January 2016

The End of Affirmative Action in Higher Education: Twenty-Five Years in the Making?

Ashlee Richman

Follow this and additional works at: https://via.library.depaul.edu/jsj

Recommended Citation
Available at: https://via.library.depaul.edu/jsj/vol4/iss1/4

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal for Social Justice by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, cmcclure@depaul.edu.
THE END OF AFFIRMATIVE ACTION IN HIGHER EDUCATION: TWENTY-FIVE YEARS IN THE MAKING?

BY: ASHLEE RICHMAN

TABLE OF CONTENTS

I. Introduction .......................................................... 62

II. Recognizing Constitutional Boundaries on Race Conscious Admissions ........................................... 64
   A. Justice O'Connor Delivers the Opinion of the Court in Grutter v. Bollinger .............................. 65
   B. Chief Justice Rehnquist Delivers Different Results in Gratz v. Bollinger .............................. 71

III. Colleges and Universities Must Look Beyond the Numbers to Attain the Benefits of a Diverse Student Body ................................................................. 73
   A. "How Much Diversity is Enough?" .............................................. 74
   B. Maximizing the Benefits of Diversity in Higher Education .................................................... 77
   C. Exploring Alternatives to Race Conscious Admissions ........................................................ 83

1 Ashlee Richman attends American University Washington College of Law, class of 2011. She attained her undergraduate degree at Northwestern University School of Education and Social Policy in 2007 but was born and raised in South Florida. Ashlee taught high school in Washington, DC as a fellow in the Marshall-Brennan Constitutional Literacy Project during the 2009-10 school year, and she has returned to teach through the program for the 2010-2011 school year. Her experiences in teaching inspired a closer look at the future of affirmative action in higher education. She would like to thank her co-teacher and classmate Frank Massaro and her professor and mentor Maryam Ahranjani for their help and support in the writing of this article.
IV. Will Race-Based Admissions Policies Still be Necessary to Achieve Diversity Twenty-Five Years After Grutter? .............................. 88

A. Racial Demographic Predictions for 2030 ...... 88

B. Navigating Affirmative Action in “Post-Racial” Society? ........................................ 90

C. Will the Court Continue to Uphold the Use of Race-Based Admissions Policies in Twenty-Five Years? ......................................... 91

V. Conclusion........................................... 95

“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

- Grutter v. Bollinger

I. INTRODUCTION

In 2003, the United States Supreme Court addressed an issue believed to be fundamental to “the dream of one Nation, indivisible”: diversity in higher education. The Court addressed the use of race-conscious admissions policies in a controversial 5-to-4 decision in Grutter v. Bollinger and a 6-to-3 decision in Gratz v. Bollinger. Though the Court upheld student body diversity as a “compelling governmental interest” permissible as a factor to

---


3 Id. at 332. The Court acknowledged the importance of “effective participation by members of all racial and ethnic groups in our civic life.” Paramount to this goal is the availability of open public institutions (particularly for higher education). The inclusion of all races and ethnicities furthers the government objective of good citizenship of all segments of American society. Id. at 331-32.


6 Grutter, 539 U.S. at 329.
be considered in the admissions process, the Court also acknowledged the limits of this goal and means for achieving it.\footnote{Gratz, 539 U.S. at 270.} Further, the Court emphasized that educational institutions may not use race-conscious admissions policies indefinitely, stressing that the courts would reevaluate the need for affirmative action in the future.\footnote{Grutter, 539 U.S. at 343.}

Few would argue with the notion that diversity in education is beneficial for all involved. A range of experiences and backgrounds improves class discussions, better prepares students for diversity in the workplace, and encourages a general understanding of people who think and feel differently on a variety of issues. Thus, affirmative action policies designed to ensure diverse student bodies in schools arguably benefit everyone involved. However, several questions remain regarding the future of race-conscious admission policies: (1) are current policies effective in actually bringing diversity to college and graduate school campuses and (2) will affirmative action policies still be necessary in 25 years.

After growing up in Palm Beach County, Florida, a geographic region with very little diversity,\footnote{See Palm Beach County, Florida, \textsc{QuickFacts.Census.Gov}, \url{http://quickfacts.census.gov/qfd/states/12/12099.html} (last visited Oct. 15, 2010).} I was optimistic about being exposed to students with different backgrounds and cultural identities in college. However, as the statistics for Northwestern University (my alma mater) show,\footnote{See Northwestern At a Glance – Profile of First-Year Class, 2010, \textsc{Northwestern.Edu}, \url{http://www.northwestern.edu/about/northwestern-at-a-glance/students.html} (last visited Oct. 15, 2010).} the demographic makeup on campus is relatively homogeneous. In addition to demographic statistics making it unlikely for most students to benefit from “diversity,”\footnote{See Northwestern University – Diversity, \textsc{CollegeProwler.Com}, \url{http://collegeprowler.com/northwestern-university/diversity/} (last visited Oct. 15, 2010) (giving Northwestern a grade of “B” in diversity).} self-segregation also plays a substan-
tial role in limiting proliferation of different ideas on campus. After two years at one of the most diverse law schools in the country,12 I still believe in the importance of diversity in education, but I have seen first-hand that schools cannot always achieve this compelling interest by relying solely on race consideration in admissions to "create" diversity.

In Grutter v. Bollinger, Justice O'Connor stressed the importance of narrowly tailoring the methods used to achieve diversity in education,13 and she placed a time limit on the need for racial preferences at twenty-five years.14 Taking the reasoning of the Court in the Bollinger cases into account, this paper will assess the effectiveness of race consideration in higher education admissions policies. Additionally, with the help of predictive statistics on national demographics, I will illustrate how the need for affirmative action will decrease over time as a result of a rise in minority populations in the United States. Lastly, I will address the time frame set by Justice O'Connor and will explain why there is merit to her aspirations for the state of diversity in the United States. However, throughout this paper, it will become clear that race considerations in admissions and the fullness of time are not all that is necessary to achieve diversity in higher education.

II. RECOGNIZING CONSTITUTIONAL BOUNDARIES ON RACE CONSCIOUS ADMISSIONS

In deciding the Bollinger cases, the Supreme Court addressed an issue plagued by inconsistency in the lower courts: student

14 Id. at 343.
body diversity as a compelling government interest.\textsuperscript{15} Though the public frequently treated \textit{Grutter} and \textit{Gratz} as a single controversy, the two cases involved distinct admissions programs, which the Court evaluated differently. The Court applied strict scrutiny in both cases,\textsuperscript{16} upholding the University of Michigan Law School’s admissions policy as constitutional,\textsuperscript{17} but rejecting the University’s undergraduate admissions policy for not being sufficiently tailored to advance the University’s interest in diversity.\textsuperscript{18}

\textbf{A. Justice O’Connor Delivers the Opinion of the Court in Grutter v. Bollinger}

Though the other eight justices were more predictable in their opinions of whether or how affirmative action is permissible, Justice O’Connor was less decided in her opinion of the issue, and her views were less foreseeable.\textsuperscript{19} O’Connor’s mentor on the Court, Justice Lewis Powell, drafted the opinion in the 1978 case of \textit{Regents of the University of California v. Bakke}\textsuperscript{20}, and

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{15} See Hopwood v. Texas, 78 F.3d 932 (5th Cir.) (holding that promoting diversity no longer serves as a compelling interest, and \textit{Bakke} was no longer good law). \textit{But see} Johnson v. Bd. of Regents, 263 F.3d 1234 (11th Cir. 2001) (maintaining diversity as a compelling interest, despite striking down a race-conscious college admissions policy for not being sufficiently narrowly tailored to advance its diversity goals).
  \item \textsuperscript{17} \textit{Grutter}, 539 U.S. at 343.
  \item \textsuperscript{18} \textit{Gratz}, 539 U.S. at 275 (prohibiting the consideration of race in the admissions process where the policy is not sufficiently flexible and does not provide enough individualized consideration of applicants).
  \item \textsuperscript{19} \textit{Jeffrey Toobin, The Nine: The Secret World of the Supreme Court} 210 (Random House, Inc, NY. 2008) (discussing how Rehnquist, Scalia, Kennedy, and Thomas believed in a “color-blind” Constitution and favored striking down all programs that drew distinctions among race, while Stevens, Souter, Ginsburg, and Breyer supported advantages for racial minorities to redress prior discrimination or foster diversity).
  \item \textsuperscript{20} \textit{Regents of the Univ. of Cal. v. Bakke}, 438 U.S. 265 (1978) (striking down the rigid quota system used at the state medical school at Davis, where the university reserved sixteen of one hundred seats for minorities). \textit{See Id. at}
\end{itemize}
\end{footnotesize}
Powell’s rationale regarding affirmative action played a substantial role in O’Connor’s opinion in *Grutter*.

In *Bakke*, Powell rejected the university’s quota system. Powell indicated, however, that race could be used as a factor in admissions, not because of reparations for decades of discrimination, but because of the benefits to the entire population. Powell emphasized that the robust exchange of ideas and informal learning through diversity provide cause for ethnic background to be a “plus” in an applicant’s file. This rationale served as the predominant justification for affirmative action for twenty-five years, and O’Connor’s opinion affirmed that Powell’s ruling still held ground in 2003.

Michigan Law School’s admissions policy sought to “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.” The policy recognized a variety of possible bases for diversity admission, such as travel abroad experience or foreign language fluency, but reaffirmed the school’s longstanding commitment to racial and ethnic diversity. The University argued that a “critical mass” of underrepresented minority students was necessary to further ensure the unique contributions that diversity would bring to the Law School. The Director of Admis-

---

217 (discussing how Justice Powell’s opinion in *Bakke* became the prevailing law on the subject).
21 *Bakke*, 438 U.S. at 313 (recognizing the benefits of “wide exposure to the ideas and mores of students as diverse as this Nation of many peoples”).
22 *Id.* at 318.
24 *Id.* at 315 (citing to the Appellant’s brief).
25 *Grutter*, 539 U.S. at 316 (referencing, particularly, “the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics, and Native Americans, who without this commitment might not be represented. . . in meaningful numbers”).
26 *Id.* at 330 (qualifying the Law School’s concept of critical mass as defined by “reference to the educational benefits that diversity is designed to produce”).

Volume 4, Number 1 Fall 2010
sions maintained that “critical mass” meant meaningful numbers such that minority students would be encouraged to participate in class without feelings of isolation. The University stated that it was not necessary to maintain a specific number or percentage of minority students, but that, as long as a “critical mass” of minority students existed on campus, racial stereotypes would lose their force, and there would be a variety of viewpoints among minority students rather than a “minority viewpoint.”

The *Grutter* Court found the Law School’s interest in a diverse student body to be compelling, recognizing that diversity was at the heart of the school’s proper institutional mission and that the University was acting in good faith. O’Connor’s opinion in *Grutter* strongly endorsed the value of student body diversity for “promoting educational benefits, assisting in the breakdown of racial and ethnic stereotypes, and the development of a diverse, racially integrated leadership class.” Through research studies and expert reports on the benefits of diversity, the Court recognized that a diverse student body provides substantial benefits for the education of all students.

Justice O’Connor next assessed the means that the Law School employed to achieve its compelling interest of furthering diversity, using *Grutter* to finally “define the contours of the narrow-tailoring inquiry with respect to race conscious university admissions programs.” O’Connor relied on the Court’s predominant holding in *Bakke*, where the Court held that a state can further a legitimate and substantial interest in diversity through “a properly devised admissions program involving the

\[27\] Id. at 318.
\[28\] Id. at 319-20.
\[29\] Id. at 329.
\[31\] *Grutter*, 539 U.S. at 333.
competitive consideration of race and ethnic origin.”32 O’Connor’s Grutter opinion, however, finally articulated some of the characteristics of a “properly devised admissions program.”33

In addition to upholding the rejection of a quota system and insulation of minority applicants from competition with other applicants,34 O’Connor specified that the consideration of race or ethnicity was permissible “only as a plus.”35 Because Michigan’s law school used a highly individualized and holistic review of each applicant’s file, giving particular consideration to an applicant’s potential contribution to a diverse educational environment, O’Connor voted to uphold the admissions policy.36

Beyond the consideration of race as a factor, the Law School took into account a broad range of qualities and experiences of value to its student body diversity.37 The Law School allowed applicants to submit personal statements, letters of recommendation, and essays describing potential contributions to the life and diversity of the Law School, which, O’Connor found, further exemplified the University’s “narrow tailoring” of its policy to its goals of diversity.38 Though the Petitioner39 and the United States argued that the Law School’s plan was not narrowly tai-

---

32 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (referenced by O’Connor in the opinion for the Court in Grutter, as justification for the consideration of race of any applicant).
33 Id. at 322.
34 Id. at 315 (referencing Justice Powell’s opinion).
35 Grutter, 539 U.S. at 334.
36 Id. at 337 (allowing for a policy without the use of a single “soft” variable for automatic acceptance or rejection, and without mechanical predeter-
37 Id. at 338 (referencing the policy’s possible bases for diversity admissions, which included “admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hard-
38 Id.
39 Id. at 316-17 (noting that Petitioner Barbara Grutter is “a white Michigan resident who applied to the Law School in 1996 with a 3.8 GPA and 161
lored because race-neutral alternatives existed to achieve the same educational benefits of student body diversity, O’Connor determined that narrow tailoring does not require the “exhaus-
tion of every conceivable race neutral alternative.” Instead, she clarified that narrow tailoring requires serious, good faith consideration of workable race-neutral alternatives to achieve diversity.

Though O’Connor’s opinion did lead to a 5-to-4 decision to uphold the Law School’s affirmative action admissions policy, O’Connor was also mindful to place limits on the ruling. In recognizing the importance of the Fourteenth Amendment to eliminate governmentally imposed discrimination based on race, O’Connor articulated that race-conscious admissions policies have an expiration date. O’Connor stated in her opinion that, though racial classifications were compelling at the time of the Grutter case, she was unwilling to support a permanent justification for racial preferences. Specifically, O’Connor endorsed a “termination point” of 25 years. This “termination point” was intended to ensure that policies reflect the need for race as a consideration, rather than an end to the importance of diversity, and the specified twenty-five years has been thought to be more of an “aspiration” than a mandate. Just as “all governmental use of racial classifications or preferences must have a logical

---

LSAT score” but was rejected, citing the school’s affirmative action policy as the cause).

40 Id. at 339 (citing Wygant v. Jackson Bd. Of Ed., 476 U.S. 267, 280 (1986) (requiring consideration of lawful alternatives and less restrictive means, but allowed policies that served the interest ‘about as well’)).

41 Id. at 340.

42 Id. at 341 (quoting Palmore v. Si doti, 466 U.S. 429, 432 (1984)).

43 Id. (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).

44 Id. at 342.

45 CIVIL RIGHTS PROJECT, supra note 30, at 11 (theorizing that the 25 years mentioned by O’Connor was devised as a result of the 25 years that had passed since the Court last assessed the use of racial preferences in Bakke).
endpoint," race conscious admissions programs must also have a stopping point, according to Grutter.\textsuperscript{46}

O’Connor maintained that a durational requirement could be met with sunset provisions in race-conscious admissions policies as well as periodic reviews to assess whether racial preferences are “still necessary to achieve student body diversity.”\textsuperscript{47} Additionally, O’Connor referenced universities in California, Florida, and Washington State as prime examples of states wherein alternative race-neutral approaches were being utilized,\textsuperscript{48} and she recommended the proliferation of these alternatives for universities in other states.\textsuperscript{49}

With this opinion, the Court essentially enumerated five questions to ask in order to determine whether a race-based admissions policy is constitutional: (1) whether the program offers a competitive review of all applications without quotas or separate tracks that insulate minorities; (2) whether the program provides flexible, individualized consideration of applicants to ensure race is only one of several factors being considered; (3) whether the institution considered workable race neutral alternatives to the program; (4) whether the program unduly burdents non-minority applicants; and (5) whether the program is limited in time, with a logical end point.\textsuperscript{50} In applying this five-step test to the facts in Grutter, the Court found that the Equal Protection Clause did not prohibit the Law School’s narrowly tailored use of race in furtherance of its compelling interest in the educational benefits of diversity.\textsuperscript{51}

\textsuperscript{46} Grutter, 539 U.S. at 342.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. (citing United States v. Lopez, 514 U.S. 549, 581 (1995) (encouraging States to perform their role as “laboratories for experimentation to devise various solutions where the best solution is far from clear”)).
\textsuperscript{50} CIVIL RIGHTS PROJECT, supra note 30, at 8.
\textsuperscript{51} Grutter, 539 U.S. at 343.
B. Chief Justice Rehnquist Delivers Different Results in Gratz v. Bollinger

Though the Court applied all five inquiries to Grutter, the Court focused mainly on the second inquiry in Gratz; unlike the Law School’s policy in Grutter, the Court found the admissions policy in Gratz to be too rigid to meet the requirement of being narrowly tailored.\(^52\) Though it also drew from the “plus factor” analysis of Bakke, the University of Michigan’s College of Literature, Science and the Arts had an admissions policy that was markedly different in its application and the results it bore than the Law School’s policy.\(^53\)

The University’s policy automatically distributed 20 points “to every single ‘underrepresented minority’ applicant solely because of race.”\(^54\) A maximum of 150 points could be given to any applicant under an element of the policy, and race was considered on this point system along with “grades, standardized test scores, socioeconomic status, geographic factors, alumni relationships, personal achievement, leadership and service skills, and writing an outstanding essay.”\(^55\) The University did not give any other consideration to potential students’ applications beyond conducting a factual review to ensure that applicants’ minority claims were accurate. This lack of further consideration made the automatic point distribution the decisive factor “for virtually every minimally qualified underrepresented minority applicant.”\(^56\)

\(^{52}\) Civil Rights Project, supra note 30, at 8.

\(^{53}\) Id. at 12.

\(^{54}\) Gratz v. Bollinger, 539 U.S. 244, 270 (referencing and quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (“[p]refering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake”).

\(^{55}\) Civil Rights Project, supra note 30, at 12.

\(^{56}\) Id. at 13 (distinguishing from Justice Powell’s example in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (finding that the race of a black applicant could be considered without being decisive)).
Relying on the holding in *Bakke*, the *Gratz* Court distinguished the University’s program from constitutionally permissible systems on the basis that programs allowed under *Bakke* “did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity.” Chief Justice Rehnquist’s opinion for the Court predominantly focused on the lack of flexibility and individualized consideration offered by the admissions policy in *Gratz*. The University’s policy of automatically distributing 20 points to a candidate on the basis of race — which amounted to one-fifth of the points needed for guaranteed admission to the University — was struck down as clearly not sufficiently tailored to achieve the interest of educational diversity. The Court condemned separate tracks and quota-like policies to guarantee admission of minority applicants.

Though Justice Souter argued in his dissent that an equivalent number of points could be given to non-minority applicants for socio-economic disadvantage or attendance at a predominantly minority high school, the Court was not persuaded. Furthermore, the University’s justification for the policy on the basis that the implementation of a program more closely structured to that of the Law School would present an “administrative chal-

---

57 *Gratz*, 539 U.S. at 270-71 (acknowledging the permissibility of a university employing an admissions program that considers race or ethnic background a “plus” in a particular file, and quoting *Bakke*, 438 U.S. at 317 (finding that such a system would be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant”)).

58 Id. at 271.

59 Id. at 274 & 274 n.21 (prohibiting the University’s reliance on the point system for the “bulk of admissions decisions”).

60 Id. at 270.

61 See id. at 270-71.

62 Id. at 294-95 (Souter, J., dissenting).

63 CIVIL RIGHTS PROJECT, *supra* note 30, at 14 (recognizing Justice Souter’s point that this tactic “could lead to non-minority applicants’ achieving higher overall scores than minority applicants”).
The End of Affirmative Action

Or

Affirmative Action

challenge," was rejected. Rehnquist held that Powell’s *Bakke* opinion did not permit a university to employ any means to achieve a stated goal of diversity without consideration of the limits of strict scrutiny analysis.

On this basis, the University’s use of race in its admissions policy was found to be unconstitutional. Unlike the Law School’s policy, which was found to be narrowly tailored, the undergraduate program’s policy was rejected for failing to achieve the “asserted compelling interest in diversity” through sufficiently directed means. Through the disallowance of this policy, in contrast to the Court’s close decision in *Grutter*, the *Gratz* Court drew limits and better outlined the means permissible to achieve diversity in higher education.

**III. Colleges and Universities Must Look Beyond the Numbers to Attain the Benefits of a Diverse Student Body**

Though the *Grutter* Court articulated some limitations to race-conscious admissions policies—alluding to sunset provisions and the need for “periodic reviews” to assess the continuing need for race-conscious admissions policies—the Court did not place a requirement on schools to assess the effectiveness of their chosen policies. The Court merely acknowledged that policies were often imperfect in nature at achieving their goals, and O’Connor wrote that she hoped that states would continue

---

64 *Gratz*, 539 U.S. at 275 (dismissing the Respondents’ contention that “[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the . . . admissions system” on the basis that challenges do not make an otherwise “problematic system” suddenly constitutional). See Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989) (disallowing “administrative convenience” to be determinative of constitutionality for a suspect classification).

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

66 *Id.*

67 *Id.*

“performing their role as laboratories for experimentation to devise various solutions.” However, merely focusing on the number of admitted students of minority background does not speak to the effectiveness of schools at achieving the diverse ‘proliferation of ideas’ that they seek. Diversity is a complex concept and not one that is easily defined. By incorporating studies done on racial stereotyping and campus diversity as well as personal experience teaching at a high school with a demographic make-up that is 100% black, this aspect of the paper breaks down the policies and practices that most effectively reap the benefits of diversity.

A. “How Much Diversity is Enough?”

During hearings for Gratz and Grutter, Justice Scalia posed the question of “how much diversity is enough?” Countless reviews on diversity in higher education reveal that greater numbers of minorities contribute to “vitality, stimulation, and educational potential” that cannot be achieved with a more homogeneous student body. The likelihood that students will engage with classmates from different backgrounds vastly increases when compositional diversity of a campus increases. Additionally, greater exposure to peers from different ethnic backgrounds decreases the potential for racism and discrimina-

69 Id. (citing to United States v. Lopez, 514 U.S. 549, 581 (1995)).
70 J Jeffrey F. Milem, Mitchell J. Chang & Anthony Lising Antonio, Making Diversity Work on Campus: A Researched-Based Perspective 4 (Association American Colleges and Universities 2005) (referencing a question posed by Justice Scalia in the Supreme Court hearings for the University of Michigan cases) [hereinafter Diversity on Campus].
71 Id.
72 Id. at 5-6 (referencing three reviews that studied educational benefits of diversity in higher education and showed that diversity-related benefits span from the individual students and institutions to private enterprise, the economy, and broader society).
73 Id. at 6.
A study done at New York University and Harvard University revealed that racial prejudice arises out of fear of the unknown, and the predisposition to fear can thus be broken down by increased positive exposure to people of other races. Our society clearly has much to gain from exposing college students to diversity. However, no magic number to achieve "diversity" has ever been spelled out by the Court, universities, or current research.

What we do know is that higher proportions of white students limit opportunities for cross-racial interaction and inhibit learning along social and cultural lines because underrepresented student groups are more likely to be "viewed as tokens." Lower minority representation makes those groups more visible and exaggerates differences, leading to the furtherance of existing stereotypes and a diminished likelihood that students will benefit from diversity of experiences and ideas. With numbers rising to the level of the much sought after "critical mass" described in Grutter, students are more likely to reap the benefits of diversity.

However, though studies support the argument that a "critical mass" of minority students would ensure that everyone profits from diversity, no one has placed a number or percentage on the demographic composition that would really make a difference. Armed with this question, I asked my students at an entirely homogenous black inner city Washington, DC school to attempt to answer the question. In discussing busing and inte-

---

74 Mark Henderson, Racism is Learnt from Fear of the Unknown, THE TIMES ONLINE (Jul. 29, 2005), http://www.timesonline.co.uk/tol/news/uk/article549216.ece (positing that the "inbuilt inclination" towards learning to fear people who appear different is best combated by positive exposure to people of different races) [hereinafter Henderson].
75 Id.
76 DIVERSITY ON CAMPUS, supra note 70, at 6.
77 Id.
79 DIVERSITY ON CAMPUS, supra note 70, at 15-6.
Integration of schools, I asked the students how they would feel if they attended a predominantly white school. Though they first answered nonchalantly, as if the change would not phase them, further prodding revealed a different story.

I gave the students a scenario in which they had the opportunity to leave their underfunded school that houses them in trailers temporarily and offers no college counseling and few Advanced Placement courses in exchange for a school with smaller class sizes, better resources, and a better chance at getting accepted by a top tier college. The catch was that they would have to be one of only a handful of black students in attendance at the otherwise all white school. First, I asked for a showing of hands as to how many of my students would attend the predominantly white school if the demographic makeup was ten percent black. Of the fourteen students who showed up to class that day, six raised their hands. Then, I decreased the composition to only five percent black, and I again asked them to raise their hands if they would switch schools and take the improved academic environment at the expense of peers who looked more like them. This time, only two students raised their hands.

Though this still does not better define what that necessary critical mass is to ensure the proliferation of diverse ideas and the quashing of racial stereotypes and discrimination, it does shed light on an important concept. Without the assurance of a more colorful student body, most minority students would sacrifice academic opportunity for comfort. No magic number or percentage can be devised through studies or class surveys, but it is clear that a minority composition that is barely visible will be ineffective at proliferating the named benefits of interracial interactions.

---

80 The hypothetical question posed described a school with nine other black students in a class of one hundred.
B. Maximizing the Benefits of Diversity in Higher Education

Achieving true diversity on college campuses undoubtedly provides a valuable educational tool; however, defining diversity is not an easy feat. Along with most schools, the Supreme Court evaluated the pursuit of diversity with the understanding that diversity simply describes student body composition. While this is a fair assessment given the overwhelmingly white composition of universities, employing numerical composition of a community to describe diversity does not address the fundamental purpose of affirmative action as asserted in Bakke: the benefit for all students of "wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." 

The exclusive reliance on numbers to exemplify "diversity" in higher education suggests the use of quotas (perhaps through "winks, nods and disguises"), despite the ruling that they are unconstitutional. Using admissions numbers as the defining factor for diversity neglects to consider what we know about college campuses: even if a school appears to be "compositionally diverse,” the racial climate of the campus may prohibit the much sought after educational benefits of enrolling a diverse student population. With balkanization and cultural stereotypes re-

81 DIVERSITY ON CAMPUS, supra note 70, at 4.
83 Gratz v. Bollinger, 539 U.S. 244, 276 n.22 (referencing Justice Ginsburg’s observation in her dissent that “[o]ne can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue,” alluding that a fully disclosed, accurately described affirmative action program is preferable to schools that may seek to achieve “similar numbers through winks, nods and disguises”).
84 Bollinger, 539 U.S. at 315.
85 DIVERSITY ON CAMPUS, supra note 70, at 4.
maining a threat to diversity on college campus, universities need to seek out effective ways of maximizing opportunities for students to reap the benefits of a compositionally diverse student body.

As I experienced as an undergraduate at Northwestern University, the presence of self-segregation and the visible clustering of students by race can greatly inhibit the opportunity for a diverse educational experience. Balkanization of minority groups can create a “formidable barrier” to interracial exchanges if universities ignore the issue of diversity after the admissions process.88

In 2009, Williamsburg County schools in South Carolina settled a lawsuit with students over same-race discrimination on the basis of harassment and a hostile intra-racial educational environment.89 As the $150,000 settlement90 in that case reflects, negative cultural stereotypes regarding minority students who excel academically can greatly inhibit students from sharing their cultural experiences and benefiting from campus diversity. Simply admitting minority students to predominantly white universities does not address social stigma and cross-cultural issues that may prevent true proliferation of diverse ideas once enrolled.

As President Barack Obama said, “Children can’t achieve unless we raise their expectation and turn off the television sets and eradicate the slander that says a black youth with a book is

87 See Roland G. Fryer, “Acting White”: The Social Price Paid by the Best and Brightest Minority Students (Education Next 2006) (assessing the effect of grades on popularity and social inclusion among minority groups) [hereinafter Fryer].
88 Diversity on Campus, supra note 70, at 24.
90 Id.
acting white." While the popularity of white students has been found to increase as their grades increase, black and Hispanic students suffer a decline in popularity when they attain higher GPAs. Once a student achieves a 2.5 GPA (an even mix of Bs and Cs), distinct popularity differences across ethnic groups emerge. Hispanic students lose popularity "at an alarming rate," and black students are less popular among their peers as they excel than their white counterparts are.

Internal integration exacerbates the problem of peer-on-peer academic discouragement. Blacks in less-integrated schools with fewer opportunities for cross-ethnic friendships experience a smaller trade-off between achievement and their popularity. Racially mixed schools increase the stigma of "acting white," and the effect on discouraging achievement and expression of ideas is almost five times greater in academic settings with more cross-ethnic friendships. Settings that are more racially integrated can reinforce pressures to "toe the ethnic line." Though minority students may be admitted to predominantly white schools, admittance does not ensure that they will integrate with white students or feel comfortable expressing themselves in a manner that will expose all students to the benefits of a diverse campus environment. Beyond playing the numbers game, more action must be taken to facilitate and encourage interracial socializing for the effects of diversity to take over.

In addition, some social institutions can do more to discourage true integration than to encourage it. Harvard psychology

---

91 Fryer, supra note 87, at 53 (citing President Obama's keynote speech from the 2004 Democratic National Convention).
92 Id. at 56 (referencing the statistics in figure 1).
93 Id.
94 Id.
95 Id. at 57-8.
96 Id. at 58.
97 Id.
98 Id.
professor and author Jim Sidanius addressed the impact of racially affiliated student groups and predominantly white Greek campus organizations. Sidanius theorized that while ceasing all support of largely segregated Greek systems or minority student organizations would be "too costly politically," students would benefit from decreased encouragement of these organizations that stifle interracial interactions. He advises college leaders to stop encouraging the growth of these types of institutions on campus by decreasing support and funds.

I witnessed the effects of some student groups as running counterproductive to the exchange of diverse ideas and experiences while in my undergraduate and graduate studies. Ethnic student groups at Northwestern University often created as many divisions in social interaction as the predominantly white but non-racially affiliated Greek organizations on campus. The few minority students I met who were in racially unaffiliated Greek houses were often either ostracized by their minority peers as "traitors" to their race, or they were viewed as "token" minorities and stereotyped more in their fraternity and sorority interactions than they were in a classroom setting. Even in law school at an incredibly diverse institution (comparatively speaking), I have seen students experience social pressures against opening discourse and fostering friendships with non-minority students. One of my closest friends is Hispanic, and though she is involved in the Hispanic student groups on campus, she still experienced bullying from her peers as a result of her white friends: when discussing campus diversity one day, she shared

(reviewing findings from recent studies that membership in groups defined largely by race and ethnicity have a negative impact on students) [hereinafter Impact of Diversity]. Findings reviewed in the article revealed that membership in fraternities, sororities, and campus student unions (whether racially affiliated or historically one race) led to an increase in feelings of victimization and animosity toward peers of other ethnicities.

100 Id.
101 Id.
102 Id.
with me that a classmate had dismissed and disparaged her to mutual friends over her perceived abandonment of her heritage. This cultural rejection of social integration by some minority groups discourages students from sharing and learning from diverse experiences.

Students’ perceptions of a university’s endorsement of diversity also play an important role in the likelihood that students will actually engage in and benefit from interracial interaction. Even when campuses are relatively diverse, the perception that the institution is not committed to diversity leads students to shy away from interacting with students of different ethnicities and backgrounds. The kind of “surface segregation” in which ethnic groups appear to cluster on campus is usually viewed as a failure of the institution to truly diversify, even by those students who have interracial relationships and are taking advantage of calculated campus diversity.

So what can be done to encourage the dissemination of ideas across cultural groups once students are admitted to predominantly white schools? Researchers recommend careful monitoring of the campus climate via surveys and interviews to generate valuable data on the extent of interaction across groups. Circulating the data through student newspapers can “dispel negatively perceived images of the racial climate” and replace them with more accurate representations of student experiences. Schools must do more than simply bring a numerically diverse student body to the same campus.

Surveys done at the University of California Los Angeles revealed that positive impacts of diversity were most likely to be found when people lived with those from other racial groups.

---

103 Diversity on Campus, supra note 70, at 12.
104 Id.
105 Id. at 24 (maintaining that such studies can indicate whether behavior of students is at odds with surface-level perceptions).
106 Id.
107 Impact of Diversity, supra note 99.
Informal interactions that fostered the development of emotional friendships rather than just the trading of information proved to be most beneficial. Scholar and author Jim Sidanius recommends that colleges “randomly assign students to roommates or deliberately mix race and ethnicity of roommates to make sure students don’t end up rooming in ethnic enclaves.”

Interracial friendships have been found to have benefits ranging from “enhanced self-confidence, motivation, and educational aspirations to greater cultural awareness and commitment to racial equity.” Even with relationships in which students more closely resemble acquaintances than close friends, students are more likely to engage in controversial topics of diversity with students of different backgrounds than with peers of the same race.

Providing stimulating courses to educate about historical, cultural, and social bases of diversity and community would also open greater discourse for exposure to diverse opinions. Though students may choose to gravitate toward their racially similar peers outside of class, courses covering diversity-related topics provide more chances for the formation of interracial relationships and have been found to encourage more favorable judgments of minorities. Even classes that do not focus specifically on a particular minority group have been found to

---

108 Id.
109 Id. (quoting Sidanius and positing that colleges should “place a premium” on diversifying through manipulated room assignments).
110 DIVERSITY ON CAMPUS, supra note 70, at 9 (referencing A.L. ANTONIO, REV. OF HIGHER EDUC., DIVERSITY AND THE INFLUENCE OF FRIENDSHIP GROUPS IN COLLEGE, 63-89 (2001) (revealing that, “outcomes associated with diversity are both realized from and mediated by friendships with students from different racial and ethnic backgrounds”)).
111 Id. at 9 (referring to topics “such as political and social views, racism and discrimination, women’s rights, and national politics”).
112 Id. at 10 (referencing a study that revealed that students who completed diversity courses had more favorable feelings toward African Americans than students who were just starting those courses).
have positive outcomes;\textsuperscript{113} this indicates that including diversity course requirements in general education curricula can affect race relations and further the goal of diversity endorsed by the Supreme Court. Moreover, diversity course requirements give students greater faith in their institution’s support of diversity. Students enrolled in diversity classes would be more likely to perceive institutional support for a positive climate for diversity, and they would thus feel more comfortable branching out to other racial groups.\textsuperscript{114}

In order to achieve the much sought after diverse educational experience, universities cannot focus solely on compositional diversity.\textsuperscript{115} When schools search only for that “critical mass” of racially underrepresented students, schools “have a tendency to focus on diversity as an end in itself, rather than as an educational process” that would actually enhance educational outcomes.\textsuperscript{116} Instead, campus diversity initiatives must be multidimensional.

\textbf{C. Exploring Alternatives to Race Conscious Admissions}

Though the Court’s holding in \textit{Grutter} allowed for race conscious admissions policies, O’Connor also reiterated the Court’s approval of states experimenting with “a wide variety of alternative approaches.”\textsuperscript{117} California, Florida, and Washington State were three of the states that legally prohibited racial preferences

\begin{itemize}
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Id.} at 16.
\item \textsuperscript{116} \textit{Id.}
\end{itemize}
in admissions. However, policies with no consideration of race have yet to prove themselves effective in admissions.

A state mandated "percent plan" was the first of the race-neutral policies adopted by states. This plan guaranteed admission to a public state university for every student falling in the designated top segment of a graduating class in a public or accredited private high school within the state. Different versions of the percent plan were instituted in Texas, California, and Florida after these states banned the use of racial preferences in admissions.

In Texas, students in the top 10% of any high school graduating class received automatic admission to the state public university of their choosing. California’s plan was much more limited, allowing only the top 4% of high school graduates to be admitted to the University of California. Florida utilized a top 20% plan, allowing administrators to decide which university a student would attend. Though the basic structures of percent plans are determined by state law, each school within that state designs its own outreach and recruitment programs to diversify admission as they see fit. As a result, campus-level procedures

118 Id. Ironically, despite the Grutter holding, Michigan has also followed suit. See Joanne Barkan, Alive and Not Well: Affirmative Action on Campus, DISSERT MAGAZINE, Spring 2008, at 50, available at http://www.dissentmagazine.org/article/?article=1162 (referencing the November 2006 decision by voters to amend the state constitution and ban affirmative action programs “for public employment, education or contracting purposes”) [hereinafter Barkan].
119 Barkan, supra note 118, at 50.
120 Id. at 52.
121 Id.
122 Id. at 52-3.
123 Id. at 53. (recognizing further limits taken by California, as well: the University decides which of the nine undergraduate campuses a student will attend, rather than giving that option as Texas did).
124 Id. (providing the State the opportunity to protect its most elite schools by channeling “the weakest ‘percenters’ to the less selective campuses”).
125 Id.
are continuously evolving as schools experiment with methods to improve their “yield” of minority students.

Two issues arise with respect to the models utilized by California, Florida, and Texas: 1) whether they are transferable from one state to another and 2) whether they are effective. California, Florida, and Texas are some of the most ethnically diverse states in the country. Because these states have greater percentages of minority residents than most other states in the country, they have larger pools of minority applicants to choose from. With fewer applicants of minority status to choose from, universities in more homogenous regions of the country may feel the continued need to rely on race-based admissions policies to get closer to achieving that “critical mass” of qualified minority applicants.

As for the effectiveness of these policies in providing diverse educational experiences, the research coming out of California, Washington, Texas, and Florida is not optimistic. California and Texas saw an immediate decrease in their minority enrollment after affirmative action was banned, particularly in selective state schools. University of California, Berkeley saw African American numbers plummet 66%, while Latino enrollment dropped 53%. University of California, Los Angeles and University of Texas, Austin saw comparable losses, with minority representation dropping as much as 33.8% in the first year after the affirmative action ban. Law schools at Berkeley, UCLA, and University of Texas decreased enrollment of African American students from 7.4% to 2.4%.

128 Barkan, supra note 118, at 51-2.
129 Id. at 52.
130 Id.
131 Id. (documenting the decrease from 1993-1996 to 1997-2001).
In 2003, Texas was forced to lift its regional ban on race-based affirmative action in light of the *Grutter* decision.\textsuperscript{132} Texas reevaluated its percent plan and added racial preferences to its holistic evaluation formula beginning with the 2005 freshman class.\textsuperscript{133} As expected, African American and Latino representation rose to 5.2 and 18.7\% respectively.\textsuperscript{134} With the return of race-based admissions policies, better outreach and recruitment, and the “student-gets-to-choose-the-campus percent plan,” UT-Austin attracted the greatest number of minority students.\textsuperscript{135}

California saw similar results when it re-adopted race-based admissions policies. California suffered changes to its minority representation and diversified educational experience with the use of race-neutral admissions policies.\textsuperscript{136} Black representation at UCLA dwindled to such a small number that it reached a “crisis point.”\textsuperscript{137} In response, UCLA and Berkeley adopted holistic admissions policies that allowed administrators to consider race as one of several factors.\textsuperscript{138} At Berkeley, these holistic procedures resulted in an increase from 1.99\% African American to 3.6\% African American in 2006.\textsuperscript{139} By combining this approach with greater recruitment and scholarships, UCLA succeeded in

\textsuperscript{132} *Id.* at 54 (referencing Texas v. *Hopwood*, 518 U.S. 1033 (1996)).

\textsuperscript{133} *Id.*

\textsuperscript{134} *Id.*

\textsuperscript{135} *Id.* (referencing the increase in African-American representation in the freshman class to 5.2 percent and the Latino representation to 18.7 percent as evidence of a more successful policy).

\textsuperscript{136} *Id.* at 55.

\textsuperscript{137} *Id.* In 2006, of 4,852 enrolled students, only ninety-six were African American students. This number was the smallest seen by California since the first required documentation of minority enrollment in 1973. That number is even more shocking when taken into context alongside the enrollment of athletes (of that ninety-six, twenty were recruited for sports) and percent of black student population in Los Angeles (ten percent black).

\textsuperscript{138} *Id.* (taking various factors into consideration by theme, including: GPA, standardized test scores, personal achievement, life challenges, part time jobs, and academic opportunities available at the student’s school).

\textsuperscript{139} *Id.*
increasing enrollment of African American students to 4.5% of the freshman class.\textsuperscript{140}

Florida's state-mandated, race-neutral plan also struggled to increase educational diversity. In 2000, Florida adopted its "Talented 20" percent plan, which was limited to public school students.\textsuperscript{141} This policy allowed students in the top 20\% of their graduating class the option of exercising "the Talented 20 'guarantee of admission'" option if the three schools in the system rejected them.\textsuperscript{142} However, this policy proved to be relatively ineffective for Florida students for two reasons: (1) most of Florida's universities participating in the plan were already relatively unselective, and (2) Florida's most selective and desirable schools, University of Florida and Florida State University, elected not to participate in the plan.\textsuperscript{143}

The results from Texas, California and Florida show that percent plans on their own do not meet the ideal goal of resembling society's overall population demographic. Only some racial diversity comes out of the percent plans because many American high schools are still racially segregated.\textsuperscript{144} Additionally, they cannot achieve what race-based admissions policies can because they are inapplicable in graduate programs and professional schools. Schools also run the risk that high school students would be encouraged to take easier courses or transfer to less rigorous schools to better their odds of gaining admission to state schools.\textsuperscript{145} One clear fact that has emerged from the mixed results of race-neutral plans is that a percent plan alone is not sufficient to diversify schools.\textsuperscript{146}

\textsuperscript{140} Id.
\textsuperscript{141} Id. at 54.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 52.
\textsuperscript{145} Id. (observing that students may actually be penalized for taking difficult courses and attending competitive schools).
\textsuperscript{146} Id. (pointing to the use of minority recruitment and academic enrichment programs for high school students to bolster minority admissions).
As for Justice O’Connor’s hope that other states follow suit and adopt race-neutral policies, the research does not reflect support for this direction just yet. A study published in the *Journal of Labor Economics* theorized that a hypothetical nationwide ban on race-conscious admissions policies in higher education would likely result in a 10% decline in minority enrollment at selective institutions.\(^\text{147}\) As a study of California’s programs revealed, none of the current alternative admissions models are capable of replicating “the composition of the student population that was in place before the termination of affirmative action.”\(^\text{148}\)

### IV. WILL RACE-BASED ADMISSIONS POLICIES STILL BE NECESSARY TO ACHIEVE DIVERSITY TWENTY-FIVE YEARS AFTER GRUTTER?

#### A. Racial Demographic Predictions for 2030

The population of the United States is projected to grow exponentially, with immigration contributing to two-thirds of the projected U.S. population increase by 2050.\(^\text{149}\) The combination of immigration trends and varied birth rates across races will lead to greater diversity in America.\(^\text{150}\) While the United States was 83% white in 1996,\(^\text{151}\) researchers now project that the


\(^{148}\) Amanda Lepof, *Empirical Study Finds Socio-economic Status Not a Likely Substitute for Race in CA College Admissions*, DIVERSITY DIGEST (Fall/ Winter 2002), http://www.diversityweb.org/Digest/FW02/studyrace.html (arguing many of the findings in the study could be generalized to race-neutral admissions procedures in other states).


\(^{150}\) *Id.* at 3.

\(^{151}\) *Id.* at 3 (describing the demographic breakdown in 1995 as follows: 83 percent white, 13 percent black, 1 percent American Indian, Eskimo, and
United States’ minority population will rise from one in every four Americans to one in every two Americans by 2050.¹⁵²

The Hispanic population will increase the fastest, with predictions that by 2020, this minority group will add more people to the United States population every year than all other minority groups combined.¹⁵³ A study by the Population Reference Bureau in 2005 estimates that nearly half of children younger than five are minorities, and Hispanics are the youngest population.¹⁵⁴ More specifically, while only 22.6% of the non-Hispanic white population is under 18 years old, 24.1% of Asians, 31.4% of Blacks, and 35% of Hispanics fall into this age group.¹⁵⁵ As white populations fall behind their minority counterparts, increasing at much slower rates than other groups, the minority population is “projected to exceed the non-minority population in five states” by 2025.¹⁵⁶ By 2030, just over twenty-five years after the Bollinger cases, minority children under 5 years old will exceed non-minority children, and the adult population will reach this feat by 2050.¹⁵⁷

These projected increases in minority populations paint a vastly different picture of the demographic makeup for higher education in future. With a predictably larger applicant pool of

¹⁵² Id.
¹⁵³ Id. at 4.
¹⁵⁴ Ron Crouch, The United States of Education: The Changing Demographics of the United States and their Schools, CTR. FOR PUB. EDUC., (Dec. 1, 2007), www.centerforpubliceducation.org (follow “staffing/students” in issues drop-down menu; then follow “changing demographics at a glance” hyperlink) (referencing Table 9 to show that more than one-third of all Hispanics are younger than eighteen).
¹⁵⁵ Id.
¹⁵⁶ Fact Sheet the United States is Becoming an Increasingly Diverse Country, CULTURALMARKETINGPR.COM, http://www.culturalmarketingpr.com/pdfs/FactSheet_diverse_usa_pop.pdf (last visited Oct. 28, 2010) (listing Hawaii, New Mexico, California, Texas, and Washington, D.C. as the five regions with the largest growing minority population).
¹⁵⁷ Id.
minority students, Justice O’Connor’s prediction that the need for affirmative action in secondary education will fade in twenty-five years may ring true. The Court’s “acid test”¹⁵⁸ of the justification for racial and ethnic admissions preferences will likely reveal a lesser need as the majority moves closer to becoming another minority group in this Nation.

B. Navigating Affirmative Action in “Post-Racial” Society?

In addition to population demographics shifting to reveal a greater minority presence, there has also been talk of the emergence of a “post-racial” society that will theoretically lessen the need for affirmative action to achieve educational diversity in the future.¹⁵⁹ President Obama’s election in 2008 as the first Black president “represents, for some, the fulfillment of Martin Luther King’s dream.”¹⁶⁰ Inspired by this milestone, many people began to wonder what the election said about the state of race relations and the debate over affirmative action.¹⁶¹ During Justice Sotomayor’s confirmation to the Supreme Court, conservatives like Texas Republican Senator John Cornyn argued that with Barack Obama as President and Judge Sotomayor nominated for the highest court, “[i]t is harder and harder to see the justifications for race-conscious decisions across the board.”¹⁶² The election of Barack Obama was viewed by many

¹⁶¹ Id.
¹⁶² David D. Kirkpatrick, Sotomayor’s Focus on Race Issues May Be Hurdle, THE NEW YORK TIMES, May 30, 2009, at A1, available at (confronting the “hot button issue” that most Americans believe you are either race-conscious or race-neutral).
as an "emancipatory moment," and many conservatives believed it signaled the need for an earlier end to affirmative action.163

However, this notion that race-conscious public policy is "growing obsolete"164 ignores current racial dynamics in the United States.165 Critics of post-racialism claims focus on statistical disparities remaining in educational attainment, net worth, and career advancement, on the basis of race.166 Scholars warn against abandoning race-conscious remedies prematurely.167 Research indicates that social pressures still play a large role in the racial and ethnic gaps in SAT scores, the underperformance of minorities in suburban schools, and the underrepresentation of blacks and Hispanics in elite colleges and universities.168 As President Obama has advocated, government policies alone cannot eradicate racial stereotypes or change cultural identities.169

Additionally, if we are to achieve Justice O'Connor's aspiration that race-based admissions policies will no longer be necessary in twenty-five years, more must be done before college to foster the natural rise of diversity in higher education. For now, the notion of "post racialism" is still more of a myth than reality, and race-based policies maintain their compelling government interest in furtherance of diversity in education.

C. Will the Court Continue to Uphold the Use of Race-Based Admissions Policies in Twenty-Five Years?

In 2030, the only presiding Justices that are likely to still be on the Court include Justice Thomas, Justice Roberts, Justice Alito,
Justice Sotomayor, and Justice Kagan. Justice Thomas made his feelings on race-based policies very clear in 2003, and there is little mystery as to how he would vote if on the Court for a re-evaluation of affirmative action twenty-five years later. Thomas felt the Law School cared too much about “aesthetic,” and not enough about creating a class that would further educational benefits for all students. Thomas also argued that this kind of “discrimination” can engender superior attitudes or provoke resentment among whites, while simultaneously stamping minorities with “a badge of inferiority,” causing them to develop dependencies or a sense of entitlement. With these sentiments, Thomas would likely advocate for the educational benefits that come with diversity, but would vote against affirmative action as a means of achieving it.

Justice Roberts, though not on the Court for the Bollinger cases, would vote predictably against affirmative action. Since his confirmation, the public has been aware of his distaste for affirmative action programs. Roberts called the promotion of affirmative action “highly objectionable,” and his vote would go against sustaining race-based admissions policies. Justice Alito would vote similarly. Alito previously advocated against race based quotas, and he co-authored briefs attacking affirmative action programs broadly.

On the other end of the spectrum, Sotomayor will also likely be on the Court in twenty-five years. Sotomayor has established a longstanding commitment to the consideration of race and

---

171 Id. at 373.
ethnicity in admissions.\textsuperscript{174} Her strong identification of and support for race-based approaches would lend support for the continued consideration of race on the basis of promulgating diversity in education.

The last vote that can be considered at this time is that of new Supreme Court Justice Elena Kagan. Recently nominated by President Barack Obama, Kagan's stance on affirmative action is relatively up in the air.\textsuperscript{175} While there is some controversy surrounding her lack of minority hires as dean of Harvard University Law School, her stance on affirmative action in higher education is unclear.\textsuperscript{176} Though only time will tell, her otherwise liberal leanings lead to the assumption that she would support racial consideration in admissions until it is no longer necessary for the assurance of diversity in higher education.

Given the unpredictability of future elections and likely candidates for nomination to the Court, it is difficult to say which votes would be secured in favor of or against race-based policies. However, a prediction can be made about the need for affirmative action and the level of support that will remain for it in the future. Just as the \textit{Grutter} Court reevaluated the use of race in admissions twenty-five years after Powell approved race-based policies in \textit{Bakke}, O'Connor predicted that the Court would reevaluate the need for affirmative action as schools' natural diversity increased over time.\textsuperscript{177} In theorizing about the likely direction that the Court and popular opinion will take regarding affirmative action, there are many factors to consider.

The most obvious change in the next twenty-five years will be the demographic makeup of the United States. The growth of

\begin{itemize}
\item \textsuperscript{174} \textit{In Post-Racial America, Are Sotomayor's Views Obsolete?}, \textsc{PosTracial America.COM}, http://postracialamerica.com/2009/05/30/in-postracial-america-are-sotomayors-views-obsolete.aspx (last visited Oct. 28, 2010).
\item \textsuperscript{175} Earl Ofari Hutchinson, \textit{Kagan's Affirmative Action Achilles Heel}, \textsc{The Huffington Post} (May 20, 2010), http://www.huffingtonpost.com/earl-ofari-hutchinson/kagans-affirmative-action_b_570915.html.
\item \textsuperscript{176} Id.
\item \textsuperscript{177} \textit{Grutter v. Bollinger}, 539 U.S. 306, 343 (2003).
\end{itemize}
minority populations will create a larger pool to draw from to find qualified minority applicants. Based on numbers alone, it is arguable that within twenty-five years, the use of racial preferences will not be as necessary to further universities’ interests in promoting diversity. Furthermore, the country has been moving toward the elimination of race-based affirmative action for years, and that popular belief will likely only grow with time as the majority population fades and minority groups become more visible.

However, simply having greater percentages of minority applications to choose from does not guarantee diversity will occur naturally at top-tier institutions. The symposium entitled Twenty-Five Years: The Future of Affirmative Action, held in 2004, featured a panel addressing O’Connor’s assertion about race consideration in admissions. The panel members primarily focused their discussion on the use of affirmative action as a remedy for past discrimination, rather than to further the compelling interest in diversity. However, Professor Brown did raise an issue that could prove to play a large role in the need for affirmative action in the future. Brown addressed the racial gap in standardized test scores, and he stressed the need to improve education in grade school to truly narrow the achievement gap in higher education. For Justice O’Connor to be correct, and for the need for affirmative action to dissipate, early education will need to improve enough to narrow the

178 Id. (finding that the only interest to justify affirmative action policies is diversity).
180 Id. at 2054 (addressing “whether the effects of slavery and subsequent policies of racial injustice, in practice in America for at least sixteen generations (400 years), can be removed in one generation (twenty-five years), or even two generations, as a barrier to entry into higher education”).
181 Id. at 2056.
achievement gap sufficiently for diversity to occur naturally in higher education.

Another issue the Court would most likely consider in a re-evaluation twenty-five years down the line is the effectiveness of current policies.\textsuperscript{182} The Court would evaluate and compare race-neutral policies at other schools against holistic policies that take race into consideration.\textsuperscript{183} Periodic review and evaluation of race-conscious policies would provide the Court with a more accurate picture of whether schools’ “narrow-tailoring” attempts are successfully aimed at achieving the compelling government interest in a diversified educational experience.

\section*{V. Conclusion}

Taking into account the benefits of diversified education, the successes and failures of race-based policies, the demographic composition of students applying for higher education, and general societal feelings toward affirmative action twenty-five years from now, it seems likely that the Court would uphold diversity as a compelling interest but would overturn the use of race-based admissions policies in furtherance of that interest.

However, this shift will only be possible if more is done over the next twenty-five years than for colleges to simply throw diverse students into the same environment and hope for the best. Colleges should do more than rely on creating a “critical mass” via race consideration in admissions; they should enact policies and practices to improve the frequency and quality of interactions among students of diverse backgrounds to fully reap the benefits of affirmative action. Additionally, education will need to improve to diminish the achievement gap before students are college-bound in order for diversity to occur more naturally in the admissions process. Lastly, for O’Connor’s prediction to be realized, universities, government, and the media should explore

\begin{flushright}
\textsuperscript{182} \textsc{Civil Rights Project}, \textit{supra} note 30, at 11. \\
\textsuperscript{183} \textit{Id.}
\end{flushright}
ways to improve race relations and enhance diversity in early education. Without a more holistic view of diversity, beyond the mere consideration of “racial preferences” in admissions, schools will not be successful in their attempts to provide the benefits of diversity through affirmative action.