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ARTICLES

The Cost of Good Intentions: Why the Supreme Court's Decision Upholding Affirmative Action Admission Programs is Detrimental to the Cause

Leslie Yalof Garfield¹

I. Introduction

The Supreme Court's decision in *Grutter v. Bolinger*,² which upheld the University of Michigan School of Law's race-preference admission plan, seemed cause for celebration among affirmative action proponents. The decision marked the first time that the Court upheld a race-preference admission plan against an Equal Protection challenge.³ Though the decision is celebratory in theory, in fact it is not much of a gain for those who believe that the only way to ensure a diverse classroom is through affirmative action programs.

Specifically, the Court ruled that an affirmative action admission policy is permissible if it provides for admissions officers to individually review each applicant.⁴ Individual review, the Court found, allowed for admissions officers to consider race as a factor in the admissions process, but not to the exclusion of other personal attributes that might add to diversity in the

1. Professor of Law, Pace Law School. B.A., with Honors, Univ. of Florida, 1982; J.D., Univ. of Florida, 1985. The author would like to thank Kristin Furrie and Katy O'Connor for their outstanding research assistance.

2. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

3. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

4. *Grutter*, 539 U.S. at 337, 341.

classroom.⁵ Considering race as one factor among many passed Constitutional muster.⁶

Proponents of affirmative action heralded the *Grutter* decision because it retained Justice Powell's edict in *Regents of the University of California at Davis v. Bakke*,⁷ that race can be considered as a factor in the admissions process. However, the reality of the decision means that schools must construct affirmative action policies that meet the stringent limitations of the Court's most recent decision on the issue.⁸ Specifically, post-secondary schools that choose to consider race as a factor in admissions must individually review each applicant to the school.⁹

Ensuring individual review is an attainable goal for law schools and small liberal arts colleges.¹⁰ However, such a goal is highly problematic for large universities as their applicant pool can be as high as 500% of that of the smaller schools.¹¹ Consequently, the only way for a large number of the country's colleges and universities to meet the demands of the *Grutter* decision is to hire additional admissions officers who can provide the kind of review mandated by the Court.¹²

5. *Id.* at 334-41.

6. *Id.* at 342-44. The Court established that a university's objective of achieving racial diversity to further its educational mission is a compelling governmental interest that can survive strict scrutiny. *Id.* at 328-30. The Court confirmed that the Law School's use of race is a "plus" factor when considering applicants individually is narrowly tailored because non-minority applicants are not unduly harmed. *Id.* at 341-44.

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

8. See discussion *infra* Part III.

9. *Grutter*, 539 U.S. at 333-44 (upholding the University of Michigan Law School's affirmative action policy because it provided for individual review of each applicant, whereby race became a "plus" factor among the multitude of diversity factors used in admissions).

10. For example, the University of Michigan Law School received "more than 3,500 applications each year for a class of around 350 students." *Id.* at 312-13.

11. In fact, the University of Michigan said as much in its arguments before the Court. However, in his decision in *Gratz*, Justice Rehnquist rejected the position. Respondent's Brief at 6 n.8, *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (No. 02-516), available at 2003 WL 402237 (last visited Sept. 28, 2006).

12. See, e.g., Greg Winter, *After Ruling, 3 Universities Maintain Diversity in Admissions*, N.Y. TIMES, Apr. 13, 2004, at A22 (noting that Ohio State "spent an additional \$250,000 on the admissions process this year [the year following the Supreme Court decisions in *Gratz* and *Grutter*], and added thirty-five application readers"); Karen W. Arenson, *The Supreme Court: Affirmative Action, Impact on Universities Will Range From None to a Lot*, N.Y. TIMES, June 25, 2003, at A22

However, hiring additional admissions officers comes at a cost. Like most other services, this cost is passed to the consumers. The most logical way for schools to foot the bill for the *Grutter* mandate therefore is to increase the application fee to the nation's institutes of higher education. While this is a seemingly innocuous means to meet the higher goal of achieving diversity in the classroom, the practical effect of increasing application fees is that it will arguably deter a disproportionate number of underrepresented minorities, who are often members of the lowest socio-economic classes.¹³ If this assumption is indeed true, then the very decision that has been heralded for achieving diversity in the classroom will, in fact, result in quite the opposite.

II. The Advent of Affirmative Action in College Admissions

To understand the dilemma that those charged with creating affirmative action admission programs face, it is important to have a sense of how the application process works. As a general matter, the college and post-college application review process is quite uniform among American institutions of higher education. Most schools require applicants to submit their high school transcript, standardized test scores,¹⁴ a summary of their co-curricular and extra-curricular activities, personal recommendations and a personal statement.¹⁵ High school tran-

(quoting Michigan President, Dr. Mary Sue Coleman as saying "Michigan is likely to have to expand its admissions staff" in order to provide for individual review).

13. Application fee waivers are available at many universities. However, requesting such a waiver is typically a separate, additional task and not part of the application for admission. Students must demonstrate financial need and these requests are subject to rejection. In the case of the University of Michigan School of Law, waivers requested exceed the number available and are awarded on a "first-come, first-served basis." See University of Michigan Law School: Prospective Students, <http://www.law.umich.edu/prospectivestudents/admissions/appfee.htm> (last visited September 6, 2006).

14. This can include, among other tests, SAT I, SAT II, GMAT, and MCAT.

15. The Princeton Review, What You Should Know Before You Apply, <http://www.princetonreview.com/college/apply/articles/process/appprimer.asp> (last visited September 6, 2006). Over 250 schools have adopted the common application, which is a standard, uniform application form that is used for admission to undergraduate programs. See Welcome to the Common App!, <http://www.commonapp.org> (last visited September 6, 2006) (the Common Application is used by nearly 300 member colleges and universities for admission to their undergraduate programs). More and more colleges are using the common application, as there are

scripts provide admissions officials with an understanding of a student's academic achievement and the rigor of his or her educational experience. Most schools provide colleges with a cumulative grade point average (GPA), which provides reviewers with an objective quantifiable number against which they can measure other applicants.¹⁶ The co-curricular and extra curricular activity sheet, personal statement, and recommendations provide reviewers with an understanding of who the student is, what makes her unique and what she will contribute to the institution to which she is applying.¹⁷

Admissions officials also pay a significant amount of attention to standardized test scores. Standardized test scores are an essential component of the application process because they are easily quantifiable, easily comparable and, arguably, objec-

twenty-three new member colleges/universities for 2005-2006. *See Id.*; *see also* Rachel Moran, *Sorting and Reforming: High-Stakes Testing in Public Schools*, 34 AKRON L. REV. 107 (2000):

In 1892, the National Education Association created the Committee of Ten to draft recommendations for strengthening the curriculum in America's high schools. This group was the first "blue ribbon panel" to address such an issue. The Committee's work was influential in developing not only secondary school course offerings, but also standards for college admissions. The resulting recommendations focused on giving modern academic subjects the same weight as classical ones and on ensuring that all students received the same preparation for "the duties of life" through a liberal education, regardless of whether they were college-bound. The Committee of Ten's report prompted the formation of yet another committee, this time to review college admissions criteria. As a result of efforts to standardize high school graduation and college entry requirements, the College Entrance Examination Board was established. The Board developed a unified examination system for admission to college. The topics chosen for the test shaped high school offerings at schools with students headed for higher education; the scope and difficulty of the tests established something akin to voluntary national standards in each subject.

Id. at 110.

16. *See* The Princeton Review, *Competition in the Application Process – Myth vs. Fact*, <http://www.princetonreview.com/college/apply/articles/process/competition.asp> (last visited September 6, 2006) ("[t]oday the primary factor in college admission is the high school transcript.").

17. *See* The Princeton Review, *Sophomore Year – Time to Narrow Down Your Extra Curricular Activities*, <http://www.princetonreview.com/college/research/articles/prepare/extracurriculars.asp> (last visited Oct. 28, 2006) ("[t]o a large extent, a college's opinion of how interesting you are will be determined by what you do when you're not in class. Your extracurricular activities can play a big part in distinguishing you from other applicants and determining your chances for admission.").

tive.¹⁸ Indeed, the widespread and heavy reliance on these scores have made them “a fixture of the college application process.”¹⁹ The Scholastic Aptitude Test (SAT)²⁰ is the most widely used standardized test score.²¹ The SAT was created in the mid-1940s to eliminate the elitist favoritism that was rampant among admissions offices in America’s top colleges and universities.²² In order to even the playing field, Henry Chauncey, Chief of the Educational Testing Service (ETS) and James Bryant Conant, Harvard University President, worked together to make the SAT a “hurdle for admission to the country’s prime universities.”²³ Their efforts succeeded and the SAT took off as one of the two most important means for evaluating students

18. See Theodore M. Shaw, *Comments of Theodore M. Shaw*, 30 COLUM. HUM. RTS. L. REV. 489 (Summer 1999):

There was a [New York Times] series about athletics in New York City. It focused on who gets what and who doesn’t get what. You take these vast inequalities, and then get to the college application process. You then realize that over the last thirty years, we have increasingly become a society run as a testocracy where the opportunities one gets in life depends, in large part, on which institutions one has attended and how one performs on standardized tests. These standardized tests reflect in part, who is class privileged, since we know that the strongest correlation on the SAT, or even the LSAT, is with economic status or whether your parents went to college, graduate or professional school.

Id. at 492.

19. Moran, *supra* note 15, at 111.

20. Originally, the SAT was called the “Scholastic Aptitude Test,” but in 1997 the Educational Testing Service (ETS) changed the name to the “Scholastic Assessment Test.” Christopher Jencks, *Racial Bias in Testing*, in THE BLACK-WHITE TEST SCORE GAP 64-66 (Christopher Jenkins & Meredith Phillips eds., Brookings Institute 1998). If the SAT measures aptitude and African-Americans score lower on the SAT than white students, this suggests that African-Americans suffer from “some kind of innate disability.” *Id.* at 66. After unsuccessfully arguing that “the SAT measured abilities developed over many years,” ETS changed the name of the SAT to the Scholastic Assessment Test. *Id.*; see also Shaw, *supra* note 18, at 489.

21. The ACT is another standardized test that first began in 1959. See FAQs About Signing Up For and Taking the Test, <http://www.actstudent.org/faq/faq.html> (last visited September 6, 2006). While not as popular as the SAT, nearly 1.2 million students took the ACT in 2004. *Id.* The test covers English, math, reading, and science, and is taken by more than 50% of high school graduates in approximately 25 states. *Id.*; see also ACT or SAT - How to Choose Between the SAT and the ACT?, <http://collegeapps.about.com/od/satactandotherexams/f/satoract.htm> (last visited September 12, 2006).

22. Hardy Green, *How the SATs Changed America*, BUSINESS WEEK, Oct. 25, 1999, at 15.

23. *Id.* Interestingly, Carl Brigham who invented the SAT was opposed to ETS and it was not formed until after his death. NICHOLAS LEMANN, THE BIG TEST:

for admission to school (the other being high school grade point average).²⁴

As the 1950's progressed, college enrollment increased dramatically and more schools began to require the SAT.²⁵ In 1957 over half a million students took the SAT.²⁶ By 1970, over two million students were taking the SAT each year.²⁷ In 2003 a record number of students took the SAT, marking the largest increase in the number of test takers in fifteen years.²⁸

The SAT provided a quick and dirty means to admit students.²⁹ Indeed, the use of these standardized tests proved so beneficial to expediting the admission process that graduate schools soon joined the bandwagon.³⁰ Admission to law school is predicated on the Law School Admissions Test (LSAT),³¹ graduate schools consider an applicant's score on the Graduate Man-

THE SECRET OF HISTORY OF AMERICAN MERITOCRACY 268 (Farrar, Straus & Giroux eds., 1999).

24. LEMANN, *supra* note 23, at 155-56.

25. *Id.* at 85.

26. *Id.*

27. *Id.* at 218.

28. In 2003, 1.4 million students took the SAT, and earned average scores of 519 for math and 507 for verbal. KRISTIN CARNAHAN & CHIARA COLETTI, THE COLLEGE BOARD, SAT VERBAL AND MATH SCORES UP SIGNIFICANTLY AS A RECORD-BREAKING NUMBER OF STUDENTS TAKE THE TEST: AVERAGE MATH SCORE AT HIGHEST LEVEL IN MORE THAN 35 YEARS (2003), http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2003/pdf/CBS2003Report.pdf. The number rose slightly in 2004, when a record setting 1,419,007 high school students took the SAT. Average scores were 508 for verbal and 518 for math. KRISTIN CARNAHAN & CHIARA COLETTI, COLLEGE BOARD, SAT SCORES HOLD STEADY FOR COLLEGE BOUND SENIORS (2004), http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2004/CBS2004Report.pdf.

29. See Michael A. Olivas, *Affirmative Action: Diversity of Opinions: Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1070 (1997) (noting that test scores and grades are "extremely useful in sorting out applications."); Brief for the Respondent at 6, n.8, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) (arguing that due to the volume of applications, individual review is overly burdensome).

30. The MCAT was first developed in 1928, but did not become the narrow MCAT that we know today, focusing on science and cognitive skills, until 1977. See Robert C. Bowman, M.D., *History of the MCAT*, http://www.unmc.edu/Community/ruralmeded/history_of_the_mcat.htm (last visited September 6, 2006). The LSAT was first administered in February of 1948. See Law School Admission Council, <http://www.lsacnet.org/LSAC.asp?url=lsac/research-reports/RR-94-01ExecutiveSummary.htm> (last visited September 6, 2006).

31. See Law School Admission Council, <http://www.lsac.org/LSAC.asp?url=lsac/about-the-lsat.asp> (last visited September 6, 2006) ("[t]he Law School Admission Test (LSAT) is a half-day standardized test required for admission to all ABA-

agement Admissions Test (GMAT),³² and medical schools require applicants to take the Medical College Admissions Test (MCAT).³³

College admissions officials generally looked at the mean standardized test score and grade point average of their applicant pool, comparing those factors against students admitted to the academic institution in previous years and were able to draw a line, marking the point at which students would be accepted or rejected from a school.³⁴ Students above the mean were considered for admission to the school; students below the mean were rejected. Consequently, a student's standardized test score often dictated the likelihood of admission to a college, university or graduate school.³⁵

approved law schools, most Canadian law schools, and many non-ABA-approved law schools.”).

32. See *Why Use the GMAT Exam?*, <http://www.gmac.com/gmac/TheGMAT/WhatIsTheGMAT/WhyUsetheGMAT.htm> (last visited September 6, 2006) (“[t]housands of graduate management programs around the world use the Graduate Management Admission Test in their admissions process.”). The Graduate Management Admission Test (GMAT) examination consists of three main parts, the Analytical Writing Assessment, Quantitative section, and Verbal section. See *Format and Length*, <http://www.gmac.com/gmac/TheGMAT/WhatIsTheGMAT/FormatandLength.htm> (last visited September 20, 2006).

33. See *Welcome to the Official Medical College Admission Test (MCAT) Website*, <http://www.aamc.org/students/mcat/start.htm> (last visited September 6, 2006) (“[t]he Medical College Admission Test (MCAT) is a standardized, multiple-choice examination designed to assess problem solving, critical thinking, and writing skills in addition to the examinee’s knowledge of science concepts and principles prerequisite to the study of medicine. Scores are reported in each of the following areas: Verbal Reasoning, Physical Sciences, Writing Sample, and Biological Sciences. Medical college admission committees consider MCAT scores as part of their admission decision process.”).

34. College admissions officials generally consider factors such as grades, test scores, high school curriculum strength, high school quality, geography, alumni relationships, leadership, race, and ethnicity. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 253-54 (2003) (noting the admission factors used by the University of Michigan). The pressure to use SAT scores is increased by the use of mean SAT/ACT scores in ranking colleges. U.S. News & World Report considers mean SAT/ACT score as part of a measure of the school’s selectivity. See *America’s Best Colleges 2007: Undergraduate Ranking Criteria and Weights*, http://www.usnews.com/usnews/edu/college/rankings/about/weight_brief.php (last visited September 20, 2006). The mean SAT/ACT scores actually have more weight than high school G.P.A. See *Id.*

35. William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131 (2002) (calling the SAT the “gatekeeper of higher education”) (citing GEORGE H. HANFORD, *LIFE WITH THE SAT: ASSESSING OUR YOUNG PEOPLE*

Relying on standardized tests, however, became increasingly problematic as it tended to benefit non-minorities and to have a deleterious effect on minorities.³⁶ As a general matter, African-Americans performed less well on the tests than their non-minority peers.³⁷ Many agreed that the tests asked questions that were biased against minorities.³⁸ "The Scholastic Achievement Test, [in particular] . . . has been widely criticized in this regard."³⁹

Indeed, the bias in the SAT is caused by a variety of factors⁴⁰ and the precise explanation for the fact that minorities

AND OUR TIMES 90 (1991)) (stating that, according to former College Board President George Hanford, "the SAT served as the most widely used and possibly the most important single talent search device the country had.").

36. See Christopher Jencks & Meredith Phillips, *The Black and White Test Score Gap: An Introduction*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 20, at 7-8; Thomas J. Kane, *Racial & Ethnic Preferences in College Admissions*, *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 20, at 431-56; see also, Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, and the NCAA*, 8 STAN. L. & POL'Y REV. 141, 145 ("[t]he average SAT score for African Americans in the 1980s and 1990s has hovered around 730, while the average for whites during this same period of time has remained about 200 points higher at approximately 930.").

37. LEMANN, *supra* note 23, at 155-56. See also Jencks & Phillips, *supra* note 36, at 1 ("[t]he typical American black still scores below 75 percent of American whites on most standardized tests. On some tests the typical American black scores below more than 85 percent of whites."); Kidder & Rosner, *supra* note 35, at 131 ("data from the [N]ational Assessment of Educational Progress (NAEP), the National Educational Longitudinal Survey (NELS), and the SAT all confirm the results of state educational assessments: African-Americans and Latino Students lag behind their peers from other ethnic groups at every educational level").

38. *Id.* In fact, in 1972 ETS's director of minority affairs, Chuck Stone, quit ETS and publicly announced that the test was biased against minorities. LEMANN, *supra* note 23, at 221; see also Shropshire, *supra* note 36, at 150 (listing examples of common arguments made by those who assert the SAT is not biased).

39. Stuart Biegel, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533, 1574 (1995) (citing Jonathan Baron & M. Frank Norman, *SAT's, Achievement Tests, and High School Class Rank, as Predictors of College Performance*, 52 EDUC. & PSYCHOL. MEASUREMENT 1047 (1992) (noting that Achievement Test results correlated more consistently with class rank than did SAT scores in a study at the University of Pennsylvania)); see generally JAMES CROUSE & DALE TRUSHEIM, *THE CASE AGAINST THE SAT* (1988) (discussing, *inter alia*, the negative impact on black and lower-income college students).

40. See for example Jencks, *supra* note 20, at 55-85, discussing labeling bias ("when the tests claim to measure one thing but actually measure something else"), content bias ("when a test claims to measure something that could in principle be measured in an unbiased way, but fails to do so because it contains questions that favor one group over another"), methodological bias ("when a test assesses mastery of some skill or body of information using a technique or method

have traditionally scored lower than non-minority students has not been fully determined.⁴¹ However, a prominent explanation is that the test is biased because the questions on the SAT require knowledge of “[w]hite upper-middle class social norms.”⁴² A common cited example of a culturally biased question from an early 1980s exam is:

RUNNER: MARATHON

- (A) envoy: embassy
- (B) martyr: massacre
- (C) oarsman: regatta
- (D) horse: stable⁴³

Approximately 53% of whites chose C, the correct answer, but only 22% of African-Americans chose C.⁴⁴ Critics of the test hypothesized that test takers from lower income households failed to properly answer the question because the word regatta was not in their vernacular.⁴⁵

that underestimates the competence of one group relative to another”), prediction bias (“whenever a test is used to predict an individual’s future performance”), and selection system bias (which arises whenever three conditions are met: “(1) performance depends partly on cognitive skills and partly on other traits; (2) it is easy to measure cognitive skills but hard to measure the other traits that determine performance; and (3) the racial disparity in cognitive skills is larger than the racial disparity in the other, unmeasured traits that influence performance”).

41. *See Id.* (examining the roles of test structure bias, heredity, environment, family, and income in the black-white test score gap). Those assessing the clear disparity among test scores thought it was because objective tests tested skills taught in schools that they were not allowed to attend. *See Kidder & Rosner, supra* note 35, at 155-58 (“[r]ace was the one area that threw the contradiction between the idea of the system (that it would fully deliver on the promise of American democracy) and the reality of it (that it apportioned opportunity on the basis of a single, highly background-sensitive quality) into the starkest relief.”).

42. Kidder & Rosner, *supra* note 35, at 156 n.74 (citing John Weiss, *The Golden Rule Bias Reduction Principle: A Practical Reform*, 6 EDUC. MEASUREMENT ISSUES & PRACTICE 23-24 (Summer 1987)).

43. *Id.*

44. *Id.*

45. Not all the questions where minorities score lower than non-minorities are racially biased. In fact, on many SAT questions that appear facially neutral, whites still score much higher than African-Americans. *Id.* at 153-55. For example:

The singer now performs a more _____ repertoire of songs than in the past, when he sang only traditional ballads.

- (A) sentimental
- (B) experimental
- (C) mellow
- (D) customary

The disparate impact of the SAT yielded a widening divide of access to education between the elite and members of low socio-economic status and/or underrepresented minority classes.⁴⁶ This growing inequity in admissions as a result of heavy reliance on the standardized test became a problem against the landscape of the emerging civil rights movement.⁴⁷ As a general matter, politicians, government officials, and educators showed a heightened awareness of the lack of accessibility to higher education, and ultimately the professions for which these schools trained students. Consequently, colleges and post-graduate in-

(E) wary

Id. at 153. While 59% of whites answered correctly (choosing B), just 37% of African-Americans answered correctly. Kidder & Rosner, *supra* note 35, at 153. Therefore, questions where minorities score lower than non-minorities are not always easily identified. *Id.* In their article, Kidder and Rosner suggest that the problem of culturally biased questions is magnified because the disparate impact on minorities is built-in to the system, which results in a perpetual system of bias. *Id.* at 146. The SAT contains scored questions and un-scored questions. *Id.* The ETS statistically analyzes the answers to the unscore questions to determine whether they will appear on future SAT exams. *Id.* In particular, the ETS seeks to ensure that the questions (1) are reliable, which means consistent with the rest of the exam and (2) meet a specified level of difficulty. *Id.* at 156. ETS determines reliability based upon "the correlation between performance on that item and performance on the test overall." *Id.* at 157. As mentioned above, whites tend to answer some questions correctly more often than African-Americans. *Id.* at 156. The converse—African-Americans students tend to answer some questions correctly more often the white students—is also true. *Id.* at 158. However, due to the reliability requirements in selecting questions, the pre-tested questions where African-American students out perform white students are not often included in the SAT. *Id.* Questions with bias favoring "[w]hites will tend to spuriously appear as reliable . . . because the benchmark of reliability is simply the sum total of all biased and unbiased questions—meaning there is a 'tyranny of the majority' dilemma inherent in the way reliability is constructed." *Id.* at 158. Thus, the system of pre-testing questions is a "self-perpetuating" system that continues to result in a disparate impact on minorities. *Id.* at 158-59.

46. See generally Nicholas Lemann, *The Great Sorting*, THE ATLANTIC MONTHLY, Sept. 1995, at 84.

47. The SAT was widely in use by the 1950s. At the same time, the Civil Rights movement was emerging. In 1957, Congress passed the first civil rights legislation since Reconstruction. See The Dwight D. Eisenhower Library, Civil Rights – The Civil Rights Act of 1957, http://www.eisenhower.archives.gov/DI/Civil_Rights_Civil_Rights_Act/CivilRightsActfiles.html (last visited September 6, 2006). The Civil Rights Act of 1957 provided for the enforcement of voting rights and criminal civil rights violations that were originally prohibited in the 1870's. *Id.* The Act also established the Civil Rights Division of the Department of Justice. *Id.* Then in 1964, President Johnson signed the Civil Rights Bill into law. *Id.*

stitutions created a means to increase enrollment of minority students in their classes.

Starting in the early 1960s, admissions officials began to vary the manner in which minority groups were accepted to their schools. Many schools devised quota systems or other preferential policies that ensured that minority applicants were accepted to their colleges, universities and graduate schools, even if the applicants presented objective test scores that were not competitive with the majority of the school's applicants. These programs, which were primarily designed to increase enrollment among African-American applicants, came to be termed "affirmative action admission policies."⁴⁸

Some of the earliest affirmative action admissions policies took the form of a quota system.⁴⁹ Schools would set aside a number of seats for minority applicants, whose admissions files were not competitive with the files of non-minority applicants.⁵⁰ In 1978, the Supreme Court struck down the use of quotas in the admissions process and schools changed their programs to enhance minority admissions "without reserving positions or benefits exclusively for minorities."⁵¹ Colleges and universities created newly reconstituted affirmative action programs, which employed preferential treatment measures where factors such as race, gender, and ethnic origin were considered positive factors in admissions and scholarship determinations.⁵² These programs ranged from allowing for separate review of minority

48. See Civil Rights.Org, Civil Rights 101, http://www.civilrights.org/research_center/civilrights101/affirmaction.html (last visited September 6, 2006) ("[a]ffirmative Action itself has been defined 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.'" (internal citation omitted)). The term was first used by President Kennedy in Executive Order No. 10925, calling for federal contractors to "take affirmative action to ensure" equal opportunity in the construction industry. *Id.* The term then spread, and was used to describe initiatives in the employment of disabled veterans and equal opportunity in education. *Id.*

49. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 273-275 (1978) (where the school's special admission program reserved sixteen out of every 100 seats for minority students).

50. This type of program was struck down in *Bakke*. See discussion *infra* Part II.

51. Samuel L. Starks, *Understanding Governmentt Affirmative Action and Metro Broadcasting, Inc. v. FCC*, 41 DUKE L.J. 933, 941 n.43 (1992).

52. *Id.*

applicants as a group and non-minority applicants,⁵³ to giving “points” to minority applicants,⁵⁴ to considering race as a factor in the application process.⁵⁵

The preferential nature of these programs gave rise to litigation from school applicants who were denied admission to their schools, arguably in favor of minority students with less impressive objective scores.⁵⁶ Litigants challenged the affirmative action admission programs as violative of the Equal Protection Clause of the United States Constitution. Specifically, these challenges argue that considering race as a factor in the admissions process unfairly favors one class over another. Surprisingly, only three challenges have reached the Supreme Court.⁵⁷ Through these challenges, however, the Court has ar-

53. See *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033. The University of Texas had two separate reviewing subcommittees. *Id.* at 562. The Chair of the Admissions Committee set a different presumptive admission or denial Texas Index (“TI”) number for minorities, who were reviewed by one subcommittee and for non-minorities, who were reviewed by a separate subcommittee. *Id.* at 561. The Admissions Committee based acceptance to the University for all applicants on an index number that was a function of each applicant’s combined undergraduate grade point average and LSAT score. *Id.* at 557 n.9. The Chair set numbers that marked automatic admissions and denials, and the subcommittees reviewed applicants based on those numbers. *Id.* at 560-61.

54. See *Gratz v. Bollinger*, 539 U.S. at 244, 252-55 (2003). The University of Michigan used a points system from 1995-1998 that resulted in a certain number of spots being “protected” for minority candidates. *Id.* at 254-255. Students could receive points for underrepresented minority status or socioeconomic disadvantage. *Id.* at 255. Every application received points for such things as high school grade point average, standardized test scores and personal achievement or leadership. *Id.*

55. See *Gratz v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001). The University of Michigan Law School’s admissions policy, adopted in 1992, called for race to be considered as a factor in the admission review process. *Id.* at 832. While grades were also a factor, the rationale for admitting students with lower scores was that they “may help achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.” *Id.* at 827.

56. See discussion *infra* Part II.

57. The three challenges include *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz*. As a general matter, few challenges have been filed considering the import of the issue. See, e.g., *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) (invalidating a race-based scholarship program tied to the admissions process); *Hopwood*, 861 F. Supp. 551; *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (holding that universities may constitutionally aim to achieve diverse student bodies).

ticulated clear guidelines defining constitutionally permissible affirmative action admission policies.

II. Supreme Court Guidelines For Constitutionally Permissible Affirmative Actions Programs

The Supreme Court first considered the constitutionality of an affirmative action admission policy in *Regents of the University of California at Davis v. Bakke*.⁵⁸ Allen Bakke, a white male, charged that the University of California at Davis Medical School admissions policy violated the Equal Protection Clause by granting preferential treatment in its admissions decisions to applicants of color.⁵⁹ Bakke unsuccessfully applied for admission to the University of California at Davis ("Davis") Medical School in 1973 and 1974.⁶⁰ He challenged the school's 1973 admission policy, adopted in an effort to diversify its entering class, on the grounds that it operated to exclude him from the school on the basis of his race. Bakke challenged the policy as violating the Equal Protection Clause,⁶¹ the California Con-

58. 438 U.S. 265. See generally Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 J.C. & U.L. 895 (1996).

59. *Bakke*, 438 U.S. at 277-78.

60. *Id.* at 266. In 1973, Bakke received a benchmark score of 468/500, but his application was late, and after his application was completed, no applicants in the general admission pool were admitted with a score below 470/500. *Id.* at 276. At that time four seats in the special admission program were open, although Mr. Bakke was not considered for these seats. *Id.* Bakke wrote to the Associate Dean and Chairman of the Admissions Committee, Dr. George H. Lowrey, to protest the admissions quotas. *Id.* In 1974, Bakke applied early and received high marks from a student interviewer, but received low marks from the faculty interviewer who, coincidentally, was Dr. Lowrey. *Id.* at 277. Dr. Lowrey gave him his lowest score of 86, making his total score 549/600 (there was one additional interviewer in 1974, so the total score was 600, as opposed to 500 in 1973). *Id.* at 277. Under the special admission program, applicants were admitted with significantly lower credentials than Bakke. *Id.* at 277.

61. U.S. CONST. amend. XIV, § 1, reads:

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.

stitution,⁶² and Title VI of the Civil Rights Act of 1964 ("Title VI").⁶³

At the time, Davis employed a bifurcated admissions policy. One committee considered non-minority applicants who had achieved a minimum 2.5 undergraduate GPA ("UGPA").⁶⁴ Another committee considered all minority candidates, regardless of their objective scores.⁶⁵ The school set aside a certain number of seats for applicants in each of the groups.⁶⁶ Individuals from the general applicant pool could not fill seats from the minority applicant pool, even if seats were available.⁶⁷ Bakke claimed that the policy, which allowed the school to set aside a certain number of places for minority applicants with lower ob-

62. CAL. CONST. art. I, § 7, reads: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

63. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (West 2006), reads: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

64. *Bakke*, 438 U.S. at 275.

65. *Id.* at 274-75. Each applicant in the non-minority group was evaluated on the basis of his or her UGPA, MCAT score, and observations made during a personal interview conducted by a member of the Admissions Committee. The Committee automatically rejected non-minority applicants whose UGPA fell below 2.5. *Id.* at 273. In contrast, the committee referred minority student applications to a Special Admissions Committee comprised mainly of members of minority groups. This Committee rated minority applicants in a manner similar to the applicants in the general applicant pool, except that a 2.5 UGPA did not serve as a ground for summary rejection. *Id.* at 275. Thus, all minority applicants were considered for admission by the Special Admissions Committee, regardless of their UGPA. *Id.* With the exception of the minimum UGPA for non-minorities, students were evaluated for admissions based on the same general criteria. However, each of the two Admissions Committees operated in a vacuum and did not compare its applicants to the other applicant group. The Special Admissions Committee did not rate or compare minority applicants to the non-minority applicants but could accept or reject applicants based on failure to meet course requirements or other specific deficiencies. The Special Admissions Committee continued to recommend applicants until the number set by faculty vote were admitted. *Id.* at 273-75.

66. *Id.* at 275. In 1968, when the overall class size was fifty, the faculty set aside eight seats for minorities. In 1971, the overall class size was expanded to 100, and in 1973, the number of seats set aside for minorities was expanded to sixteen. *Id.*

67. *Id.* at 272-76. However, there was one special circumstance varying from this rule. *Id.* at 276 n.6 (detailing a special circumstance).

jective test scores than his own, was tantamount to a quota.⁶⁸ The trial court found that Davis' admission policy was a racial quota and held that it violated the California and United States Constitutions, as well as Title VI.⁶⁹ The California Supreme Court affirmed this holding.⁷⁰ Upon the State's appeal, the Supreme Court of the United States granted *certiorari*.⁷¹

The Supreme Court subjected the Davis policy to the strict scrutiny test.⁷² According to the majority, "the Constitution guarantees that when a program "touch[es] upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear is precisely tailored to serve a compelling governmental interest."⁷³ Thus, the Court wrote, the policy would be struck down unless UC Davis could prove that there was a compelling governmental interest in using a quota in the admissions process and that its affirmative action admissions policy as drafted was narrowly tailored to meet that interest.

Ultimately, the Court, in a highly fractionalized opinion, struck down the Davis policy. Justice Powell wrote the majority opinion,⁷⁴ concluding that the Davis program violated both Title VI and the Equal Protection Clause.⁷⁵ Applying the strict scru-

68. *Id.* at 277-78. When Davis rejected Bakke in 1973, four seats reserved for applicants from the minority pool were unfilled, while the seats for the general admission pool were filled. *Id.* at 266. Following the second rejection, Bakke sued Davis and the Regents of the University of California in state court. *Id.*

69. *Id.* at 278-79. In reaching its conclusion, the trial court emphasized that minority applicants in the program were rated only against one another and that sixteen places out of the class of 100 were reserved exclusively for minorities. *Id.* at 279.

70. *Bakke v. Regents of Univ. of Cal.*, 553 P.2d 1152 (Cal. 1976). The California Supreme Court ordered UC Davis to admit Bakke to the Medical School, since the school was unable to demonstrate that he would not have been admitted in the absence of the challenged program. *Id.* at 1172. Applying strict scrutiny, the court concluded that the program violated the Equal Protection Clause because it was not the least intrusive means of achieving the school's compelling goals. *Id.* at 1167.

71. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 268, 281 (1978).

72. *See Id.* at 290-95.

73. *Id.* at 299 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938).

74. *Bakke*, 438 U.S. at 269.

75. *Id.* at 271.

tiny test,⁷⁶ Justice Powell found that there was a compelling governmental interest in attaining a diverse student body.⁷⁷ A diverse student body contributing to a robust exchange of ideas, he wrote, is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated.⁷⁸ However, although the Constitution does not bar admission policies from introducing race as a factor in the selection process, Justice Powell concluded that the program was not narrowly tailored, and that preferring members of any one group for no reason other than race or ethnic origin is discrimination on its own.⁷⁹

The Davis admissions policy, which set aside a specific number of seats for students in identified minority groups, unfairly benefited the interest of a victimized group at the expense of other innocent individuals and, therefore, violated the Equal Protection Clause.⁸⁰ Additionally, its practice of having sepa-

76. *Id.* at 279. Justice Powell also wrote that "in order to justify the use of a suspect classification, a State must show that its purpose or interest 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." *Id.* at 305 (quoting *In re Griffiths*, 413 U.S. 717, 721-22 (1973)); see also *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964).

77. Attainment of a diverse student body is related to academic freedom. *Bakke*, 438 U.S. at 311-12.

78. *Id.* Justice Powell noted that educational excellence is widely believed to be promoted by a diverse student body. *Id.* at 313-14.

79. *Id.* at 307 ("[w]e have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."). Title VI clearly establishes that where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by federally-funded institutions, race-conscious action is required to accomplish the remedial objectives of Title VI. *Id.* at 307-09. Justices Brennan, White, Marshall, and Blackmun agreed with this, stating that "[Title VI] does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment." *Id.* at 328 (Brennan, J., dissenting).

80. *Id.* at 307. Justice Powell upheld the California Supreme Court's decision that the special admissions program was unlawful, and that Bakke was to be admitted to Medical School; however, the Court reversed the decision enjoining the Medical School from considering race in admissions. *Id.* at 324-25. Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens, in a concurring opinion, agreed that the policy was unlawful because it unfairly favored one group over another. *Id.* at 324-26. Justices Brennan, White, Marshall, and Blackmun concurred in the holding and dissented in part, as they did not believe that Bakke should be admitted to the Medical School or that quotas should be maintained. *Id.*

rate admissions subcommittees review minority and non-minority candidates inappropriately insulated applicants from comparison against the entire admissions pool.⁸¹ For these reasons, Justice Powell concluded that the Davis admissions policy was constitutionally impermissible.

Justice Powell's opinion acknowledged that the majority viewed the Davis admissions policy as seeking to achieve a goal that is of paramount importance to the fulfillment of its mission and, in fact, as serving an important governmental interest.⁸² Justice Powell's opinion endorsed the policy of considering race as a "plus" in instances where an affirmative action admissions policy is free from clear goals or quotas.⁸³ Indeed, a majority of the Court recognized the University's right to select students who would best contribute to the "robust exchange of ideas."⁸⁴ However, "ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."⁸⁵

at 379. They joined in Parts I and V-C, and White joined in part III-A. *Id.* at 328. Along with Justice Powell, Justices Brennan, White, Marshall, and Blackmun upheld the use of race in the admissions process, while Justices Burger, Stevens, Rehnquist, and Stewart considered the issue irrelevant to this case. See RON SIMMONS, *AFFIRMATIVE ACTION: CONFLICT AND CHANGE IN HIGHER EDUCATION AFTER Bakke*, 1-2 (1982).

81. *Bakke*, 438 U.S. at 315.

82. *Id.*

83. *Id.* at 317. For example, assume two applicants, one minority and one non-minority, have the same UGPA and MCAT scores. Under Justice Powell's opinion, an admissions committee can offer admission to the minority applicant before it offers admission to the non-minority applicant, since a diversity viewpoint "plus" UGPA and MCAT score is of more value to the school than a non-diversity viewpoint and the same "objective" test scores. For a discussion of the validity of the "plus" factor rationale, see Krista L. Cosner, *Affirmative Action in Higher Education: Lessons and Directions from the Supreme Court*, 71 IND. L.J. 1003, 1004 (1996).

84. *Bakke*, 438 U.S. at 312-13.

85. *Id.* at 314. The Court acknowledged that the importance of diversity may be greater at the undergraduate level than at the medical school level, where the focus is on "professional competency," but concluded that the "contribution of diversity is substantial" even at this level, because doctors provide services to a "heterogeneous population." *Id.* at 313-14. The Court also noted that while law schools focus on gaining legal skills and knowledge, this focus "cannot be effective in isolation from the individuals and institutions with which the law interacts." *Id.* at 314 (internal quotation omitted). Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist, joined in Justice Powell's conclusion that the program was invalid, based on the conclusion that the program violated Title VI, and thus there was no need to evaluate the program under the Equal Protection Clause.

For nearly fifteen years following *Bakke*, the federal appeals courts did not consider challenges to affirmative action admission policies. In 1992, however, the Fifth Circuit considered the first of several equal protection challenges, none of which made it to the Supreme Court. These decisions all hinged on the applicability of Justice Powell's majority decision. The various circuits reached different conclusions on the precedential value of Justice Powell's decision. In *Hopwood v. Texas*,⁸⁶ the Fifth Circuit concluded that Justice Powell's decision in *Bakke* was not binding on its court and that race could not be considered as a factor in the admissions process.⁸⁷

The *Johnson* Court considered an appeal from the District Court for the Southern District of Georgia, which held that the University of Georgia's ("UGA") policy of awarding a fixed numerical bonus to non-white and male applicants, which it did not give to white and female applicants, was unconstitutional.⁸⁸ The majority concluded that Justice Powell's opinion in *Bakke*

Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist joined in his conclusion that the program was invalid, however, they did not consider the constitutional issue since they concluded that the program violated Title VI. *See generally, Id.* at 408-22 (Stevens, J., concurring and dissenting in part). However, while not agreeing outright with Justice Powell's compelling "governmental interest" definition, the plurality's acknowledgement of a university's right to achieve a heterogeneous student body suggests a tacit agreement. Of the Justices' lead opinion, Justices Brennan, White, Marshall, and Blackmun were in the minority, concluding that Title VI permits federally-funded entities to enact programs or policies that assist minority groups to gain equal access to programs more easily available to Caucasians. *Id.* at 324 (Brennan, J., dissenting). However, Title VI and the Civil Rights Act do not take precedence over the constitutional protection of the Equal Rights Clause, and thus such programs or policies are valid only to the extent that they are coterminous with the Fourteenth Amendment. Thus, because four Justices chose to limit the extent of their agreement with Justice Powell's conclusion, Justice Powell's scrutiny of the Davis Policy under the Equal Protection Clause became, in a sense, a majority of one. *Id.*

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

87. *See Id.* A majority of the Fifth Circuit broadly ruled that the University of Texas may not use race as a factor in law school admissions. *Id.* at 959. This holding suggests that all schools in its jurisdiction were prohibited from doing the same. Justice Powell's holding in *Bakke* was rejected by the majority, and found not binding due to the fact that "no other Justice joined in that part of the opinion discussing the diversity rationale." *Id.* at 944.

88. *Johnson v. Bd. of Regents of Univ. of Ga.*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000). On appeal to the Eleventh Circuit, UGA argued that the school's policy should be upheld because it was narrowly tailored to meet what Justice Powell acknowledged in *Bakke* as a compelling governmental interest in admitting a diverse class. *Id.*

was not binding under *Marks v. United States*,⁸⁹ which held that “when a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁹⁰ Although the Court suggested that there could be a compelling governmental interest,⁹¹ ultimately, the court struck down UGA’s policy as failing the narrowly tailored test.⁹²

In *Smith v. University of Washington Law School*,⁹³ however, the Ninth Circuit ruled Justice Powell’s opinion in *Bakke* was binding on its court,⁹⁴ and that “the attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education.”⁹⁵ The Eleventh Circuit agreed with

89. *Marks v. United States*, 430 U.S. 188 (1977).

90. *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001) (quoting *Marks*, 430 U.S. at 193).

91. The Eleventh Circuit suggested there could be a compelling governmental interest because of the government’s demonstrated need for the program as a means to eradicate present effects of past discrimination. *Id.* at 1252. Interestingly, the court relied on a compelling governmental interest that justifies race based policies in the work place. *Id.* The court disregarded Powell’s stated compelling governmental interest in a need for diversity in the classroom. *Id.* at 1252-53.

92. *Id.* at 1254.

93. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001). The University of Washington Law School had used race as a factor in its admissions policy from 1994-1998, until the school voluntarily complied with a State of Washington law that precluded schools from granting preferential treatment to any individual on the basis of race. *Id.* at 1191.

94. The Ninth Circuit applied the analysis of *Marks*, which held that “the holding of the Court may be viewed as that position taken by those Members who concurred in judgments on the narrowest grounds” is binding on the Court. *Id.* at 1199. Therefore, Justice Powell’s opinion in *Bakke* was binding.

95. *Id.* at 1197. The Ninth Circuit went on to state that:

The district court correctly decided that Justice Powell’s opinion in *Bakke* described the law and would require a determination that a properly designed and operated race-conscious admissions program at the Law School of the University of Washington would not be in violation of Title VI or the Fourteenth Amendment. It was also correct when it determined that *Bakke* has not been overruled by the Supreme Court. Thus, at our level of the judicial system, Justice Powell’s opinion remains the law.

However, the Law School has encountered a peripeteia in its own state; it is bound by I-200, which precludes it from granting “preferential treatment” to any individual “on the basis of race.” That has rendered Smith’s request for prospective relief moot because we “[should] not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith [should] be presumed in the absence of a showing to the contrary”

Hopwood when it reached a similar conclusion in *Johnson v. Board of Regents of the University of Georgia*.⁹⁶ The *Johnson* majority concluded that Justice Powell's opinion in *Bakke* was not binding;⁹⁷ however, it was still willing to uphold the policy if it passed the strict scrutiny test.⁹⁸ The split among the circuits made the issue ripe for Supreme Court review.

In 2003, twenty-five years after the *Bakke* case, the Supreme Court again considered the constitutionality of affirmative action admission plans when it heard the twin cases of *Grutter v. Bollinger*⁹⁹ and *Gratz v. Bollinger*.¹⁰⁰ *Gratz v. Bollinger*, was filed by a Caucasian female and a Caucasian male, each of whom were denied admission to the University of Michigan's College of Literature, Science, and the Arts ("LSA").¹⁰¹ Jennifer Gratz and Patrick Hamacher challenged LSA's admissions policy, alleging that it improperly used race as a factor, in violation of 42 USC §§ 1981 and 1983, and the Equal Protection Clause of the Fourteenth Amendment.¹⁰²

Barbara Grutter challenged the University of Michigan School of Law's ("Law School") admissions policy as violating the Equal Protection Clause of the United States Constitution.¹⁰³ At the time Grutter applied to the school, the Law School used an admissions plan that allowed admissions officials to consider race as one of several factors that would lead toward admission into the school.¹⁰⁴ Specifically, the policy re-

Id. at 1201 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978)).

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

97. The Eleventh Circuit relied on its findings in *Marks*, which held that "when a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 1247. Applying a *Marks*-type analysis, the *Johnson* court concluded, similarly to *Hopwood*, that Justice Powell's decision, read with Justice Brennan's concurrence, supported the very narrow principle that race could never be a factor in admissions policies. For these reasons, the Eleventh Circuit clearly articulated its conclusion that Justice Powell's decision was not binding on its court. *Id.* at 1247-48.

98. *See United States v. Paradise*, 480 U.S. 149 (1987).

99. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

100. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

101. *Id.* at 251. The complaint was filed in October of 1997. *Id.* at 252.

102. *Id.* at 251-52.

103. *Grutter*, 539 U.S. at 316-17; *see* U.S. CONST. amend. XIV, § 1.

104. *Id.* at 318-21 (finding the Law School's plan "bears the hallmarks of a narrowly tailored plan" by considering race a "'plus' factor" in admissions). Unlike

quired those reviewing applications to consider each applicant individually and to weigh a series of attributes including, Law School Admission Score, undergraduate degree and grade point average, race or ethnicity, work experience, years out of law school, etc.¹⁰⁵ Given the propensity for minority applicants to perform less well on the LSAT, the policy allowed admissions officials to treat race as a “plus” in an effort to admit a more critically diverse class.¹⁰⁶

Grutter challenged the program in federal court, arguing that the law school used race as a predominant factor, which gave members of a minority group a significantly greater chance of admission than a non-minority student with the same credentials.¹⁰⁷ Grutter also alleged that the law school had no compelling reason that would justify the use of race.¹⁰⁸ The district court agreed with Grutter that the use of race was unlawful, because the Law School did not have a compelling interest in increasing the racial balance of its entering class and the use of race was not narrowly tailored.¹⁰⁹ The Court of Appeals sitting *en banc* reversed, holding that there was a compelling state interest in admitting a diverse entering class and that the Law School’s plan, which allowed committee members to treat race as a “plus,” was narrowly tailored to meet that goal.¹¹⁰

the system utilized by the Law School, Michigan’s undergraduate admissions program assigned a point value to factors. *Gratz*, 539 U.S. at 253-54. However, the Supreme Court found that race was assigned such a high point value that it was a decisive factor in the undergraduate admissions policy instead of just one of many factors considered. *Id.* at 272.

105. *Grutter*, 539 U.S. at 338 (noting factors in admission includes fluency in foreign languages, overcoming personal adversity and family hardship, extensive community service, unusual intellectual achievement, employment experience, nonacademic experience, and personal background).

106. *Id.* at 318.

107. *Id.* at 317.

108. *Id.*

109. *Id.* at 321.

110. *Id.* In *Grutter*, the United States District Court for the Eastern District of Michigan, Southern Division, subjected the Law School’s admissions policy to strict scrutiny. *Id.* at 321. The court concluded that Justice Powell’s majority opinion in *Bakke* was not binding, and therefore the Law School’s mission of admitting a diverse class was not a compelling governmental interest to justify including race in the list of non-objective factors that could contribute to an applicant’s success. *Id.* The district court further found that the admissions policy was not narrowly tailored, concluding that the Law School’s goal of admitting a “critical mass” was practically indistinguishable from a quota, and was such an

Concurrent with *Grutter's* court challenge, Jennifer Gratz and Patrick Hamacher challenged LSA's admissions policy, arguing that it violated the Equal Protection Clause of the Constitution.¹¹¹ Between 1995 and 2000, LSA revised its admission's

amorphous figure that a program could never be narrowly tailored to achieve it. *Id.* Judge Friedman issued an injunction prohibiting the Law School from considering race in its admissions policy. *Id.* In response to the district court decision, the Law School petitioned the Sixth Circuit. The Sixth Circuit heard the *Grutter* appeal *en banc* on the same day as *Gratz*. *Gratz v. Bollinger*, 539 U.S. 244, 259 (2003).

The main issues before the Sixth Circuit were whether the district court erred in concluding that Justice Powell's opinion was not binding and, if so, whether the Law School's admissions policy passed constitutional muster under Powell's reasoning in *Bakke*. *Grutter*, 539 U.S. at 321. As to the first issue, the Sixth Circuit concluded that the district court improperly applied a *Marks* analysis to the plurality opinion in *Bakke*. *Id.* In *Bakke*, Justice Brennan's concurrence, which was joined by three other Justices, signaled his agreement with Justice Powell that diversifying a student body could be a compelling governmental interest. *Grutter v. Bollinger*, 288 F.3d 732, 742-43 (6th Cir. 2002). Furthermore, the court found that its subsequent treatment of *Bakke*, in cases like *Metro Broadcasting, Inc. v. F.C.C.*, supports the conclusion that Powell's position in *Bakke* represents the holding of the case. *Id.* at 743. Justice Martin held that since, under a *Marks* analysis, Justice Powell's decision in *Bakke* is binding on the courts, it should remain the law until the Supreme Court expressly overrules it. *Id.* at 744.

Once the Sixth Circuit concluded that the district court misapplied controlling law, it considered whether, under *Bakke*, the Law School's admissions policy was narrowly tailored to meet the compelling governmental interest of admitting a diverse entering class. *Id.* at 746-47. The court recognized that the Law School's admissions policy closely tracked the Harvard Plan, which the *Bakke* Court suggested would pass strict scrutiny. *Id.* at 747. Specifically, the Law School policy did not use quotas, only considered race, ethnicity, and other soft variables as potential "plus" factors in an applicant's file, and read and evaluated each applicant individually. *Id.* For these reasons, it was narrowly tailored. The court further considered the school's policy of weekly reviews of the race and ethnicity of the admitted applicants. *Id.* The goal of this practice, according to the Law School, was to ensure that the school enrolled a "critical mass" of underrepresented minority students, so that a few wouldn't feel isolated or as though they must be the spokesperson for an entire group of people. *Id.* Enrolling a critical mass, the Law School offer, ensured that the entire class would obtain the benefits of an academically diverse student body. *Id.* Ultimately, the Sixth Circuit Court was satisfied that a "critical mass" did not equal a quota, and the court upheld the Law School's admissions policy. *Id.*

The petitioners from the *Grutter* case filed a writ of *certiorari* to the Supreme Court following the Sixth Circuit decision. *See Grutter*, 539 U.S. 306 (2002). The Court granted *certiorari* on December 2, 2002. The *Gratz* petitioners also asked the Court to grant *certiorari*, even though the Sixth Circuit had not yet rendered an opinion in that case, so that the Court could address the constitutionality of affirmative action admissions policies "in a wider range of circumstances." *Gratz*, 539 U.S. at 260.

111. *Gratz*, 539 U.S. at 249-50.

policy on several occasions.¹¹² Essentially, the admissions policy allotted a point value, called a SCUGA¹¹³ score, to certain factors, including high school GPA, standardized test scores, geography, alumni relationships, quality of high school, etc.¹¹⁴ Additionally, the policy allotted points for the unique characteristics of an applicant.¹¹⁵ The school combined the SCUGA score with a student's SAT and GPA. An applicant's total score determined whether the committee would read the application. The district court found that LSA had a compelling interest in achieving a diverse student body, and the admissions program between 1999 and 2000 was narrowly tailored.¹¹⁶ The court of appeals did not consider the constitutionality of LSA's admission program.¹¹⁷

Both cases made their way to the Supreme Court and were decided on the same day, June 23, 2003.¹¹⁸ Because these were challenges to racial-preference policies, the Supreme Court subjected both to strict scrutiny.¹¹⁹ Thus, the Court could only uphold the policy if the proponents demonstrated that the

112. *Id.* at 254-57.

113. "SCUGA" is an acronym with letters signifying "the quality of an applicant's high school (S), the strength of an applicant's high school curriculum (C), an applicant's unusual circumstances (U), an applicant's geographical residence (G), and an applicant's alumni relationships (A)." *Id.* at 254.

114. *See Id.*

115. *See Id.* In 1995-97, these unique characteristics were termed "an applicant's unusual circumstances." *Id.* at 254-55. For 1995 and 1996, minority applicants were rated based upon a different scale than non-minority applicants, but in 1997 the minority status was allotted a higher point value under the "unusual circumstances" category. *Id.* at 255. In 1998, the points for such unique characteristics were allotted under categories such as "personal achievement or leadership" and "miscellaneous," which included "membership in an underrepresented racial or ethnic minority group." *Id.* Finally, in 1999 and 2000, the LSA added an additional procedure that allowed for applicants to be "flagged" for further review. *Id.* at 256. In 1998-2000, twenty points on a 150 point scale, were awarded for "membership in an underrepresented racial or ethnic minority group." *Id.* at 255-56.

116. *Id.* at 258. For a discussion on the different admissions policies, see *supra* text accompanying note 34.

117. *Gratz*, 539 U.S. at 259-60.

118. *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 244 (2003).

119. *Grutter*, 539 U.S. at 326; *Gratz*, 539 U.S. at 270. *See* Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631 (2005) (discussing the new strict scrutiny test).

program was narrowly tailored to meet a compelling governmental interest.¹²⁰

In each case, the Court held that there was a compelling governmental interest in achieving a diverse classroom;¹²¹ and for that reason, any program aimed at achieving a diverse entering class would pass the compelling governmental interest prong of the strict scrutiny test. The Court differed, however, in whether the two programs were narrowly tailored. In *Gratz*, the Court struck down LSA's affirmative action admission program, holding that it was not narrowly tailored because it gave points, wholesale, to a class of individuals and did not allow for individual review in a meaningful way that would assess whether a particular applicant would contribute to a diverse setting.¹²² In *Grutter*, however, the Court upheld the law school's program, ruling that its policy of requiring admissions committee members to individually assess each application was narrowly tailored.¹²³ The individual review process ensured that an applicant was not admitted solely based on membership in a particular class, but instead, was admitted because his or her race or ethnicity was one of several factors that might contribute to creating a well-rounded entering class with robust discussion.¹²⁴

120. *Grutter*, 539 U.S. at 326; *Gratz*, 539 U.S. at 270.

121. *Grutter*, 539 U.S. at 328-33; *Gratz*, 539 U.S. at 270-76.

122. *Gratz*, 539 U.S. at 270-76. The Supreme Court upheld Justice Powell's explanation that universities could use race as a "plus" factor. *Id.* at 270 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)). However, the Court also re-emphasized the "importance of considering each particular applicant as an individual, assessing all of the qualities that individuals possess, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education." *Id.* Then, the Court found that the University's policy of distributing twenty of 150 points to an applicant based upon qualifying as an "underrepresented minority" did not provide for the individualized review required by *Bakke*. *Id.* at 271-72. The Court found the awarding of points made race the "decisive" factor for "virtually every minimally qualified underrepresented minority applicant." *Id.* at 272.

123. *Grutter*, 539 U.S. at 333-44.

124. *Id.* The Court found that the Law School plan bears the 'hallmarks of a narrowly tailored plan[.]' because it used race as a "plus" factor in the context of individualized review of each and every applicant." *Id.* at 334. The Court described the Law School's plan as "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id.* at 337.

Chief Justice Rehnquist provided the majority opinion in the *Gratz* decision.¹²⁵ Writing for the majority,¹²⁶ Chief Justice Rehnquist found that the fatal flaw in the University's admissions policy was its failure to provide individual review of each candidate.¹²⁷ LSA's policy of automatically distributing twenty points to every applicant from the "underrepresented minority" applicant pool had the result of treating race as an absolute, "which could jettison a member of an underrepresented group into the accept category, regardless of the experiences or qualities that race had contributed to the development of the individual."¹²⁸ LSA's admission policy went beyond the spirit of Justice Powell's opinion in *Bakke*, that race could be considered a factor in the admissions policy since it failed to allow for interpretation of "individual qualities or experiences not dependant upon race but sometimes associated with it."¹²⁹

Under LSA's policy, admissions officials individually reviewed applications but only if the application got a high enough SCUGA score. The majority found this policy flawed since the individual review was only provided after admissions counselors automatically assigned points to a candidate.¹³⁰ They rejected the LSA's concern that the volume of applications made it impractical to use an admissions system primarily

125. *Gratz*, 539 U.S. at 244.

126. Justices O'Connor, Kennedy, Scalia, and Thomas joined the Court's majority opinion.

127. *Id.* at 271. "[The Court finds] that the University's current policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve educational diversity." *Id.* at 270.

128. *Id.* at 270-71. LSA's policy went beyond the spirit of Justice Powell's edict that race can be considered a factor in admissions, since it failed to allow for interpretation of "individual qualities or experience not dependent upon race but sometimes associated with it." *Id.* at 272-73. The Court held that the possibility of committee review, "is of little comfort under our strict scrutiny analysis." *Id.* at 274. There was not enough information in the record to know how many applicants were actually "flagged" but the Court felt that it was undisputed that the individual consideration was "the exception and not the rule." *Id.* at 274. It also did not satisfy strict scrutiny because the individualized review of the committee only occurred after LSA distributed "the University's version of a 'plus' that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant." *Id.*

129. *Id.* at 272-73 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978)).

130. *Gratz*, 539 U.S. at 271-72

based on individual review, and thus automatic assignment was the only means to efficiently consider the volume of applicants it received each year.¹³¹ In response, the Court wrote, “the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.”¹³²

In her concurrence, Justice O'Connor wrote that LSA's practice of assigning points to applicants merely because they are members of a particular class precluded the committee from considering the particular applicant's ability to contribute to meaningful class discussion.¹³³ Under LSA's policy, “underrepresented minority” status granted the applicant such a significant number of points that it had the effect of almost guaranteeing acceptance to the school, rather than serving as a contributing factor in the decision making process.¹³⁴ Justice O'Connor found that the policy, which she defined as a “non-individualized mechanical system”¹³⁵ was flawed and therefore unconstitutional.

Justice Thomas, in his concurring opinion, found LSA's policy flawed because “it awards all underrepresented minorities the same racial preference.”¹³⁶ The system of automatically assigning points failed to afford admissions counselors the ability

131. *Id.* at 275.

132. *Id.*

133. *See id.* at 277-80 (O'Connor, J., concurring). LSA's automatic award of points did not satisfy the requirement of providing individualized consideration. *Id.* This is in contrast to the Law School's program, which O'Connor held constitutional because each application was read completely and considered individually and therefore race was only used as a “plus.” *Id.*

134. Justice O'Connor acknowledged that an applicant could acquire a significant number of points through the other factors in the applicant's SCUGA score, but noted that the points assigned for those other categories were significantly lower than those assigned for race. *Id.* at 279. Consequently, “[e]ven the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race.” *Id.*

135. *Id.*

136. *Id.* (Thomas, J., concurring).

to identify and consider what viewpoints an applicant might bring to the classroom.¹³⁷

The various majority opinions in *Gratz* clearly endorsed the notion that seeking a critical mass of diverse viewpoints in the classroom serves a compelling governmental interest. However, race in and of itself did not dictate the viewpoint that an individual might bring to the classroom. In order to ensure this, admissions officials needed to evaluate the voice that each applicant would bring to the classroom. Such a voice is not automatically determined based on race. Thus, anything short of an individual evaluation of an applicant's history, past experiences, and other factors that might contribute to his or her values and opinions, would fall short of being narrowly tailored.¹³⁸

In *Grutter v. Bollinger*, a divided Court upheld the Law School's admissions policy.¹³⁹ The Court first reaffirmed past decisions, which found a compelling governmental interest in admitting a diverse entering class.¹⁴⁰ Furthermore, the Court found that the Law School's policy was narrowly tailored to meet that interest since it allowed members of the admissions committee to individually review each applicant in a way that

137. *Id.* at 281. Ultimately, Justice Thomas would have gone further than his brethren and perhaps (given his opinion) even overruled *Bakke*. *Id.* According to Justice Thomas, "a State's use of racial discrimination in higher education admissions is categorically prohibited under the Equal Protection Clause." *Id.*

138. Those dissenting believed that the program was, in fact, narrowly tailored to meet the strict scrutiny test. Justice Souter would have likely upheld LSA's policy. *Id.* at 295 (Souter, J., dissenting). Noting the holdings in *Bakke* and *Grutter*, Justice Souter wrote that the Court has acknowledged that there is a compelling governmental interest in achieving diversity and that race can be considered a plus in the admissions process in order to achieve that diversity. Awarding value requires a school to consider race in a way that increases the applicant's chances of acceptance. *Id.* at 295. Justice Ginsburg's dissent focused more on the need to correct past inequality than it did on the need for diversity in the classroom. *Id.* at 298 (Ginsburg, J., dissenting). She wrote, "[t]he stain of generations of racial oppression is still visible in our society." *Id.* at 304. As a result, there is a compelling need for such policies and wide latitude should be given when interpreting whether the policies are narrowly tailored. *Id.* at 303. Therefore, Justice Ginsburg found "no constitutional infirmity." *Id.*

139. *Grutter v. Bollinger*, 539 U.S. 306 (2003). Justice O'Connor wrote the majority opinion, which was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* at 310. Justices Scalia and Thomas joined in part. *Id.*

140. *Id.* at 322-32.

considered race and ethnicity among a host of diversity factors.¹⁴¹

The majority reaffirmed Justice Powell's conclusion in *Bakke* that achieving diversity in education supports a compelling governmental interest.¹⁴² "Skills needed in today's increasingly global marketplace can only be developed through exposure to a widely diverse people, cultures, ideas and viewpoints."¹⁴³ Thus, the school's articulated compelling governmental interest transcends the classroom to society as a whole.¹⁴⁴

Once the majority concluded that the Law School's program met the compelling governmental interest prong of the strict scrutiny test, it turned its attention to whether the program was narrowly tailored. The ideal policy, according to the majority, would be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant and place them on the same footing for consideration, although not necessarily according them the same weight."¹⁴⁵ The Law School's policy of considering race or ethnicity as only one of many equal factors that could contribute to making an applicant qualified for admission to the law school made the program sufficiently flexible.¹⁴⁶ Recalling the language of many

141. *Id.* at 334-35.

142. *Id.* Justice O'Connor, writing for the majority, observed, that in the Court's view, "attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" *Id.* at 333. The Law School properly articulated a compelling governmental interest, by stating in its mission statement the need to admit a "critical mass" in order to assemble a class that is broadly diverse. *Id.* at 328-30. Justice O'Connor stated that the benefits from diversity "are substantial," as shown by the District Court. *Id.* Achieving diversity helps promote "cross-racial understanding," breaks down stereotypes, and lets students better understand people from other races. *Id.* at 328-32. These benefits of diversity were also asserted by the amicus curiae, including major American businesses, and high-ranking retired officers and civilian officials from the United States Military. *Id.* at 331-32.

143. *Id.* at 331. The Court also adopted the military's conclusion that "a highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." *Id.*

144. *Id.* at 331-32.

145. *Id.* at 334 (internal quotation omitted).

146. *Id.* at 337-42. Justice O'Connor found significant similarities between the Law School's policy and the Harvard Plan, to which Justice Powell referred in *Bakke* as constitutionally permissible. *Id.* at 334-40. Both plans adequately en-

of its earlier strict scrutiny cases, the Court considered whether the Law School policy was the least restrictive means to achieve its goals. Indeed, any policy that gives some sort of preferential treatment to a particular category of persons would be less than ideal and one could always speculate that there are more restrictive alternatives to achieving the goal of a diverse classroom.¹⁴⁷ To be sure, while the Court recognized that one might be able to hypothesize alternatives to the Law School's policy, the policy before the Court met the strict scrutiny test.¹⁴⁸ Justice O'Connor, writing for the majority, concluded that narrowly tailored "does not require exhaustion of every conceivable race-neutral alternative."¹⁴⁹

The Court next turned its attention to whether the Law School policy's mission of seeking a "critical mass" would mean that the policy was too broad in scope to be narrowly tailored. The Court's dissenters argued that the goal of seeking a "critical mass" was really nothing more than a disguised quota.¹⁵⁰ The majority disagreed, and ultimately concluded that the program was sufficiently narrowly tailored and therefore passed the strict scrutiny test.¹⁵¹ Ultimately, the Court was sufficiently

sure that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. *Id.* Neither the Harvard Plan, nor the Law School's admissions policy, identified either race or ethnicity as the single characteristic that would ensure diversity. *Id.*

147. *See generally id.* at 341.

148. *Id.* at 337-41. The Court agreed with the Sixth Circuit that the school had considered race-neutral alternatives. *Id.* at 339-40. The district court had proposed race-neutral alternatives like using a lottery system, decreasing the school's reliance on grades and test scores, or automatically admitting a certain percentage from each high-school. *Id.* at 340. The Court rejected these alternatives; the lottery system would not work because it precluded the individualized review that is required. *Id.* Requiring the Law School to lower its standards would be to drastically change the school and require it to sacrifice a vital part of its educational mission. *Id.* Automatically admitting a certain top percentage of each high school class would also not work because they also precluded individualized review and the Court did not understand how it could be applied to graduate level schools. *Id.*

149. *Id.* at 339.

150. *See generally id.* at 374-75 n.12. Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas dissented.

151. "The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota." *Grutter v. Bollinger*, 539 U.S. 306, 335-37 (2003). "[T]here is of course '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 ad-

convinced that the Law School had adopted a workable and constitutionally permissible program.¹⁵²

III. The Challenge of Meeting the Supreme Court's Affirmative Action Ideal

Grutter and *Gratz* create a blueprint for constructing an affirmative action admissions policy that would withstand an

mitted.' 'Some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." *Id.* at 336 (internal citation omitted).

152. While the Court found that a policy that considers race or ethnicity as one factor among several factors to be narrowly tailored, it expressed its concern that schools continue to use such policies *ad infinitum*. *Id.* at 342. "In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews . . ." *Id.* Justice O'Connor wrote that the Court "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 343.

Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy each filed a separate opinion in which they concurred in part and dissented in part. Both Justice Thomas and Justice Scalia's opinions suggest that they would never uphold an admissions policy that granted racial preferences. *Id.* at 347-49 (Scalia, J., concurring in part) and 349-78 (Thomas, J., concurring in part). Justice Thomas concurred with that part of the Court's holding which he interpreted to require "that racial discrimination in higher education admissions would be illegal in 25 years." *Id.* at 351. He disagreed, however, with the Court's decision to uphold the Law School's compelling interest in maintaining a diverse entering class. *Id.* Thomas looked at the Law School's policy from a pragmatic standpoint. The Law School's need to use race as a plus in admissions was derived from its desire to admit an elite entering class. *Id.* As a general matter, non-minority students significantly outperformed underrepresented minorities on objective tests, hence the need for the "plus" in the admissions policy. *Id.* at 369-70. If, however, the Law School chose to admit a majority of the student body with objective test scores, it would not need to give underrepresented minorities a "plus" in the admissions process. *Id.* at 378. There is no compelling state interest in having an elite Law School, and for this reason the policy should have been struck down Chief Justice Rehnquist in his dissent provided little guidance toward what he thought the Law School could have done to make the process narrowly tailored. *Id.* at 378-87 (Rehnquist, C.J., dissenting). He paid careful attention to the relationship between the number of underrepresented minority students who applied to the Law School, and the number who were accepted. According to the Chief Justice, "the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups, and the percentage of the admitted applicants who are members of these same groups, is far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers.'" *Id.* at 383. The mathematical precision, in which Justice Rehnquist believed the Law School engaged, was problematic as it was tantamount to a quota. *Id.* at 383-86. For this reason, Rehnquist would have struck down the law school program. See Garfield, *supra* note 119, at 670-71.

equal protection challenge.¹⁵³ Under these most recent cases, a court will find a compelling governmental interest in adopting a race-based admissions policy whose mission includes admitting a critical mass of underrepresented minorities.¹⁵⁴ A court will also likely conclude that a program meets the narrowly tailored prong of the test if it provides for meaningful individual review of applicants.¹⁵⁵

Precedent confirms that a policy identical to that of the Law School's is the constitutional ideal. Justice O'Connor, writing for the majority in *Grutter* found that the individual review process of the Law School program ensured that an applicant's admission was not based predominately on membership in a particular class.¹⁵⁶ The *Gratz* majority essentially endorsed the *Grutter* plan by holding that anything short of individual review of applicants against all other applicants would fail a constitutional challenge.¹⁵⁷ Thus, administrators and admissions officials at post-secondary schools need only adopt the Law School model to insulate their institutions from future constitutional challenges. Even the Court acknowledged that the Law School model is not easily attainable for schools that receive a significantly large number of applications¹⁵⁸ in any given academic year.¹⁵⁹ The challenge, therefore, is for large educational institutions to create an affirmative action admission policy that mimics a model that was created for a relatively small graduate institution.

At the outset, colleges and universities would be well advised to adopt a mission statement to support their affirmative

153. See Garfield, *supra* note 119, at 679-83, (discussing the "new" strict scrutiny test the Court developed for reviewing affirmative action admission programs).

154. See generally *Grutter*, 539 U.S. 306; *Gratz v. Bollinger*, 539 U.S. 244 (2003).

155. *Grutter*, 539 U.S. at 309.

156. Garfield, *supra* note 119, at 677.

157. *Id.* at 684.

158. The Law School receives more than 3,500 applications and admits approximately 350 students annually. *Grutter*, 539 U.S. at 312-313. LSA receives roughly 15,000 first-year applications every year and admits approximately 9,400 students. UNIVERSITY OF MICHIGAN COLLEGE OF LITERATURE, SCIENCE, AND THE ARTS PROFILE 3 (2005), <http://www.lsa.umich.edu/UofM/Content/lsa/document/LSAprofile2006.pdf>.

159. *Gratz*, 539 U.S. at 275.

action admission policies. The Law School's mission statement identifying its goal to "promote and enhance classroom discussion both inside and outside the classroom by admitting students with perspectives that vary from those that have not experienced historic educational discrimination"¹⁶⁰ clearly satisfied the compelling governmental interest prong of the strict scrutiny test.¹⁶¹ Thus, schools could adopt a mission statement with identical language and know that they are fairly likely to succeed in showing a compelling governmental interest.¹⁶²

The absence of a mission statement will not preclude a court's finding of a compelling governmental interest if the defending school can demonstrate that its policy is intended to obtain diversity in the classroom. LSA did not offer the Court an identifiable mission statement.¹⁶³ Even so, the *Gratz* Court concluded that given Justice Powell's opinion in *Bakke*, an affirmative action admission policy could meet the compelling governmental interest prong since there is great educational value in a robust exchange of diverse ideas.¹⁶⁴ A declaration of

160. *Grutter*, 539 U.S. at 319.

When asked about the policy's "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against," Lempert explained that this language did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination. Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers. *Id.* (internal citations omitted).

161. *Id.* at 329-31. The mission statement notes a "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups that 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." Memorandum of Law in Support of Renewed Motion By Defendants Bollinger, Lehman, and Shields for Summary Judgment on the Grounds of Qualified Immunity at *2, *Grutter v. Bollinger*, Civ. No. 97-75928 (E.D. Mich. June 14, 2000), available at <http://www.vpcomm.umich.edu/admissions/legal/grutter/rmqigru03.html>. (last visited September 25, 2006).

162. *See Id.*

163. *See generally* Defendants' Renewed Motion for Summary Judgment as to Plaintiffs' Claims for Injunctive and Declaratory Relief at *6, *Gratz v. Bollinger*, Civ. No. 97-75231 (E.D. Mich. June 14, 2000), available at <http://www.vpcomm.umich.edu/admissions/legal/gratz/drmgz06.html> (last visited September 25, 2006) (discussing LSA's position on its policies pertaining to student body diversity).

164. *Gratz v. Bollinger*, 539 U.S. 244, 270-71 (2003).

intent on the part of the school, however, would make any constitutional challenge easier to survive.

The other requirement for constitutionally permissible affirmative action admission programs is the need for individual review of applicants.¹⁶⁵ The *Gratz* majority rejected LSA's admissions policy because of its failure to look at each applicant and what he or she might contribute to the classroom.¹⁶⁶ According to Justice Rehnquist, *Bakke* required schools to consider each applicant's "individual qualities or experiences,"¹⁶⁷ including race. A meaningful, individualized review of each application was the only way to assure compliance with the Court's rule of law.

Under the *Gratz* and *Grutter* Courts' edicts, however, a school may continue to automatically reject or automatically admit¹⁶⁸ candidates, alleviating an admissions office of individual review of every application. The automatic reject/admit practice is a means to decrease the number of applications that a school's admission office must spend time reviewing. This practice is clearly necessary given the "volume of applications," which makes it "impractical to review each applicant individually".¹⁶⁹

Under this program, a school sets certain objective numbers for an applicant's SATs and UGPA which would assure them acceptance or rejection to the school.¹⁷⁰ Thus, for in-

165. See *supra* text accompanying note 133.

166. See *supra* text accompanying notes 127 and 128.

167. *Gratz*, 539 U.S. at 272. See also *supra* text accompanying note 128.

168. Students may be admitted or rejected by a clerk without counselor review if grades and test scores are above or below certain standards. See Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment at 14, n.6, *Gratz v. Bollinger*, Civ. No. 97-75231 (E.D. Mich. May 30, 1999), available at <http://www.vpcomm.umich.edu/admissions/legal/gratz/gzsumfnt.html> (last visited September 25, 2006). LSA states that the "automatic admit" process relates only to the timing of when clerks caused certain applicants to be informed of admissions decisions Moreover, although clerks were able to reject candidates with low grades and test scores without counselor review, the process was not utilized because clerks were uncomfortable rejecting students without counselor review. *Id.*

169. *Gratz*, 539 U.S. at 275. See *supra* text accompanying note 29.

170. The increasing importance to a school's reputation based on its *U.S. News & World Report* ranking has, arguably, increased schools' use of automatic accept/reject categories. *U.S. News & World Report* credits a school's student selectivity with 15% of the weight in ranking schools. This 15% is also weighted,

stance, the 2005 *Fiske Guide*, one of the leading guide books on American colleges and universities, reports that students admitted to the Washington University of St. Louis, an elite private institution in St. Louis, Missouri, had a mean verbal SAT score range between 640 and 730 and a mean math SAT score range between 670 and 750.¹⁷¹ Most students were also in the top 10 percent of their class, or had a UGPA of approximately 3.6.¹⁷² Hypothetically, Washington University would automatically reject an applicant who submits objective scores of a 2.5 GPA¹⁷³ and an 1100 SAT, which is below the school's mean numbers. Presumably, someone with these scores does not present a profile similar to a large portion of the school's entering class and would, therefore, be unable to compete academically.¹⁷⁴ In contrast, the school might automatically admit an applicant who submits an SAT score of 1600 and a UGPA score of 4.0, well above that same mean. Schools need only review all applications that fall between the automatic accept and automatic reject categories.

The *Grutter* and *Gratz* decisions provide clear guidelines for schools to follow. Any institute of higher education interested in meeting the Court's affirmative action admission policy need merely identify as its mission the goal of admitting a diverse entering class. The school must also ensure that it reviews applicants even-handedly, providing individualized

with 50% of selectivity derived from SAT scores, 40% from GPA, and 10% from acceptance rate. Robert J. Morse & Samuel Flanigan, *Using the Rankings*, U.S. NEWS & WORLD REPORT, 2006, http://www.usnews.com/usnews/edu/college/articles/brief/06rank_brief_2.php. In an effort to climb up in the rankings, therefore, schools are increasingly limiting the number of admitted students with SATs below their desired mean. See Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC'Y REV. 105 (2006); see also Amanda Griffith & Kevin Rask, *The Influence of the U.S. News and World Report Collegiate Rankings on the Matriculation Decision of High-Ability Students: 1995-2003* (Aug. 2004) (unpublished comment), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=595223; but see Mitchell Berger, *Why the U.S. News and World Report Law School Rankings are Both Useful and Important*, 51 J. LEGAL EDUC. 487, 492-93 (2001).

171. EDWARD B. FISKE, *FISKE GUIDE TO COLLEGES* 703 (2d. ed. 2005).

172. *Id.* (3.6 average on a 4.0 scale is considered an A average).

173. A 2.5 on a 4.0 scale is equal to a C+ average.

174. A student with a UGPA of 4.0 and SAT score of 1600 would presumably be admitted to an institution with these scores, but selective schools are not likely to have an automatic admit category.

review of any applicant who is not accepted based on objective criteria.

The seemingly attainable policy outlined by the Supreme Court is inherently flawed, particularly for larger institutions. Those with multitudinous applicants do not have the luxury of time for individual review.¹⁷⁵ LSA's concern that individual review of a large applicant pool is an unattainable goal is a well founded one. For its 2006 entering freshman class, the University of Michigan received 25,733 applications for its undergraduate program and accepted 12,196 applicants.¹⁷⁶ Even small institutions are deluged with applicants. Bucknell University, a small liberal arts school with approximately 3,000 students, received 9000 applications for 915 spots.¹⁷⁷ Individual review of these applications is costly, time consuming and a potential drain of admissions office administrative resources.

To alleviate individual review of all applicants, many graduate and post-graduate institutions with significant numbers of applicants quietly use automatic admit/reject categories.¹⁷⁸ The only constitutional limitation on the practice of setting ceilings and floors is that the automatic reject and automatic admit categories remain race-neutral.¹⁷⁹ Assuming one were to accept the premise that African-Americans and other minority groups score lower on the SATs,¹⁸⁰ an automatic reject/accept policy with a narrow band of applicants for review would eliminate a disproportionate number of minority applicants. In order to assure a larger applicant pool, schools must lower the automatic reject category, thereby increasing the number of minority ap-

175. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

176. University of Michigan Undergraduate Admissions, Fast Facts, <http://www.admissions.umich.edu/fastfacts.html> (last visited September 12, 2006).

177. Letter from Mark Davies, Director of Admissions, Bucknell University, (Mar. 28, 2006) (on file with author).

178. *Sixth Annual APPAM Admissions Directors Meeting Looks at Policies and Procedures in the Admissions Process*, APPAM NEWS (Ass'n for Pub. Policy Analysis & Mgmt., Wash., D.C.), Summer/Fall 2005, at 2, available at <http://www.appam.org/news/newsletter/appam-summer-fall-05.pdf>.

179. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (holding the use of setting aside a specific number of class seats based on race or ethnicity is a quota); *Gratz*, 539 U.S. at 273 (rejecting as unconstitutional LSA's practice of automatically awarding points to underrepresented minorities to improve the likelihood of admittance).

180. *See supra* text accompanying note 36.

plicants in the individual review category. This widened band of reviewable applicants will mean that admissions offices will need to dedicate more time and resources to their review process.

Automatic admit/reject categories, however, are problematic to the affirmative action cause. Ironically, reliance on objective factors prompted the need for affirmative action in the first place, since admissions programs based on objective factors failed to yield a diverse entering class.¹⁸¹ Now, almost forty years after the affirmative action seeds were first sown, the *Grutter* and *Gratz* decisions, in some ways, place admissions offices back at square one.

The easy response to meeting the demands of the Court's constitutional requirements is to merely increase the number of admissions officers reading each application.¹⁸² Ideally, each school's office would be fully staffed with individuals capable and in a position to provide a full review to every applicant. But adding admissions officers is not necessarily practical. Such a decision would require a school to dedicate significant funding for additional personnel.¹⁸³ The cost of such funding would most likely be passed to the consumer, which is the applicant.¹⁸⁴

181. See *supra* text accompanying note 18.

182. Robert A. Sedler, *Affirmative Action, Race, and the Constitution: From Bakke to Grutter*, 92 Ky. L.J. 219, 238-39 (2003).

183. For example, Pace Law School a small, private New York law school receives over 3200 applications each year for approximately 250 spots. The eight members of the admissions committee consider approximately 1100 applications each year. The remainder are rejected or accepted based on the Admissions Director's decision. Applications are read over a period of five months. A school wishing to offer committee review to the widest possible number of applicants to assure the most diverse entering class, would most likely have to review almost twice as many applications, assuming the automatic accept category remained the same. In order to meet this need, the admissions staff would need to double. A 100% staff expansion would necessitate a 100% increase in the admissions office's personnel budget. Telephone Interview with Lisa Lancia, Associate Director of Admissions, Pace Law School, in White Plains, NY (Apr. 11, 2006).

184. The courts have recognized that there are significant educational benefits that stem from diversity and raised these benefits to the level of a compelling government interest. At the same time however, the strict "narrowly tailored" requirement will require schools to spend a significant amount of money on staff to review applications as a result of the requirement of individualized review of all applications. In light of the significant benefits that diversity provides to the students, the schools, the American military, American businesses and the country as a whole, the government should assist schools financially to ensure that affirma-

Given the need for additional personnel, the question becomes, who should bear the financial responsibility of meeting the demands of *Grutter*? Ideally, those who are benefiting from the product (the review of applications) should bear the cost of meeting the Constitutional mandate. By passing along the cost of individual review to the applicant, however, the gatekeeper is effectively closing the gate in front of those whom it seeks to admit. Since many of the applicants that affirmative action admission programs seek to benefit are socio-economically disadvantaged, such a policy would actually have a chilling effect on the applicants that schools are trying to admit in their effort to reach a critical mass of diversity in the classroom.

A different solution to the problem posed by *Grutter* might be to pass the cost of the additional admissions counselors on to those admitted to the school.¹⁸⁵ Clearly, the Court holds ideal any learning that is conducted in a classroom of diverse viewpoints.¹⁸⁶ Since training through diverse voices has the potential to benefit innocent third parties in the classroom, the value is equal for all students regardless of race or ethnicity.¹⁸⁷ By passing the cost on to students who are admitted to a school with a constitutionally permissible affirmative action admissions policy, the school will be charging them for something of value.

Raising the cost of tuition is also potentially chilling to those who are not in a position to financially afford higher education. Today, most private institutions cost in excess of \$40,000 per year.¹⁸⁸ Arguably, the students that affirmative action admission policies seek to admit, with educationally disadvantaged backgrounds, often come from lower socio-economic classes.¹⁸⁹ It is these students for whom higher tuition costs will be most problematic.

tive action programs can be maintained that provide the required level of review and scrutiny of all applicants.

185. This could be done through a tuition hike.

186. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 292 (2003). Indeed, the Court has recognized that there is a societal benefit. See *supra* text accompanying note 143.

187. Garfield, *supra* note 58, at 914.

188. See generally FISKE, *supra* note 171.

189. See Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1925-27 (1996).

To be fair, the Supreme Court did not require full individual review for each applicant and consequently the need for an increased admissions staff might not be as urgent as is posited. Schools could adopt a two-tiered review process. Under this process, admissions officials would quickly review applicants and flag applications that demonstrate a unique experience or quality of value; a more meaningful individual review is granted to those who make the "first cut."¹⁹⁰ This two tiered process is the next best, and less expensive alternative for providing meaningful review of candidates because it would require less admissions manpower than a full review of every application submitted to a particular school.

While the *Gratz* court found the process of flagging files problematic, it did not reject the practice outright.¹⁹¹ LSA "created the possibility of an applicant's file being flagged," after admissions counselors automatically assigned a point value to the applicant's file.¹⁹² Indeed, reviewing all applications to a school and flagging those of interest, might meet the guarantees of individual review and serve as a practical means of making a first cut for schools with a substantial number of applications. Such a process, however, seems neither logical nor practical. At the outset, it too remains enormously expensive since, at minimum additional admissions officials would have to be available to provide a first read-through of upwards of 20,000 applications. Moreover, initially flagging an application is likely to only minimally decrease the number of qualified applications since

190. This is the policy that Pace Law School uses. See *supra* text accompanying note 183.

191. See *Gratz*, 539 U.S. at 273-74. The *Gratz* Court was more concerned with LSA's timing of flagging applications than the idea of flagging applications for review purposes. *Id.* at 274.

Counselors may, in their discretion, flag an application for the ARC to review after determining that the applicant (1) is academically prepared to succeed at the University, (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University's composition of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography. After reviewing "flagged" applications, the ARC determines whether to admit, defer, or deny each applicant.

Id. at 256-57.

192. *Id.* at 273. Moreover, flagging was "the exception and not the rule" under LSA's policy. *Id.* at 274.

most individuals applying to a school demonstrate some type of unique quality that might be of value to the school.

Ultimately, the court's strict scrutiny test mandates individual review of the broadest number of applicants. Most institutes of higher education must craft new policies, and staff them in a way that facilitates timely and full review of an increasingly large number of applicants. Meeting the Court's new mandate therefore comes at an expense to the institution and to those it seeks to admit.

IV. Conclusion

Given the stringent requirements of the *Grutter* and *Gratz* decisions, meeting the demands of a constitutionally permissible program seems quite demanding.¹⁹³ Schools across the nation will be forced to increase their admissions resources or potentially forgo the ability to admit a diverse class. In the short run, it seems likely that schools will meet the challenge, but it will come at a great expense to those that affirmative action seeks to benefit.

Not only is the reality of the law problematic to the longevity of affirmative action admission policies, the frailty of the majority opinion in *Grutter* coupled with the continued national movement against affirmative action¹⁹⁴ pose a threat to even those affirmative action policies that are identical to the Law School model.¹⁹⁵ A further shift to the right in the Court's ideological make-up could potentially end the ability of schools to adopt race-preference admissions policies. Only five of the nine Justices fully agreed with the majority that the Law School's policy in *Grutter* was constitutional¹⁹⁶ and an overwhelming

193. See *supra* text accompanying note 183.

194. See Mary Wiltenberg, *Affirmative Action Battle Brews Anew in Michigan*, THE CHRISTIAN SCIENCE MONITOR, Jan. 20, 2004, at 18, available at <http://www.csmonitor.com/2004/0120/p18s01-legn.html>.

195. See Senator Dianne Feinstein, Address Before the Los Angeles County Bar Association and Public Counsel (Aug. 24, 2005), available at <http://www.senate.gov/~feinstein/05speeches/s-supreme-ct.htm> (last visited September 25, 2006). For example, see *Lawrence v. Texas*, 539 U.S. 558 (2003) as opposed to *Bowers v. Hardwick*, 478 U.S. 186 (1986), or *Plessy v. Ferguson*, 163 U.S. 537 (1896) as opposed to *Brown v. Board of Education*, 349 U.S. 274 (1955).

196. This included Justices O'Connor, Ginsberg, Breyer, Stevens and Souter. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003).

majority of the Court struck down LSA's program in *Gratz*.¹⁹⁷ Justice O'Connor's departure from the Court and President Bush's nomination of conservative John Roberts is also problematic to its proponents.¹⁹⁸ Finally, recent anti-affirmative action proposals such as Proposition 54 in California¹⁹⁹ (which would have barred bar state agencies from classifying people by race or ethnicity) or I-200 in Washington State²⁰⁰ (which precludes schools from granting preferential admissions considerations based on race²⁰¹) further illustrate the growing trend against pro-affirmative action policies.

The *Grutter* and *Gratz* decisions provide a bittersweet victory for those who favor affirmative action admission policies. At best, the decision will cause an undue financial burden on applicants and the institutions that seek to admit them. At worst, it will provide an unworkable situation, thereby silencing important voices and viewpoints in many of our nation's elite educational institutions.

197. This included Chief Justice Rehnquist, Justice Breyer, Justice O'Connor, Justice Thomas, Justice Kennedy and Justice Scalia. See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003).

198. See generally *Bush Nominates Roberts to Supreme Court*, CNN.COM, July 20, 2005, <http://www.cnn.com/2005/POLITICS/07/19/scotus.main/>.

199. See generally Richa Amar, *Unequal Protection and the Racial Privacy Initiative*, 52 UCLA L. REV. 1279, 1279-87 (2005) (discussing California's Proposition 54).

200. See generally Tom Brune, *Locke Keeps Diversity as Goal*, SEATTLE TIMES, Dec. 1, 1998, at B1.

201. For a discussion in support of Proposition 54, see Lynn Vincent, *Cruz Missile: CALIFORNIA: Recall politics may thwart an initiative that would end state classifications of citizens by race*, WORLD MAGAZINE, Sept. 27, 2003, available at <http://www.worldmag.com/articles/8071>.

The 'Racial Privacy Initiative' (RPI), would bar Golden State agencies from classifying people by race or ethnicity. Its chief architect, University of California regent and anti-affirmative action activist Ward Connerly, crafted the measure to end government's preferential treatment based on race: RPI's passage will signal America's first step towards a color-blind society.

Id. (internal quotations omitted); see also Robert Siegel, *California Recall Hearing* (Nat'l Pub. Radio: All Things Considered, Sept. 22, 2003), available at <http://www.npr.org/templates/story/story.php?storyId=1439119> (reporting that California gubernatorial candidate Cruz Bustamante could not spend controversially raised campaign contributions to fight Proposition 54).