximately 900 offers of admission in order to obtain an entering class of approximately 500 students.\(^{141}\)

During the early 1990s, administrators at the law school based its initial admissions decisions upon an applicant’s Texas Index (“TI”) number which was a

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\(^{139}\) *Hopwood v. Texas*, 78 F.3d 932 at 934 (5th Cir. 1996).

\(^{140}\) Id.

\(^{141}\) Id. at 935
composite of the applicant’s undergraduate grade point average (GPA) and their Law
School Aptitude Test (LSAT) score. Administrators used this composite score in order
to rank applicants and in order to make an estimate of the number of offers of admission
it needed to make in order to fill the entering class.\textsuperscript{142} At the same time, the law school
admissions office used discretionary judgment in interpreting the scores of applicants by
considering the strength of an applicant’s undergraduate education, the difficulty of his
or her major, significant trends in his grades and the undergraduate grades as his
colleges. The admissions office also considered individual qualities of candidates such
as background, life experiences and outlook and how these qualities could contribute to
the law school class. These qualities were often significant in terms of the marginal
candidates.\textsuperscript{143}

Due to the large number of applicants, the TI score was typically used to sort
candidates into three categories: “presumptive admit,” “presumptive deny,” or a middle
“discretionary zone.” Ultimately, an applicant’s TI score determined how extensive a
review his application would receive.\textsuperscript{144} For example, most applicants who were placed
in the ‘presumptive admit’ category received offers of admission with very little
review.\textsuperscript{145} Also, applicants in the ‘presumptive denial’ category also received very little
review although these files could be upgraded if the reviewers believed that the TI score
was not reflective of an applicant’s ability to compete in the law school.\textsuperscript{146} Then,

\begin{flushright}
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 935-936
\textsuperscript{146} Id. at 936
\end{flushright}
applications in the middle range were provided the most thorough review. In this instance, all applicants’ files, with the exception of African-American and Mexican Americans, were put into stacks of thirty and given to an admissions subcommittee made up of three members of the full admissions committee. Each subcommittee member could then submit a number of votes usually ranging from nine to eleven among the thirty files. If an applicant received two or three votes, he or she received an offer of admission. If an applicant received one vote, he or she was placed on a waiting list. If an applicant did not receive any votes, he or she was denied admission.\textsuperscript{147}

On the other hand, African-Americans and Mexican Americans were provided different consideration from other candidates. When compared with the scores of Caucasian applicants or non-preferred minorities, the TI scores of African-Americans and Mexican Americans were lowered so that the law school could consider more of such applicants and thus admit more of them.\textsuperscript{148} For example, in March of 1992, the ‘presumptive’ TI admission score for resident Caucasians and non-preferred minorities was 199 while Mexican Americans and African-Americans only needed a TI score of 189 to be ‘presumptively’ admitted. At the same time, the difference in the ‘presumptive’ deny scores was more noticeable with non-minorities having a ‘presumptive’ denial score of 192 and African-Americans and Mexican Americans having a ‘presumptive’ denial score of 179.\textsuperscript{149} These contrasting standards were significant as they affected an applicant’s chance of admission since the presumptive

\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
denial score of Caucasians and non-minorities was 192, while the presumptive admit score for minorities was 179.\textsuperscript{150} Therefore, a minority applicant could be admitted with a TI score already lower than the score for a presumptively denied Caucasian or non-minority applicant.\textsuperscript{151} In fact, out of an applicant pool of in-state applicants who were within the range of 189-192, 100\% of African-Americans and 90\% of Mexican Americans were admitted. However, only 6\% of Caucasians were offered admission.\textsuperscript{152} The law school’s rationale for lowering the standards for African-Americans and Mexican Americans was to admit a class consisting of 10\% Mexican Americans and 5\% African-Americans which would have been consistent with the percentages of those races graduating from Texas colleges.\textsuperscript{153}

In addition to lowering the standards for TI scores, the law school also separated applications in the evaluation process. For example, when an application form was received, the law school color-coded it based on race. If an applicant failed to indicate a race, he or she was presumed to be a non-preferential applicant.\textsuperscript{154}

The law school also reviewed minority applicants who fell into the discretionary zone differently from Caucasian applicants since the applications of African-Americans and Mexican Americans were reviewed by a minority subcommittee of three, instead of the regular discretionary subcommittee, which would meet to discuss every minority

\textsuperscript{150} Id.
\textsuperscript{151} Id. at 937
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
candidate.\textsuperscript{155} Most noticeable was the fact that most of the minority subcommittee decisions were ‘virtually final.’\textsuperscript{156}

Finally, the law school also maintained a segregated waiting list by separating applicants by race and residents which allowed for many minority applicants who were not admitted to be set aside for a ‘minority-only’ waiting list. This assisted the law school in obtaining an applicant pool of acceptable minority applicants.\textsuperscript{157}

This case was initiated by plaintiffs Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers, who had all applied for admission to the 1992 entering law school class.\textsuperscript{158} All were considered ‘discretionary’ zone applicants, while Hopwood had a TI of 199, which was a score just high enough to qualify in the presumptive admit zone for resident Caucasians. However, she was placed in the discretionary zone because her educational background was considered to be ‘overstated.’\textsuperscript{159} On the other hand, Carvell, Elliott, and Rogers had TI’s of 197 which was at the top of the discretionary zone and their applications were reviewed by the admissions subcommittee with each receiving one or no votes.\textsuperscript{160}

The plaintiffs sued primarily under the Equal Protection Clause of the Fourteenth Amendment by arguing that they were subjected to unconstitutional racial discrimination

\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 938
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
by the law school’s evaluation of their admissions applications.\textsuperscript{161} The district court ruled that the law school had violated the plaintiffs’ equal protection rights after evaluating the process under the strict scrutiny standard.\textsuperscript{162} By evaluating the admissions process under this standard, the court asked whether the law school’s admissions process served a compelling governmental purpose and whether it was narrowly tailored to achieve this purpose. After the evaluation, the court found that the law school’s reasons for using race as a criteria for admission—obtaining the educational benefits that emerge from a racially and ethnically diverse student body and attempting to correct the past effects of discrimination—met the constitutional criteria.\textsuperscript{163}

Once the purposes were deemed compelling, the district court then turned to determine whether the process was narrowly tailored enough to further these goals and upheld that the parts of the program which provided minorities with a “plus.”\textsuperscript{164} At the same time, the district court determined that disparate treatment in which applicants of different races were not compared with the rest of the applicant pool was not allowed, thus, striking down the law school’s use of separate admissions committees for applicants considered to be in the ‘discretionary’ zone.\textsuperscript{165} Therefore, the court ultimately found that the law school’s 1992 admissions program violated the equal protection rights of the plaintiffs.\textsuperscript{166}

\begin{footnotes}
\footnotetext[161]{Id.}
\footnotetext[162]{Id.}
\footnotetext[163]{Id.}
\footnotetext[164]{Id. at 939}
\footnotetext[165]{Id.}
\footnotetext[166]{Id.}
\end{footnotes}
The appellate court went on to explain that the main purpose of the Equal Protection Clause was to “prevent the States from purposefully discriminating between individuals on the basis of race,” and that it sought “ultimately to render the issue of race irrelevant in governmental decision-making.”\textsuperscript{167} Therefore, the court turned to the issue with which was charged to determine: whether the law school’s consideration of race as a factor in admissions violated the Equal Protection Clause.\textsuperscript{168}

For its analysis, the appellate court pointed out that the district court approved of the use of race in admissions to attain a diverse student body in order to obtain the educational benefits that stem from it, and it approved the use of race as a remedy for the “present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole.”\textsuperscript{169}

The appellate court then turned to the precedent established by \textit{Bakke}\textsuperscript{170} by pointing out that the original force recognizing diversity as a compelling state interest within higher education came with Justice Powell’s separate opinion.\textsuperscript{171} In fact, the court pointed out that although Powell’s opinion was significant, it was not joined by any other Justice on the Court, yet, it has still played an integral part in the ongoing debate over affirmation action within higher education. However, the court’s purpose for bringing up Powell’s decision was to shed light on the discussion of compelling state

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{167} Id.
\item\textsuperscript{168} Id. at 940
\item\textsuperscript{169} Id. at 941
\item\textsuperscript{170} \textit{University of California Board of Regents v. Bakke}, 438 U.S. 265 (1978).
\item\textsuperscript{171} \textit{Hopwood v. Texas}, 78 F.3d 932 at 941 (5th Cir. 1996).
\end{enumerate}
\end{footnotesize}
interests under the Equal Protection Clause. In doing so, it reiterated the four state interests outlined by Powell and offered by the defendants in Bakke that provided an explanation for the justification for race in admissions: reducing the historic shortfall of minorities in medical schools and in the medical profession; offsetting the effects of societal discrimination; increasing the numbers of physicians in underserved communities; and obtaining the educational benefits derived by the attainment of a diverse student body.

Justice Powell then determined that the only purposes deemed appropriate for the use of race in admissions were the purposes of attaining a diverse student body and for remedying the effects of past discrimination. However, Justice Powell pointed out that the remedial justification was limited to “identified discrimination with disabling effects.” He went on to indicate that diversity was an appropriate justification by arguing that this argument furthered academic freedom within higher education which fell under a special concern of the First Amendment since universities should be granted the right to admit those students who would provide for the most ‘robust exchange of ideas.’ However, this use of race, as pointed out by Justice Powell, should be one of many elements considered in obtaining a diverse student body. Powell went on by saying that race could be considered a ‘plus’ within an admission program which meant that a program could consider a multitude of factors for

172 Id. at 942
173 Id.
175 Id. at 943, quoting Bakke, 438 U.S. 265, 313 (1975).
admission, including race, and still pass constitutional muster. Therefore, an applicant’s race could potentially ‘tip the scales’ in favor of admission as long as the applicant was compared with the rest of the applicant pool and as long as there was no set number of students a program set for admitting.

At the University of Texas law school, the plaintiffs argued that the concept of diversity was not a compelling governmental interest with which the appellate court agreed as it pointed out that the law school used race as more than a ‘plus’ factor and the idea that it did not view Justice Powell’s view in Bakke as binding precedence on the issue. The court went on to explain that the word ‘diversity’ was not mentioned anywhere in Bakke with the exception of Justice Powell’s lone opinion which had not been represented by a majority of the Court in Bakke or any other case since then.

The appellate court continued by indicating that the use of race in admission for the purpose of attaining diversity actually contradicted the equal protection of the Fourteenth Amendment and that diversity actually promoted the use of race instead of minimized it since it treated minorities as groups instead of individuals which could also serve in creating hostilities among the races by promoting incorrect racial stereotypes. Therefore, the appellate court held that the use of race in admissions for the purpose of achieving diversity was unconstitutional as it explained that the use of

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177 Id. at 943.
178 Id. at 944.
179 Id. at 946.
race has the effect of stigmatizing an individual and that it inhibited the purpose of the Fourteenth Amendment which was to end racially-motivated state action.\textsuperscript{180}

The court next turned to the University of Texas law school’s purpose of remediying the present effects of past discrimination in Texas’s primary and secondary schools. In this instance, the court pointed out that the Supreme Court has held that “a state actor may racially classify where it has a ‘strong basis in the evidence for its conclusion that remedial action was necessary.’”\textsuperscript{181} Furthermore, “in order to justify an affirmative action program, the state must show there are ‘present effects of past discrimination.’”\textsuperscript{182} In fact, it would need to show that prior discrimination had present, lasting effects; it would need to show the degree of these effects; and it would need to limit the ‘plus’ factor provided to applicants in order to remedy the past harm.\textsuperscript{183} In this case, the appellate court ruled that a state does not have a compelling purpose to correct present effects of societal discrimination as it explained that the Supreme Court required that there must be some proof of prior discrimination on the part of the governmental actor before a racial classification could be made.\textsuperscript{184} Thus, in essence, the use of race as a remedial action was limited to the harm caused by a specific, identifiable state actor and because of past wrongs at the specific school.\textsuperscript{185} In this case, since the law school could not identify itself as a past discriminator that caused

\textsuperscript{180} Id. at 947
\textsuperscript{181} Id. at 947-948, citing Croson 488 U.S. at 500, 109 S.Ct. at 730, quoting Wygant, 476 U.S. at 277, 106 S.Ct. at 1849.
\textsuperscript{182} Id. at 949, quoting Hopwood I, 21 F.3d 603, 605 (5th Cir. 1994).
\textsuperscript{183} Id. at 951.
\textsuperscript{184} Id. at 949.
\textsuperscript{185} Id.
present effects of this past discrimination, it could not use this justification for a purpose in using racial classifications in its admissions program, despite its historical argument of past discrimination by the state of Texas in its school systems.\textsuperscript{186} The court continued by stating that a majority of the faculty, staff, and students at the law school had nothing to do with any past discrimination on the part of the law school and that if any racial tension existed at the law school, then it was the result of current societal discrimination that was fueled by the consideration of race in admissions.\textsuperscript{187} Ultimately, the court ruled that the law school failed in showing a compelling state interest for using a racial classification in remedying the present effects of past discrimination.\textsuperscript{188}

Of note of the *Hopwood* case is the fact that *Bakke*\textsuperscript{189} was essentially ignored by the appellate court as it struck down the use of race for the same purposes provided as arguments in *Bakke*. Thus, the *Hopwood* court did not accept the diversity argument which had passed constitutional muster under the strict scrutiny standard in *Bakke*.

Upon appeal to the U.S. Supreme Court, the petition for a writ of *certiorari* was denied as the petition before the Court did not challenge the judgment of the court. Rather, it challenged the rationale relied on by the Court of Appeals in making its decision.\textsuperscript{190}

\begin{flushleft}
\textsuperscript{186} Id. at 954.
\textsuperscript{187} Id. at 953.
\textsuperscript{188} Id. at 955.
\textsuperscript{189} 438 U.S. 265 (1978).
\end{flushleft}
It was not until *Gratz*\(^{191}\) and *Grutter*\(^{192}\) were decided by the U.S. Supreme Court in the summer of 2003 that re-affirmed the use of affirmative action in the realms of higher education. These two cases assured institutions of higher education that the use of race in admissions was constitutional now, in the present, as it was back when *Bakke* was decided twenty-five years prior.

**Significant Doctrinal Shift**

Over time, the Court has defined affirmative action on the surface. As discussed earlier in this chapter, in the *University of California Regents v. Bakke*,\(^{193}\) the U.S. Supreme Court approved of affirmative action policies that used race or ethnic background as a ‘plus’ factor in an applicant’s file for admission. In doing so, the Court embraced the idea that the file of a particular individual could be assessed for the applicant’s potential for contributing to the diversity of the institution without the factor of race being the decisive factor.\(^{194}\) The Court did not specifically define what a ‘plus’ factor looked like in admissions policies and left this policy design with the administrators who created such policy. Although the Court approved of the use of a ‘plus’ factor, the Court imposed a limitation on such policies by forbidding the use of quota-systems.\(^{195}\)

Even as the Court determined that race could be used as a ‘plus’ factor, and that quota systems could not be used, it did not elaborate on the threshold of these race-

\(^{191}\) 539 U.S. 244 (2003).
\(^{194}\) Id. at 317.
\(^{195}\) Id. at 304
based affirmative action plans. That is, the Court did not indicate the specific tipping point for when policy-makers have gone too far in implementing race-based admissions policies. Instead, the Court left such decisions up to administrators at the institutions as long as no official quotas were established.

With the *Gratz*\textsuperscript{196} and *Grutter*\textsuperscript{197} decisions, there was much anticipation that the Court would provide more guidance on race-based admissions policies as it re-visited its decision on race-based affirmative action policies in *Bakke*. It was one position to say that quota-systems were not appropriate, but the meaning of the use of race as a ‘plus’ in admissions policies was still unclear. Over the years, the issue has only become more complex as administrators from different institutions interpret the ‘plus’ factor in their own way since the Court has traditionally deferred to the expertise of individuals in academia as to how to select students for their own institutions and thus how to implement the ‘plus’ factor in order to obtain the diversity desired by administrators at these institutions.

Yet, as the Court re-affirmed the use of race-based admissions in addition to the rationale of the compelling purpose of diversity, the failure of the Court to clearly define the tipping point of when an institution has gone too far in the use of the ‘plus’ factor added to the increasing complexity of these policies. That is, administrators were left without any specific guidelines as to when the tipping point was reached and how one made this determination.

\textsuperscript{196} 539 U.S. 244 (2003).

\textsuperscript{197} 539 U.S. 306 (2003).
In *Gratz*, the admissions officials at the University of Michigan employed the use of automatically distributing twenty points to every single applicant from an “underrepresented minority group” as defined by the administrators at the University. Yet, students who had an “extraordinary talent” may have only received five points for this talent. The Court determined that the undergraduate admissions policy at the University of Michigan was not an appropriate policy as it did not provide for individualized consideration in the admissions process. With the use of an automatic distribution of twenty points for simply belonging to a particular identified group, the Court determined that the policy has the effect of making “the factor of race…decisive” for virtually every minimally qualified minority applicant. This was further proven by the administrators at the University who conceded that virtually every qualified underrepresented minority applicant was admitted. The Court also did not approve of the ‘flagging’ process used by University admissions officials which provided for the individualized review desired by the Court to those applicants that admissions counselors had determined were academically prepared, had achieved a minimum selection index score in the selection process and who possessed a quality or characteristic that was important to the University’s position of its entering class.

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198 539 U.S. 244 (2003).
199 Id. at 271.
200 Id. at 273.
201 Id at 271.
202 Id. at 272.
203 Id. at 273.
204 Id at 256-257.
These characteristics included high school class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity or geography. After reviewing the ‘flagged’ applicants, admissions counselors made decisions about whether to admit, defer or deny. This ‘flagging’ policy did not pass as an ideal policy for the Court as the ‘individualized’ review only occurred after the admissions counselors had automatically distributed the University’s version of a ‘plus’ that made race a decisive factor for virtually every minimally qualified under-represented minority applicant. Therefore, the Court determined that the University’s policy was not narrowly tailored enough to achieve the administrator’s assertion that there was a compelling interest in diversity, thus the admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.

Then in *Grutter*, admissions officials from the University of Michigan law school used a policy that focused on academic ability along with a ‘flexible’ assessment of applicants’ talents, experiences and potential “to contribute to the learning of those around them.” Through this policy, admissions officials evaluated each applicant based on all of the information in the file which included personal statements, letters of recommendation and an essay describing the ways in which the applicant would

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205 Id at 257.
206 Id.
207 Id at 274.
208 Id at 275.
210 Id at 315.
contribute to the life and the diversity of the law school.\textsuperscript{211} With respect to diversity, administrators at the law school confirmed that their policy was created while keeping in mind of the law school's commitment to a "particular type of diversity," which included racial and ethnic diversity with the inclusion of students from groups which have been historically discriminated against such as African-Americans, Hispanics and Native Americans.\textsuperscript{212} Administrators at the law school indicated that enrolling a 'critical mass’ of underrepresented minority students allowed for representation of these students who otherwise might not be represented at the law school in addition to seeking to ensure that these students could make contributions to the "character of the law school."\textsuperscript{213}

Unlike the admissions policy in \textit{Gratz}, the law school did not award points to applicants based on their membership or identification within a recognized racial or ethnic group. Instead, the goal of a 'critical mass’ of underrepresented minority students is what intrigued the Court and received the Court’s scrutiny. However, despite the appearance of looking like a quota, the Court determined that the law school’s admissions policy was a narrowly tailored plan\textsuperscript{214} and that the administrators of the law school’s goal of attaining a critical mass of underrepresented minority students did not transform the policy into a quota system.\textsuperscript{215} Through this determination, the Court also pointed out that quotas as properly understood, were programs in which a certain 'fixed' number or proportion of opportunities were “reserved exclusively for

\textsuperscript{211} Id.
\textsuperscript{212} Id. at 316.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 334.
\textsuperscript{215} Id. at 335-336.
certain minority groups. In the law school’s instance, the Court determined that the law school engaged in a “highly individualized, holistic review” of each applicant’s file, providing consideration for all of the ways an applicant could contribute to the diversity of the law school. At the same time, the Court pointed out that when policy makers use race as a ‘plus’ factor in university admissions, the program must remain flexible “to ensure that each applicant is evaluated as an individual and not in a way that makes the applicant’s race or ethnicity the defining feature of his or her application.”

The Court in Grutter, outlined the distinction between the law school policy and the policy at the undergraduate level at the University of Michigan in Gratz as it indicated that the law school awarded no “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity.” In doing so, the Court determined that “like the Harvard plan, the law school’s admissions policy ‘is flexible enough to consider all pertinent elements of diversity….although not necessarily according them the same weight.’” Thus, since admissions officials at the law school provided for consideration of “all pertinent elements of diversity,” the Court determined that the law school could select non-minority applicants who would have greater potential to enhance student body diversity than the underrepresented minority applicants.

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216 Id. 335.
217 Id. at 337.
218 Id.
219 Id.
220 Id.
221 Id. at 341.
Summary

U.S. Supreme Court decisions on race-based affirmative action within institutions of higher education have been rare since there have only been a total of three with the Bakke, Gratz and Grutter decisions. However, despite the rare occurrence, the decisions and rationale have been consistent with the idea that race-based affirmative action policies in admissions are a compelling state interest for the purpose of obtaining a diverse student body. The Court has not wavered on the issue that using race-based affirmative action policies is a compelling interest in obtaining a diverse student body and the Court has not wavered that such policies should be narrowly tailored to fit this purpose. At the same time, the Court has also not wavered on the precedence established in Bakke that despite the approval of such policies, quotas or set-asides for the purpose of achieving a diverse student population are still forbidden.

Despite the consistency of the Court decisions on the major issues, over time, the actual policies have become more complex as administrators have become creative with the design of race-based policies in order to create policies that will not only achieve the purpose of obtaining a diverse student body but also remain within the limits of affirmative action jurisprudence. In fact, the true distinction between Gratz and Grutter fell to the actual public policy procedures involved as the issues were the same and the Court evaluated the issues with the same level of scrutiny and under the same criteria of established precedence in both cases. Yet, there was a difference in the outcome of the actual policy involved. In Gratz, the policy procedure was unacceptable yet in Grutter the policy procedure was acceptable. Also, even as the Court in Gratz and Grutter re-affirmed the use of race-based affirmative action policies and continued
to follow the rationale that such policies satisfied a compelling state interest of diversity, the Court continued to define affirmative action on the surface. The Court did not address the issue of specifically defining race-based affirmative action policies and what such policies ideally looked like. By not clearly defining what ideal policies looked like, the Court was essentially telling administrators to not be obvious about such policies as the Court did not specify at which point a threshold is met and when policy-makers have gone too far in implementing such policies. Instead, the only guidance the Court emphasized is that quotas may not be used, race may continue to be used as a ‘plus’ factor in such policies and that as long as there was individualized review of applicants, then this was sufficient to pass the narrowly tailored test.

Thus, after Bakke, the focus seemed to be on quota systems and the idea that they are not narrowly tailored to fulfill the purpose of a diverse student body. After the Gratz and Grutter decisions, the focus seemed to be on the individualized review of applicants, but just how individualized remains unclear as the Court did not indicate how detailed admissions officials needed to be in evaluating individual files and just how much of a ‘plus’ was allowed.

Finally, also remaining consistent with Bakke, the Court did not mandate that such policies must be implemented. Instead, the Court deferred the issue to the policy-makers of the individual states to decide whether such policies would be implemented at state public institutions and how the policy would be implemented. In doing so, the Court affirmed the policy as Constitutionally permissible, however, it prohibited certain procedures to provide guidance to policy-makers by informing them that if the public
policy itself were implemented, then the policy-makers needed to follow proper
procedure in the implementation of the policy.

Finally, as the Court re-affirmed the compelling state interest for such policies, and left the decision of whether such policies should be implemented to the policy-makers of the states, the Court avoided the question of whether there were differing compelling state interests. Instead, the Court left the creation and the implementation of these policies to the policy makers in each of the individual states to address with respect to the individual needs and essentially the individual objectives of policy-makers in each of the individual states. Yet, if the Court has held that such policies were compelling state interests, this may lead one to believe that implementing such policies is something that all policy makers in each of the states would implement and something that all policy makers in the states would make a priority. However, this does not seem to be the case with the growth of percent plans in admissions and the passage of state constitutional provisions eliminating and forbidding the use of race within public entities. With the Court’s assertion in *Grutter* that it expects that “twenty-five years from now, the use of racial preferences will no longer be necessary to further the interest approved today”\(^{222}\) opens the question of whether a compelling interest actually has a time limit and who should be the one to make this determination.

\(^{222}\) Id. at 343.
CHAPTER 4
THE GRATZ V. BOLLINGER & GRUTTER V. BOLLINGER DECISIONS

Introduction

It was not until the *Gratz*\textsuperscript{1} and *Grutter*\textsuperscript{2} cases were decided by the U.S. Supreme Court in the summer of 2003 that re-affirmed the use of affirmative action in the realms of higher education. These two cases assured policy makers within institutions of higher education that the use of race in admissions was Constitutionally acceptable within the parameters of *Bakke*\textsuperscript{3} decided twenty-five years prior.

In *Grutter*,\textsuperscript{4} the United States Supreme Court found itself reexamining the issue of race-based affirmative action. In *Grutter*,\textsuperscript{5} the Court was asked to decide whether the use of race as a factor in student admissions at the University of Michigan Law School was unlawful. This issue of race and admissions within higher education was an issue that the Supreme Court had not visited since *Bakke* in 1979.

The University of Michigan Law School Admissions Program

At the time of this case, the University of Michigan Law School was considered among the top law school’s in the Nation as it received over 3,500 applications each year for an admitted class of 350 students.\textsuperscript{6} As part of its official admissions policy, the Law School looked for students who had a strong likelihood of succeeding in the study and practice of law as well as a candidate who could contribute in "diverse ways." In

\begin{itemize}
\item[\textsuperscript{1}] 539 U.S. 244 (2003).
\item[\textsuperscript{2}] 539 U.S. 306 (2003)
\item[\textsuperscript{3}] *University of California Board of Regents v. Bakke*, 438 U.S. 265, 316 (1978).
\item[\textsuperscript{4}] 539 U.S. 306 (2003).
\item[\textsuperscript{5}] Id.
\item[\textsuperscript{6}] Id. at 313.
\end{itemize}
this manner, the Law School sought a mixture of students with different backgrounds and experiences that could contribute to the atmosphere of the Law School in terms of respect and learning. The trademark of the policy was its focus on academic ability along with flexible characteristics of an applicant’s talents, experiences, and potential for contributing to the learning atmosphere of fellow students. Specifically, the policy required admission officials to evaluate an applicant’s file which included an undergraduate grade point average (GPA), the Law School Admissions Test (LSAT) score, a personal statement, letters of recommendation, and an essay where the applicant described how they would contribute to the atmosphere and diversity of the Law School.

In evaluating an applicant’s files, careful attention was placed on GPA and LSAT scores as these were seen as predictors of success in law school and ultimately in the success of the practice of law. However, high scores on both did not guarantee admission, nor did low scores automatically disqualify an applicant as the policy required admissions officials to look at other criteria deemed important to the Law School’s educational objectives. These criteria, which the Law School called, ‘soft variables’ included “the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant’s essay, and the areas and difficulty of undergraduate course selection.” With all of these indicators, the Law School hoped to "achieve that diversity which has the potential to enrich everyone’s education and

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7 Id. at 314.
8 Id. at 315.
9 Id.
10 Id.
thus make a law school class stronger than the sum of its parts.”\textsuperscript{11} Furthermore, the policy did not restrict the types or amount of diversity contributions on the part of each applicant and recognized that there are many possible alternatives for diversity in admissions. However, the Law School did indicate that it was committed specifically to “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.”\textsuperscript{12} Furthermore, the Law School included in its policy that its purpose in enrolling a “critical mass” of underrepresented minority students, was to guarantee the contribution of these minority groups to the overall character of the Law School.\textsuperscript{13}

**Legal Challenges**

The woman who ultimately brought this case to the Supreme Court was Barbara Grutter, a Caucasian Michigan resident who applied to the Law School in 1996 with a 3.8 GPA and 161 LSAT score. She was initially placed on the waiting list, but later denied. Then, in December 1997 she filed suit in the U.S. District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, et al.\textsuperscript{14} In her petition, Grutter alleged that the Law School discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights

\textsuperscript{11} Id.

\textsuperscript{12} Id. at 316.

\textsuperscript{13}Id.

\textsuperscript{14} Id.
Act of 1964.\textsuperscript{15} Specifically, Grutter alleged that her application was rejected because the Law School used race as a ‘predominant factor,’ in the process, thereby giving applicants belonging to minority groups specified in the Law School’s admissions policy, a greater chance of admission than those applicants who were not members of these groups.

The District Court agreed to decide on the issue of whether the Law School’s asserted purpose in attaining a diverse student body in order to obtain the educational benefits that stem from such a body was a compelling purpose.\textsuperscript{16} When race is a factor in a classification, the judicial review requirement is strict scrutiny and in order to pass this test, the purpose must satisfy a compelling governmental interest.

The District Court also indicated that it would conduct a bench trial to look at the Law School’s admissions decisions and whether its consideration of race in these decisions resulted in a “race-based double standard.”\textsuperscript{17} During the bench trial, the Law School presented evidence pertaining to its use of race in its admission process. Dennis Shields, the Director of Admissions at the time Grutter applied, testified that he did not direct his staff to admit a specific number or percentage of minority students. Instead, he indicated that an applicant’s race could be considered with all of the other factors in an applicant’s files.\textsuperscript{18} He also testified that at the peak of the admissions season, he looked at ‘daily reports’ that showed racial and ethnic composition of the entering class in addition to residency status and gender. He indicated that this was

\textsuperscript{15} Id. at 317.
\textsuperscript{16} Id. at 317-318.
\textsuperscript{17} Id. at 318.
\textsuperscript{18} Id.
done to ensure that a ‘critical mass of underrepresented minority students’ could be attained in order to obtain the educational benefits of a diverse student body.\textsuperscript{19} He further emphasized that he did not look to admit any specific number or percentage of minority students.

After Shields’ testimony, Erica Munzel, his successor as Director of Admissions, testified that ‘critical mass’ meant ‘meaningful numbers’ or ‘meaningful representation,’ which she interpreted to indicate a number that encouraged minority students to participate in the classroom and not feel isolated.\textsuperscript{20} Munzel also echoed Shields testimony when she indicated that there was no number, percentage, or range of numbers or percentages that made up the ‘critical mass.’\textsuperscript{21}

The District Court also heard testimony from Professor Richard Lempert who chaired the faculty committee that adopted the Law School’s written admissions policy. He stressed that the Law School sought students with diverse interests and backgrounds in order to enhance the classroom and educational experiences.\textsuperscript{22} When asked about the language of the policy that purported to include those students who had been ‘historically discriminated against,’ Lempert explained that the Law School did not aim to remedy past discrimination.\textsuperscript{23} Rather, it sought to include students who belonged to groups that have been discriminated in the past so that they could provide

\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 319
\textsuperscript{23} Id.
a perspective to those students who did not belong to such groups. Finally, one last witness, a professor at the time when the Law School policy was adopted, testified that when a ‘critical mass’ of minority students are admitted, “racial stereotypes lose their force because non-minority students learn there is no ‘minority viewpoint’ rather a variety of viewpoints among minority students.”

Both parties also presented quantitative data at the trial level to determine the extent to which the Law School actually used race in admissions. Interestingly, Grutter’s expert witness concluded that membership in a specified minority group, “is an extremely strong factor in the decision for acceptance,” and that applicants from these groups were provided an “extremely large allowance for admission” compared to non-minorities. However, he did concede that race was not a ‘predominant’ factor in the decision making process.

The Law School’s expert focused more on what would happen if the Law School implemented a race-blind admissions system. He concluded that this would have a dramatic effect on the number of minority or underrepresented students admitted to the Law School. To illustrate his point, he showed that in 2000, 35% of the total minority applicants were admitted, which represented 14.5% of the entering class. If the Law School had used a race-blind system during this year, only 10% of these applicants would have been admitted, thus bringing the number of minority students down to a total of 4% of the entering class.

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24 Id.
25 Id. at 319-320.
26 Id. at 320.
27 Id.
After all of this evidence, the District Court ultimately held that the Law School’s use of race was not lawful as its asserted interest of attaining a diverse student body was not a compelling purpose that met the standard of strict scrutiny.\(^{28}\) The District Court based its decision on the precedence set by *Bakke*\(^{29}\) as it indicated that *Bakke* did not recognize that the attainment of a diverse student body was a remedy for past discrimination.\(^{30}\) Furthermore this court indicated that even if diversity were found to be a compelling purpose for the policy, the policy, itself, was not ‘narrowly tailored’ enough to pass the strict scrutiny standard.\(^{31}\) Based on this information, the District Court prohibited the Law School from using race as a factor in admissions decisions, but this decision was stayed while the Court of Appeals determined the District Court’s decision.\(^{32}\)

The Court of Appeals had a different interpretation of *Bakke*\(^{33}\) as it reversed the District Court’s decision and stated that Justice Powell’s opinion in *Bakke* did establish precedence by establishing diversity as a ‘compelling state interest,’ that would survive strict scrutiny.\(^{34}\) In fact, the Court of Appeals reasoned that Powell’s opinion on the aspect of diversity was what controlled the rationale for the entire judgment in *Bakke*.\(^{35}\)

\(^{28}\) Id at 321.
\(^{31}\) Id.
\(^{32}\) Id.
\(^{35}\) Id.
Furthermore, the Court of Appeals ruled that the Law School’s policy was narrowly tailored as it used race as a ‘plus' factor and because the court saw similarities between the Law School’s policy and the Harvard policy, Justice Powell had used as an ideal model in the *Bakke* opinion.\(^{36}\)

**U.S. Supreme Court Decision**

With these two very different outcomes from the District Court and the Court of Appeals, the Supreme Court granted *certiorari* to decide whether diversity was a compelling purpose that could justify the narrowly tailored use of race in admissions policies at public institutions.\(^{37}\) The Court’s discussion began by pointing out the disagreement between the District Court and the Court of Appeals, the Supreme Court had 'splintered' viewpoints in *Bakke*\(^ {38}\) as it wrestled with the concept of affirmative action. In fact, O’Connor’s opinion pointed out that four Justices would have upheld the program in *Bakke* in order to correct past racial prejudice.\(^ {39}\) Then, another four would have struck down the program all together based on statutory grounds.\(^ {40}\) Essentially, the Court pointed out that it was Powell’s piece of the opinion that established the rationale of the Court’s decision in upholding race-based admissions policies and it was this piece of the *Bakke* opinion on which the Court in *Grutter* based its opinion.

The Court started out by restating Powell’s position on equal protection and the idea that it needs to be consistent and applied equally from one individual to another. If


\(^{37}\) Id. at 322.


\(^{40}\) Id.
this were not the case, then the protection would not be equal as the Equal Protection clause was intended. Furthermore, in Powell’s opinion, when governmental decisions “touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”41 With this in mind, the Court pointed out that based on this standard, only one of the reasons the Law School had explained would survive the strict scrutiny standard.42

The Grutter Court went on to reiterate that in doing so, Powell, explicitly rejected the interest in ‘reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,’ as “unlawful interest in racial balancing.”43 The Court continued to explain Powell’s rejection of correcting past societal discrimination that caused harm to innocent third parties who had nothing to do with the harm that was perceived to have been suffered by members of disfavored minorities. Finally, the Court pointed out that Powell also rejected the interest in Bakke that sought to increase the number of minority physicians that could serve and practice in ‘underserved’ communities because the admissions program was not designed to promote and maintain that particular goal.44

Therefore, the only interest left that Powell did not reject was that of the university’s use of race to further the interest of the attainment of a diverse student

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41 Id. at 323 quoting Bakke, 438 U.S. 265, 299 (1978).
42 Id. at 323.
In doing so, the Court reminded us of Powell’s rationale that this idea was supported and based on the tenets of academic freedom and of Powell’s emphasis that the “nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”

Furthermore, the Court indicted that the “tradition and experience lend support to the view that the contribution of diversity is substantial.” This idea emphasized the support and deference that courts, including the Supreme Court in the United States, have in allowing universities to make decisions where they are thought to have the expertise. In this case and in the Bakke decision, the Courts supported that “in seeking the right to select those students who will contribute the most to the ‘robust exchange of ideas,’ a university seeks to achieve a goal that is of paramount importance in the fulfillment of its mission.”

However, Justice O’Connor pointed out that despite Justice Powell’s support of diversity and academic freedom, he also emphasized that race should only be a factor a university may use in attempting to attain the goal of a diverse student body. Specifically, as Justice Powell stated:

It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups that can justify the use of race. Rather, the diversity that furthers a compelling state

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45 Id. at 324 quoting Bakke, 438 U.S. 265, 311 (1978).
47 Id. at 324 quoting Bakke, 438 U.S. 265, 313 (1978).
48 Id. at 324 quoting Bakke, 438 U.S. 265, 313 (1978).
49 Id. at 324 quoting Bakke, 438 U.S. 265, 314 (1978).
interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.\textsuperscript{50}

With these ideas, Justice Powell attempted to define diversity and the idea that it can encompass not only race but numerous other elements.

What was unique about \textit{Bakke}\textsuperscript{51} was that no other Justices joined in the support of the diversity rationale set forth by Powell and this opinion is often a confusing factor to many lower courts. However, the holding of the \textit{Bakke} Court was viewed “as that position taken by those Members who concurred in the judgments on the narrowest grounds.”\textsuperscript{52} In this case, more Justices concurred with the idea of affirmative action with the addendum that such policies are narrowly tailored to the specific purpose and that the policies do not indicate a quota in obtaining a diverse population of students. Despite the divided decisions from previous lower courts, this Court endorsed Justice Powell’s view that using race in university admissions was a compelling state interest in obtaining a diverse student body.\textsuperscript{53}

In doing so, the Court first turned to the Equal Protection Clause of the Fourteenth Amendment by reiterating that the Clause “provides that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws.’”\textsuperscript{54} Furthermore, since the classification in question was a group classification based on race, the Court followed precedence while recognizing that such classifications imposed by the

\begin{flushleft}
\textsuperscript{50} Id at 324-325, quoting \textit{Bakke}, 438 U.S. 265, 315 (1978).
\textsuperscript{51} 438 U.S. 265 (1978).
\textsuperscript{53} \textit{Grutter}, 539 U.S. at 325 (2003).
\textsuperscript{54} Id. at 326 quoting U.S. CONST., amend. XIV, §2.
\end{flushleft}
government should be reviewed under the strict scrutiny standard. At the same time, the Court recognized that a classification such as this must be narrowly tailored to the means of a compelling governmental interest in order to pass scrutiny. As the Court indicated its review of this classification, it also pointed out that by making the determination that the policy should be exacted under strict scrutiny did not automatically make the policy invalid. Rather, this standard was needed in order to "smoke out' illegitimate uses of race" through careful review to ensure that the government was pursuing an important goal that required the use of a "highly suspect tool."55 The Court went on to say that "when race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is satisfied."56

Furthermore, the Court stated that "context matters" when looking at race-based governmental action under the Equal Protection Clause as not all decisions based on race were objectionable. However, the strict scrutiny standard provided an outline through which such policies and decisions could be evaluated to make a determination that the purpose(s) for such policies and decisions were sincere and that the government was using appropriate action in the use of race for making such decisions.57

With this in mind, the Court looked at whether the Law School's justification for its use of race in making admissions decisions served a compelling governmental interest,

56 Id. at 327.
57 Id.
which was to obtain “the educational benefits that flow from a diverse student body.”⁵⁸ Through this assertion, the Law School asked the Court to recognize “in the context of higher education, a compelling state interest in student body diversity.”⁵⁹ As the Court had previously done, it deferred to the educational judgment to those in higher education—the Law School in this instance—by holding that the Law School had a compelling interest in attaining a diverse student body and by stating that this diversity was “essential to its educational mission.”⁶⁰ The Court justified its deference through the assurance that the scrutiny afforded this particular policy was no less strict “for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.”⁶¹ In doing so, the Court recognized its long-standing deference for a university to make its academic decisions as long as they were within the parameters of the Constitution. This rationale was supported by the Court’s recognition of the importance of public education and the freedom of thoughts, ideas and speech associated with it.⁶² Furthermore, it announced that through Justice Powell’s recognition of diversity as a compelling governmental interest in Bakke,⁶³ he recognized the freedom of a university to make its own judgments as to education, which was grounded in the First Amendment through academic freedom. Through the selection of students who would contribute to the most ‘robust exchange of ideas,’

⁵⁸ Id.
⁵⁹ Id. at 328.
⁶⁰ Id.
⁶¹ Id.
⁶² Id. at 329.
Powell asserted that the university sought a purpose that was ‘paramount to its mission.’\textsuperscript{64}

Therefore, this Court determined that the Law School’s purpose in attaining a diverse student body was a compelling interest that served its institutional mission. Furthermore, the Court pointed out that “good faith” would be assumed in cases such as this unless there was a clear finding that an institution was not acting under such auspices.\textsuperscript{65} If, as the Court indicated, the Law School had attempted to simply identify and ensure that a specific percentage of a particular group based on race or ethnicity was admitted, then, this would be unconstitutional as the Law School’s policy would amount to racial balancing.\textsuperscript{66} In this instance, the Court found no wrongdoing on the part of the Law School in its attempt to obtain a ‘critical mass’ since it defined this concept in terms of obtaining educational benefits from a diverse student body.\textsuperscript{67}

Furthermore, the Court accepted the Law School’s claim that there are many educational benefits obtained from a diverse student body and bolstered this argument as it pointed out that the District Court had emphasized that the policy provided for the break down of racial stereotypes so that students were able to better understand those of different races and ethnicities.\textsuperscript{68} Therefore, this provided for “livelier, more spirited,


\textsuperscript{65} Id. at 329, quoting \textit{Bakke}, 438 U.S. at 318-319.

\textsuperscript{66} Id. at 329-330, quoting \textit{Bakke}, 438 U.S. at 307.

\textsuperscript{67} Id. at 330.

\textsuperscript{68} Id.
and simply more enlightening and interesting” classroom discussions with the addition of students from various backgrounds.\textsuperscript{69}

In addition to this evidence, the Court relied on the Law School’s \textit{amici} which pointed out educational benefits from student body diversity and expert studies and reports that were entered at trial which showed that diversity within a student body supports learning outcomes and prepares students for the reality of an increasingly diverse workforce which helps prepare them as professionals.\textsuperscript{70} This idea was further supported from other evidence which showed that American businesses have expressed that the skills needed for the global marketplace can only be obtained through exposure to ‘widely diverse people, cultures, ideas, and viewpoints.’\textsuperscript{71}

To further this argument, the Court then used an idea based on testimony from high-ranking military officers and civilian leaders of the U.S. military that a “highly qualified, racially diverse officer corps…is essential to the military’s ability to fulfill its principle mission to provide national security.”\textsuperscript{72} Therefore, in order for the military to fulfill its mission, it must be “selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.”\textsuperscript{73} As a result of this analysis, the Court illustrated that since the military must be selective in its admissions in addition to being racially diverse,

\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 331.
\textsuperscript{73} Id.
then the country’s most selective institutions must also be selective and diverse in order to fulfill its mission.\textsuperscript{74}

Turning back to educational institutions, the Court emphasized the importance of education and its role in “maintaining the fabric of society” and the idea that education is “the foundation of good citizenship.”\textsuperscript{75} For these reasons, the Court determined that the dissemination of information and the opportunity to gain access to such knowledge within public institutions of higher education should be available to all people irrespective of race or ethnicity.\textsuperscript{76} Furthermore, the Court indicated that it is an essential government objective to ensure that public institutions are open to individuals of all races and ethnicities and that this heightened sense of openness within higher education was of the utmost importance.\textsuperscript{77} The Court concluded this idea that participation and a presence of a diverse group of members of society are essential within the community if “the dream of one Nation, indivisible, is to be realized.”\textsuperscript{78}

The Court continued as it alluded to the fact that universities, and specifically, law schools, are important establishments for the training of many of the Nation’s leaders\textsuperscript{79} by pointing out that high proportions of our nation’s state governorships, seats in the U.S. Senate and seats in the U.S. House of Representatives are held by individuals with

\textsuperscript{74} Id.


\textsuperscript{76} Id. at 331.

\textsuperscript{77} Id. at 331-332, quoting Brief for United States as Amicus Curiae 13.

\textsuperscript{78} Id. at 332.

\textsuperscript{79} Id quoting Sweatt v. Painter, 339, U.S. 629, 634 (1950).
law degrees. Additionally, the Court emphasized this relationship was most evident in what it deemed ‘highly selective law schools.’

Therefore, the Court accentuated that it is a necessity to ensure that opportunities for leadership are clearly open to “talented and qualified individuals of every race and ethnicity” in order to produce leaders who the nation’s citizens perceive as credible and competent. At the same time, the Court indicated that citizens must believe in the integrity and openness of the public institutions that provide the training for the nation’s leaders. In particular, the Court pointed out that it has recognized that law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.” For this reason, the Court concluded that legal education must be accessible by all ‘talented and qualified individuals of every race and ethnicity,’ to ensure that all members of our diverse society are provided the opportunity to be educated at the institutions which afford the training that is required for an educated and successful citizenry. Therefore, by ensuring that its Law School was accessible to a diverse population that could provide the sharing of various viewpoints and unique experiences for the students in their preparation as members of a heterogeneous society, the Law School determined from its experience and expertise that obtaining a

81 Id. at 332.
82 Id.
‘critical mass’ of underrepresented minorities was a compelling governmental purpose for obtaining the educational benefits of a diverse student body.\textsuperscript{85} Despite the Court’s approval of the Law School’s assertion that obtaining a diverse student body, it was also pointed out that even when racial distinctions are allowed, the government is limited in how it may pursue its purpose so that “the means chosen to accomplish the government’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.”\textsuperscript{86} Furthermore, the Court indicated that the purpose of narrowly tailoring a policy is to ensure that “the means chosen ‘fit’…the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”\textsuperscript{87}

This was the first time since Bakke in which the Court had an opportunity to define the parameters of the concept of the narrow-tailoring question with regards to race-conscious university admissions programs as it pointed out that when determining whether a policy was narrowly tailored, the policy must be looked at and molded to fit within the unique issues brought up by using race to obtain a diverse student body in higher education.\textsuperscript{88} As such, it turned to Bakke to look at what it meant for a policy to be narrowly tailored. Bakke specifically stated that in order for an admissions policy to be narrowly tailored, a race-conscious program could not use a quota system nor could it separate certain applicants who had specific racial or ethnic qualities from competition.

\textsuperscript{85} Id. at 333.

\textsuperscript{86} Id. quoting Shaw v. Hunt 517 U.S. 899, 908 (1996).

\textsuperscript{87} Id. quoting Richmond v. J.A. Croson Co., 488 U.S., at 493.

\textsuperscript{88} Grutter 539 U.S. at 334 (2003).
with all of the other applicants. As an alternative, the Grutter Court repeated that a university could use race or ethnicity as a ‘plus’ factor in making admissions decisions. Furthermore, the policy must also be flexible so that it considered all aspects of diversity based on what each applicant could contribute to the overall diversity of the institution and so that it placed all applicants on “the same footing for consideration, although not necessarily according them the same weight.”

Based on these criteria, the Grutter Court determined that the Law School’s admissions program was narrowly tailored and that the plan did not operate as a quota system. In making this determination, the Court denoted that a “‘quota’ is a program in which a certain fixed number or proportion of opportunities are ‘reserved exclusively for certain minority groups.’” In providing additional guidance, the Court indicated that “a permissible goal…requires only a good faith effort…to come within a range demarcated by the goal itself,” in addition to the idea that a permissible goal also allows for the use of race as a plus factor while guaranteeing that each applicant is accorded the same consideration as all of the other qualified applicants.

The Court expressed that the Law School’s aim for a ‘critical mass’ of underrepresented minority students did not translate to a quota system as the Court recognized that the Harvard Plan Justice Powell used as an example of a narrowly

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89 Id. at 334 quoting Bakke, 438 U.S., at 315.
90 Id. at 334 quoting Bakke, 438 U.S., at 317.
91 Id. at 334.
92 Id. quoting, Croson, 488 U.S. at 496.
93 Id. quoting, Sheet Metal Workers v. EEOC, 478 U.S. 421, 495.
tailored race-conscious admissions plan in Bakke\textsuperscript{95} showed that there is “some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.”\textsuperscript{96} Moreover, Powell pointed out that attention to the number of students admitted without any additional action, did not automatically turn a flexible admissions policy into a quota system.\textsuperscript{97} With this in mind, it was also determined that the Law School’s review of “daily reports,” which provided for the racial and ethnic make-up of the entering class did not necessarily indicate that certain individuals were going to be provided more weight in their consideration for admission.

However, the Court pointed out that despite the fact that a race-conscious admissions program does not operate under a quota system does not necessarily demonstrate that the policy meets the standard of individualized consideration. Rather, as the Court implied:

When using race as a ‘plus’ factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.\textsuperscript{98}

Considering this information, the Court determined that the Law School maintained a holistic approach in its evaluation of each applicant’s file while providing consideration for all the ways in which an applicant could contribute to the diverse

\textsuperscript{95} 438 U.S. 265 (1978).

\textsuperscript{96} Grutter 539 U.S. at 335 quoting Bakke, 438 U.S. at 323.

\textsuperscript{97} Id quoting Bakke, 438 U.S. at 323.

\textsuperscript{98} Id. at 336-337 quoting Bakke, 438 U.S. at 318 n.52
educational climate. Furthermore, the Court indicated that all races were met with the same individualized consideration.\textsuperscript{99} The Court then compared the Law School’s admissions plan to that of the Harvard plan explained in \textit{Bakke} in determining that the Law School’s policy was “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according the same weight.”\textsuperscript{100}

The Court was also satisfied that the Law School’s race-conscious admissions program guaranteed that all aspects, besides race, that could contribute to the diversity of the student body were considered along with race in making admissions decisions.\textsuperscript{101} In doing so, the Law School did not limit the types of qualities and experiences that could be considered valuable toward the contribution of a diverse student body.\textsuperscript{102} In addition, the Law School considered each applicant’s ability and promise toward making a “notable contribution to the class by way of a particular strength, attainment or characteristic.”\textsuperscript{103} Additionally, applicants were given the opportunity to emphasize how they could contribute to the overall diversity of the Law School through a personal statement, essays, and letters of recommendation.\textsuperscript{104} With this in mind, the Court was satisfied that the Law School’s admissions program was flexible enough by taking into

\textsuperscript{99} Id. at 337.
\textsuperscript{100} Id. at 337 quoting Bakke, 438 U.S. at 317.
\textsuperscript{101} Id. at 337.
\textsuperscript{102} Id. at 338.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
consideration an array of diverse characteristics that would contribute to a diverse student body.\textsuperscript{105}

The Court continued as it explained that the process of narrowly tailoring an admissions policy does not require a university to try every possible race-neutral policy before it determines that the only option available that would work is one based on race. Rather, narrow tailoring requires that an institution acts in good faith in considering race-neutral characteristics along with race that will help in obtaining the diverse student body the institution aims in achieving.\textsuperscript{106} In making a determination that the Law School’s policy was narrowly tailored, the Court revealed that the Law School’s program considered race as one of many factors for consideration for admission in its aim to put together a diverse student body that encompassed a diversity that included more than just race.\textsuperscript{107} The Court also indicated that the Law School could have implemented a more race-neutral policy such as a lottery or a “percentage” plan found in states such as Texas, Florida, and California, however, such policies and plans would negate the individualized consideration.\textsuperscript{108} Therefore, the Court determined it was satisfied that the Law School contemplated race-neutral choices that would also assist in obtaining a ‘critical mass’ of underrepresented minority students without making the Law School give up its high selectivity standard which was the foundation of its educational mission/objective.\textsuperscript{109} Finally, “to be narrowly tailored, a race conscious admissions

\textsuperscript{105} Id. at 339.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 340.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
program must not “unduly burden individuals who are not members of the favored racial and ethnic groups.”110 With this criteria in mind, the Court determined that the Law School’s program did not “unduly burden” non-minority groups as it considered “all pertinent elements of diversity…” through the selection of non-minority applicants who had the ability to contribute to the overall student body diversity as much as underrepresented minorities.111

Despite this ruling, the Court pointed out that one of the purposes of the Fourteenth Amendment was to eliminate all “governmentally imposed discrimination based on race,” and therefore, race-based admissions program should be limited in time. The Court explained that making race-conscious programs a permanent fixture would “offend the fundamental equal protection principle.”112 To determine whether such programs are still needed at various institutions, the Court indicated that periodic reviews of such policies and a needs assessment would be required to determine if such preferences were still necessary to obtain the desired student body diversity.113 The Court also went on to denote that administrators at universities in Florida, California and Washington state were already experimenting with different racially neutral admissions policies since the laws of these states prohibited race-conscious programs and that policy-makers in other states should take notice of these alternatives and

110 Id. at 341, quoting, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 630 (1990).
111 Id. at 340 quoting Bakke, 438 U.S. at 317 (1978).
112 Id. at 342
113 Id.
attempt to implement their own.\textsuperscript{114} By placing a time limit on race-conscious admissions programs, the Court stated that this would “assure that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”\textsuperscript{115}

Finally, in its concluding remarks, the Court reiterated that the Equal Protection Clause does not prohibit the Law School’s use of a race-conscious admissions program in its attempt to further a compelling governmental purpose of obtaining the educational benefits derived from a diverse student body as it affirmed the judgment of the Court of Appeals.\textsuperscript{116}

**Concurring Opinions: Justice Ginsburg’s Concurrence**

In a concurring opinion of *Grutter*, Justice Ruth Bader Ginsburg, pointed out that the Court’s indication that race-conscious programs “must have a logical end point” was aligned with the International Convention on the Elimination of All Forms of Racial Discrimination which was ratified by the United States in 1994.\textsuperscript{117} She also stated that predominantly minority communities lag behind others in terms of the educational resources available to them and that many minority students are faced with inadequate and unequal educational opportunities in the public school area as schools which causes them to not meet standards required by highly selective institutions.\textsuperscript{118} However, she also pointed out that despite these inequalities, some underrepresented

\begin{itemize}
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Id. quoting, *Richmond v. J.A. Croson Co.*, 488 U.S., at 510.
  \item \textsuperscript{116} Id. at 343.
  \item \textsuperscript{117} Id. at 344.
  \item \textsuperscript{118} Id. at 345
\end{itemize}
minorities are able to meet the high standards for admissions established by the country’s ‘finest’ undergraduate and graduate educational institutions and that as primary public education improves in these communities, there should be a positive correlation of students from these communities able to meet the standards set at highly selective institutions. Therefore, she concluded that “one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”

**Dissenting Opinions**

**Justice Rehnquist’s Dissent**

In his dissenting opinion to the *Grutter* decision, Chief Justice William Rehnquist, began by agreeing with the Court that when racial distinctions are made and permissible, the government must “ensure that its means are narrowly tailored to achieve a compelling state interest.” However, he went on to say that the Law School at the University of Michigan did not employ narrowly tailored means in order to meet the desired interest it asserted in its argument. Justice Rehnquist pointed out that the Law School argues that it must take steps in order to obtain a “critical mass” of underrepresented minority students, yet he went on to say that the program it used is actually a “veil” in an effort to obtain racial balancing.

Justice Rehnquist elaborated by reminding the Court that previous cases have established that in order for a program to withstand strict scrutiny, the Law School must

119 Id. at 346.
120 Id.
121 Id. at 378.
122 Id. at 379.
demonstrate that the methods used must “fit” the asserted compelling state interest 'with greater precision than any alternative means.' He went on to include that 'even in the specific context of higher education, we emphasized that “constitutional limitations protecting individual rights may not be disregarded.”

Yet, Justice Rehnquist asserted that the Court has deferred the use of strict scrutiny in its analysis of the Law School’s admissions policy. He pointed out that the Law School asserted a “critical mass” of underrepresented minorities was necessary to achieve the educational benefits derived from a diverse student body. The Law School explained that this “critical mass” meant:

…a sufficient number of underrepresented minority students to achieve several objectives: to ensure that these minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes.

However, Justice Rehnquist pointed out that the Law School’s record showed that the admissions practices with regard to these underrepresented minorities were different and could not be excused under the constant use of the term “critical mass.”

In reality, as Justice Rehnquist asserted, the concept was applied differently among the three underrepresented minority groups as the number of African Americans admitted were significantly higher than those of Native Americans or Hispanics. He pointed out that these findings were significant and that the Law School had never provided any

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123 Id. quoting Adarand Constructors Inc. v. Pena, 515 U.S. 200, 280 n.6.

124 Id.

125 Id. at 380 citing App. To Pet. For Cert. 211a; Brief for Respondent Bollinger et al. 26.

126 Id. at 380.

127 Id. at 381.
information explaining why significantly more individuals from one underrepresented minority group were needed in order to achieve the “critical mass” that would serve in reaching the desired student body diversity.\footnote{128} Furthermore, he did not understand why Hispanics had been seemingly capped off in terms of admits when they have been identified as one of the three groups the Law School indicated was among ‘the groups most isolated by racial barriers in our country.’\footnote{129}

Justice Rehnquist went on to indicate that when the “critical mass” label is discarded, an understanding of why the disparity of admits exists from one group of underrepresented minorities to another emerges.\footnote{130} As Justice Rehnquist reminded us that while the Court’s statement that the Law School’s goal of attaining a “critical mass” of underrepresented minority students is not a practice in attaining a certain percentage of a particular group based on race or ethnicity, he indicated that the correlation between the percentage of the Law School’s pool of applicants among these groups of underrepresented minority groups and the percentage of those admitted from these same groups is too much of a coincidence to be discarded as simply the result of the Law School paying “some attention to the numbers.”\footnote{131}

Therefore, in light of this finding, Justice Rehnquist indicated this strong correlation must be the result of careful ‘race-based planning’ by the Law School. He expanded on this concept that the plan suggested a ‘formula’ for admission based on an assumption that all applicants are equally qualified, thus, the proportion of these

\footnote{128 Id.}
\footnote{129 Id. at 382-383.}
\footnote{130 Id at 383.}
\footnote{131 Id.}
underrepresented groups admitted should be the same as the proportion in the applicant pool.\textsuperscript{132} Justice Rehnquist went on to point out that the Law School failed to explain this phenomenon and that it actually attempted to mask the fact that the policy is one that was designed to guarantee a proportionate representation of applicants from the selected underrepresented minority groups.\textsuperscript{133} Without an explanation from the Law School, Justice Rehnquist concluded this practice extended offers of admission to members of designated minority groups in proportion to the statistical proportion in the applicant pool which amounts to racial balancing, which Justice Rehnquist points out is what the Court itself calls “patently unconstitutional.”\textsuperscript{134}

Finally, Justice Rehnquist touched on the Law School’s failure to impose a specific time limit for its use of race in admissions which potentially provides for the use of racial preferences on a permanent basis. This was essentially the final straw for Rehnquist as he concluded that the Court’s display of deference to the Law School upheld the policy despite serious flaws that are forbidden by the Equal Protection Clause of the Constitution.\textsuperscript{135}

\textbf{Justice Kennedy’s dissent}

Justice Anthony Kennedy initiated his dissent by pointing out that \textit{Bakke}\textsuperscript{136} established the principle that when a university takes race into account as part of its admissions program, the program must pass the strict scrutiny test, which Justice

\begin{footnotesize}
\footnote{132} Id. at 385.
\footnote{133} Id. at 386.
\footnote{134} Id.
\footnote{135} Id. at 387.
\footnote{136} 438 U.S. 265 (1978).
\end{footnotesize}
Kennedy believed the Court did not use in its analysis of the Law School’s admissions program. As he pointed out, to say that the standard was used would simply undermine the test and those precedents that helped establish it.\textsuperscript{137}

Justice Kennedy elaborated that the Court reaffirmed the use of race as a factor yet it failed to implement the safeguard of strict scrutiny that the Court requires when such a policy is in place. He explained that the Court deferred to the university’s implementation of its goal of a diverse student body rather than the university’s educational objective as is often the case in cases when a public college or university is involved.\textsuperscript{138} He argued that in a university setting, the objective of racial diversity can be accepted based on evidence presented by a university, but the method by which the university seeks to achieve this objective must not be given deference as he stated that “preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.”\textsuperscript{139} With this in mind, Justice Kennedy asserted that the majority did not use the settled principle of strict scrutiny which is designed to address such concerns. He explained that the Court was actually accepting the Law School’s assertion that its admissions policy met the constitutional requirements without actually questioning how the Law School’s admissions policy was really implemented.\textsuperscript{140} He went on while joining the dissenting opinion of Chief Justice Rehnquist as he emphasized the point made in that opinion that the ‘critical mass’ concept is actually a

\textsuperscript{137} Grutter 539 U.S. at 387.
\textsuperscript{138} Id. at 388
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 388-389
veil used by the Law School in an attempt to cover up its attempt to make race an automatic factor in a majority of instances and to achieve numerical goals that are essentially quotas.¹⁴¹ He illustrated this point by telling us that with respect to seats of admission, the remaining seats, after the applicants with upper range LSAT scores and grades have been admitted, are those in which race is likely ‘outcome determinative,’ since an applicant’s change of admission is smaller if he or she does not have minority status.¹⁴² Therefore, the idea of individual review was one that was compromised and one that Kennedy asserted the Law School had failed to demonstrate how such review can occur when they continued to seek that ‘critical mass’ at this stage in the admissions process.¹⁴³

He continued that the ‘tension’ between the pursuit of critical mass and individual applicant review was at its highest toward the end of the process and it was also during the end of the admissions process when race was most likely to be the decisive outcome as admissions officers regarded daily reports which indicated the composition of the incoming class along racial and ethnic lines.¹⁴⁴ By consulting these daily reports during the last stages in the admissions process, Justice Kennedy asserted that the only individual review left was that of race since this was the only factor the admissions officers were truly looking for at this point. At the same time, by consulting these daily reports, Justice Kennedy pointed out that the admissions officers could re-calculate the ‘plus factor’ provided for race depending on how close the committee was in reaching its

¹⁴¹ Id. at 389
¹⁴² Id.
¹⁴³ Id.
¹⁴⁴ Id. at 391.
‘critical mass.’ The major flaw that Justice Kennedy perceived was that the Law School had not made an effort to safeguard against this procedure as he explained that in order to be constitutional, “a university’s compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process.” Furthermore, Justice Kennedy stated that an educational institution must ensure that each applicant receives individual consideration such that race does not become the predominant decision-making factor in admission of a particular candidate.

By deferring to the Law School in its choice of admissions programs, Justice Kennedy asserted that the Court’s failure to use the strict scrutiny standard would result in serious consequences since courts would lose the efforts of faculties and administrators in looking for new and more adequate ways that would guarantee individual consideration. Furthermore, Justice Kennedy indicated that the Court was satisfied with the Law School’s profession of its own good faith. This deference to the Law School, Justice Kennedy believed, undermined the strict scrutiny standard, which would ordinarily force educational institutions to explore more race-neutral alternatives. Therefore, Justice Kennedy concluded that the Court’s holding was ‘regrettable’ in that it allowed racial minorities special circumstances in the admissions

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145 Id. at 392.
146 Id.
147 Id. at 393.
148 Id.
149 Id.
process without having such processes scrutinized by the strict scrutiny standard, which
was the requirement for allowing race to be considered in the first place.\textsuperscript{150}

\textbf{Justice Scalia’s dissent}

In further dissenting opinions on \textit{Grutter}, Justice Antonin Scalia, joined the Chief
Justice in his argument that the admissions process was a 'sham' used to cover up a
‘racially proportionate admissions process' which was demonstrated through the
statistics pointed out by Justice Rehnquist.\textsuperscript{151}

Justice Scalia also agreed with a number of Justice Thomas’ assertions in his
dissent, particularly Thomas’ assertion that the Law School’s interest in maintaining a
“prestige” law school whose admissions standards have excluded African-American and
other minorities was not a compelling state interest, as if this was the case, ‘everything
is.’\textsuperscript{152} He elaborated that the ‘educational benefit’ the Law School sought in order to
prepare its students for a diverse workforce and society is something that will not be
graded on in the Law School or any bar examiner. Rather, these types of lessons are
life lessons. He went one step further in indicating that if it is appropriate for the Law
School to employ racial discrimination “for the purpose of putting together a ‘critical
mass’ that will convey generic lessons in socialization and good citizenship,” then it
would be appropriate for the state of Michigan to use such practices and reasons for
adding the same minorities to its workforce.\textsuperscript{153}

\textsuperscript{150} Id. at 395.
\textsuperscript{151} Id. at 347.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 347-348.
Finally, Justice Scalia indicated that the split decisions in *Gratz* and *Grutter* would only seem to prolong the controversy and fuel further litigation based on whether educational benefits from a diverse student body really do exist as well as lawsuits that claim an institution may be going above or below the ‘critical mass’ standard set in *Grutter*. In his concluding comments he indicated that he did not look forward to these cases and emphasized that the Constitution “proscribes government discrimination on the basis of race, and state-provided education is no exception.”

**Justice Thomas’ dissent**

By far the most lengthy dissent from the *Grutter* decision came from Justice Clarence Thomas and he started it by introducing a quote from Frederick Douglas which communicated that the government should not interfere with the African-American man and allow for the African-American man to stand on his own since interference would simply do him more harm. This message was one that Justice Thomas felt was ‘lost’ on the majority from the *Grutter* decision, as he believed that African-Americans could achieve in all ways without the interference of university administrators. At the same time, Justice Thomas sympathized, somewhat with those who supported the Law School’s use of race in admissions since he wished to see all students succeed, however, he also pointed out that the Constitution does not permit an institution maintain a ‘status quo’ in admissions policies when it amounts to racial

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156 Id. at 349.
157 Id. at 349.
158 Id. at 350.
discrimination. At the same time, Justice Thomas pointed out that the Constitution did not allow for what had been stated in the other dissents of *Grutter* which was the failure to use the strict scrutiny standard which the Court failed to do in its deference to the Law School.  

Justice Thomas criticized the Court’s failure to use strict scrutiny and its approval of the Law School’s admission policy as he pointed out that a university may not maintain a high admission standard and provide for exemptions to selected favored races. He went on to point out that the Law School’s selective admissions policy was of its own choosing and under its own knowledge that the policy produced racially disproportionate results. However, he pointed out that racial discrimination should not be a permissible solution to a self-imposed injury brought on by the selective admissions process.  

Despite an overall dissent of the Court’s decision, Justice Thomas did concur on a few points. For example, he agreed with the Court in its approval of only one racial classification and that further use of race in admissions remains unlawful. Furthermore, he agreed with the Court’s assertion that racial discrimination in higher education admissions would be illegal in twenty-five years.  

However, Justice Thomas quickly reverted back to his dissenting argument that the Law School’s current use of race violates the Equal Protection Clause and that the

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159 Id.
160 Id.
161 Id.
162 Id. at 351.
Constitution means the same thing today as it will twenty-five years from now.\textsuperscript{163} Justice Thomas’ argument was based on his belief that the Law School’s argument for the use of race is not a compelling purpose that constitutes a ‘pressing public necessity.’ Furthermore, Thomas pointed out that the Constitution “abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”\textsuperscript{164}

Justice Thomas then turned to determining whether the interest asserted to by the Law School was compelling enough to justify racial discrimination as he indicated the Law School’s statement that it wished to obtain the educational benefits that come from a diverse student body, should be scrutinized very carefully as the statement implied that ‘diversity’ and ‘educational benefits’ are pieces to the Law School’s compelling state interest.\textsuperscript{165} Yet, Justice Thomas pointed out that there must be other ways in which law students can receive a better education besides ensuring that a ‘critical mass’ of underrepresented minority students are part of the law school class.\textsuperscript{166} In fact, Justice Thomas explained that the Law School believed that the only way to obtain the educational benefits it desired was through a racially mixed student body.\textsuperscript{167} Justice Thomas elaborated that the Law School’s argument for a diverse student body

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Id. at 353.
  \item \textsuperscript{165} Id. at 354.
  \item \textsuperscript{166} Id.
  \item \textsuperscript{167} Id. at 355.
\end{itemize}
\end{footnotesize}
could only be interpreted one way: “Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the educational benefits that are the end, or allegedly compelling state interest, not ‘diversity.’” 168 Justice Thomas indicated that the Law School’s refusal to look at alternative admissions policies that would be racially neutral in order to improve its educational mission only ‘marginally’ so that its status as an elite institution would not be compromised. 169

Finally, Justice Thomas pointed out the flaws in the Court’s decision in Grutter as well as Powell’s decision in Bakke 170 as he indicated that both decisions were based on the idea that racial discrimination could be allowed so that a goal such as ‘classroom aesthetics’ could be considered a compelling state interest in one instance (i.e., education) but not in another. In doing so, Justice Thomas insisted that the Court was expanding the range of permissible uses of race through the approval of a process that puts together a law school class. 171 Thus, he concluded that the Court’s failure to provide reference to any principle that calls for justification of such a process is due to the fact that none exist. 172

Justice Thomas then moved on to discuss that despite the Law School’s argument to maintain an elite law school, Justice Thomas indicated that there was no

168 Id.
169 Id.
171 Grutter, 539 U.S. at 356.
172 Id. at 357.
state necessity for even maintaining a public one, much less an elite one. Furthermore, he pointed out that 'marginal improvements' in legal education also do not qualify as a compelling state interest. In explaining this position, Justice Thomas stated that simply because states engage in a certain activity did not necessarily indicate that the activity necessitated a 'pressing public necessity.' Pointing to evidence that several other states do not have public, state supported law schools, Justice Thomas used this argument that Michigan's maintenance of the Law School does not constitute a compelling state interest. Furthermore, even if a state could demonstrate a compelling interest for having an elite law school, Justice Thomas asserted that Michigan has failed to do so.

Justice Thomas went on to remind the Court that it had limited the scope of equal protection review and activities that occur within a particular state's jurisdiction. In fact, from Missouri. Gaines v. Canada, Justice Thomas pointed out that the Court interpreted the Equal Protection Clause in a way that explained that it does not permit States to justify racial discrimination on the basis of what other states or the rest of the nation my or may not do. Therefore, the only interests that could meet the standards of the Equal Protection Clause's demands would have to be found in the State's jurisdiction. Justice Thomas argued that Michigan does not have the interest of operating a public law school that would educate that State's citizens and train that

173 Id.
174 Id. at 358.
175 Id.
176 305 U.S. 337 (1938).
177 Grutter, 539 U.S. at 358.
State’s lawmakers since the State of Michigan does very little in training attorneys would actually serve the citizens of Michigan.\textsuperscript{178} In fact, Justice Thomas pointed out that based on facts from the Michigan Bar and Michigan Lawyers Weekly, the Law School trained few Michigan residents who would remain in Michigan to practice. In contrast, Justice Thomas mentioned that the State’s other public law school, Wayne State University sent 88\% of its graduates on to serve the people in the State of Michigan. With this in mind, Thomas showed that the Law School’s elite and highly selective status aimed to serve as an educational institution for the rest of the nation’s lawyers and that its decision to be an ‘elite institution’ does very little to advance the citizenry of the State of Michigan or any other interest of the State of Michigan.\textsuperscript{179}

As further evidence that the interest of maintaining an elite law school was not a compelling interest, Justice Thomas pointed to the fact that other policy-makers in other states, such as Texas and California did not choose to maintain such law schools, despite the fact that their size could reasonably expect their States to provide top-notch legal training at separate law schools for students who would most likely remain in the State upon graduation.\textsuperscript{180} Finally, as Justice Thomas concluded this aspect of his argument, he reminded the Court that even if the Law School’s ‘racial tinkering’ produced real educational benefits, a minor improvement in the legal education at the school could not justify racial discrimination when no compelling state interest existed for the Law School to exist, especially on an elite status.\textsuperscript{181}

\textsuperscript{178} Id. at 359.
\textsuperscript{179} Id. at 360.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 361.
Thomas illustrated that the Law School’s stated interest in maintaining an elite and exclusive status was critical to the Court’s decision that its use of admissions “standards” created the Law School’s “need” to racially discriminate.\textsuperscript{182} However, Justice Thomas showed that the Court made an error because race-neutral alternatives to the Law School’s policy were only required to be as “workable” or do about “as well” in meeting the compelling state interest. At the same time, the Court never recognized the Law School’s stated interest as a compelling state interest, as pointed out by Thomas. Furthermore, despite the fact that the Law School concedes that it could alter its admissions procedures to accept students who meet the \emph{minimum} qualifications, it declined to do so. Therefore, after what the Court determined was a narrowly tailored policy, the Court held that the Law School had a compelling state interest in doing what it wanted to do, which Justice Thomas could not agree.\textsuperscript{183}

\textbf{Educational Autonomy}

Thomas called attention back to the Court’s deference to the Law School which he concluded was the opposite of strict scrutiny and he shed light on the idea of educational autonomy that was grounded in the First Amendment which established the idea of ‘academic freedom’ in \textit{Sweezy v. New Hampshire},\textsuperscript{184} Justice Thomas explained that Justice Frankfurter’s concurring opinion in this case highlighted the viewpoint that:

\begin{quote}
It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in
\end{quote}

\textsuperscript{182} Id.

\textsuperscript{183} Id. at 362.

\textsuperscript{184} 354 U.S. 234 (1957).
which there prevail ‘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. 185

Justice Thomas argued that ‘it is the business’ of the current Court to provide
justification when it indicates certain provisions of the Constitution such as the First
Amendment permit a public university to do what would otherwise be prohibited by the
Equal Protection Clause. He pointed out that the only source the Court uses in deferring
to the Law School was Justice Powell’s decision in Bakke186 for which he relied on
Frankfurter’s concurring opinion in Sweezy. 187

Yet, in Justice Thomas’ view, there was no basis for public universities to do in
particular circumstances that would otherwise violate the Equal Protection Clause in any
other instance. 188 Furthermore, Justice Thomas also doubted that when Justice
Frankfurter spoke about governmental intrusions into the independence of universities,
that he was thinking about the Constitution’s prohibition on racial discrimination. 189
Therefore, he concluded that the Court’s deference to the Law School’s belief that racial
aesthetics, or diversity, lead to educational benefits, in addition to the Law School’s
refusal to alter its admissions policies or standards in order to maintain its elite status,
should have no basis in the Constitution or the Court’s decisions. 190

185 Grutter, 359 U.S. at 363, quoting, Sweezy, 354 U.S. at 263.
188 Grutter, 539 U.S. at 363.
189 Id. at 364.
190 Id.
Turning back to the admissions process, Thomas called attention to the fact that no law school can claim ignorance to the poor performance of African-Americans on the LSAT, yet, law schools continue to use the test and try to reverse the effect of the underperformance of African-American by using racial discrimination in the admissions process in order to obtain a ‘critical mass,’ within its student body. At the same time, Thomas emphasized that the Law School’s continued use of the test as a standard when it knows it does not favor certain races, should not be given deference by the Court.\textsuperscript{191} In using the test, the Law School should have understood and abided by the parameters imposed by the Constitution.\textsuperscript{192}

Furthermore, Justice Thomas revealed that the Law School was really not looking for students who despite lower LSAT scores can perform and succeed in the study of law. Instead, they seek a class that ‘looks right.’\textsuperscript{193} In doing so, the Law School enticed students who were not prepared and promised them a degree from the University of Michigan and everything else that came with it. Yet, in reality, Justice Thomas pointed out that once there, these students could not thrive or succeed in this atmosphere of extreme competition.\textsuperscript{194} Furthermore, even though most of these students graduated with law degrees, Justice Thomas asserted that there was no evidence indicating that they had received a better legal education or that they have become better attorneys than those students who had graduated from less ‘elite’
Finally, Justice Thomas suggested that these policies cause more harm than good as he alludes to *Adarand*, in that “these programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”

Justice Thomas then illustrated that despite the fact that the Law School admitted a number of African-Americans who would be admitted on their own accord, the question remained as to who was legitimately admitted and who was not. Furthermore, he went on to say that since a majority of African-Americans were admitted to the Law School because of discrimination, they were labeled as undeserving and were left with this stigma as they took positions in government, industry, and academia. Finally, Justice Thomas reminded the Justices of the Court that they had rejected the remediating of societal discrimination as a reason for government sanctioned use of race, yet, they seemed to support the Law School’s aim for proportional racial representation in the Law School class, yet, as Justice Thomas reminded the Court that “the Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.”

Finally, Justice Thomas dissented with the Court’s assertion that racial discrimination in admissions will be given another twenty-five years before it was no longer considered narrowly tailored to the Law School’s interest in a diverse student body.

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195 Id.
199 Id. at 374 quoting, *DeFunis* 416 U.S. at 342.
body. Thomas asserted that if the process is illegal in twenty-five years, it is also illegal now.\textsuperscript{200} He elaborated that the racial gap in academia will not disappear in twenty-five years, or that the Court’s holding that this racial discrimination will be unconstitutional after this time based on any kind of ‘gap’ closing in this time.\textsuperscript{201} However, he did concede that the commitment of a twenty-five year time limit on the policy was simply a holding in deference of the Law School’s educational judgment.\textsuperscript{202} Yet, Justice Thomas maintained his dissent that the Court’s majority decision would only serve in weakening the principle of equality set forth in the Declaration of Independence and the Equal Protection Clause as he conceded that the country must wait another twenty-five years before we saw ‘this principle of equality vindicated.\textsuperscript{203}

The University of Michigan Undergraduate Admissions Program

While the Court was considering the \textit{Grutter}\textsuperscript{204} case, they were also looking at \textit{Gratz v. Bollinger}\textsuperscript{205} which emerged out of the University of Michigan’s undergraduate level. In \textit{Gratz}, just like \textit{Grutter}, the Court was faced with the issue of whether the University of Michigan’s use of racial preferences in its undergraduate admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{206} In \textit{Gratz}, the petitioners Jennifer Gratz and Patrick Hamacher applied to the University of Michigan’s

\begin{thebibliography}{99}
\bibitem{200} Id. at 375.
\bibitem{201} Id. at 376.
\bibitem{202} Id. at 377.
\bibitem{203} Id. at 378.
\bibitem{204} 539 U.S. 306 (2003).
\bibitem{205} 539 U.S. 244 (2003).
\bibitem{206} Id. at 249-250.
\end{thebibliography}
College of Literature, Science, and the Arts (LSA). Gratz and Hamacher were both residents of the state of Michigan and they were both Caucasian.\(^\text{207}\) Gratz had applied for admission for the fall of 1995 entering class and was told that a decision on her admission would be delayed because she was not considered as competitive as the other students who were in the first review of applications. Then, in April, Gratz was informed that the LSA would not be able to offer her a spot in the entering class; therefore, Gratz entered the University of Michigan at Dearborn.\(^\text{208}\)

Hamacher applied to the University for the fall of 1997 and was also informed that his admissions decision would be delayed because although he was qualified academically, he was not considered competitive for the first review applicants. He was also subsequently denied admission in April 1997.\(^\text{209}\) Upon his denial, Gratz and Hamacher filed a class-action suit in the United States District Court for the Eastern District of Michigan claiming violations to the “equal protection of the laws under the Fourteenth Amendment…and for racial discrimination.”\(^\text{210}\)

**U.S. Supreme Court Decision**

The Court began its analysis by looking at the admissions guidelines for the time periods in question. At the University of Michigan, the University’s Office of Undergraduate Admissions (OUA) oversaw the LSA admissions process. In doing so, it

\(^{207}\) Id. at 251.

\(^{208}\) Id.

\(^{209}\) Id.

\(^{210}\) Id. at 252.
used written guidelines for each academic year and the admissions counselors made their decisions based on these guidelines.\textsuperscript{211}

In making a determination for admission, the OUA considered a number of factors such as high school grades, standardized test scores, high school quality, leadership, alumni relationships, curriculum strength, and race. During the time periods in question, the University considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it was acknowledged that the University admitted "virtually every qualified…applicant" who was a member of these groups.\textsuperscript{212}

In 1995 and 1996, the OUA counselors evaluated applications based on grade point average along with what were called “SCUGA” factors which included the quality of an applicant’s high school (S), the strength of an applicant’s high school curriculum (C), and applicant’s unusual circumstances (U), and applicant’s geographical residence (G), and an applicant’s alumni relationships (A).\textsuperscript{213} The GPA score and the SCUGA scores were combined, providing the admissions counselors with an applicant’s “GPA 2” score after which the counselors used this score to reference a set of “Guidelines” tables. These tables listed GPA 2 ranges on a vertical axis and ACT/SAT scores on a horizontal axis and each table was divided into cells which included the course of action recommended for the applicant: admit, reject, delay for additional information, or postpone for reconsideration.\textsuperscript{214}

\textsuperscript{211} Id. at 253.

\textsuperscript{212} Id. at 254, citing App. To Pet. For Cert. 111a.

\textsuperscript{213} Id. at 254.

\textsuperscript{214} Id.
In the year Gratz applied, applicants with the same GPA 2 score and the same SAT/ACT scores were given different admissions decisions based on their racial or ethnic status. In Gratz’s case, her GPA 2 score and ACT scored place her in a ‘cell’ calling for a postponed decision on her application. However, a minority applicant with Gratz’s scores would have fallen in a ‘cell’ calling for admission.\(^{215}\)

In the year Hamacher applied, the University had modified its admissions procedure, slightly by altering the GPA 2 score to include additional point values under the applicant’s unusual circumstances category of the ‘SCUGA’ factors. Under the new system, applicants could receive points for minority status, socioeconomic disadvantage, attendance at a high school with a predominantly underrepresented minority population, or if the student would be considered an underrepresented minority to the program for which they were applying. The Court used the example of a male applying to the nursing program to help illustrate this point.\(^ {216}\) Under these procedures, Hamacher’s GPA 2 score and ACT score placed him in a ‘cell’ calling for a postponement of an admissions decision.\(^ {217}\) Yet, again, just like Gratz’s situation, a minority applicant with the same scores as Hamacher would have been admitted.\(^ {218}\)

By 1998, the OUA discontinued its use of the Guidelines tables and the SCUGA point system and replaced it with a ‘selection index’ where an applicant could score a

\(^{215}\) Id.

\(^{216}\) Id. at 255.

\(^{217}\) Id.

\(^{218}\) Id.
maximum of 150 points. Each applicant was awarded points based on high school grade point average, standardized test scores, academic quality of an applicant’s high school, strength or weakness of high school curriculum, in-state residence, alumni relationship, personal essay, personal achievement, and leadership experience.

The significant aspect of these qualities is that under a ‘miscellaneous’ category, minority applicants were awarded twenty points based on his or her membership status in an underrepresented racial or ethnic group.

From 1995 to 1998, the admissions guidelines called for the admission of qualified applicants from underrepresented minority groups as soon as possible because the University recognized that admitted and notifying these students early on in the admissions process made these applicants more likely to enroll. At the same time, the University monitored its rolling admissions procedures very closely to allow for certain applications to be considered which were submitted later in the admissions process by using “protected seats” to ensure there were spaces still available to specific groups. Athletes, foreign students, ROTC applicants, and underrepresented minorities were all considered protected categories and were eligible for these seats.

In 1999 and 2000, the OUA used a selection index which called for the automatic awarding of twenty points to every applicant from an underrepresented racial or minority

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219 Id.
220 Id.
221 Id.
222 Id. at 256.
223 Id.
224 Id.
Also, in 1999, the University started using an Admissions Review Committee (ARC) which gave an additional level of consideration to certain applications. Under this system, admissions counselors could ‘flag’ an application for the ARC to review if it was determined that the applicant was academically prepared to succeed at the University, had obtained a minimum selection index score, and had a quality or characteristic deemed important to the University’s make-up of its freshman class. Qualities considered were high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography. After reviewing these ‘flagged’ applicants, the ARC make a decision to admit, defer, or deny admission.

With these facts in mind, the District Court first looked at the Bakke decision in its analysis. The court pointed out that there had been no decision from the Court since Bakke that accepted or supported the diversity rationale set forth by Justice Powell in his opinion, yet there had also been no decisions refuting it either. Therefore, the District Court concluded that the University had provided firm evidence that obtaining a racially and ethnically diverse student body was a compelling governmental purpose as it provided for numerous educational benefits.

225 Id.
226 Id. at 256-257.
227 Id. at 257.
228 Id.
231 Id. at 258.
Once the University’s purpose was deemed appropriate, the court next considered whether the LSA’s admissions guidelines were narrowly tailored to its purpose. Relying, once again on the *Bakke* decision, the District Court determined that the admissions program the LSA began using in 1999 was narrowly tailored since it did not use strict quotas or set a predetermined number of minority students to admit. The District Court also determined that the automatic twenty points awarded to underrepresented minority applicants did not classify as a quota since applicants were not ‘insulated’ from each other in the actual reviewing process. At the same time, the District Court rejected the argument from the petitioners that applicants were competing for different groups of seats and that the admissions system was nothing more than a way to achieve racial balancing. The court explained this was not the case as the University was not looking to admit a certain proportion of minority candidates nor was it looking to admit a proportion that would be representative of the community.

Despite the finding that the guidelines from 1999 were constitutional, the District Court had a more difficult time with the admissions guidelines that the LSA used from 1995-1998. The challenge was due to the University’s previous use of ‘protecting’ or ‘reserving’ seats for underrepresented minority applicants which effectively did not allow for candidates who did not fall into this category to compete for these seats in the entering class. This process was in conflict with Justice Powell’s opinion from

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232 *Id.*
233 *Id.*
234 *Id.* at 259.
235 *Id.*
Bakke and the court considered this policy to have been operating as a quota system.

Based on these determinations, the court ruled in favor of the petitioners with regard to the admission policies from 1995 through 1998 and in favor of the University for the admissions policies for 1999 and 2000. However, the question remained as to the constitutionality of the consideration of race in university admissions, which is how Gratz arrived on the docket of the Court.

Throughout the litigation, the petitioners contended that the University’s use of race in consideration for admission violated the Equal Protection Clause of the Fourteenth Amendment, which was what the Court was faced with deciding. Specifically, the petitioners argued that the Court has only approved the use of racial classifications in order to rectify identified past discrimination, which was an argument that was not used by the University. Furthermore, the petitioners indicated that “diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means.” Despite this articulation, the Court rejected this argument based upon the reasons that had been set forth in Grutter, which had been decided earlier in the day before Gratz was heard by the Court.

238 Id. at 260.
239 Id.
240 Id. at 268.
Even though it was approved that the University’s interest and mission for diversity was approved as a compelling state interest, the petitioners still contended that the policy used by the University in regard to the use and consideration of race was not narrowly-tailored to achieve the interest set forth in its purpose.\textsuperscript{243} They argued that the admissions guidelines did not resemble those set forth in \textit{Bakke} by Justice Powell, yet, the University contended that its policy modeled very closely after the ideal admissions program described by Justice Powell in addition to the Harvard admission program he had endorsed in his decision.\textsuperscript{244}

Since the classification in question pertained to race, the Court required a strict scrutiny review of the policy under the Equal Protection Clause. Furthermore, the Court pointed out that “this standard of review…is not dependent on the race of those burdened or benefited by a particular classification.”\textsuperscript{245} In addition, in order to withstand this strict scrutiny, the University was required to show that the current admissions program demonstrated ‘narrowly tailored measures that further compelling governmental interests.”\textsuperscript{246} The Court went on to say that a review under strict scrutiny to determine if a policy was narrowly tailored must entail ‘a most searching examination.”\textsuperscript{247} After such an examination, the Court found that the University’s policy

\begin{itemize}
  \item \textsuperscript{242} \textit{Gratz v. Bollinger}, 539 U.S. at 268 (2003).
  \item \textsuperscript{243} Id. at 269.
  \item \textsuperscript{244} Id.
  \item \textsuperscript{245} Id. at 270 quoting, \textit{Richmond v. J.A. Croson Co.}, 488 U.S. 469, 494 (1989).
  \item \textsuperscript{246} Id. at 270, quoting, \textit{Adarand Constructors, Inc., v. Pena}, 515 U.S. 200, 227 (1995).
\end{itemize}
that automatically awarded twenty points to every single underrepresented minority applicant based only on race was not narrowly tailored to achieve the significant educational benefits derived from a diverse student body.\textsuperscript{248}

To support this affirmation, the Court relied on Justice Powell’s explanation from \textit{Bakke} and his assertion that “preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.”\textsuperscript{249} However, the Court went on to illustrate Powell’s idea about the ‘plus’ factor and that it would be okay for a university to use an admissions program that could deem particular race or ethnic backgrounds as a ‘plus’ in an applicant’s file. The ‘plus’ would be based on an evaluation of a particular applicant’s potential of bringing a diverse perspective and therefore an educational benefit to the class without race being a determinative factor for admission.\textsuperscript{250} Under Justice Powell’s view, an admissions system like this would be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.”\textsuperscript{251} At the same time, Justice Powell’s view illustrated the point that it was essential for universities to consider applicants on an individual basis and to assess all the qualities of an applicant for potential contributions to the particular university setting.\textsuperscript{252} This also conveyed the idea that one particular characteristic did not automatically determine or ensure an educational benefit to a

\begin{footnotesize}
\begin{enumerate}
\item[248] Id. at 270.
\item[249] Id. at 270, quoting \textit{Bakke}, 438 U.S., at 307.
\item[250] Id. at 270-271, quoting \textit{Bakke}, 438 U.S., at 317.
\item[251] Id. at 271, quoting \textit{Bakke}, 438 U.S., at 317.
\item[252] Id. citing, \textit{Bakke}, 438 U.S., at 315.
\end{enumerate}
\end{footnotesize}
The university’s diversity as it can vary from institution to institution. Rather, each characteristic of the applicant was considered equally in assessing an applicant’s entire application.

Based on this analysis, the Court determined that the LSA policy did not provide for individual consideration of the qualities of each applicant as it automatically provided for twenty points to every applicant who fell into the ‘underrepresented minority’ group as defined by the university. The Court went on to point out that the LSA’s automatic distribution of twenty points had the effect of making ‘the factor of race…decisive’ for nearly all minimally qualified underrepresented minority applicants which was contradicted Justice Powell’s example of the ‘plus’ factor in Bakke where “the race of a ‘particular African-American applicant’ could be considered without being decisive.”

To provide further support for their decision about the LSA’s admissions system, the Court discussed the Harvard College Admissions Program that Justice Powell had endorsed in Bakke so that they could “illustrate the kind of significance attached to race under the Harvard College program.” In doing so, they explained that the Harvard College program provided for the following criteria:

The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee

253 Id. citing, Bakke, 438 U.S., at 315.
254 Id.
255 Id. at 272, quoting, Bakke, 438 U.S., at 315.
256 Id. quoting, Bakke, 438 U.S., at 324.
might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associate with it.\footnote{Id. at 272-273, quoting Bakke, 438 U.S., at 324.}

The Court went on to clarify that the example from \textit{Bakke} provided support that the LSAs admissions program had problems since even student C’s ‘extraordinary artistic talent’ could only be rewarded with a maximum of five points whereas, students A and B would automatically award them twenty points for their applications. As such, this policy did not provide for the individualized attention to each applicant’s files that this Court and Justice Powell called for in making a determination for admission.\footnote{Id. at 273.}

The Court went on to explain that instead of looking at how each applicant’s backgrounds, experiences, and characteristics could contribute to the overall educational environment, students A and B applying to the University would automatically be awarded twenty points simply because they were African-American and student C applying to the University would only be awarded five points for his artistic talent, without taking into consideration how these qualities could specifically bring a diverse educational benefit.\footnote{Id.}

The Court went on to criticize the University’s ‘flagging’ of applicant’s files for consideration as it emphasized the defect in the University’s system as compared to Powell’s example from \textit{Bakke}.\footnote{Id. at 273.} To clarify this point, the Court used its examples of students A, B, and C. The Court first showed that student A would never be ‘flagged,’

\footnotetext[257]{Id. at 272-273, quoting Bakke, 438 U.S., at 324.}
\footnotetext[258]{Id. at 273.}
\footnotetext[259]{Id.}
\footnotetext[260]{Id.}
since the University had already admitted that automatically awarding twenty points would provide for the admission of every ‘qualified underrepresented minority applicant.’ Since student A would have been an applicant considered to be of ‘superior academic performance,’ he would have fit the description of a ‘qualified underrepresented minority’ and therefore he would have automatically been awarded twenty points. With the awarding of twenty points to student A, his admission decision would be sealed and therefore, no consideration of his background and experiences would be assessed in order to determine his potential for contributing to the diversity of the institution. Rather, every student who met the characteristics of student A would be admitted based upon his or her membership within a particular racial group.

The Court went on to explain that it was possible for students B and C to be ‘flagged,’ assuming that student B would not already be admitted based on the automatic twenty points he would be awarded based on his race and assuming that C could manage to earn another seventy points. However, the Court was not comforted by the fact that the ‘flagged’ applications would be reviewed by the admissions committee individually while ignoring the points already given to the applicant as this process did not seem to meet the strict scrutiny standard. At the same time, the Court was not optimistic that the number of ‘flagged’ applications was large and that the actually ‘flagging’ and thus the actual individual review of applicants would remain low. Furthermore, the Court pointed out that applications were only ‘flagged’ after an initial

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261 Id.
262 Id. at 273-274.
263 Id. at 274.
264 Id.
review and distribution of twenty points as a ‘plus’ which ended up making race a determinative factor in the admissions decision.\textsuperscript{265}

The University argued that the number of applications it received and that it was faced with reviewing made it impossible to review each applicant individually, but the Court disagreed with this assertion as it stated that “the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.” \textsuperscript{266}

The Court continued by indicating that Justice Powell’s opinion in Bakke did not provide for a university to employ any program or process it wanted in order to achieve the goal of diversity. Therefore, the Court concluded that since the University’s use of race in the admissions policy it was using at the time to admit freshmen was not narrowly tailored to achieve the University’s goal and mission of obtaining a diverse student body violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{267}

**Concurring Opinions**

**Justice O’Connor’s Concurrence**

In her concurring opinion for Gratz, Justice Sandra Day O’Connor contrasted her approval of the admissions policy for the University of Michigan’s Law School with her disapproval of the Office of Undergraduate Admission at UM since it did not allow for a significant amount of individualized review of all applicants.\textsuperscript{268} In doing so, she pointed out that the Law School considered, on a case-by-case basis, each diversity attribute.

\textsuperscript{265} Id.

\textsuperscript{266} Id. at 275, citing J.A. Croson Co., 488 U.S. at 508, (1989).

\textsuperscript{267} Id. at 275.

\textsuperscript{268} Id. at 276.
Yet, the Office of Undergraduate Admissions relied on the selection index which provided for an automatic 20-point bonus to every underrepresented minority applicant without evaluating the candidates overall qualities such as background and experiences.\textsuperscript{269} 

Justice O’Connor admitted that Justice Powell indicated that a university is not required to give all diversity factors the same amount of weight in evaluating candidates as this may vary from year-to-year, depending upon the ‘mix’ of a class, yet, Justice O’Connor stated that the policy at the OUA does not allow for individualized assessment of the diversity factors. This, she went on to say, demonstrated the opposite of the Law School’s policy which provided for freedom for the admissions officers to provide insight into each applicant’s ability to contribute to the overall diversity of the incoming class. However, she pointed out that the only potential source for individualized evaluation for the OUA is with the Admissions Review Committee, yet, this committee only reviewed a small portion of the applicants and according to O’Connor, was merely an “afterthought” for the rest of the admissions process with a majority of the admissions decisions made based on the initial selection index.\textsuperscript{270} Therefore, as the policy stood at the time, O’Connor could not approve of what she saw as a ‘mechanical’ admissions policy that left very little for individualized review for every applicant.\textsuperscript{271}

\textsuperscript{269} Id.
\textsuperscript{270} Id. at 279-280.
\textsuperscript{271} Id. at 280.
Justice Thomas’ Concurrence

Justice Clarence Thomas’ concurring opinion in Gratz was much shorter than his dissenting opinion from Grutter as he simply stated that the Court correctly applied the established precedents. However, he also went on to emphasize that “a State’s use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.”

Significance of Gratz & Grutter

The significance of Gratz & Grutter is not simply because race-based affirmative action policies within higher education were found to not be in violation of the Equal Protection Clause of the Fourteenth Amendment, but also because it appeared that the question of whether Justice Powell’s opinion in the Bakke decision twenty-five years prior was part of the decision and thus allowed for the diversity rationale to be accepted as a compelling reason for universities to take race into consideration during the admissions process. The splintered decision in Bakke left much to ponder as has been seen in the other higher education affirmative action cases that emerged since Bakke, yet failed to reach the Supreme Court.

Finally, with the Gratz & Grutter decisions, administrators at public institutions of higher education are free to implement race-based affirmative action policies as long as they are narrowly tailored and as long as they are implemented with the mission to create a diverse student body which will result in an educational benefit to its students.

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274 Id.

The main unit of analysis for this study was an investigation into the effects of the Gratz\(^1\) and Grutter\(^2\) decisions regarding race-based affirmative action policies at highly selective public institutions. In addition, scholarly commentary concerning the public policy of race-based affirmative action policies within higher education was provided in order to obtain an understanding of the rationale behind providing preferential treatment to specific minority applicants. The literature review provided a perspective regarding both sides of the argument in addition to how race-based affirmative action policies emerged and how they were accepted within higher education. The literature review also provided a theoretical perspective from which to interpret the arguments supporting and opposing affirmative action and the role in influencing the state legislative policy process which affects the policy formation at public institutions.

The purpose of this study was to conduct an examination of the effects of the Grutter v. Bollinger and Gratz v. Bollinger decisions regarding affirmative action policies at highly selective public institutions of higher education. As part of this study, the most recent Supreme Court decisions on affirmative action within higher education were examined. Then, federal and state laws that may impact affirmative action policies at highly selective institutions of higher education were also examined. Finally, this research examines the actual policies and what the Court deems acceptable from an equal protection viewpoint and a narrowly tailored standard.


Considerable attention was given to the *Gratz* and *Grutter* cases as many wondered if the decisions from these cases would mean the end of *Bakke* and race-based preferences within state institutions of higher education. If the Court had decided in *Gratz* and *Grutter* that race-conscious admissions plans were a violation of Equal Protection and that an institution’s interest in obtaining a diverse student body for educational benefits were not a compelling purpose for implementing such policies, then race-based affirmative action policies at public institutions would have been halted. Conversely, if the Court had upheld the Michigan policies and its rationale behind the policies, then other states, which, by the time these decisions were handed down, had begun to strike down such policies either by way of legislative action, on its own merit, or through the actions of governmental actors (i.e., Florida\(^3\)), may be encouraged to experiment and implement more of these types of admissions policies.

In *Grutter*, relying heavily on *Bakke* and Justice Powell’s remarks on diversity, the Court held that diversity was a compelling purpose for implementing race-based affirmative action admissions policies in order to achieve educational benefits derived from a diverse student body. However, the Court’s approval of diversity also communicated the point that diversity can mean many things and that numerous factors could be considered diverse in considering individuals for admission.\(^4\) The Court also continued its disapproval of quotas as it discussed and evaluated the Law School’s admissions policy even though the Law School’s policy of admitting a ‘critical mass’ was

\(^3\) FLA. ADMIN. CODE ANN. 99-281, §3 (b), (1999), with the implementation of One Florida, in 1999, Governor Jeb Bush eliminated affirmative action in college admissions at state institutions and in state contracts.

\(^4\) Id.
not seen as a quota system since it did not ‘insulate’ candidates from one another during the review process. Instead, it was seen as essential to further its compelling interest in obtaining the educational benefits of the diverse student body indicated in the mission of the institution.

The *Gratz* decision was identical in ruling that diversity was a compelling governmental interest, but the Court found that the manner in which the University considered the race of applicants in its undergraduate admissions guidelines constituted a quota-type system and was therefore in violation of the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964. However, the ruling on the constitutional issue was a victory for the University of Michigan and for affirmative action supporters.

With the Court’s affirmation that diversity was a compelling purpose for implementing race-based affirmative action admissions policies in order to achieve educational benefits derived from a diverse student body, derived from the *Gratz* and *Grutter* cases, the constitutionality of affirmative action at state supported institutions of higher education appears valid for now. At the same time, the Court has once again supported its deference to these institutions in implementing such policies. However, since these decisions, there has been no significant impact on state institutions in the

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5 Id. at 334.
7 U.S. CONST. amend. XIV.
implementation of race-based affirmative action admissions policies despite the Court’s endorsement of *Bakke*\(^\text{10}\) and race-conscious affirmative action.

**Summary**

This study traced the affirmative action movement within the context of higher education, specifically looking at the ideology behind the public policy and the Court’s decisions in *Bakke*\(^\text{11}\) which established precedence to subsequent legal challenges at the federal level and finally to the most recent decisions thirty full years later in *Gratz*\(^\text{12}\) and *Grutter*.\(^\text{13}\) First, the study looked at the historical perspective of affirmative action and highlighted procedures used in the implementation of these policies in addition to highlighting the diversity argument as an interest that Justice Powell found persuasive in *Bakke* and which the Court found persuasive in *Gratz* & *Grutter*. Secondly, this research provided a look at the jurisprudence surrounding race-based affirmative action in institutions of higher education with issues ranging from Equal Protection and strict scrutiny to academic freedom and diverging court opinions from *Bakke*. Third, a review of the litigation surrounding the precedence of *Bakke* was presented in addition to a review of the litigation pertaining to the University of Michigan Undergraduate Admissions Program and the University of Michigan Law School’s Admission Program culminating in the U.S. Supreme Court decision in *Gratz v. Bollinger* and *Grutter v. Bollinger*. Finally, this study briefly reviewed affirmative action legislation and policies at the state level since the *Gratz* and *Grutter* decisions.

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\(^{11}\) Id.


U.S. Supreme Court Affirmative Action Standards in *Gratz & Grutter*

Prior to hearing *Grutter v. Bollinger*\(^{14}\) and *Gratz v. Bollinger*\(^{15}\) the Court had not addressed the issue of the use of race in higher education in thirty years, since the landmark *Bakke*\(^{16}\) case had emerged out of the University of California at Davis Medical School. Since *Bakke* was the only Supreme Court decision on affirmative action within higher education, the Court looked to it to establish the standards and criteria used in *Grutter v. Bollinger* and *Gratz v. Bollinger*. Despite the fact that *Bakke* was a Supreme Court decision, the jurisprudence associated with race-based affirmative action policies in higher education was seen as uncertain as the *Bakke* decision had produced six separate decisions, none of which received a majority of the Court. For example, Four Justices would have upheld the program in *Bakke* to remedy past racial prejudice; Four other Justices would have struck down the program on statutory grounds; and finally Justice Powell provided a fifth vote for invalidating the set-aside program at the medical school in addition to reversing the state court’s injunction against any use of race whatsoever.\(^{17}\) In fact, the only holding in *Bakke* by the Court was that a “state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”\(^{18}\)

The question presented in *Gratz* and *Grutter* was whether the use of race as a factor in admissions policies was unlawful or in violation of the Equal Protection Clause.

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With the Court’s ‘splintered’ decision in *Bakke*, the current Court looked at Justice Powell’s opinion which announced the judgment of the Court as the criterion for constitutional analysis of race-conscious admissions policies.\(^1^9\) In his judgment, Justice Powell approved of the university’s use of race to further only one interest: “the attainment of a diverse student body.”\(^2^0\) However, Powell did not believe in diversity for diversity’s sake, nor did he believe that “it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,”\(^2^1\) Instead, Powell’s view indicated that “the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”\(^2^2\)

At the same time, the Court indicated that the admissions plan must be narrowly-tailored which meant that administrators could not use a quota system which “insulated each category of applicants with certain desired qualifications from competition with all other applicants.”\(^2^3\) Furthermore, when using race as a ‘plus’ factor in admissions, the Court indicated that the admissions program must be flexible enough to ensure that every applicant is evaluated individually and that each file is provided a holistic review.\(^2^4\)

\(^{19}\) *Grutter*, 539 U.S. at at 323.

\(^{20}\) Id. at 324, quoting *Bakke*, 438 U.S., at 311.

\(^{21}\) Id. at 324, quoting *Bakke*, 438 U.S., at 314.

\(^{22}\) Id. at 325, quoting *Bakke*, 438 U.S., at 315.

\(^{23}\) Id at 334.

\(^{24}\) Id. at 337
Diversity

The diversity rationale is of note as it is currently the only rationale that has been accepted by the Court as a compelling governmental interest to justify the use for race-based admissions policies at institutions of higher education as it was endorsed by Justice Powell in *Bakke*\(^{25}\) and reemphasized and endorsed by Justice O’Connor’s opinion in *Grutter*\(^{26}\) that the diversity viewpoint was a compelling state interest that could justify the use of race as a criteria for admission.\(^{27}\) Thus, the idea is that in creating a diverse student body, colleges and universities will better prepare its students to succeed and interact in society as it already exists in its diverse nature.

However, even if a policy were created for the purpose of achieving the educational diversity valued by the First Amendment, the assignment of a fixed number of places to a minority group was not a necessary means toward this purpose.\(^{28}\) That is, the policy must be narrowly tailored so that the “the means chosen ‘fit’…the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”\(^{29}\) This was to ensure that all factors of diversity were considered equally and that if a ‘plus’ for race were used, then race was not the determinative factor in the admission decision.


\(^{27}\) Id. at 328.

\(^{28}\) *Bakke* at 316.

\(^{29}\) Id. at 333.
Shift in Affirmative Action Policy

With respect to diversity, the focus has been on the use of race as the main diversity factor or criteria. However, diversity is not limited to race. As the Court indicated in the Grutter case, the law school did not limit the range of qualities and experiences that may be considered valuable contributions to student body diversity.\textsuperscript{30} Instead, the Court pointed out that the policy at the law school indicated that there were many possible classifications for diversity admissions, such as travel abroad, extensive community service, successful careers in other fields, and socio-economic factors to name a few. At the same time, at the law school, applicants were afforded an opportunity to emphasize their own potential diversity contributions through the submission of a personal statement, letters of recommendation and an essay demonstrating how the applicant would contribute to the life and diversity of the law school.\textsuperscript{31}

Since Bakke, there has been a shift from using race as the primary ‘plus’ factor in admissions policies to a more holistic, individualized review of applicants in making decisions for admissions. In the Bakke decision, the Court alluded to this idea that such qualities of diversity could include “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor or other qualifications as deemed important.”\textsuperscript{32} In considering all of these elements of diversity, the Court

\textsuperscript{30} Id. at 338.
\textsuperscript{31} Id.
\textsuperscript{32} Bakke at 317.
determined that an admissions program operated in such a manner allowed for flexibility in considering all elements of diversity in addition to the qualifications of the applicant, providing for equal consideration yet not necessarily providing for the same ‘weight.’

**Individualized Review**

The Court in *Grutter* alluded to this “highly individualized, holistic review” of each applicant’s file, which provided for serious consideration to all the ways an applicant could potentially contribute to a diverse educational environment. In doing so, the law school allowed for individual consideration of applicants of all races. In contrast to the policy in *Gratz*, the Court determined that in *Grutter*, the law school did not award “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity.”

The problem with the policy in *Gratz* was that it was not narrowly tailored in that every single underrepresented minority applicant received an automatic twenty point bonus without consideration of the particular background, experiences or qualities of the individual applicant. As a result, the Court determined that this “mechanized selection index score, by and large, automatically determined the admissions decision for each applicant.” Therefore, this index score precluded admissions counselors from looking at applicants on an individual basis since the score had already made this determination for them.

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33 Id.
34 *Grutter* at 337.
35 Id.
36 *Gratz* at 276.
37 Id.
38 Id. at 277.
Thus, with respect to actual policy, in *Grutter*, the Court referenced *Bakke* and the Harvard Plan,\(^\text{39}\) indicating that the law school’s policy had enough flexibility so that it did not limit the range of qualities and experiences that could be considered valuable contributions to student body diversity.\(^\text{40}\) In doing so, the law school gave substantial consideration and weight to diversity factors other than race which allowed for non-minority applicants to compete for a diversity ‘plus’ factor other than race.\(^\text{41}\)

**Applicable Judicial Decisions**

In the 1990s and early 2000s, the Circuit Courts were divided on race-based affirmative action policies and whether diversity was a compelling interest to obtain the educational benefits that institutions claimed arose from creating a diverse student body. Despite the *Bakke* decision, many courts did not view Justice Powell’s lone decision in that case as binding precedent. Instead, these courts simply saw his decision as one that help provide the last vote to invalidate quota systems, in favor of ‘plus’ systems, and to reverse the state court injunction against any use of race.\(^\text{42}\)

For example, in the 1996 *Hopwood*\(^\text{43}\) decision, the Fifth Circuit rejected the ‘plus’ factor by indicating that it was not clear if anyone else on the Court had agreed with Powell and with this in mind, the Fifth Circuit determined that there were no binding

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\(^{39}\) *Grutter* at 337.

\(^{40}\) Id. at 338.

\(^{41}\) Id.


\(^{43}\) *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).
majority decisions that these types of plans were constitutional. In coming to this conclusion, the Fifth Circuit held that ‘any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. In 1996, the U.S. Supreme Court denied certiorari in the Hopwood case indicating that “while the use of race or national origin as a factor in its admissions process is an issue of great national importance…this record is inadequate to assess definitively the constitutionality of the law school’s current consideration of race in its admissions process.”

Then in 2001, the Eleventh Circuit in Johnson v. Board of Regents struck down the University of Georgia’s ‘plus factor’ affirmative action plan in which a fixed numerical value was added to every minority application. In this instance, the University implemented an admissions policy that first considered test scores and GPA; in the second round of application evaluation, a point system was used that included many factors including race. The Eleventh Circuit held that the University’s affirmative action program was unconstitutional because it “mechanically awards an arbitrary


45 Eckes, <http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print >

46 Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

47 Eckes, <http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print >

48 Johnson v. Board of Regents of University of Georgia, 263 F.3d 1234 (11th Cir. 2001).


50 Eckes, <http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print >

51 Johnson v. Board of Regents of University of Georgia, 263 F.3d 1234 (11th Cir. 2001).
‘diversity’ bonus to each and every non-Caucasian applicant…and severely limits the range of other factors relevant to diversity.” The court did not strike down the concept of diversity as a compelling state interest; instead it struck down the policy as not being narrowly tailored. Then, just as the Fifth Circuit in Hopwood had determined, the Eleventh Circuit in Johnson asserted that Powell’s opinion in Bakke was not the holding of the Supreme Court.\(^5^3\)

Despite these divided courts, there was one Circuit that viewed Bakke as binding as the Ninth Circuit in Smith v. University of Washington\(^5^4\) held that Powell’s opinion in Bakke was ‘good law,’\(^5^5\) as it indicated that the attainment of a diverse student body was a constitutionally permissible goal for a university. It also indicated that given the support of the several justices from Bakke who were supportive of the remedial justification, the court in the Ninth Circuit would have accepted an even more expansive use of racial factors than that elaborated in Justice Powell’s opinion.\(^5^6\) For instance, the court also elaborated that “ethnic diversity can be one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”\(^5^7\) The court elaborated that some of these qualities could include, “exceptional personal talents, unique work or service experience, leadership potential, maturity, maturity,

\(^{52}\) Eckes, <http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print >

\(^{53}\) Ibid., <http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print >


\(^{56}\) Eckes, <http://findarticles.com/p/articles/mi_qa3994/is_200401/ai_n9383333/print>

demonstrated compassion, a history of overcoming disadvantage, or ability to communicate with the poor.”\(^\text{58}\) Overall, the Ninth Circuit was supportive of race used as a factor in admissions as long as there was an individualized component that did not preclude any applicants from competing for any seats simply because they were not the “right color or had the wrong surname.”\(^\text{59}\)

Despite the Ninth Circuit’s recognition that race is allowed in university admissions, it also conceded that the Court had also not looked favorably upon race-based factors more recently.\(^\text{60}\) However, the court had not looked specifically at university admissions and the Ninth Circuit pointed out that since the Court had not spoken on race-based admissions since \textit{Bakke}, then Justice Powell’s approach had not lost any of its meaning and significance within the context of higher education.\(^\text{61}\) At the same time, the Ninth Circuit emphasized that it would leave it to the Supreme Court to declare the \textit{Bakke} rationale obsolete, if it chose to ever do so, and it also emphasized that the lower courts should not necessarily speculate on what they think the Supreme Court might do, rather, they “must let it decide.”\(^\text{62}\)

**The University of Michigan Law School Litigation**

The U.S. Supreme Court decision in \textit{Grutter v. Bollinger}\(^\text{63}\) was based on a review of litigation pertaining to the Law School’s use of race in its admissions policy. In

\(^{58}\) Id. at 15450.

\(^{59}\) Id.

\(^{60}\) Id. at 15455.

\(^{61}\) Id.

\(^{62}\) Id.

Grutter, the key issue that needed to be resolved was a disagreement among the judges of the Courts of Appeals as to whether diversity was a compelling interest that could justify the narrowly tailored use of race in selecting applicants for admission to public universities.\(^{64}\) In its analysis, the Court reflected that it had last addressed the use of race in public higher education over twenty-five years ago in Bakke,\(^{65}\) and it used the criteria established in Bakke to analyze the present case. In doing so, the Court used a set of criteria to analyze the Grutter\(^{66}\) case in making its determination on the issue in question. First, the Court reminded us that Powell’s view on attaining a diverse student body was grounded in academic freedom, which usually provides academia great deference by the Court.\(^{67}\) The Court determined that based on Powell’s viewpoint in Bakke, student body diversity was a compelling state interest that could justify the use of race in university admissions\(^ {68}\) and that the Court’s conclusion that the Law School had a compelling interest in a diverse student body was informed by its view that attaining a diverse student body was a part of the Law School’s institutional missions and that “good faith” on the part of the university was “presumed” without “a showing to the contrary.”\(^ {69}\)

Finally, the Court determined that the Equal Protection Clause did not prohibit the Law School’s narrowly tailored use of race in making admissions decisions that were

\(^{64}\) Id. at 322.


\(^{67}\) Id. at 324.

\(^{68}\) Id. at 328.

\(^{69}\) Id. at 329.
meant to further a compelling interest in obtaining the educational benefits that flow
from a student body.\textsuperscript{70} The \textit{Grutter v. Bollinger} decision was a widely anticipated
decision and a victory for affirmative action proponents since the U.S Supreme Court
had finally clearly stated that race-based affirmative action policies are appropriate in
university admissions for the purpose of creating a diverse student body. The Court
was clear in explaining that the use of race in admissions was not a violation of equal
protection and the Court was even clearer in explaining that the university had a
compelling interest in securing the educational benefits of a diverse student body as
long as the policy was narrowly tailored to attain this mission.

\textbf{The University of Michigan Undergraduate Admissions Program Litigation}

The U.S. Supreme Court decision in \textit{Gratz v. Bollinger}\textsuperscript{71} was based on a review
of litigation pertaining to the University of Michigan’s Undergraduate Admissions
Program. As it did in \textit{Grutter v. Bollinger},\textsuperscript{72} the Court looked at \textit{Bakke}\textsuperscript{73} for its analysis
of the \textit{Gratz v. Bollinger}\textsuperscript{74} case as it pertained to the diversity rationale and how it
employed its admissions policy. Furthermore, the Court indicated that in order to
survive strict scrutiny, the University must demonstrate that its use of race in its
admissions program employed “narrowly tailored measures that further compelling
governmental interests.”\textsuperscript{75}

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\textsuperscript{70} Id. at 343.
\textsuperscript{74} \textit{Gratz v. Bollinger}, 539 U.S. 244 (2003).
\textsuperscript{75} Id. at 270, quoting \textit{Adarand}, 515 U.S. 200, 227 (1995).
The *Gratz v. Bollinger* decision, just like the *Grutter v. Bollinger* decision was another landmark case pertaining to race-based affirmative action within higher education. Although the Court struck down the specific policy procedure in this particular instance, it still continued to support the concept of race-based affirmative action policies as long as they were narrowly tailored to serve a compelling interest in diversity. Thus, the *Gratz* decision, just like the *Grutter* decision, was another victory for affirmative action proponents.

**Affirmative Action Legislation after *Gratz & Grutter***

The *Gratz* and *Grutter* decisions outlined the guidelines for which race-based affirmative action was permissible in terms of the U.S. Constitution. The Fourteenth Amendment provides that, “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.” This has been interpreted that the power of implementing race-based affirmative action policies is left to the states. Every state constitution and legislature varies, thus the responsibility of implementing race-based affirmative action policies is left to the policy-makers in the individual states and at the individual institutions.

Just over three years after the *Gratz* and *Grutter* decisions, the state of Michigan passed Proposal 2 on November 7, 2006, which amended the Michigan Constitution by adding Section 26 to Article 1 which banned public institutions from using affirmative action programs that gave preferential treatment to groups or individuals based on their

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76 U.S. CONST. amend. XIV
race, gender, color, ethnicity or national origin. It specifically named The University of Michigan in the legislation as it indicated that no public colleges or universities will discriminate or provide preferential treatment.\textsuperscript{77} Thus, despite the Court’s decision, the people of Michigan decided that race-based affirmative action policies were not going to be implemented in their state. By the action of the voters of the state of Michigan, the Court’s decision was nullified within a shorter period of time in which the case had been debated throughout the various court systems. Therefore, the voters and policy makers in the state of Michigan determined it no longer has a compelling purpose for such policies. This demonstrates that the Court’s decisions in \textit{Gratz} and \textit{Grutter} had no significant impact on race-based affirmative action policy and it also demonstrates that public policy can change despite the Court’s decisions in determining a compelling state interest.

Even prior to these decisions, policy-makers and voters in various states had already passed constitutional initiatives banning public entities from providing preferential treatment to individuals based on race and ethnicity. These states included California\textsuperscript{78} and Washington\textsuperscript{79} which passed their own state constitutional amendments in 1996 and 2000, respectively. Florida was another state that banned race-based affirmative action policies at its state institutions.\textsuperscript{80} However, Florida’s ban was based on then Governor Jeb Bush’s Executive Order, however, since Florida’s leadership has

\begin{itemize}
  \item \textsuperscript{77} MICH. CONST. art 1 §26 (1), (2006).
  \item \textsuperscript{78} CAL. CONST. art. 1, § 31 (a), (1996).
  \item \textsuperscript{79} WASH. REV. CODE title 49, chapter 49.60, §49.60.401, (2000).
  \item \textsuperscript{80} FLA. ADMIN. CODE ANN. 99-281, §3 (b), (1999). The implementation of One Florida by Governor Jeb Bush prohibited the use of race in admissions at state institutions.
\end{itemize}
changed with the election of Charlie Crist in 2008, there has been no indication that this order will be rescinded or that state policy makers are interested in establishing any formal policy on affirmative action at the public institutions of higher education. Thus, despite the Court’s decisions, policy makers within state legislatures could direct the legislature to prohibit or abandon such public policy or policy makers could modify the procedural aspect of the public policy so much so that there was no impact.

At the same time, since the Gratz and Grutter decisions, Texas has yet to abandon its “10 percent” plan, outlined in Texas House Bill 588\(^81\) that state legislators adopted in 1997 in an effort to admit more minority students into top public universities with race-neutral criteria.\(^82\) The legislation was adopted, at the time, in response to the Fifth Circuit Court of Appeals decision in Hopwood which prohibited public colleges and universities from considering race and ethnicity in admissions decisions.\(^83\) The policy makers who designed the law thought that 10% admissions would ensure and maintain a diverse student population at competitive universities such as the University of Texas at Austin.\(^84\) Since the inception of the plan, the system had worked as expected as minority enrollments at the University of Texas at Austin have increased in addition to rural white students who attended high schools that had previously not sent very many students to the flagship institution.\(^85\) Although the 10% plan has not been abandoned, it

\(^81\) TEX. (EDUC.) CODE ANN., § 51.801 (West 1997).


\(^83\) Ibid., http://www.insidehighered.com/news/2009/06/01/texas

\(^84\) Ibid., http://www.insidehighered.com/news/2009/06/01/texas

\(^85\) Ibid., http://www.insidehighered.com/news/2009/06/01/texas
has been modified slightly for the University of Texas at Austin which would require this flagship institution to fill only 75% of its freshman spots for high school students in the state under the plan.\textsuperscript{86} The change was in response to complaints from administrators at the University of Texas at Austin and some legislators who complained that too large of a share of the freshman class was admitted through this policy without much control over the make up of the freshman class.\textsuperscript{87} In the admissions process for the class that will enter in the fall of 2009, 86% of Texans were admitted on the basis of being in the top 10% of their high school classes.\textsuperscript{88}

Based on \textit{Gratz} and \textit{Grutter}, states face uncertainty about whether state constitutional provisions or legislation will permit race-based affirmative action policies at state institutions. At the same time, if policy-makers at state institutions implement race-based affirmative action policies, legal challenges will now involve the actual race-based affirmative action policies implemented. Although the Court in \textit{Gratz} and \textit{Grutter} determined the constitutionality of such policies, the Court did not provide for a clear understanding of a model race-based affirmative action policy. The Court once again emphasized that quotas were forbidden and that race could be used as a ‘plus’ factor as long as it was not the deciding factor, yet, the Court was not clear about when a policy is acceptable and when a policy is not acceptable. That is, the Court did not clearly define the meaning of narrowly tailored and what a narrowly-tailored policy looked like. Instead, the Court gave deference to policy-makers within higher education to

\textsuperscript{86} TEX. (EDUC.) CODE ANN., § 51.801 (West 1997).


\textsuperscript{88} Ibid., http://www.insidehighered.com/news/2009/06/01/texas
determine how a narrowly tailored policy should be designed and only a few guidelines of what a narrowly tailored policy did not look like.

In *Gratz*, the policy was not narrowly tailored and thus not acceptable because admissions officials automatically granted applicants twenty points for simply identifying with a particular race, which precluded non-minority applicants the ability to obtain these points in pursuit of admission. Whereas, in *Grutter*, the policy was deemed acceptable because the Court determined that the law school provided for individualized review of applicants. At the same time, the Court approved of the law school’s goal of attaining a ‘critical mass’ of underrepresented minority students through the use of daily reports which kept track of racial and ethnic composition of the class. In doing so however, the Court failed to clearly define ‘critical mass,’ and how this part of the policy was narrowly tailored. Instead, the Court simply indicated that an admissions policy must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weigh.” The Court then determined that the law school’s admissions policy bore “the hallmarks of a narrowly tailored plan and proceeded to explain what policy-makers at universities could not do with respect to quotas and insulating applicants for consideration.” Yet, policy-makers could still consider race or ethnicity, flexibly, as a ‘plus’ factor within the context of individualized consideration of applicants.

89 *Grutter* at 334.

90 Id.

91 Id.
After the *Gratz* and *Grutter* decisions, the focus seemed to be on the individualized review of applicants, but just how individualized remains unclear as the Court did not indicate how detailed admissions officials needed to be in evaluating individual files and just how much of a ‘plus’ was allowed. Instead, the Court emphasized flexibility in the policy and the Court also, as it has typically done in the past, deferred to the policy-makers and administrators of institutions within higher education in this instance as it failed to elaborate on what a model or narrowly tailored race-based affirmative action policy looked like.

**Conclusion**

The U.S. Supreme Court in *Gratz* and *Grutter* held that the Law School’s interest in obtaining a diverse student body was a compelling purpose for implementing a race-based affirmative action admissions policy and that such policies did not violate equal protection guarantees as long as the policies were narrowly tailored to include consideration of all applicants in the process. The decisions are notable because with diverging court opinions in various appellate courts, coupled with uncertainty pertaining to *Bakke* and whether the diversity argument represented the majority rule, the decisions provided more clarity regarding whether these policies were in violation of the Equal Protection Clause of the Fourteenth Amendment.

Following *Gratz* and *Grutter*, it seems clear for now that the Equal Protection Clause will permit race-conscious admissions programs as long as administrators at institutions narrowly tailor their policies and make a good faith effort to consider race-neutral alternatives that would help the institution achieve the diversity it seeks to provide along with the educational benefits that it claims the diversity provides. At the
same time, these decisions also seem to answer the question that diversity is a compelling purpose for the implementation of race-conscious policies. Therefore, a standard for the implementation of race-based affirmative action policies has seemingly been established so many years after *Bakke* and after many conflicting federal cases that were never granted *certiorari* to the Court. As the Court denied *certiorari* for so many years on the issue of affirmative action within higher education, speculation could be made that the Court was attempting to avoid the issue or that it simply wanted the issue to filter a bit longer through the lower courts.92 Yet, the Court finally revisited the issue and after having done so, the precedent it established or what many see as re-affirmed, may also have been an indicator of the constitutional matters that the Court desires not to hear in the near future.93 However, if the Court’s opinion is vague about certain aspects such as an official standard for a narrowly tailored admissions policy, it may, in fact, invite litigation94 in the lower courts which may ultimately lead the issue back to the Court.

The Court has held that race-based affirmative action policies are constitutional and the Court has also continued its deference, in the name of academic freedom, to individual policy-makers at the state institutions to implement these policies. Many administrators at state institutions will vary as to whether they wish to implement race-based policies depending on their mission, the make up of their student body in addition to their state constitutions which may prohibit preferential treatment based on race, sex, ethnicity, or national origin. At the same time, even if such policies were implemented

93 Ibid., 153.
94 Ibid., 154.
at institutions, the actual design of the policies will vary greatly as the Court has failed to clearly define a narrowly tailored policy. From an educational policy viewpoint, the *Bakke* decision is an example of a landmark decision on affirmative action that provides choice in the implementation of such policies. While the *Gratz* and *Grutter* decisions provide further support for *Bakke* and clear up some inconsistencies from various Circuit Courts of Appeals, *Bakke* established the argument that diversity is a compelling purpose for implementing race-based affirmative action policies while *Gratz* and *Grutter* affirmed this criterion.

However, after *Gratz* and *Grutter*, questions remain regarding affirmative action within higher education as the Court did not provide much guidance as to when an affirmative action policy procedure is acceptable and when it is not acceptable. That is, the threshold of when a policy violates an individual's equal protection has not been determined and it remains unclear as the Court has not provided for a litmus test that could provide a clear answer as to when a policy passes the threshold.

The following policy considerations are at the center of any race-based affirmative action plan:

- Holistic (i.e., does the policy look at all characteristics of the applicant and consider all elements together rather than looking at one single factor to make a decision)
- Equal protection, equal opportunity (i.e., do all applicants have the same chance of acceptance? Do all applicants start off on "equal" footing?)
- Mission of the institution (i.e., what is the purpose of the use of race-conscious admissions policies and does it fit within the goals and aim of the institution?)
- Diversity (i.e., is the purpose of the implementation of a race-conscious admissions program to enhance the diversity at the institution in order to provide an educational benefit to the student body?)
• Narrowly tailored (i.e., is the policy tailored to the specific purpose indicated? Is it flexible?)

Policy makers at state institutions who decide to implement these types of policies must also address the fact that there are other forms of diversity without placing a racial classification on it that would assist in racially and ethnically diversifying an institution’s campus. At the same time, they have the responsibility to seek race-neutral alternatives to admissions that would allow for the diversity desired by the institution in order for students to obtain the educational benefits received from exposure to a diverse student body. Without doing so, policy-makers at institutions will only be subject to more lawsuits as it has already been indicated that such policies must be limited in time and eventually phased out.

Finally, it remains unclear that previous appellate decisions on affirmative action in higher education, such as Hopwood, are no longer “good law” as every Circuit Court of Appeals is only a few rulings away of determining that race-based affirmative action policies are unconstitutional at which time, the Gratz and Grutter cases, and even Bakke, would be insignificant at the given moment. Despite the ruling in Fisher, the adherence to prior decisions may remain intact in certain jurisdictions. The limited in time concept that Justice O’Connor alluded to in her opinion in Grutter, may arrive sooner rather than the twenty-five years that elapsed between the Bakke and Gratz and Grutter decisions.

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95 Fisher v. University of Texas at Austin, Case No. A-08-CA-263-SS (2009) (not yet published to S.W.2d). Case law from the United States District Court for the Western District of Texas in which a federal judge, Sam Sparks, ruled that University of Texas at Austin administrators had followed the diversity guidelines set forth in Gratz and Grutter. Additionally, Judge Sparks concluded that the policy was narrowly tailored to its purpose and that administrators provided for holistic review of applicants. In his concluding remarks, Judge Sparks alluded that as long as Grutter remained “good law,” then the University of Texas’ current admissions program remains Constitutional.
Implications

The major implication of the Grutter v. Bollinger and Gratz v. Bollinger decisions goes beyond the constitutional issues of race-based affirmative action policies within higher education. The issues, as revealed in this research, are settled by the Court, however, the policy itself and its implementation remains with the policy-makers of the individual states and individual institutions. Therefore, the future of race-based affirmative action policies remains within the realm of state constitutional and legislative initiatives as already seen with several states that have already passed constitutional amendments forbidding the use and implementation of such policies or those legislatures that have implemented race-neutral alternatives such as the states of Texas and California with percent plans.

The U.S. Supreme Court’s Gratz and Grutter decisions seem to resolve the constitutional question of whether race-based affirmative action programs at institutions of higher education violate the Equal Protection Clause of the Fourteenth Amendment in addition to whether the diversity argument is an acceptable rationale for the implementation of such programs and policies. The Court’s decisions shift the issue back to policy-makers of individual states and institutions for them to determine whether such policies shall be implemented as long as the policies are consistent with the criteria established by the Court. The decisions did not mandate that race-based affirmative action policies be used nor did the decisions nullify already existing state constitutional laws or legislation that forbade the use of these policies or used race-neutral alternatives. Rather, the decisions simply confirmed that race-based affirmative
action policies were constitutionally permissible. As included in his conversation on precedents, Gerhardt illustrated a theory on precedence made by Alexander Bickel, a constitutional law scholar, that “virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.”

What this means is that Supreme Court decisions, and therefore, the *Gratz* and *Grutter* decisions cannot make an impact on their own; rather, there must be support from constituencies such as legislatures, policy-makers and often the people who have the most to gain or lose in these decisions. However, what was determined by *Grutter*, or at least asserted by Justice O’Connor, was that the use of such policies “must be limited in time,” as “enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.”

Despite the great anticipation of the *Gratz* and *Grutter* decisions, there has been no significant impact or any far-reaching implications on the implementation of such policies at highly selective public institutions since these decisions were handed down over six years ago. The public policy would only impact a handful of institutions as the policy does not apply to every institution such as open enrollment institutions, or institutions with lower criteria for admission. Even if it does apply to an institution, policy makers at many highly selective institutions have not implemented such policies. If a Court’s decision is to be validated, policy must be exercised on its behalf. After all, the decisions alone do not create policy; the Court simply attempted to provide guidance.

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96 Ibid., 156.

with respect to such policies should policy-makers instigate a dialogue that would shape and create more race-based affirmative action policies.

However, based on the analysis and despite established precedence, current policy trends show that policy makers in states and at highly selective public institutions are engaged in policies that do not use race as a factor in admissions or that race-neutral alternatives are being used. Even if the Court had struck down affirmative action as a public policy within higher education, many policy makers have already shown that carefully tailored race-neutral plans such as the 10% plan in Texas, have been able to ensure diverse student populations at highly selective institutions over time and are therefore being used instead. That is, policy makers at highly selective institutions and policy makers in states where there are highly selective institutions, are choosing alternative measures in how their admissions processes work despite the decisions. By using these race-neutral alternatives, policy makers at these institutions may be insulated from becoming one of the next parties to an affirmative action cause of action that is heard before the Court.

Finally, although the Gratz and Grutter decisions are established precedence, the Gratz and Grutter decisions have not had any significant effects on affirmative action as a public policy within higher education because despite the status of precedence, they are not necessarily binding decisions as those who are confronted with the same legal issue may not necessarily be bound by this earlier judicial decision.\footnote{Gerhardt, 152.} This does not mean that lower courts will not follow the precedence based upon the similarity of facts
and people could reasonably expect that this would occur. However, it may be more accurate to say that the decisions may simply provide some persuasive authority as the more closely related a dispute is to one that the Court has already decided, the more likely lower courts would follow the decision. Yet, ultimately, lower courts may exercise discretion in certain instances based upon changes in circumstances as well as the political context in which the debate has arisen. After all, this will be the case at some point as it pertains to race-based affirmative action within higher education if such policies will reach a termination point.

The effects of the *Gratz* and *Grutter* decisions seem to provide the opposite effects of the political climate of institutions of higher education which have espoused the benefits for diversity over the last thirty years since the *Bakke* decision. At the same time, for such highly anticipated decisions in 2003, the decisions seem somewhat insignificant as they apply to a very select few institutions as the policy may only impact highly selective public institutions. These landmark decisions leave the policy making and implementation to the individual states and institutions and in doing so, provides for each state and institution to address its own needs and address the mission it undertakes for its students and potential students. The appeal for race-based affirmative action is the idea that creating a diverse student body will provide educational benefits for the entire student body. Whether race-based affirmative action policies can achieve these goals depends on the goals and missions of these institutions and the diversity of the student body to provide these educational benefits.

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99 Ibid., 152.

100 Ibid., 152.
Additionally, whether these policies are permitted or implemented seems to rely largely on the goals of the people of the states and leaders within the legislatures.

Recommendations for Further Research

The decisions in *Gratz* & *Grutter* will not change the controversy surrounding race-based affirmative action policies and public opinion from opponents that such policies are a form of reverse discrimination and proponents arguing that such policies are needed to provide for a diverse student population at various institutions. Despite these most recent decisions on affirmative action policies in higher education, questions still remain such as whether a diverse student body does provide benefits and how much. At the same time, questions remain pertaining to the narrowly tailored policies of affirmative action that must exist if such policies were to exist at all. As Crump indicated what occurred in *Gratz* and *Grutter*, “the majority seemed to explain what narrow tailoring is not, rather than explaining what it is.”\(^{101}\) Another issue at the core of this controversy is the question of what constitutes as diversity and who should be classified as an underrepresented minority student. Some argue that affirmative action programs have neglected those students who actually need it and would benefit from it: those attending the worst minority schools.\(^{102}\) While others argue that racial affirmative action simply benefits the most advantaged minority students thus providing little help for the


poor and working class students of color.\textsuperscript{103} Through the use of economic affirmative action instead of race-based affirmative action, benefits would be derived from a whole new “cohort,” of individuals that included not only African Americans and Latinos, but also working class Caucasians and Asians.\textsuperscript{104}

Further study in the following areas may provide for an increased understanding of the use and implementation of race-based affirmative action policies:

- Examine more race-neutral ways to increase student body diversity.
- Examine the relationship with race-based financial aid policies and admissions policies.
- Further investigate the idea that a diverse student body provides educational benefits to the student body and specify which benefits and how much students are benefited.
- Investigate how those states with constitutional provisions prohibiting race-based policies are dealing with maintaining a diverse student population at their public institutions.
- Examine the narrow tailoring aspect of race-based policies to provide a more definitive answer as to what constitutes narrowly tailored and thus a legitimate policy.

Such examinations would benefit the public policy discussion regarding race-based affirmative action policies at public institutions of higher education. Finally, courts and policy-makers would benefit from the research in determining specific procedural guidelines of such policy, which is currently vague.


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12. U.S. CONST. amend. XIII
13. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
14. 34 C.F.R. §100.3
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BIOGRAPHICAL SKETCH

Kari A. Mattox received her Bachelor of Arts degree in English literature in May of 1998 from Florida State University, graduating magna cum laude. In the Spring of 1999, Ms. Mattox matriculated at the University of Florida, Levin College of Law, pursuing the degree of Juris Doctor and graduating in December of 2001. Upon graduation, Ms. Mattox worked for the University of Florida College of Pharmacy while applying for admission to the doctoral program in Higher Education Administration within the College of Education at the University of Florida. In the Summer of 2002, Ms. Mattox matriculated into the doctoral program for educational leadership and policy. Throughout the completion of the program, in addition to the College of Pharmacy, Ms. Mattox has been employed by the University of Florida Department of Housing; Santa Fe Community College, as a Student Development Specialist; and finally, as the Assistant Dean of Students at the Levin College of Law, where she is presently employed. Ms. Mattox’s research interests include higher education law and policy in addition to public school law.