

# **AFFIRMATIVE ACTION IN HIGHER EDUCATION: RECENT DEVELOPMENTS IN LITIGATION, ADMISSIONS AND DIVERSITY RESEARCH**

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## **A Report for the Society of American Law Teachers (SALT)**

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## **I. Affirmative Action Litigation Update**

### **A. The Current Landscape and the Role of Intervenors**

Students of color—not university administrators—have the broadest, deepest and most urgent interests in preserving affirmative action. After all, when race can no longer be a factor in admission decisions, it is minority students who are denied access to higher education opportunities. Yet, students of color have too often been silenced and marginalized in litigation challenging affirmative action, with predictably deleterious consequences. For example, in the landmark *Bakke*<sup>2</sup> case, the University of California (UC) had no interest in arguing that Allan Bakke may have been denied admission because the Dean at the UC Davis Medical School had the prerogative to reserve seats for the relatives of wealthy donors.<sup>3</sup> UC also declined to present evidence that affirmative action was necessary to remedy its prior discrimination or to neutralize racial bias in admission criteria like standardized tests, since such evidence might expose the University to litigation from rejected minority applicants.<sup>4</sup>

Despite these clear conflicts of interest, and while for decades leading scholars and advocates have recognized the importance of student intervention in affirmative action cases,<sup>5</sup> it has been a real struggle to get minority student voices heard. Thus, in the

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<sup>2</sup> In *Bakke*, a fractured Supreme Court struck down the affirmative action program at the UC Davis Medical School, though it upheld the use of race as a plus factor in admission decisions. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of Powell, J.). For analysis of the viability of *Bakke* in light of the Court’s more recent decisions, see Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745 (1996).

<sup>3</sup> JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 32, 39-53 (1979) (also criticizing the UC’s restricted defense of affirmative action, including how UC had a greater institutional interest in quickly establishing a clear precedent rather than in mounting a defense under optimal conditions, and how UC contributed to the notion that Bakke was better qualified based on test scores and undergraduate grades).

<sup>4</sup> *Id.* at 39-53; David M. White, *Culturally Biased Testing and Predictive Invalidity: Putting Them On the Record*, 14 HARV. C.R.-C.L. L. REV. 89, 124-25 (1979).

<sup>5</sup> For scholarship in this area, see DREYFUSS & LAWRENCE, *supra* note 3, at 39-53; Emma Coleman Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV.

Fifth Circuit's *Hopwood* decision<sup>6</sup>—where the University of Texas Law School failed to develop a full record on its own (embarrassing) history of racial discrimination or its misuse of the LSAT—the court denied intervention.<sup>7</sup>

However, in 1999 the Sixth Circuit overturned two district court decisions denying intervention in affirmative action lawsuits against the University of Michigan and its Law School.<sup>8</sup> The Sixth Circuit was persuaded by the Intervenors' argument that the "University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy."<sup>9</sup> In *Grutter v Bollinger*,<sup>10</sup> the University of Michigan Law School case, students of color and progressive White students intervened in order to have their voices heard, to shape the trial court record, to present their own experts, to contribute to the larger public debate and to build a student movement in support of affirmative action.<sup>11</sup> *Grutter* and *Gratz v. Bollinger*,<sup>12</sup> (the Michigan undergraduate case) currently have the highest likelihood of being granted certiorari by the U.S. Supreme Court.<sup>13</sup>

## **B. *Grutter*: The University of Michigan Law School Case**

### **1. Trial Court Ruling on the University's Case:**

#### **Diversity is not a Compelling Interest**

During January and February of 2001, Bernard Friedman, the federal district court judge in *Grutter*, conducted a trial on the following three issues:

- 1) the extent to which race is a factor in the law school's admissions decisions;
- 2) whether the law school's consideration of race in making admissions decisions constitutes a double standard in which minority and non-minority students are treated differently; and
- 3) whether the law

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C.R.-C.L. L. REV. 31 (1979); Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH J. RACE & L. 263 (1999) (reviewing the case law about Federal Rules of Civil Procedure 24(a) in the context of higher education affirmative action cases); Theodore M. Shaw, *The Debate Over Race Needs Minority Students' Voices*, CHRON. HIGHER EDUC., Feb. 25, 2000, at A72 (discussing impact of presence/absence of intervention in Michigan, Texas, Maryland and Georgia affirmative action cases).

<sup>6</sup> See *infra* Part I.E.

<sup>7</sup> Tomiko Brown-Nagin, *A Critique of Instrumental Rationality: Judicial Reasoning About the "Cold Numbers" in Hopwood v. Texas*, 16 LAW & INEQ. 359, 380-81, 393-94 (1998) (criticizing the *Hopwood* decision, and noting a failed effort by the NAACP Legal Defense and Educational Fund and the Thurgood Marshall Law Student Association to intervene).

<sup>8</sup> *Grutter v. Bollinger*, 188 F.3d 394 (6<sup>th</sup> Cir. 1999) (consolidated cases).

<sup>9</sup> *Id.* at 401.

<sup>10</sup> See *infra* Part I.B.

<sup>11</sup> The Intervenors consists of 41 Black, Latino, Asian American, and other students (ranging from high school students to law students), along with three pro-affirmative action coalitions: United for Equality and Affirmative Action (UEAA), The Coalition to Defend Affirmative Action By Any Means Necessary (BAMN), and Law Students for Affirmative Action (LSAA).

<sup>12</sup> See *infra* Part I.C.

<sup>13</sup> See *infra* Parts I.B-1.F.

school may take race into account to ‘level the playing field’ between minority and non-minority applicants.<sup>14</sup>

Judge Friedman limited the Plaintiffs, Defendants, and Defendant-Intervenors to 30 hours each to present their respective cases, but only the Intervenors elected to use their entire allotted time.<sup>15</sup> On March 23, 2001, Friedman issued his ruling, which the Defendants and Intervenors appealed.<sup>16</sup> The remainder of this section summarizes the *Grutter* trial court ruling, and integrates the decision with background material on the expert witness reports and testimony.

### i) Factual Findings

In *Grutter*, the trial court began by reviewing the testimony of key officials and documents related to admissions at the University of Michigan Law School (UMLS) from the 1980s to the present.<sup>17</sup> Judge Friedman concluded, “[T]he evidence indisputably demonstrates that the law school places a very heavy emphasis on an applicant’s race in deciding whether to accept or reject.”<sup>18</sup> In arriving at this finding of fact, Friedman relied heavily on the report and testimony of statistician Dr. Kinley Larntz, who served as the principal expert for the Center for Individual Rights (CIR).<sup>19</sup> Larntz’s primary analysis—indeed the core of the case presented by CIR<sup>20</sup>—consisted of cell-by-cell comparisons for each racial and ethnic group of the different admission odds of applicants with similar LSAT scores and UGPAs. Judge Friedman found Larntz’s calculations to be “mathematically irrefutable proof that race is indeed an enormously important factor.”<sup>21</sup> Thus, Friedman largely rejected the testimony and report of Stephen Raudenbush (the University of Michigan’s statistical expert), who criticized Larntz’s methodology and conclusions.<sup>22</sup> Friedman was silent on the Intervenors’ critique of Larntz, which is included in David M. White’s expert report.<sup>23</sup>

In addition to Larntz’s testimony, Judge Friedman found it significant that over the years the Law School’s goal was to have entering classes with around 10-17%

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<sup>14</sup> *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 825 (E.D. Mich. 2001). In December 2000, the third issue was presented a bit differently, as a question of whether “race should be considered to offset disadvantages minority students face in test scores and grades.” Jodi S. Cohen, *Minorities Set to Testify at U-M Trial, Students Say Criteria Used for Law School Entry Discriminate*, DETROIT NEWS, Dec. 24, 2000, at 1.

<sup>15</sup> Telephone Interview with Miranda K.S. Massie, Scheff & Washington--Detroit, lead counsel for the Intervening Defendants in *Grutter* (Feb. 18, 2001). The Plaintiffs took about 19 hours and the University Defendants took about 16 hours.

<sup>16</sup> 137 F. Supp. 2d 821.

<sup>17</sup> *Id.* at 825-39.

<sup>18</sup> *Id.* at 840.

<sup>19</sup> Expert Report of Dr. Kinley Larntz, *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-75928), reprinted in 5 MICH. J. RACE & L. 463 (1999) (Larntz is a professor emeritus at the University of Minnesota). See also Jodi S. Cohen, *Witness: Odds Lean to U-M Minorities*, DETROIT NEWS, Jan. 18, 2001, at Metro, 1 (summarizing Larntz’s trial testimony).

<sup>20</sup> Larntz was one of only three witnesses called by CIR at trial, and his testimony was given the lion’s share of CIR’s time and attention.

<sup>21</sup> 137 F. Supp. 2d at 841.

<sup>22</sup> *Id.* at 841-42. Indeed, Friedman found additional support in Raudenbush’s testimony for the conclusion that race was an enormous factor in admissions. *Id.* at 842.

<sup>23</sup> Expert Report of David M. White, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), reprinted in 12 LA RAZA L.J. \_\_ (2001-2002).

underrepresented minorities (Black, Latino, and Native American students) in order to attain “critical mass.”<sup>24</sup> He also found it significant that the Law School’s dean and admissions director monitored the daily admission reports, which were classified by race/ethnicity.<sup>25</sup> Thus, the fact that UMLS had broad targets<sup>26</sup> and the fact that it tracked the admissions process as it crafted an entering class—both common practices at law schools—were transformed into “proof” of an unconstitutional hidden quota system.<sup>27</sup>

## ii) *Bakke* and the Diversity Issue

In his trial court ruling in *Grutter*, Judge Friedman determined, “[T]he court is persuaded that *Bakke* did not hold that a state educational institution’s desire to assemble a racially diverse student body is a compelling government interest.”<sup>28</sup> While noting that five Justices in *Bakke* agreed that universities have a substantial, legitimate interest in considering race in admissions,<sup>29</sup> Friedman agreed with CIR’s contention that Justice Powell’s opinion—upholding the use of race as a plus factor in order to promote the educational benefits of a diverse learning environment—represented his views only, and did not constitute a holding of the case.<sup>30</sup> This holding is directly at odds with the December 2000 district court ruling in *Gratz v. Bollinger*<sup>31</sup> and the Ninth Circuit’s ruling in *Smith v. University of Washington Law School*<sup>32</sup> (both of which are detailed in this article).

A second reason Judge Friedman ruled that diversity does not rise to the level of a compelling governmental interest is that he rejected the University of Michigan’s argument that, under *Marks v. United States*,<sup>33</sup> Justice Powell’s opinion qualifies as the holding of *Bakke* because it is the narrowest ground on which to support the judgment.<sup>34</sup> In *Marks*, the Court held: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”<sup>35</sup> Friedman held that *Marks* had no application to *Grutter* because Powell’s diversity rationale was not narrower than the Brennan group’s remedial rationale, but simply different and non-overlapping.<sup>36</sup>

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<sup>24</sup> The concept of critical mass is cited in the UMLS admission policy statement and by Michigan officials who testified in the trial. *Grutter*, 137 F. Supp. 2d at 825-36.

<sup>25</sup> *Id.* at 842.

<sup>26</sup> Judge Friedman acknowledged (in a buried footnote) that the percentage of underrepresented minorities fluctuated from a low of 5.4% in 1998 to a high of 19.2% in 1994, but his opinion focused on the fact that between 1986 and 1999 there was an overall *average* of 12.6% underrepresented minorities in the graduating classes. *Id.* at 840-42.

<sup>27</sup> Regarding the daily admissions reports, Friedman concluded, “There would be no need for this information to be categorized by race unless it were being used to ensure that the target percentage is achieved.” *Id.* at 842.

<sup>28</sup> *Id.* at 844.

<sup>29</sup> *Id.* at 844.

<sup>30</sup> *Id.* at 843-46.

<sup>31</sup> 122 F. Supp. 2d 811 (E.D. Mich. 2000).

<sup>32</sup> 233 F.3d 1188 (9<sup>th</sup> Cir. 2000).

<sup>33</sup> 430 U.S. 193 (1977).

<sup>34</sup> 137 F. Supp. 2d at 847-48.

<sup>35</sup> 430 U.S. at 193 (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

<sup>36</sup> 137 F. Supp. 2d at 847.

Lastly, Judge Friedman repudiated the diversity rationale by noting that the Supreme Court's recent affirmative action rulings treat benign racial classification with far greater suspicion than the Court applied in the *Bakke* era.<sup>37</sup> Drawing from two public contracting cases, *Croson*<sup>38</sup> and *Adarand*,<sup>39</sup> Friedman concluded, "When read together, *Adarand* and *Croson* clearly indicate that racial classifications are unconstitutional unless they are intended to remedy carefully documented effects of past discrimination."<sup>40</sup>

### iii) Diversity and Educational Benefits

By ruling that Powell's diversity rationale is not part of *Bakke*'s holding, Judge Friedman largely sidestepped the heart of the University of Michigan Law School's expert witness evidence, in which it sought to establish the educational benefits that accrue from a racially and ethnically diverse learning environment.<sup>41</sup> In *Grutter*, the court acknowledged that racial diversity enhances the educational experience of law school.<sup>42</sup> Nonetheless, Friedman minimized the Defendant's evidence on this issue by tersely opining about the difference between racial diversity and viewpoint diversity. Citing affirmative action critic Terrance Sandalow, Friedman confidently suggested that the racial resegregation of legal education would likely have little impact on the views expressed in law school classrooms.<sup>43</sup>

### iv) Narrow Tailoring

In *Grutter*, Judge Friedman ruled that even if racial diversity were a compelling interest, the University of Michigan Law School's current affirmative action program nevertheless fails to be narrowly tailored to serve that interest.<sup>44</sup> Friedman cited five considerations weighing against a finding of narrow tailoring: 1) the "critical mass" concept is too amorphous; 2) the University did not specify an ending date; 3) the Law School's enrollment targets amounted to a hidden quota system; 4) there was no articulated, logical explanation why some groups were included in the plan and others were excluded; and 5) the University failed to try "race-blind" alternatives, such as increased recruiting or a lottery system.<sup>45</sup>

## 2. Silencing the *Grutter* Intervenor: Obscuring Issues of Bias and Discrimination<sup>46</sup>

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<sup>37</sup> *Id.* at 848.

<sup>38</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>39</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>40</sup> 137 F. Supp. 2d at 848-49.

<sup>41</sup> Part III of this article details some of the leading research on the issue of racial diversity and educational benefits, including evidence presented in *Grutter* and *Gratz*.

<sup>42</sup> 137 F. Supp. 2d at 849.

<sup>43</sup> *Id.* at 849-50 (citing Terrance Sandalow, *Identity and Equality, Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874 (1999)).

<sup>44</sup> *Id.* at 850.

<sup>45</sup> *Id.* at 850-53.

<sup>46</sup> For an analysis of the silencing of race in the law, see Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847 (2000).

## i) Societal Discrimination?

After summarizing the Defendant-Intervenors' trial evidence, Judge Friedman found that "the comparatively lower grades and test scores of underrepresented minorities is attributable, at least in part, to general, societal racial discrimination against these groups,"<sup>47</sup> but he concluded that these facts provide no constitutional protection for the University of Michigan Law School's affirmative action program. Friedman proclaimed that the "daunting" legal flaw in the Intervenors' case is that "the Supreme Court has held that the effects of general, societal discrimination cannot constitutionally be remedied by race-conscious decision-making."<sup>48</sup> The Intervenors charge that Friedman's characterization grossly misrepresents their core argument in *Grutter*. In their brief to the Sixth Circuit, the Intervenors responded to Judge Friedman's castigation:

So it has (the Court has disavowed the societal discrimination rationale), but famously enough to ensure that the student intervenors never argued that the affirmative action plan at UMLS is justified on the basis that it remedies general societal discrimination: not in moving to intervene, not in summary judgment proceedings, not at trial, and not in post-trial pleadings. On the contrary, their arguments and evidence about discrimination and bias, while grounded in a broader exposition of the context of race in America, were centered on the two academic criteria at the heart of law school admissions across the country and at the heart of the plaintiff's case. . . . The district court set up its concluding magician's moment in the very first words of its section on the intervenors by entitling the section "Remediating Societal Discrimination as a Rationale for Using Race as a Factor in University Admissions: The Intervenors' Case." The rabbit having thus been tucked into the hat, it was there to be pulled out at the end of the opinion.<sup>49</sup>

Additional support for the Intervenors' objection to Friedman's interpretation can also be found in Justice Powell's *Bakke* opinion. Since in the very same opinion Powell both rejected societal discrimination as a justification for affirmative action,<sup>50</sup> and opined that compensating for bias in standardized testing and grades could conceivably justify race-sensitive admissions,<sup>51</sup> Judge Friedman is mistaken to confuse these two issues. Judge Friedman's "top down" legal conclusions and factual findings cannot be understood in isolation from the "bottom up" arguments and evidence presented by the Intervenors. In particular, the Intervenors' arguments about the two primary law school admission criteria (LSAT scores and undergraduate grades) deserve explanation.

## ii) Evidence of Bias in Standardized Testing

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<sup>47</sup> 137 F. Supp. 2d at 868.

<sup>48</sup> *Id.* at 868-69 (citing *Wygant v. Jackson Bd. of Educ.* 476 U.S. 267, 274 (1986)).

<sup>49</sup> Defendant-Intervenors' Proof Brief at 18, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928). *Petition for cert. filed* May 16, 2001.

<sup>50</sup> *Bakke*, 438 U.S. at 296 n.36.

<sup>51</sup> *Id.* at 306 n.43.

In *Grutter*, the district court's finding that race is an "extremely strong factor"<sup>52</sup> in admission to UMLS was largely a function of the court's adoption of CIR expert Kinley Larntz's evidence,<sup>53</sup> which is to say that the LSAT is the standard for "merit" and, by implication, for Equal Protection analysis.<sup>54</sup> The Intervenors' criticism of racial bias on the LSAT are part of an effort to challenge the unquestioned assumption underlying the *Grutter* Plaintiff's case—that the University of Michigan Law School's affirmative action plan involves a preference for "less qualified" students of color. The Intervenors put together a team of several expert witnesses on the issue of the racial/ethnic bias on the LSAT and similar standardized tests, including Martin Shapiro, Jay Rosner, David M. White and Eugene Garcia. These reports are included in this issue of the *La Raza Law Journal*.

Professor Martin Shapiro, a psychometrician from Emory University with extensive experience testifying in higher education civil rights cases,<sup>55</sup> presented a report and testimony detailing the methods used to develop and pre-test questions appearing on standardized tests.<sup>56</sup> Shapiro argued that discrimination against students of color occurs as an inevitable (though not intentional) byproduct of the manner in which standardized tests like the LSAT are developed and pre-tested.<sup>57</sup> Shapiro testified that the requirement that test items are internally consistent (high scorers should get the item correct and vice versa) produces the following double-bind for under-represented minorities and other lower-scoring groups: items that lessen or reverse the disparate impact of the test are *a priori* defined as poor/unreliable items, and are thus removed from the final version of the test.<sup>58</sup>

Jay Rosner and David M. White amplified Shapiro's criticism—that the LSAT pre-testing process inculcates racial bias. Rosner, Executive Director of the Princeton Review Foundation,<sup>59</sup> testified that the LSAT and similar standardized tests amount to a "White preference test" because the test development process weeds out nearly all the

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<sup>52</sup> 137 F. Supp. 2d at 841.

<sup>53</sup> *Id.* at 840-42.

<sup>54</sup> CIR must assume that LSATs and UGPAs *mean the same thing* across racial and ethnic categories in order to claim that disparities in admission rates among those with equivalent LSATs and UGPAs are evidentiary proof of "reverse discrimination."

<sup>55</sup> Shapiro has served as an expert witness or consultant in dozens of education and employment discrimination cases. A few examples of the cases implicating standardized testing are: *Sharif v. N.Y. State Educ. Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989); *Hopwood v. State of Tex.*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996); *Golden Rule Life Ins. Co. v. Washburn* (Cir. Ct. Sangamon Co., Ill., settled Nov. 20, 1984) (No. 419-76). For Shapiro's views on standardized tests see Martin M. Shapiro et al., *Minimizing Unnecessary Racial Differences in Occupational Testing*, 23 VAL. U. L. REV. 213 (1989).

<sup>56</sup> Expert Report of Martin M. Shapiro, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), reprinted in 12 LA RAZA L.J. \_\_\_ (2001-2002); Erik Lords, *Expert: Aptitude Tests are Biased*, DETROIT FREE PRESS, Feb. 7, 2001; Anna Clark, *Attorney, Judge Clash Over Witness*, MICH. DAILY, Feb. 7, 2001 (summarizing Shapiro's testimony); *Grutter*, 137 F. Supp. 2d at 861.

<sup>57</sup> Expert Report of Shapiro, *supra* note 56, *passim*.

<sup>58</sup> *Id.*

<sup>59</sup> Rosner's background includes running test preparation courses at historically Black colleges as well as litigating against ETS and LSAC. For an example of Rosner's writings in this area, see Jay Rosner, *Discrimination is Built into Standardized Aptitude Tests*, LONG TERM VIEW, Sept-Oct. 1993, at 14. <http://www.longterm.mslaw.edu/longtermauthors.htm>.

questions that do not favor Whites.<sup>60</sup> Rosner asserts that expensive preparation courses significantly improve students' scores on the LSAT.<sup>61</sup> Rosner also points out that wealth differences and a test-preparation avoidance phenomenon related to racialized (negative) experiences with standardized tests worsen racial and ethnic performance differences on the LSAT.<sup>62</sup>

David White,<sup>63</sup> director of Testing for the Public, a Berkeley-based non-profit educational research organization, likewise testified that several factors cause the LSAT to unfairly exaggerate racial and ethnic differences in academic preparation.<sup>64</sup> One line of evidence White cited was a study I authored (and he oversaw) involving 1996-98 applicants to Boalt Hall, whose main "feeder" schools are substantially similar to those of the University of Michigan Law School.<sup>65</sup> The Testing for the Public study matched applicants possessing equivalent UGPAs and graduation dates within each of fifteen elite feeder schools (Berkeley, Stanford, Harvard, Michigan, etc.).<sup>66</sup> David White testified that among these pools of equally accomplished college students, African Americans trailed their White classmates on the LSAT by 9.2 points, Latinos scored 6.8 points lower, and Native Americans scored 4.0 points lower, and that controlling for these students' choice of major did nothing to lessen these gaps.<sup>67</sup> In the context of a narrow tailoring requirement, it is important to point out that the size of the LSAT differences in this study were remarkably similar to the racial/ethnic differences in LSAT averages among accepted applicants to the University of Michigan Law School. During 1995-2000, the period in question in the *Grutter* litigation, admitted African American

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<sup>60</sup> Expert Report of Jay Rosner, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), reprinted in 12 LA RAZA L.J. \_\_ (2001-2002); Jodi S. Cohen, *Testimony Claims Law Testing Bias: Executive for Test Firm Says Questions Favor Wealthy White Males*, DETROIT NEWS, Jan. 25, 2001, at 2; *Grutter*, 137 F. Supp. 2d at 860.

<sup>61</sup> Expert Report of Rosner, *supra* note 60.

<sup>62</sup> *Id.*

<sup>63</sup> For White's views on the LSAT see, e.g., TOWARDS A DIVERSIFIED LEGAL PROFESSION (David M. White ed., 1981); David M. White, *Two Views of Standardized Testing*, 55 HARV. EDUC. REV. 332 (1985); David M. White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R.-C.L. L. REV. 89 (1979); *Panel Discussion: Affirmative Action and Standardized Testing*, 4 TEX. HISPANIC J. L. & POL'Y 85 (1998).

<sup>64</sup> Expert Report of White, *supra* note 23; *Grutter*, 137 F. Supp. 2d at 861.

<sup>65</sup> Expert Report of White, *supra* note 23.

<sup>66</sup> *Id.* White's Expert Report describes an initial study of Boalt's top five feeder schools: Berkeley, UCLA, Stanford, Harvard and Yale. A later version of the study included 15 feeder schools and was recently published. See William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (2001). See also Katherine S. Mangan, *White Students Do Better on LSAT than Minority Classmates With Similar GPA's, Report Says*, CHRON. HIGHER EDUC., Aug. 30, 2001, available at <http://chronicle.com/daily/2001/08/2001083003n.html>. David White's February 2001 testimony incorporated the expanded version of the study.

<sup>67</sup> See Expert Report of White, *supra* note 23; *Grutter*, 137 F. Supp. 2d at 861; Kidder, *Does the LSAT Mirror or Magnify*, *supra* note 66. White testified that these results mirrored a similar 1981 study he oversaw involving applicants from a dozen law schools. See Joseph Gannon, *College Grades and LSAT Scores: An Opportunity to Examine the 'Real Differences' in Minority-Nonminority Performance*, in TOWARDS A DIVERSIFIED LEGAL PROFESSION 272 (David M. White ed., 1981).

applicants averaged 9.6 points lower than Whites, and Mexican Americans averaged 7.0 points lower.<sup>68</sup>

David White testified that the LSAT produces a false impression of reverse discrimination, since the UGPAs of students of color admitted to Michigan were in the same range as Whites, and in recent years the admitted applicants at the Law School who had the lowest UGPAs were usually *Whites*.<sup>69</sup> White argued that race-based affirmative action was an appropriate remedy for a problem with standardized testing that had uniquely racialized consequences, since socioeconomic differences alone do not account for racial/ethnic disparities in LSAT scores.<sup>70</sup> Thus, in appealing Judge Friedman's ruling, the Intervenor's argue:

The caste system in America is not absolute, and there are other kinds of privilege and disadvantage besides those strictly based on race. Nevertheless, racial bias on the LSAT means that the black daughter of bankers will be outscored by the white daughter of municipal employees by an average of 6 points, the difference between attending a competitive law school or none at all.<sup>71</sup>

David White buttressed the Intervenor's argument that the LSAT test construction process contributes to the problem of racial bias. White reviewed the psychometric literature surrounding the LSAT item bias detection method (called differential item functioning, or DIF) and concluded that DIF is an inadequate and ineffective method for rooting out culturally biased test items.<sup>72</sup>

White's report also summarized recent studies documenting the phenomenon of "stereotype threat," a line of research pioneered by psychologists Claude Steele and Joshua Aronson suggesting that the psychosocial milieu of standardized testing can be experienced differently depending on the test-taker's race or ethnicity.<sup>73</sup> In fact, UMLS's sole expert witness on standardized testing was Professor Steele of Stanford University.<sup>74</sup> In his expert report, Steele concluded that stereotype threat can artificially depress test performance of under-represented minorities because they face the added interference and pressure of having one's individual performance confirm a socially salient negative stereotype about one's group.<sup>75</sup> In what turned out to be a serious development, in the middle of the *Grutter* trial UMLS attorneys removed Claude Steele

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<sup>68</sup> *Grutter*, 37 F. Supp. 2d at 864 n.56. The gap for Native Americans is larger (6.8), but the Native American sample sizes both in the Michigan and Boalt applicant pools are exceptionally small, creating a lot of random variation.

<sup>69</sup> Expert Report of White, *supra* note 23.

<sup>70</sup> *Id.* (citing LSAC research conducted by Linda Wightman).

<sup>71</sup> Defendant-Intervenor's Proof Brief at 18, *Grutter* (No. 97-75928) (citing trial testimony of David M. White).

<sup>72</sup> See Expert Report of White, *supra* note 23. For a detailed critique of DIF see Kidder, *Does the LSAT Mirror or Magnify*, *supra* note 66, at 1106-09; William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J. L. & FEMINISM 1, 34-35 (2000); Shapiro et al., *supra* note 55, at 226-27, 263-65.

<sup>73</sup> Expert Report of White, *supra* note 23.

<sup>74</sup> For summary and analysis of stereotype threat research, see Kidder, *Does the LSAT Mirror or Magnify*, *supra* note 66, at 1085-89.

<sup>75</sup> Expert Report of Claude M. Steele *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-75928), *reprinted in* 5 MICH. J. RACE & L. 439, 444-48 (1999); Deposition of Claude M. Steele, *Grutter v. Bollinger* (E.D. Mich. 1998) (No. 97-75928) (Jan 28, 1999).

from their “will call” witness list.<sup>76</sup> This made it impossible for the Intervenors to obtain Steele’s testimony, and made it easier for Judge Friedman to find that there was insufficient evidence to establish the influence of stereotype threat in contributing to racial and ethnic differences in LSAT scores.<sup>77</sup>

Finally on the testing front, the Intervenors called on the testimony of Eugene Garcia and Richard Lempert. Garcia, dean of UC Berkeley’s Graduate School of Education and chair of the UC system’s Latino Eligibility Taskforce, addressed why his Task Force led the charge to eliminate the SAT as a UC eligibility requirement.<sup>78</sup> Garcia testified that standardized tests often reward race/class privilege in the form of exposure to “academic English,” rather than measuring true merit.<sup>79</sup> He also stated that the end of affirmative action in California has resegregated the UC system—particularly at the Berkeley and UCLA law schools—and that there are simply no workable “race-neutral” alternatives to affirmative action.<sup>80</sup>

Lempert, a professor of law and sociology at the University of Michigan, earlier testified for UMLS about the formation of the Law School’s current affirmative action plan.<sup>81</sup> The Intervenors called Lempert to testify about a major empirical study he coauthored that assessed the career success of White, Black, Latino, and Native American UMLS alumni.<sup>82</sup> The study by Lempert, Chambers and Adams is described in more detail in Part III of this article. The authors found that despite lower LSAT scores and UGPAs, under-represented minority alumni of UMLS were equally successful in terms of income and career satisfaction, they had superior civic contributions compared to their White classmates, and that overall, LSATs and UGPAs were not significant predictors of career outcomes in legal practice.<sup>83</sup>

In *Gratz* Barbara Lerner, a former researcher for the Educational Testing Service, and a conservative commentator,<sup>84</sup> served as CIR’s expert to defend standardized tests

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<sup>76</sup> Defendant-Intervenors’ Proof Brief at 8, *Grutter* (No. 97-75928).

<sup>77</sup> Clark, *Attorney Judge Clash over Witness*, *supra* note 56 (describing the conflict between Judge Friedman and Intervenor attorney Miranda Massie over the Steele incident).

<sup>78</sup> Expert Report of Eugene E. Garcia, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), *reprinted in* 12 LA RAZA L.J. \_\_ (2001-2002). Garcia is an expert in the areas of bilingual and diversity education. For an example of his writings on affirmative action, see Aida Hurtado et al., *Becoming the Mainstream: Merit, Changing Demographics, and Higher Education in California*, 10 LA RAZA L.J. 645 (1998).

<sup>79</sup> Expert Report of Garcia, *supra* note 78; *Grutter*, 137 F. Supp. 2d at 861-62; Anna Clark, *Witness Testifies: UC Becoming Resegregated*, MICH. DAILY, Feb. 9, 2001.

<sup>80</sup> Expert Report of Garcia, *supra* note 78; Clark, *Witness Testifies*, *supra* note 79.

<sup>81</sup> *Grutter*, 137 F. Supp. 2d at 834-35.

<sup>82</sup> *Id.* at 862-63.

<sup>83</sup> *Id.* at 862-63. For the full study, see Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000).

It should also be noted that Lempert, who has served on Law School Admission Council committees, testified at trial that he does not believe there is any “hard data” showing that the LSAT is biased against students of color in terms of predicting law school grades. 137 F. Supp. 2d at 863. For a critique of the conventional view about bias and prediction (which Lempert shares), see Kidder, *Does the LSAT Mirror or Magnify*, *supra* note 66, at 1085-1101.

<sup>84</sup> See, e.g., Barbara Lerner, *The Supreme Court and the APA, AERA, NCME Test Standards*, AM. PSYCHOLOGIST, Oct. 1978, at 915; Barbara Lerner, *The War on Testing: Detroit Edison in Perspective*, 33 PERSONNEL PSYCHOL. 11, 11 (1980); Barbara Lerner, *Facing the Unpleasant Facts About Achievement*, PUB. INTEREST, Sum. 1983, at 129; Barbara Lerner, *American Education: How Are We Doing?*, PUB.

and rebut Claude Steele.<sup>85</sup> However, in *Grutter* CIR did not retain Lerner or any other experts on the issue of standardized testing.

### iii) Trial Court Findings on Testing

In *Grutter*, the district court commented that the “gap in LSAT scores between underrepresented minorities and Caucasians is even more difficult to explain” than gaps in undergraduate grades.<sup>86</sup> Judge Friedman ruled, “The court is unable to find that anything in the content or design of the LSAT biases the test for or against any racial group. If such a bias exists, it was not proved at trial.”<sup>87</sup> Friedman dismissed the evidence and testimony presented by Shapiro, Rosner, and White, concluding that they did not demonstrate to the court’s satisfaction that test design or the selection of LSAT questions contributes to racial/ethnic differences in LSAT scores.<sup>88</sup>

The court did find plausible a couple of the Intervenor’s explanations of the LSAT gaps. Dean Garcia’s testimony that standardized tests favor students steeped in “academic English” and Rosner’s testimony that underrepresented minorities enroll in expensive test preparation courses in “token numbers” were found by Judge Friedman to likely contribute to LSAT performance differences.<sup>89</sup>

Regarding Claude Steele’s research on stereotype threat, recall that Judge Friedman blocked the Intervenor’s efforts to have Steele testify at trial.<sup>90</sup> Friedman then concluded that the sparseness of the evidence precluded him from determining whether stereotype threat was influential in contributing to LSAT performance differences.<sup>91</sup> Friedman’s hostility to the Intervenor’s test bias evidence is visible in his characterization of the stereotype threat evidence. Judge Friedman criticized Steele’s expert report as follows: “He reports the results of only one experiment he performed using the GRE, and he does not indicate when the experiment was done, how many students participated, whether the results were tested for statistical significance, or whether the results were published and subjected to peer review.”<sup>92</sup> Unfortunately, this seriously misstates the record because Steele’s *Grutter* deposition and numerous deposition exhibits (both entered into the record by designation) cite to several stereotype threat experiments. Thus, Friedman simply ignored information in the record about stereotype threat research, including specifics available on dates, sample sizes, statistical significance tests performed and the issues of peer-reviewed scientific journals in which the studies appeared.<sup>93</sup>

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INTEREST, Fall 1982, at 59; Barbara Lerner, *Intelligence and Law*, in INTELLIGENCE: MEASUREMENT, THEORY, AND PUBLIC POLICY 172 (Robert L. Linn ed., 1989).

<sup>85</sup> Expert Report of Barbara Lerner, *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (No. 97-75231), presented Jan 22, 1999; Deposition of Barbara Lerner, *Gratz v. Bollinger*, (E.D. Mich. 1998) (No. 97-75231) (Mar. 12, 1999).

<sup>86</sup> 137 F. Supp. 2d at 866.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 866-67.

<sup>89</sup> *Id.* at 868.

<sup>90</sup> Clark, *Attorney, Judge Clash over Witness*, *supra* note 56.

<sup>91</sup> 137 F. Supp. 2d at 867-68.

<sup>92</sup> *Id.*

<sup>93</sup> Steele Deposition at 15, 18, 29-31, 41, 47, 112-114, 126, 170-171, 216-220, 240, *Grutter* (No. 97-75928), *supra* note 75. For Steele’s research on stereotype threat *see, e.g.*, Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613 (1997);

#### iv) Evidence of Bias in Undergraduate Grades: Campus Climate Research

With support from the Society of American Law Teachers (SALT), the *Grutter* Intervenor commissioned UCLA professors Walter Allen and Daniel Solorzano (and their colleagues) to conduct a campus climate study, including surveys and focus groups, of four of the top feeder schools to the University of Michigan Law School, including Michigan, Michigan State, Harvard, and UC Berkeley.<sup>94</sup> Allen and Solorzano, established authorities regarding the effects of campus climate on performance in higher education, produced an expert report that is reprinted in this volume of the *La Raza Law Journal*.<sup>95</sup> Based on the results of twelve focus groups<sup>96</sup> and 200 surveys,<sup>97</sup> Allen and Solorzano found that White privilege and entitlement are overarching features of the undergraduate racial climate, and that the cumulative effect of the educational environment creates an uneven playing field for students of color.<sup>98</sup>

Professor Allen testified at length in the *Grutter* trial about the campus climate study of UMLS feeder schools as well as the findings of the substantially larger body of research he has conducted on the same topic.<sup>99</sup> Allen testified that the pervasiveness of White male privilege on predominantly White college campuses impose extra burdens on students of color, who often “feel their presence is questioned and belittled” in such an environment.<sup>100</sup> Allen concluded that hostile campus climate adversely affects the college grades of students of color, and that affirmative action is necessary to ensure that such bias in undergraduate grades does not cause minority applicants to be unfairly evaluated in the admissions process.<sup>101</sup>

#### v) Trial Court Findings on the Campus Climate Study

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Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995), reprinted in THE BLACK-WHITE TEST SCORE GAP 401 (Christopher Jencks & Meredith Philips eds., 1998); Claude M. Steele, *Thin Ice: “Stereotype Threat” and Black College Students* ATLANTIC MONTHLY Aug. 1999, at 44; Steven J. Spencer et al., *Stereotype Threat and Women’s Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4 (1999); Joshua Aronson et al., *When White Men Can’t Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 29 (1999). Incidentally, many of these studies were also in the court record as part of David M. White’s expert report. Expert Report of White, *supra* note 23, at 15 n.43.

<sup>94</sup> Expert Report of Walter Allen & Daniel Solorzano, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), reprinted in 12 LA RAZA L.J. \_\_\_ (2001-2002).

<sup>95</sup> *Id.*

<sup>96</sup> Six of the groups were at Michigan, two at Harvard, one at Michigan State, and three at Berkeley. *Id.* at 7.

<sup>97</sup> Thirty-six of the surveys were from Michigan, 31 from Harvard, 49 from Michigan State, and 84 from Berkeley. The Allen/Solorzano surveys included 78 men, 122 women, 94 African Americans, and 43 Latinos. *Id.* at 1-12.

<sup>98</sup> *Id.* at 56-59.

<sup>99</sup> 137 F. Supp. 2d at 859; Jen Fish, *UCLA Professor Presents Data from Race Study in U. Michigan Law Trial*, MICH. DAILY, Feb 8, 2001.

<sup>100</sup> 137 F. Supp. 2d at 859; Fish, *UCLA Professor Presents Data*, *supra* note 99.

<sup>101</sup> 137 F. Supp. 2d at 859; Fish, *UCLA Professor Presents Data*, *supra* note 99.

In *Grutter*, the district court gave no weight to Professor Allen and Solorzano’s campus climate study.<sup>102</sup> Judge Friedman objected to the study’s sample size and the methods used to seek participants.<sup>103</sup> As with his findings on standardized testing, Friedman’s propensity for overkill in criticizing the campus climate evidence attests to his underlying hostility towards the Intervenor’s case. Thus, Friedman discounted the Allen and Solorzano study for not quantifying the degree to which hostile campus climate undermines UGPAs, for not mapping out exactly how much the influence of racially hostile environments varies from one individual to another, for not establishing that the studies findings were also applicable to UMLS’ other feeder schools, and finally, for not focusing research on other groups such as Arab Americans, southern Europeans, and religious minorities.<sup>104</sup>

Once again, the district court seriously misstated the record. Regarding Friedman’s unfounded criticism that there was no testimony or evidence indicating a hostile climate on other campuses, and his complaint about the small sample size in the Allen and Solorzano study, roughly half of Dr. Allen’s trial testimony was devoted to his prior empirical research in this area.<sup>105</sup> The feeder school study was presented not as an isolated and freestanding exercise, but as a confirmatory extension of research that Walter Allen and others had already been pursuing for decades.<sup>106</sup> To give one example, in Allen’s *Harvard Educational Review* study—which was cited in the expert report and discussed as part of his trial testimony—he came to similar conclusions about the negative impact of a hostile climate after surveying over 2,500 African American students at sixteen public universities, including UMLS feeder schools like Michigan, UCLA, Wisconsin-Madison, and Eastern Michigan.<sup>107</sup> Moreover, Judge Friedman’s expectation—that, in the midst of a defending a constitutional challenge to an affirmative action program for African Americans, Latinos, and Native Americans, the Intervenor’s experts should have designed focus groups specifically for religious minorities and southern/eastern Europeans—is simply ridiculous.

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<sup>102</sup> 137 F. Supp. 2d at 865.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 866.

<sup>105</sup> Telephone Interview with Miranda K.S. Massie, lead counsel for the Intervenor in *Grutter v. Bollinger* (Aug. 22, 2001).

<sup>106</sup> Defendant-Intervenor’s Proof Brief at 18, *Grutter* (No. 97-75928).

<sup>107</sup> Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 34 (1992). In this study Allen found that the Black students on the predominantly White campuses he surveyed emphasized feelings of alienation and racial discrimination (in contrast to historically Black public universities). *Id.* at 39. The *Grutter* study merely augments Allen’s conclusion in this earlier work: “Finally, little doubt exists over the negative impact of hostile racial and social relationships on Black student achievement. When Black students are made to feel unwelcome, incompetent, ostracized, demeaned, and assaulted, their academic confidence and performance understandably suffer.” *Id.* at 41.

For related work by Allen and Solorzano, see, e.g., COLLEGE IN BLACK AND WHITE: AFRICAN AMERICAN STUDENTS IN PREDOMINANTLY WHITE AND IN HISTORICALLY BLACK PUBLIC UNIVERSITIES (Walter R. Allen et al. eds., 1991); Sylvia Hurtado et al., *Enhancing Campus Climates for Racial/Ethnic Diversity: Educational Policy and Practice*, 21 REV. HIGHER EDUC. 279 *passim* (1998); Daniel Solorzano & O. Villalpando, *Critical Race Theory, Marginality, and the Experience of Minority Students in Higher Education*, in EMERGING ISSUES IN THE SOCIOLOGY OF EDUCATION: COMPARATIVE PERSPECTIVES (C. Torres & T. Mitchell eds., 1998).

vi) Other Components of the Intervenors' Case

While the Intervenors' case focused mainly on standardized testing and campus climate, their efforts to establish a wider context of historical and policy arguments for affirmative action should also be acknowledged. Many of the nation's foremost experts in their areas of specialty testified at trial. Gary Orfield of Harvard testified about the inferior, segregated K-12 education provided to Black and Latino students (particularly in Michigan), about the consequences of ending affirmative action, and about his recent research with the Harvard Civil Rights Projects on the value of diversity in legal education.<sup>108</sup> Professor Frank Wu (Howard University Law School) testified about the ways in which Asian Pacific Americans benefit from affirmative action and how "model minority" stereotyping is used as a vehicle to limit the opportunities of other minority groups.<sup>109</sup> Likewise, Faith Smith (President, Native American Educational Services College) testified about the importance of affirmative action to Native American students and their communities.<sup>110</sup>

John Hope Franklin, famed historian and Co-Chair of the President Clinton's Initiative on Race, testified for several hours about the history of racism and inequality in America, and how this history is linked to the current struggle over affirmative action.<sup>111</sup> Four students, Erica Dowdell, Concepcion Escobar, Crystal James, and Tania Kappner, testified poignantly about their educational experiences at the University of Michigan and about the post-affirmative action environments of UCLA and Berkeley.<sup>112</sup>

While the thirty-hour time limit prevented other experts for the Intervenors from testifying at trial, they nonetheless produced expert reports that are an important part of the defense of affirmative action. Professor Stephanie Wildman (now at Santa Clara University Law School) addressed the value of affirmative action in creating opportunities for women and in breaking down entrenched systems of privilege.<sup>113</sup> Elizabeth Chambliss (Harvard Law School) reported the results of her research, much of which was commissioned by the American Bar Association, on the status of people of

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<sup>108</sup> Jodi S. Cohen, *Harvard Witness Defends U-M: Scrapping Affirmative Action Will Bring Back Segregation, He Warns*, DETROIT NEWS, Jan. 24, 2001, at A2.

<sup>109</sup> Jen Fish, *Intervenors Argue Affirmative Action Helps Many Races*, MICH. DAILY, Feb. 13, 2001. For scholarly work by Wu on affirmative action, see e.g., Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129 (1996); Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995); Theodore Hsien Wang & Frank H. Wu, *Beyond the Model Minority Myth*, in THE AFFIRMATIVE ACTION DEBATE 191 (George E. Curry ed., 1996).

<sup>110</sup> Fish, *Intervenors Argue*, supra note 109.

<sup>111</sup> 137 F. Supp. 2d at 860.

<sup>112</sup> 137 F. Supp. 2d at 856-57; Jen Fish, *Judge Hears From U. Michigan Student on Stand*, MICH. DAILY, Jan. 24, 2001; Clark, *Attorney, Judge Clash over Witness*, supra note 56; Fish, *UCLA Professor Presents Data*, supra note 99; Cohen, *Harvard witness defends U-M*, supra note 108.

<sup>113</sup> Expert Report of Stephanie M. Wildman Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), reprinted in 12 LA RAZA L.J. \_\_\_ (2001-2002). For Wildman's views on affirmative action and White privilege, see, e.g., STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED (1996); Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TULANE L. REV. 1625 (1990); Stephanie M. Wildman & William C. Kidder, *Balancing Hopes and Dreams*, S.F. DAILY J., Jan. 23, 2001, at 4.

color in the legal profession.<sup>114</sup> Finally, Marcus Feldman (Professor of Biology, Stanford) refuted genetic determinist arguments about the causes of current racial/ethnic differences in educational achievement.<sup>115</sup> Feldman, whom Judge Friedman would not permit to testify,<sup>116</sup> argued that the dubious research of race/IQ scholars needs to be identified as an undercurrent in *Grutter*, given that CIR has repeatedly accepted financial contributions from the Pioneer Fund, a leading White supremacist/eugenics organization.<sup>117</sup>

### 3. Post-trial Developments

In its March 27, 2001 ruling in *Grutter v. Bollinger*, the district court enjoined UMLS from considering race as a factor in admission decisions.<sup>118</sup> The Law School immediately moved for a stay of this injunction pending appeal, which Judge Friedman promptly denied.<sup>119</sup> However, two days later the Sixth Circuit overturned Friedman's ruling, so UMLS can continue its affirmative action program while the case proceeds on appeal.<sup>120</sup> *Grutter* was originally scheduled to be heard on October 23, 2001 by a Sixth Circuit panel consisting of Judge Martha Daughtrey and Judge Karen Moore—who previously served on the panel that granted the students' motion to intervene in 1999<sup>121</sup>—as well as Chief Judge Boyce Martin.<sup>122</sup> At the last minute this was pushed back to December 2001, and *Grutter* will now be heard en banc by all nine active judges on the Sixth Circuit.<sup>123</sup>

## C. *Gratz*: The University of Michigan Undergraduate Case

### 1. University Wins Partial Summary Judgment Upholding *Bakke*

On December 13, 2000 U.S. district court judge Patrick Duggan ruled in *Gratz* that the University of Michigan could consider race as a factor in student selection in order to

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<sup>114</sup> Expert Report of Elizabeth Chambliss, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928). See also ABA COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (1998), <http://www.abanet.org/minorities/milestogo.pdf>.

<sup>115</sup> Expert Report of Marcus W. Feldman, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), reprinted in 12 LA RAZA L.J. \_\_ (2001-2002).

<sup>116</sup> Jodi S. Cohen, *Testimony wraps up in U-M lawsuit*, DETROIT NEWS, Feb. 11, 2001.

<sup>117</sup> Expert Report of Feldman, *supra* note 115. On the CIR-Pioneer Fund connection, see Laura Flanders, *Affirmative Racism*, THE NATION, Mar. 8, 1999, available at <http://www.thenation.com/issue/990308flanders.shtml>; African American Opportunities in Higher Education: What are the Racial Goals of the Center for Individual Rights? 23 J. BLACKS HIGHER EDUC. 94, 98 (Spring 1999); JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 49-51 (1996).

<sup>118</sup> 137 F. Supp. 2d at 872.

<sup>119</sup> *Grutter v. Bollinger*, 137 F. Supp. 2d 874 (E.D. Mich., April 3, 2001).

<sup>120</sup> *Grutter v. Bollinger*, 247 F.3d 631 (6<sup>th</sup> Cir. 2001) (granting the stay of injunction on April 5).

<sup>121</sup> 188 F.3d 394 (6<sup>th</sup> Cir. 1999).

<sup>122</sup> Telephone Interview with Miranda K.S. Massie, lead counsel for the Intervenors in *Grutter v. Bollinger* (Oct. 18, 2001).

<sup>123</sup> Peter Schmidt, *Full Appeals Court to Hear Affirmative-Action Lawsuits Against U. of Michigan*, CHRON. HIGHER EDUC., Oct. 22, 2001.

further the objective of obtaining diversity, and that the equal protection rights of White applicants were not violated by the University's current (1999-present) admission policy.<sup>124</sup> Like *Grutter*, *Gratz* will now be heard en banc by the Sixth Circuit on December 6, 2001.<sup>125</sup>

In an opinion covering both the issues of compelling interest and narrow tailoring,<sup>126</sup> the district court in *Gratz* also granted Plaintiffs' motion for summary judgment regarding the unconstitutionality of the University's 1995-1998 admission procedures.<sup>127</sup> Judge Duggan previously bifurcated the case into a liability and a damages phase. The most recent ruling dealt only with Equal Protection Clause liability, as well as Plaintiffs' request for injunctive and declaratory relief.<sup>128</sup>

On the question of whether it is permissible to take account of race in a college admissions program, Judge Duggan agreed with the Defendant's argument that *Bakke*'s holding is that a properly devised admission program that uses race as a plus factor is constitutional.<sup>129</sup> Yet, the court noted, "What is less clear, however, is whether five Justices implicitly agreed that diversity can be a compelling interest in the context of higher education, i.e., whether universities have a compelling interest in the educational benefits that flow from a racially and ethnically diverse student body."<sup>130</sup>

Judge Duggan reached the same ultimate conclusion as had the Ninth Circuit a week earlier in *Smith v. University of Washington Law School*<sup>131</sup>—namely "that under *Bakke*, diversity constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process..."<sup>132</sup> However, Judge Duggan specified that he did not necessarily agree with the Ninth Circuit that Justice Powell's opinion is the narrowest footing on which a race-sensitive admissions process could stand.<sup>133</sup>

Duggan criticized the Fifth Circuit panel in *Hopwood* for reading "too much into the other Justices' silence regarding Justice Powell's diversity rationale. It is just as likely that the other Justices felt no need to address the issue of diversity based upon their finding that under intermediate scrutiny, the program at issue was justified as a means to remedy past discrimination."<sup>134</sup> He suggested that Justice Brennan's opinion (joined by White, Marshall and Blackmun) could be interpreted as "implicit approval" of diversity,

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<sup>124</sup> *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000). For news coverage, see, e.g., Michael A. Fletcher, *Use of Race in Admissions Upheld*, WASH. POST, Dec. 14, 2000, at A2; Jodi S. Cohen, *Judge Upholds U-M Affirmative Action Policy*, DETROIT NEWS, Dec. 14, 2000, at 1; Patrick Healy, *Michigan Case a Victory for Affirmative Action*, BOSTON GLOBE, Dec. 14, 2000, at A1; Michael Grass, *After Three Years, U. Michigan Suit Clears District Level*, MICH. DAILY, Dec. 14, 2000, at 1; June Kronholz, *Judge Strikes Down Challenge to Race as Admissions Factor at Michigan School*, WALL ST. J. Dec. 14, 2000, at B14.

<sup>125</sup> Schmidt, *Full Appeals Court to Hear*, *supra* note 123.

<sup>126</sup> 122 F. Supp. 2d at 816.

<sup>127</sup> *Id.* at 831.

<sup>128</sup> *Id.* at 814.

<sup>129</sup> *Id.* at 819.

<sup>130</sup> *Id.*

<sup>131</sup> See *infra* Part I.D.

<sup>132</sup> *Gratz*, 122 F. Supp. 2d at 820.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

based, in part, on Brennan's description of *Bakke* in *Metro Broadcasting*.<sup>135</sup> The *Gratz* court distinguished higher educational admissions from employment and other contexts because the former implicates "the uneasy marriage of the First and the Fourteenth Amendments."<sup>136</sup>

Next, the *Gratz* court found that the University of Michigan "presented this Court with solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body."<sup>137</sup> On this point Duggan cited with approbation the expert report of Patricia Gurin and amici by the United States and the Association of American Law Schools (representing over 360 institutions).<sup>138</sup> In contrast, the court found that

Plaintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students. In fact, during oral argument, counsel for Plaintiffs indicated his willingness to assume, for purposes of these motions, that diversity in institutions of higher education is 'good, important, and valuable.'<sup>139</sup>

Judge Duggan devoted several paragraphs to a brief filed by The National Association of Scholars (NAS),<sup>140</sup> a conservative faculty organization opposed to multicultural/feminist curriculum and affirmative action.<sup>141</sup> Judge Duggan concluded that NAS' criticism of Gurin's study and other works did not get to the "core issue of whether the educational benefits that flow from a diverse student body constitute a compelling governmental interest, but rather, whether the means employed to achieve that interest are narrowly tailored."<sup>142</sup>

On the narrow tailoring issue, the *Gratz* court upheld the current admission system at Michigan. The court concluded that the Universities' program did not contain rigid quotas or seek to admit a predetermined number of minorities, and that the practice of adding 20 index points (on a 150 point scale) to minority applicants, and "flagging" some minority files for further consideration amounted to permissible "plus" factor policies.<sup>143</sup> Judge Duggan held that the University of Michigan satisfied its burden of showing it considered race-neutral alternatives.<sup>144</sup> Duggan concluded that random selection above a certain threshold was not likely to produce a sufficiently diverse student body.<sup>145</sup> He also found persuasive Michigan expert William G. Bowen's opinion that

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<sup>135</sup> *Id.* (citing *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 568 (1990), *rev'd on other grounds*. Justice Brennan described the Court's *Bakke* decision as recognizing that "a 'diverse student body' contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated.").

<sup>136</sup> *Id.* at 821 (citing *Hopwood v. State of Tex.*, 78 F.3d 932, 965 n.21 (5<sup>th</sup> Cir. 1996) (Wiener, J., concurring)).

<sup>137</sup> *Id.* at 822.

<sup>138</sup> *Id.* at 822-23.

<sup>139</sup> *Id.* at 823.

<sup>140</sup> *Id.* at 824.

<sup>141</sup> STEFANCIC & DELGADO, *supra* note 117, at 124-126 (1996). *See infra* Part III.C. for further discussion of NAS and affirmative action.

<sup>142</sup> 122 F. Supp. 2d at 824.

<sup>143</sup> *Id.* at 826-27.

<sup>144</sup> *Id.* at 830.

<sup>145</sup> *Id.*

percentage plans<sup>146</sup> like the Texas Ten Percent plan “provides a spurious form of equality that is likely to damage the academic profile of the overall class of students admitted to selective institutions.”<sup>147</sup>

The *Gratz* court found the Universities’ 1995-1998 admissions program impermissible, largely because the court found that Michigan engaged in “protecting” or “reserving” seats for under-represented minorities, and because different admission grids and action codes were used for applicants depending on their race.<sup>148</sup>

## 2. Intervenor Loses Case for a Remedial Rationale

In *Gratz*, Judge Duggan separately addressed the Intervenor-Defendants’ arguments about remedial justifications for affirmative action.<sup>149</sup> In late February 2001, Judge Duggan granted summary judgment to the Plaintiffs (CIR) on this issue, though he stated that it had no practical effect on his prior ruling that the University of Michigan’s 1999-2000 admissions program was constitutional.<sup>150</sup> The Intervenor, represented by LDF, MALDEF and the ACLU, contend that the University of Michigan’s affirmative action program satisfies a compelling governmental interest because it serves to “remedy the present effects of discrimination that it has caused or tolerated; remedy the negative racial climate that it has sustained or that has been caused by others on the campus; and remedy or off-set the effects of any current discrimination in which it is engaged.”<sup>151</sup>

To meet the threshold required for a compelling interest, the court required both that the discrimination be identified with specificity, and a strong evidentiary basis for the remedial action taken.<sup>152</sup> The court contrasted this with generalized, societal discrimination.<sup>153</sup> Judge Duggan first addressed whether remedying discrimination was the actual (as opposed to the articulated) purpose behind the University’s affirmative action program.<sup>154</sup> He ruled that it is not sufficient that remedial measures “may have” motivated the University, and that the Intervenor failed to provide evidence that remedying discrimination was the real justification for Michigan’s affirmative action plan.<sup>155</sup>

Secondly, the *Gratz* court ruled that the Intervenor did not establish as a factual matter the existence of the alleged discrimination, and the necessity of the remedy.<sup>156</sup> The court quickly summarized the record of discrimination and exclusion of students of color (particularly African Americans) at the University of Michigan during the last century.<sup>157</sup> This history included Title VI compliance investigation and the University of Michigan actively discouraging Black applicants during the 1960s, racial hostility in the

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<sup>146</sup> For discussion of percentage plans see *infra* Part II.D.

<sup>147</sup> 122 F. Supp. 2d at 830.

<sup>148</sup> *Id.* at 831-33.

<sup>149</sup> *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

<sup>150</sup> *Id.* at 802.

<sup>151</sup> *Id.* at 792.

<sup>152</sup> *Id.* at 792-93.

<sup>153</sup> *Id.* at 793.

<sup>154</sup> *Id.* at 794-95.

<sup>155</sup> *Id.* at 795.

<sup>156</sup> *Id.* at 796-97.

<sup>157</sup> *Id.* at 796-99.

dormitory system and several racist incidents during the 1970s, 1980s, and 1990s.<sup>158</sup> Judge Duggan found that the Intervenors failed to establish that 1) the University ever facially discriminated against minorities in admission decisions, 2) minorities were ever outright excluded in admissions, and 3) the University's past admissions programs had a discriminatory impact on minority applicants.<sup>159</sup>

Judge Duggan ruled that the Intervenors' evidence did not satisfactorily demonstrate the continuing effects of past discrimination on current minority applicants.<sup>160</sup> Specifically, the court rejected—as a non-cognizable form of societal discrimination—the Intervenors' argument that current minority applicants (unlike many Whites) were disadvantaged by the fact that their parents could not pass on the privileges of attending institutions like the University of Michigan.<sup>161</sup> Likewise, the court found that the University of Michigan was not a passive participant (at least with respect to the most recent past) in creating a racially hostile climate.<sup>162</sup>

Finally, the *Gratz* court found unpersuasive the Intervenors' contention that affirmative action was necessary to offset the discriminatory effects of other aspects of the University of Michigan's admissions policy.<sup>163</sup> The Intervenors argue that Black and Latino applicants are less likely than Whites to receive bonus points in the admissions process for attending highly ranked high schools, for enrolling in advanced courses (which are often unavailable at less affluent schools), for being the children of alumni, or for residing in the 45 northern counties the University has designated as under-represented.<sup>164</sup> The court concluded, "Because both the allegedly discriminatory [plus] factors and the racial preferences are part of the same program, there is no overall discriminatory impact."<sup>165</sup> This is curious logic since the Intervenors point is precisely that affirmative action, in effect, *compensates* for these other discriminatory plus factors. In any event, the court also found that counteracting the adverse impact of other admission criteria is not a narrowly tailored remedy.<sup>166</sup>

## D. The University of Washington Law School and Initiative-200

In the state of Washington there are two related affirmative action developments. In March 1997, CIR sued the University of Washington Law School over its admissions program. Then in November 1998 the voters of Washington approved Initiative-200 (I-200), which like California's Proposition 209, prohibits taking account of race in public-sector employment, contracting and university admissions.<sup>167</sup> I-200 passed with a 58%

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<sup>158</sup> *Id.* at 797-99.

<sup>159</sup> *Id.* at 799.

<sup>160</sup> *Id.* at 799-800.

<sup>161</sup> *Id.* at 800.

<sup>162</sup> *Id.* at 800-01.

<sup>163</sup> *Id.* at 801-02.

<sup>164</sup> *Id.* at 801.

<sup>165</sup> *Id.* at 802.

<sup>166</sup> *Id.*

<sup>167</sup> For a policy analysis of I-200, see Robert H. Kelley, *The Washington Civil Rights Initiative: The Need for a Meaningful Dialogue*, 34 GONZ. L. REV. 81 (1998-99).

majority of Washington voters.<sup>168</sup> UC Regent Ward Connerly and publishing mogul Steve Forbes raised much of the funds for the I-200 campaign.<sup>169</sup>

In *Smith v. University of Washington Law School*, CIR filed a Title VI class action lawsuit on behalf of four White applicants denied admission to the law school. However, soon after the passage of I-200, federal district court judge Thomas Zilly dismissed claims for declaratory and equitable relief as moot, and decertified the class of White plaintiffs.<sup>170</sup> All that was left was monetary damages for three applicants. Judge Zilly also ruled that Powell’s opinion in *Bakke*—supporting the use of race as a plus factor to achieve educational diversity—was still good law. Previously, Zilly refused to allow intervention on the part of students of color represented by the ACLU, ruling that the students failed to establish that the University would inadequately represent their interests.<sup>171</sup>

## 1. Ninth Circuit Rules that Diversity is Compelling

Judge Zilly’s rulings—on mootness and whether diversity is a compelling interest—were appealed by CIR. On December 4, 2000 the Ninth Circuit held that the class certification claims were moot, and, more importantly, that Justice Powell’s *Bakke* opinion—taking account of race as a plus factor in order to enhance educational diversity is a compelling governmental interest—remained good law.<sup>172</sup> The Ninth Circuit panel noted that the district court faithfully followed Justice Powell’s opinion in *Bakke*, but concluded: “The difficulty with which we are presented is that in *Bakke* none of the other Justices fully agreed with Justice Powell’s opinion, so we are left with the task of deciding just what the Supreme Court decided.”<sup>173</sup> Citing the Supreme Court’s decision in *Marks v. United States*, the Ninth Circuit discerned the *Bakke* holding to be the position taken by Justices who concurred in the judgments on the narrowest grounds.<sup>174</sup>

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<sup>168</sup> D. Frank Vinik et al., *Affirmative Action in College Admissions: Practical Advice to Public and Private Institutions for Dealing with the Changing Landscape*, 26 J.C. & U.L. 395, 414 (2000).

<sup>169</sup> *Id.* at 413-15 (reporting that Connerly helped to raise more than half of the \$1.3 million spent by supporters of the initiative and that Forbes sponsored radio ads for the proposition).

<sup>170</sup> See 194 F.3d 1045, 1048-49 (9<sup>th</sup> Cir. 1999). See also Patrick Healy & Liz McMillen, *Judge Affirms ‘Bakke’ in U. of Washington Suit*, CHRON. HIGHER EDUC., Feb. 26, 1999, at A32; Douglas Lederman, *Federal Judge Narrows Scope of Affirmative-Action Suit Against U. of Washington*, CHRON. HIGHER EDUC., Feb. 19, 1999, at A40.

<sup>171</sup> See Douglas Lederman, *Student Groups Lose Bid to Intervene in Lawsuit*, CHRON. HIGHER EDUC., Aug. 7, 1998, at A33.

<sup>172</sup> *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9<sup>th</sup> Cir. 2000). See also Sara Hebel, *U.S. Appeals Court Upholds Use of Affirmative Action in Admissions*, CHRON. HIGHER EDUC., Dec. 15, 2000, at A40; Kenneth J. Cooper, *U.S. Courts Differ on Preference: Affirmative Action Gets Mixed Verdict*, WASH. POST, Dec. 7, 2000 at A10; *U.S. Supreme Court May Settle Issue of Race-Based College Admissions, Opinions Differed in Decisions on UW, Texas Cases*, SEATTLE POST-INTELLIGENCER, Dec. 8, 2000, at C5. The briefs for CIR and the University of Washington Law School, along with an amicus brief filed by the American Council on Education and many other educational organizations, are reprinted in the *Journal of College and University Law*. See 26 J.C. & U.L. 429 (2000) (Plaintiff’s Ninth Circuit Brief); 26 J.C. & U.L. 445 (2000) (Defendant’s Ninth Circuit Brief); 26 J.C. & U.L. 467 (2000) (Brief of Amici Curiae for the American Council of Education and several other associations of colleges and universities that support affirmative action on educational grounds).

<sup>173</sup> 233 F.3d. at 1196-98.

<sup>174</sup> *Id.* at 1199 (citing *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (other citations omitted)).

In *Smith*, the Ninth Circuit pointed out the added complications of applying *Marks* in the *Bakke* case because of the disagreement between Justice Powell and Justice Brennan over the constitutionality of UC Davis Medical School's particular admissions program.<sup>175</sup> Still, the Ninth Circuit held: "A majority would have allowed for some race-based considerations in educational institutions, both under Title VI and under the Fourteenth Amendment. Thus, a race-based possibility must be taken to be the actual rationale adopted by the Court."<sup>176</sup> Specifically, the Ninth Circuit concluded that although Brennan did not specify the diversity rationale, "we can hardly doubt that he would have embraced that somewhat narrower principle if need be, for he thought that it was simply an allotrope of the principle he was propounding."<sup>177</sup>

In *Smith*, the Ninth Circuit acknowledged the Supreme Court's more recent disapproval of race-conscious affirmative action in non-educational settings, yet it concluded that only the Supreme Court can overrule *Bakke*, even if the rationale behind *Bakke* has been undermined by subsequent decisions.<sup>178</sup> In a footnote, the Ninth Circuit criticized the Fifth Circuit's contrary 1996 ruling in *Hopwood* for its "failure to properly apply the teachings of *Marks* and *Agostini*."<sup>179</sup> The present conflict between the Ninth and Fifth Circuits increases the pressure on the Supreme Court to take up one of the major educational affirmative action cases.<sup>180</sup> Since the Court denied certiorari in the *Smith* case in late May 2001,<sup>181</sup> litigation involving the University of Michigan appears to be the best candidates to make it before the Supreme Court in the near future.

## E. The Fifth Circuit's Rulings in *Hopwood II* and *III*

### 1. Brief Overview of *Hopwood II*

In *Hopwood v. Texas*<sup>182</sup> four White plaintiffs represented by CIR charged that the University of Texas Law School (UTLS) violated the Fourteenth Amendment and the Civil Rights Act of 1964 by granting racial preferences to Black and Mexican American applicants in the 1992 admission cycle.<sup>183</sup> *Hopwood* involved three appeals before the Fifth Circuit. In 1994 the Fifth Circuit affirmed the lower court's denial of intervention by student of color organizations represented by the NAACP Legal Defense and Education Fund (*Hopwood I*).<sup>184</sup> *Hopwood II* involved a 1996 appeal on the merits of

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1200.

<sup>178</sup> *Id.* (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

<sup>179</sup> *Id.* at 1201 n.9 (citations omitted). It is worth noting here that Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sat by designation on the Ninth Circuit panel in *Smith*.

<sup>180</sup> See Sara Hebel, *Courting a Place in Legal History*, CHRON. HIGHER EDUC., Nov. 24, 2000, at A23.

<sup>181</sup> *Smith v. Univ. of Wash. Law Sch.*, 121 S. Ct. 2192 (2001); Michael A. Fletcher, *Justices Won't Review Affirmative Action Case*, WASH. POST, May 30, 2001, at A3; Ben Gose, *Supreme Court Declines to Review Affirmative Action in Higher Education*, CHRON. HIGHER EDUC., May 29, 2001.

<sup>182</sup> 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd* 78 F.3d 932 (5<sup>th</sup> Cir. 1996).

<sup>183</sup> See *id.* at 553.

<sup>184</sup> 21 F.3d 603 (5<sup>th</sup> Cir. 1994).

Plaintiffs' claims, with current Solicitor General Ted Olson arguing on behalf of CIR.<sup>185</sup> The majority of the Fifth Circuit Panel held that taking account of race in order to foster educational diversity is not, in light of recent Supreme Court precedent, a compelling governmental interest and cannot withstand strict scrutiny.<sup>186</sup> The *Hopwood II* majority also held that UTLS could not justify its affirmative action program as a remedy to discrimination because remedial affirmative action measures must be based on past wrongs at the Law School—not other components of the Texas public education system.<sup>187</sup>

The Fifth Circuit declined to rehear the case en banc, which prompted a blistering dissent joined by seven members of the court.<sup>188</sup> Later the Supreme Court also denied UTLS' petition for a writ of certiorari.<sup>189</sup> While Justice Ginsburg (joined by Justice Souter) noted that the constitutionality of using race or national origin in higher education admissions is "an issue of great national importance," the Supreme Court declined to review the case on mootness grounds.<sup>190</sup>

## 2. Recent Developments: *Hopwood III*

On December 21, 2000 a different Fifth Circuit panel decided *Hopwood III*, which dealt with appeals and cross-appeals of the district court rulings pursuant to remand from *Hopwood II*.<sup>191</sup> In particular, *Hopwood III* addressed a finding of fact that none of the Plaintiffs had a realistic chance of being offered admission to UTLS even under a race-blind system, rulings on attorneys' fees, and the granting of an injunction prohibiting any consideration of race at all in the UTLS admission process.<sup>192</sup>

The *Hopwood III* panel found that the *Hopwood II* court did not clearly err in ruling that UTLS could only remedy the past discrimination at the Law School.<sup>193</sup> Specifically, the court found that *Hopwood II* was not clearly erroneous because the Supreme Court has yet to establish specific rules for determining how localized prior discrimination must be in order to permit a governmental entity to practice remedial affirmative action.<sup>194</sup> Similarly, the Fifth Circuit found that the *Hopwood II* court was not clearly erroneous in holding that diversity may never be a compelling governmental interest justifying race-conscious affirmative action because this was not the controlling rationale in *Bakke*.<sup>195</sup> The court concluded:

Although Justice Powell would surely have disagreed with that holding, we cannot say that *Hopwood II* conflicts with any portion of *Bakke* that is binding on this court. Some may think it was imprudent for the *Hopwood*

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<sup>185</sup> 78 F.3d 932 (5<sup>th</sup> Cir. 1996).

<sup>186</sup> *Id.* at 941-944.

<sup>187</sup> *Id.* at 952.

<sup>188</sup> 84 F.3d 720, 721-722 (5<sup>th</sup> Cir. 1996).

<sup>189</sup> Order Denying Writ of Certiorari, 518 U.S. 1033 (1996).

<sup>190</sup> *Id.* at 1033-34.

<sup>191</sup> 236 F.3d 256 (5<sup>th</sup> Cir 2000).

<sup>192</sup> *Id.* at 261. I will summarize only the *Hopwood III* court's reversal of the district court's injunction against any consideration of race in the UTLS admissions process, for it was here that the University urged the court to reexamine the merits of *Hopwood II*.

<sup>193</sup> *Id.* at 272-74.

<sup>194</sup> *Id.* at 273-74.

<sup>195</sup> *Id.* at 274-75.

II panel to venture into uncharted waters by declaring the diversity rationale invalid, but the panel's holding clearly does not conflict directly with controlling Supreme Court precedent.<sup>196</sup>

In a footnote, the *Hopwood III* panel also expressed its disagreement with the Ninth Circuit's holding earlier in the month that Powell's diversity rationale is binding Supreme Court precedent:

(W)e do not read *Marks* as an invitation from the Supreme Court to read its fragmented opinions like tea leaves, attempting to divine what the Justices 'would have' held. Rather...we read *Bakke* as not foreclosing (but certainly not requiring) the acceptance by lower courts of diversity as a compelling state interest.<sup>197</sup>

The *Hopwood III* panel found that the district court abused its discretion when it issued a permanent injunction prohibiting UTLS from "taking into consideration racial preferences in the selection of those individuals to be admitted as students."<sup>198</sup> The Fifth Circuit reversed the district court's injunction for failure to conduct an evidentiary hearing on whether an injunction "was needed in the future" and for noncompliance with Federal Rule of Civil Procedure 52(a), which requires federal trial courts to support their judgments with written findings of fact and conclusions of law.<sup>199</sup> The *Hopwood III* court also found that the district court's absolute prohibition impermissibly conflicted with *Bakke*'s holding that it is permissible to consider race in some circumstances.<sup>200</sup>

As a practical matter, *Hopwood III* does not give educational institutions in Texas any more leeway to now consider race in selecting students.<sup>201</sup> An appeal for the Fifth Circuit to rehear *Hopwood III* en banc was denied in January 2001.<sup>202</sup> In June 2001, the Supreme Court also denied certiorari in the *Hopwood III* case, which is not surprising given that the Court previously declined to take up *Hopwood II*.<sup>203</sup> Thus, two suits involving the University of Michigan are the most likely candidates to present the kind of genuine controversy that the Court appears to be waiting for.

## F. University of Georgia

### 1. District Court Rejects *Bakke* Diversity Rationale

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<sup>196</sup> *Id.* at 275.

<sup>197</sup> *Id.* at 275, n.66.

<sup>198</sup> *Id.* at 276.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 276-77.

<sup>201</sup> Chris Vaughn, *Order Lifted in College Entry Case, Court Maintains Ban on Race-Based Admissions*, FORT WORTH STAR-TELEGRAM, Dec. 22, 2000 at 1 (quoting Patricia Ohlendorf, UT Vice President for Institutional Relations: "Race still may not be used in the 5<sup>th</sup> Circuit. Because of that, our admissions and financial aid policies will not change."); Ron Nissimov, *Hopwood Decision Stands*, HOUSTON CHRON., Dec. 22, 2000, at A37 (quoting Frank Newton, Dean of the Texas Tech Law School: "Sadly, this opinion does little to change the *Hopwood* rule in Texas."); Mary Ann Roser & Sharon Jayson, *UT Wins Round in Ballet Over Affirmative Action*, AUSTIN AM.-STATESMAN, Dec. 22, 2000, at A1 (reporting that UT will not be changing its admissions policy based on *Hopwood III*).

<sup>202</sup> 248 F.3d 1141 (5<sup>th</sup> Cir. 2001).

<sup>203</sup> Order Denying Writ of Certiorari, 121 S.Ct. 2550 (2001). See also Larry D. Hatfield, *Justices Dodge Affirmative Action*, S.F. CHRON., June 26, 2001, at A7; Ben Gose, *Supreme Court Declines to Hear Hopwood Affirmative-Action Case*, CHRON. HIGHER EDUC., June 26, 2001.

In *Johnson v. Board of Regents of the Univ. System of Georgia*, federal district Judge B. Avant Edenfield ruled that the University of Georgia's 1999 admissions policy—which awarded points to minorities and men for a small fraction of applicants—violated Title VI and Title IX.<sup>204</sup> In an opinion that made *Hopwood II* look subdued by comparison, Judge Edenfield ruled that Justice Powell's opinion in *Bakke* is not binding precedent, though it does carry some persuasive weight.<sup>205</sup> The *Johnson* case comes on the heels of several other lawsuits filed against the University of Georgia (UGA), including *Wooden* and *Tracy*, which have a tortured procedural history of consolidation, separation, remand, and reconsideration.<sup>206</sup>

In the UGA admission program, about 85% of offers were made based solely on applicants' GPA/ACT index scores.<sup>207</sup> Remaining applicants were re-ranked and could receive up to a maximum of 8.15 points based on twelve factors that included such things as curriculum quality, leadership activities, parent/sibling ties to UGA, race, and gender (in 1999 only).<sup>208</sup> Among the small proportion of applicants who were not already admitted or rejected solely on the basis of high school grades and test scores, non-White status (race) was given 0.5 points, meaning that at most race accounted for a meager 6% of the 8.15 points possible under UGA's Total Student Index.<sup>209</sup> The *Johnson* court found that UGA's admissions policy was clearly patterned after the Harvard Plan that Justice Powell approved of in *Bakke*, but the court determined that "Powell's view as to the validity of a 'Harvard-style' admissions system was mere dicta and not a holding in any event, since *Bakke* concerned a dual-track program rather than a 'plus factor' program like Harvard's or UGA's."<sup>210</sup>

Judge Edenfield looked to other cases like *Croson*, *Adarand*, and *Hopwood II*, to support his finding that diversity is not a compelling interest.<sup>211</sup> He applied concepts from the Court's public contracting affirmative action cases and declared, "To base racial preferences upon an amorphous, unquantifiable, and temporally unlimited goal is to engage in naked racial balancing."<sup>212</sup> Finally, Judge Edenfield found that UGA did not "meaningfully show how racial diversity actually fosters educational benefits."<sup>213</sup> He also characterized UGA's evidence on the value of diversity (based on the testimony of former UGA President Charles Knapp) as mere speculation and anecdote.<sup>214</sup>

## 2. The Intervenors' Role

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<sup>204</sup> 106 F. Supp. 2d 1362 (S.D. Ga., 2000).

<sup>205</sup> *Id.* at 1369.

<sup>206</sup> *Tracy v. Bd. of Regents*, 59 F. Supp. 2d 1314 (S.D. Ga. 1999); *Wooden v. Bd. of Regents*, 32 F. Supp. 2d 1370 (S.D. Ga. 1999); *Wooden et al. v. Univ. of Ga.*, 208 F.3d 1313 (11<sup>th</sup> Cir. 2000).

<sup>207</sup> Sara Hebel, *Federal Judge Declares U. of Georgia Admissions Policies Unconstitutional*, CHRON. HIGHER EDUC., Aug. 4, 2000, at A28.

<sup>208</sup> *Johnson v. Bd. of Regents of the Univ. System of Ga.*, 263 F.3d 1234, 1241-42 (11<sup>th</sup> Cir. 2001).

<sup>209</sup> *Id.* at 1241.

<sup>210</sup> 106 F. Supp. 2d at 1368-69.

<sup>211</sup> *Id.* at 1369-71.

<sup>212</sup> *Id.* at 1373.

<sup>213</sup> *Id.* at 1371.

<sup>214</sup> *Id.* at 1372.

Soon after the *Johnson* ruling, UGA officials appealed the decision to the Eleventh Circuit.<sup>215</sup> The Intervening-Defendants, represented by the NAACP Legal Defense and Educational Fund (LDF) filed a separate appeal.<sup>216</sup> In the meantime, UGA discontinued the use of race and settled other claims, including a suit against the Law School, in order to “clear the decks” while they proceed with the *Johnson* appeal.<sup>217</sup> Apparently, UGA officials view this case as their chance to take a national leadership role on affirmative action.<sup>218</sup> The Eleventh Circuit heard oral argument in late May 2001, and a ruling was announced on August 27, 2001.<sup>219</sup>

Unfortunately, in its eagerness to obtain a clear ruling on the *Bakke* question, UGA repeated the University of California’s *Bakke* errors by failing to develop a factual record on either the educational benefits of diversity or the viability of a remedial rationale for affirmative action, and by not vigorously contesting the Plaintiffs at every step of the litigation.<sup>220</sup> For example, in *Tracy* and *Wooden*, two 1999 rulings, Judge Edenfield voiced extreme skepticism of the diversity rationale, opining that “the very concept of ‘diversity’ has become so malleable that it can be instantly conscripted to march in any ideologue’s army.”<sup>221</sup> Yet, despite such writing on the wall, UGA proffered only a meager amount of anecdotal testimony (not rigorous social science evidence) to support its core argument that race-conscious affirmative action is a compelling interest because it fosters an enhanced educational environment.<sup>222</sup>

LDF, in the Eleventh Circuit appeal of *Johnson* agreed with UGA that diversity is a compelling interest, yet LDF also argued that the University’s affirmative action plan serves the purpose of remedying the lingering effects of the University’s 160-year history of *de jure* segregation.<sup>223</sup> Thus, LDF contended, the district court ruling in *Johnson* is properly viewed as only a partial summary judgment, since no party sought summary judgment on the remedial issue, and since Judge Edenfield erred by excluding this issue from his ruling.<sup>224</sup> LDF further argued that the district court abused its discretion by denying the Interveners either a special case management order or an extended discovery

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<sup>215</sup> Sara Hebel, *U. of Georgia Plans Appeal of Affirmative-Action Ruling*, CHRON. HIGHER EDUC., Sept. 22, 2000, at A31.

<sup>216</sup> Brief on Appeal of Interveners Antoine Hester, et al, *Johnson v. Bd. of Regents of the Univ. System of Ga.*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000) (Nos. 00-14340, 00-14382).

<sup>217</sup> Sara Hebel, *U. of Georgia Settles Affirmative-Action Suit*, CHRON. HIGHER EDUC., Feb. 16, 2001, at A30; Hebel, *U. of Georgia Plans Appeal of Affirmative-Action Ruling*, supra note 215.

<sup>218</sup> See Sara Hebel, *Courting a Place in Legal History*, CHRON. HIGHER EDUC., Nov. 24, 2000, at A23 (quoting UGA President Michael Adams: “As someone who grew up in the southern region of the country, which has not been perceived to be on the cutting edge of racial relations, the fact that we’re going to provide some leadership in a place like Georgia is important to me.”). See also Larry Copeland, *U. of Ga. Leader: Affirmative Action Worth Fighting For*, USA TODAY, Oct. 21, 1999, at A5.

<sup>219</sup> Rhonda Cook *UGA’s Admissions Policy Argued in Appellate Court*, ATLANTA J. & CONST., May 23, 2001, at E3; Doug Gross, *Judges Question UGA on Admissions Policies*, FLORIDA TIMES-UNION, May 23, 2001, at B8.

<sup>220</sup> *Johnson*, 106 F. Supp. 2d at 1371-72, 1376-77.

<sup>221</sup> *Tracy*, 59 F. Supp. 2d at 1321. See also *Wooden*, 32 F. Supp. 2d at 1380 (opining that the abstract benefits of diversity are greatly outweighed by the costs imposed by racial classifications).

<sup>222</sup> *Johnson*, 106 F. Supp. 2d at 1371-74.

<sup>223</sup> Interveners’ Brief at 21-23, *Johnson* (Nos. 00-14340, 00-14382). In *Wooden*, Judge Edenfield rejected the remedial rationale for UGA’s affirmative action program. 32 F. Supp. 2d at 1382-84.

<sup>224</sup> Interveners’ Brief at 21-22, *Johnson* (Nos. 00-14340, 00-14382).

schedule in order to compile a factual record on the remedial and diversity rationales.<sup>225</sup> LDF attorneys and other civil rights leaders worry that *Johnson* is not the right case to go to the Supreme Court, given the absence of either social science evidence on the educational benefits of diversity or the factual record needed to support a remedial justification for affirmative action.<sup>226</sup>

### 3. The Eleventh Circuit Ruling

On August 27, 2001, an Eleventh Circuit panel sustained the district court's ruling which granted the White Plaintiff's motion for summary judgment.<sup>227</sup> While the district court struck down UGA's affirmative action plan on the grounds that diversity is not a compelling interest, the Eleventh Circuit ruled that even if diversity was compelling, UGA still violated the Equal Protection Clause by not narrowly tailoring its affirmative action plan to meet that interest.<sup>228</sup> The court expressed extreme skepticism of Justice Powell's opinion in *Bakke*: "[W]e do not believe that Justice Powell's opinion is binding, and his discussion of the Harvard Plan was entirely dicta."<sup>229</sup> However, since the *Johnson* Eleventh Circuit panel explicitly limited its ruling to the question of narrow tailoring, its characterization of the diversity rationale is also mere dicta.<sup>230</sup>

Reviewing the summary judgment ruling *de novo*, the Eleventh Circuit held that UGA "does not even come close" to showing a reasonable factfinder that its admissions plan is narrowly tailored to achieve diversity.<sup>231</sup> The Eleventh Circuit adapted a four-part narrow tailoring test based on *United States v. Paradise*, a remedial-based employment affirmative action case.<sup>232</sup> The *Johnson* court's framework included inquiries into 1) whether race was used in a rigid or mechanical manner; 2) whether race-neutral factors that contribute to diversity were fully taken into account; 3) whether the "favored" groups received an arbitrary or disproportionate benefit; and 4) whether the University genuinely considered race-neutral alternatives.<sup>233</sup>

Essentially, the Eleventh Circuit found that UGA failed to satisfy any of its narrow tailoring criteria, finding its affirmative action program inflexible, mechanical, arbitrary, and out of proportion.<sup>234</sup> Moreover, the court found that UGA developed no evidentiary record to substantiate claims that its program only marginally impacted White applicants, or that it considered race-neutral alternatives.<sup>235</sup> Finally, the Eleventh Circuit

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<sup>225</sup> *Id.* at 39-42.

<sup>226</sup> Hebel, *Courting a Place in Legal History*, supra note 180 (reporting the comments of Ted Shaw of LDF); Telephone Interview with Elise Boddie, Assistant Counsel for LDF (Aug. 1, 2001).

<sup>227</sup> *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).

<sup>228</sup> *Id.* at 1237, 1244-45.

<sup>229</sup> *Id.* at 1261.

<sup>230</sup> *See id.* at 1237 ("The district court found the admissions policy unlawful because, in its view, student body diversity is not a compelling interest sufficient to withstand the strict scrutiny that courts must apply to government decision-making based on race. We need not, and do not, decide that issue, because even assuming that student body diversity is a compelling interest, the University's 1999 freshman admissions policy is not narrowly tailored to achieve this interest.").

<sup>231</sup> *Id.* at 1251.

<sup>232</sup> *Id.* at 1252-53.

<sup>233</sup> *Id.* at 1253.

<sup>234</sup> *Id.* at 1254-58.

<sup>235</sup> *Id.* at 1259-60

held that the remedial rationale proffered by the Intervenor’s—that affirmative action at UGA is necessary to ameliorate the vestiges of its prior discriminatory practices—did not “defeat the Plaintiff’s entitlement to summary judgment.”<sup>236</sup>

UGA will now terminate affirmative action and other universities in the Eleventh Circuit will most likely question whether *any* meaningful affirmative action program can presently survive the gauntlet of the Circuit’s narrow tailoring analysis. There may be a silver lining to the *Johnson* case, in that UGA apparently will not appeal to the Supreme Court.<sup>237</sup> Thus, at least for now it appears that other affirmative action programs across the country will not be placed in even greater jeopardy based on the UGA’s half-hearted and troublesome defense of affirmative action.

## **G. California: The Post-Affirmative Action Landscape**

### **1. Brief Overview of Proposition 209 and the UC Regents’ SP-1 Resolution**

The University of California (UC) face constrained by two overlapping prohibitions of race-conscious affirmative action, one of which was recently rescinded. First, in July 1995 the UC Regents—led by governor Pete Wilson and anti-affirmative action maven Ward Connerly—voted 14 to 10 to ban race-based affirmative action in admissions, contracting and hiring.<sup>238</sup> The UC Regents’ SP-1 resolution took effect at the graduate/professional school level in 1997, and at the undergraduate level in 1998. Next, the California voters approved Proposition 209 with a 54% majority in November 1996. Prop. 209 states: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting.”<sup>239</sup> Prop. 209 took effect in January 1998, and it applies to “preferential treatment” broadly, not just to admission decisions. Thus, Prop. 209 places limitations on financial aid and scholarships, whereas SP-1 does not. In 1997 the Ninth Circuit upheld the constitutionality of Prop. 209 in the face of a challenge under the Hunter/Seattle “political structure” doctrine.<sup>240</sup>

### **2. SP-1: Recent Developments**

In April 2000, UC Regent William Bagley—a moderate Republican attorney from San Francisco—announced his intention to eventually propose a resolution to the UC

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<sup>236</sup> *Id.* at 1264-65. It was easier for the Eleventh Circuit to rule that there was insufficient evidence on the Intervenor’s remedial rationale since the court also held that the district court did not abuse its discretion by denying the Intervenor’s motion for a special case management schedule or extension of discovery, the purpose of which was precisely to develop a fuller record on the need to remedy past discrimination at UGA. *See id.* at 1268-69.

<sup>237</sup> Angelo Ancheta, Presentation of the Harvard Civil Rights Project at the Society of American Law Teacher’s “Beyond Bakke” Conference, University of Cincinnati School of Law (Oct. 6, 2001) (citing conversations with unnamed UGA officials).

<sup>238</sup> Kit Lively, *University of California Ends Race-Based Hirings, Admissions*, CHRON. HIGHER EDUC., July 28, 1995, at A27.

<sup>239</sup> CAL. CONST. ART I, § 31.

<sup>240</sup> *See Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431 (9<sup>th</sup> Cir. 1997).

Regents to overturn SP-1.<sup>241</sup> As the composition of the UC Regents recently changed—because Gray Davis appointees replaced those of George Deukmejian and Pete Wilson—there emerged a new majority favoring the repeal of SP-1. After months of maneuvering and arm-twisting, the UC Regents unanimously rescinded SP-1 in May 2001.<sup>242</sup> Even Ward Connerly, who originally made a name for himself by championing SP-1, and who consistently opposed rescinding SP-1,<sup>243</sup> saw the writing on the wall. Connerly most likely made a tactical decision to minimize his losses once it became clear that SP-1 would be rescinded by a decisive vote.<sup>244</sup> Nonetheless, Prop. 209 remains in effect, so the repeal of SP-1 has little practical effect vis-à-vis affirmative action at UC. However, many Prop. 209 enthusiasts, including Connerly, fear that rescinding SP-1 may lay the groundwork for an eventual effort to overturn Prop. 209.<sup>245</sup>

### 3. *Hi Voltage*: Prop. 209 Prohibits Race-Conscious Outreach

On November 30, 2000, a unanimous California Supreme Court held that Prop. 209 (Cal. Const. Art. I, § 31) prohibited governmental agencies from using recruitment and outreach programs that focus on women and minorities. In *Hi-Voltage Wire Works, Inc., v. City of San Jose*, the California Supreme Court struck down San Jose’s two-pronged program under which all contractors bidding on city projects over \$50,000 were required to satisfy either a participation or an outreach requirement.<sup>246</sup> Under the participation prong, contractors had to satisfy an “evidentiary presumption” of nondiscrimination compared to a City-determined estimate of how many MBE/WBE subcontractors would be expected in the absence of discrimination.<sup>247</sup> If this requirement was not met, the outreach prong required that firms document at least three attempts to contact MBE/WBE firms to determine their interest in participating in the project, and also required good faith negotiation with MBE/WBE firms that expressed interest.<sup>248</sup> The *Hi-Voltage Wire Works* Court found that both prongs were impermissible racial preferences.<sup>249</sup>

In addition to its ruling on the legality of San Jose’s program, the *Hi-Voltage Wire Works* decision raises concerns because of the majority’s sweeping condemnation of

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<sup>241</sup> Anne Benjaminson, *Regent Urges End to Affirmative Action Ban at U. California Schools*, DAILY CALIFORNIAN, April 13, 2000, at 1. Bagley intentionally abstained from voting on SP-1 because Regent bylaws prevent a member who voted against a successful measure from subsequently proposing to overturn it. *Id.*

<sup>242</sup> Rebecca Trounson & Jill Leovy, *UC Regents Vote to Rescind Ban on Affirmative Action*, L.A. TIMES, May 17, 2001, at A11.

<sup>243</sup> See, e.g., Jeffrey Selingo, *U. of California Board May Revisit Ban on Affirmative Action in Admissions*, CHRON. HIGHER EDUC., Jan. 19, 2001, at A24 (quoting Connerly as stating with regards to rescinding SP-1: “It would be the dumbest thing we could do.”); Anne Benjaminson, *U. California Regent Proposes Reversal of Race-blind Admissions to Repair Reputation*, DAILY CALIFORNIAN, Feb. 1, 2000, at 1 (quoting Connerly as predicting that the proposed repeal would never make it on the Regents agenda, and that it would receive little support if it ever came to a vote).

<sup>244</sup> See Trounson & Leovy, *supra* note 242.

<sup>245</sup> Selingo, *U. of California Board May Revisit*, *supra* note 243.

<sup>246</sup> 24 Cal. 4<sup>th</sup> 537 (2000).

<sup>247</sup> *Id.* at 543.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 562-63.

affirmative action, including a conclusory analysis of the U.S. Supreme Court's jurisprudence in cases such as *Bakke*, *Steelworkers v. Weber*, *Sheet Metal Workers v. EEOC*, and *Johnson v. Transportation Agency*.<sup>250</sup> For example, the majority opinion in *Hi-Voltage Wire Works*, authored by Justice Janice Rogers Brown, proclaimed that *Johnson* "replaced individual right of equal opportunity with proportional group representation."<sup>251</sup> Although concurring in the judgment, Chief Justice Ron George (joined by Justice Werdegar) strenuously dissented over the majority's lengthy discussion of earlier affirmative action cases, which Justice George regarded as unnecessary to the task of interpreting and applying the language of Prop. 209.<sup>252</sup> George argued that the majority's overreaching "can serve only to undermine confidence in the opinion's analysis of the legal question actually presented."<sup>253</sup> Justice George added:

Second, by using misleading and unflattering slogans to characterize past judicial decisions upholding race-conscious and gender-conscious affirmative action programs. . . .the majority opinion, in my view, will be widely and correctly viewed as presenting an unfair and inaccurate caricature of the objective or justification of the overwhelming majority of race- or gender-conscious affirmative action programs.<sup>254</sup>

The *Hi-Voltage Wire Works* case may have important ramifications for higher education outreach efforts. For example, the University of California system spent \$180 million last year on minority outreach programs in California elementary and secondary schools.<sup>255</sup> UC officials are uncertain whether they can continue race-targeted mailings of admission and financial aid information, as well as race-specific phone calls to encourage admitted students of color to enroll at UC.<sup>256</sup>

## II. THE CURRENT ADMISSIONS ENVIRONMENT

In California, Florida and elsewhere, the debate about educational affirmative action involves competing—and often highly politicized—claims about the racial and ethnic consequences of ending affirmative action. Therefore, an assessment of current admissions trends at public universities where affirmative action has been discontinued provides a helpful foundation for understanding the significance of recent and pending court cases. This report emphasizes law school admission statistics, and to a lesser degree undergraduate figures, rather than medical schools and other graduate programs. This section begins with background information on national law school admission

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<sup>250</sup> See *id.* at 551-55.

<sup>251</sup> *Id.* at 555.

<sup>252</sup> *Id.* at 578.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> See Harriet Chiang, *Affirmative Action Setback / State Supreme Court rules Prop. 209 prohibits minority-based outreach*, S.F. CHRON., Dec. 1, 2000, at A1.

<sup>256</sup> See *id.*; Maura Dolan, *State Justices Deal New Setback to Affirmative Action*, L.A. TIMES, Dec. 1, 2000, at A1; Pamela Burdman, *UC System Has No Leeway to Consider Race in Admissions, Despite Recent Court Ruling*, BLACK ISSUES IN HIGHER EDUC., Jan. 4, 2001, at 22, 23; Tanya Schevitz, *UC San Diego Told Scholarships May Be Illegal Under Prop. 209*, S.F. CHRON., July 23, 2001, at A6.

patterns, and is followed by an examination of the consequences of Prop. 209 at University of California Law Schools, the *Hopwood* decision at the University of Texas Law School, and Jeb Bush's "One Florida" plan.

## A. Overview of National Law School Admission Data

Despite myriad attacks on affirmative action, a large majority of American law schools can and still do practice race-sensitive admissions to some degree. Nonetheless, due to the fact that traditional criteria like the LSAT figure so prominently in admission decisions, White applicants have for a long time enjoyed the highest overall admission rates to ABA law schools.<sup>257</sup> Chart 1, based on data from the Law School Admission Council, displays 1991-1999 cumulative acceptance rates (broken down by race/ethnicity) across virtually every ABA law school. Chart 1 indicates that even when diversity is a factor in admission decisions, White applicants consistently have a better chance of gaining admission to at least one ABA law school than African Americans, Native Americans, Chicanos/Latinos or Asian Americans. This pattern held true in the early 1990s, when there were about 100,000 applicants nationally, as well as the last couple admission cycles, when the national applicant pool was closer to 70,000.

The Black-White differences in opportunity are particularly dramatic. African American admission rates ranged from a low of 38% in the highly competitive 1991-92 cycle to a high of 47% in the less intense 1997-98 cycle. White admission rates ranged from 54% in 1991-92 to 77% in 1997-98. Thus, affirmative action supporters may find it discouraging that the high-water mark for African American admission rates is still appreciably below the *lowest* annual figure for White applicants. It is also noteworthy that these disparities in opportunity favoring White applicants over students of color have persisted at least since the *Bakke* era,<sup>258</sup> and that White applicants consistently have higher admission rates even among those with equivalent undergraduate grade-point averages.<sup>259</sup>

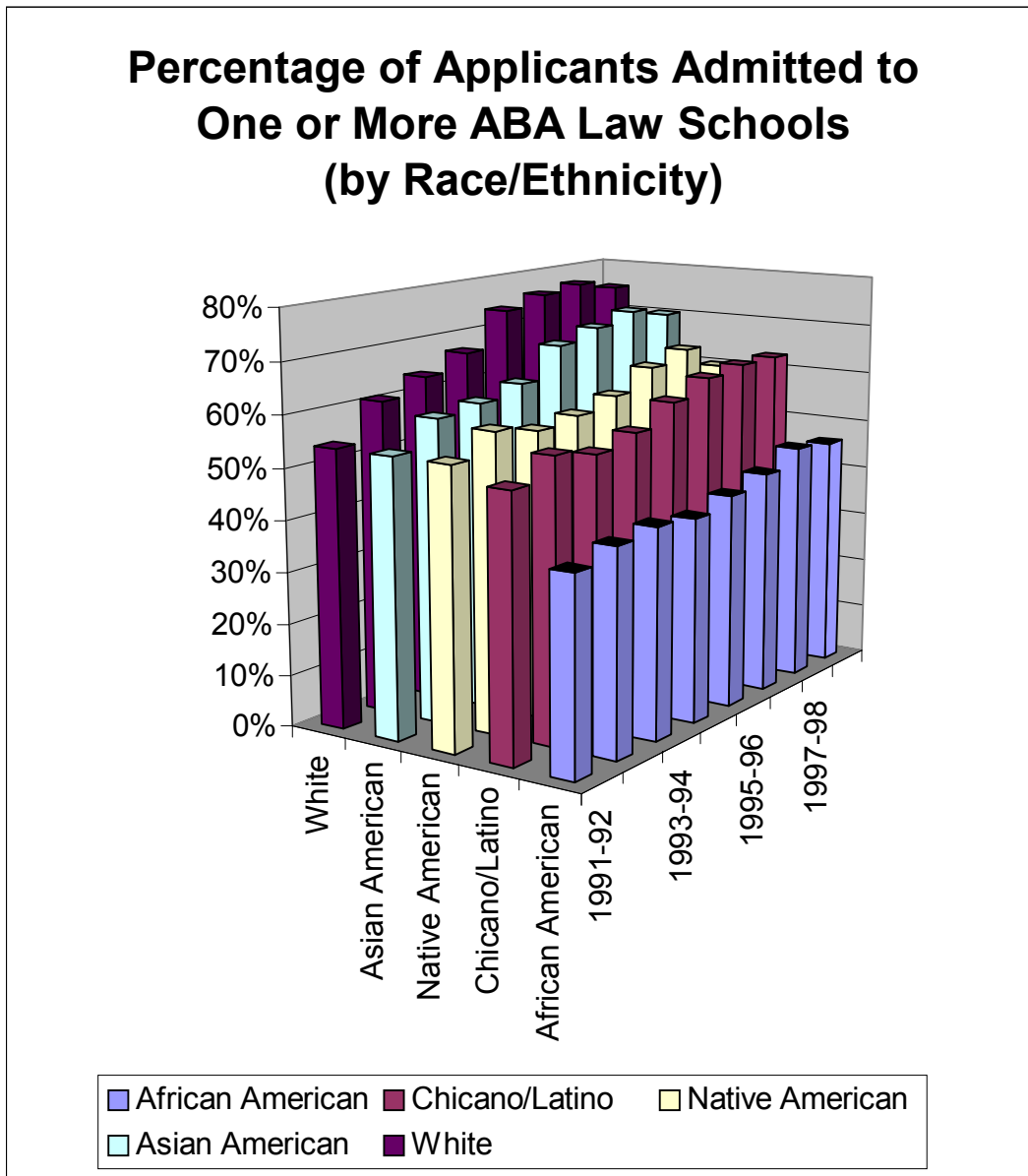
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<sup>257</sup> In other articles I have argued that the LSAT is a culturally biased, artificial barrier for students of color, so, aside from the *Grutter* litigation, I will not address the testing issue here. See Kidder, *Does the LSAT Mirror or Magnify*, *supra* note 66; William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts about Thernstrom's Rhetorical Acts*, 7 *ASIAN L.J.* 29 (2000); Kidder, *Portia Denied*, *supra* note 72; William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 *TEX. J. WOMEN & L.* 167 (2000).

<sup>258</sup> See Kidder, *Rise of the Testocracy*, *supra* note 257, at 209-210 (reviewing LSAC admission rate data from the 1970s, 1980s and 1990s).

<sup>259</sup> *Id.* at 209, tbl. 3.

Chart 1<sup>260</sup>



Undergraduate institutions like the University of California will soon begin graduating post-affirmative action classes, which will make it even more difficult for law

<sup>260</sup> LAW SCHOOL ADMISSION COUNCIL, 1991-92 NATIONAL DECISION PROFILES (1993); LAW SCHOOL ADMISSION COUNCIL, 1992-93 NATIONAL DECISION PROFILES (1994); LAW SCHOOL ADMISSION COUNCIL, 1993-94 NATIONAL DECISION PROFILES (1995); LAW SCHOOL ADMISSION COUNCIL, 1994-95 NATIONAL DECISION PROFILES (1996); LAW SCHOOL ADMISSION COUNCIL, 1995-96 NATIONAL DECISION PROFILES (1997); LAW SCHOOL ADMISSION COUNCIL, 1996-97 NATIONAL DECISION PROFILES (1998); LAW SCHOOL ADMISSION COUNCIL, 1997-98 NATIONAL DECISION PROFILES (1999); LAW SCHOOL ADMISSION COUNCIL, 1998-99 NATIONAL DECISION PROFILES (2000). The figures in Chart 1 are for virtually all applicants to ABA law schools who took the LSAT on the 120-180 scale. Thus, there are some applicants excluded from Chart 1 who took the LSAT on the pre-1991 scale, and then applied to law school years later.

schools to assemble diverse classes (at least under prevailing definitions of “merit”). The “shape of the river”<sup>261</sup> of applicants to law school may soon be substantially affected by efforts to ban affirmative action because large, selective public universities are leading tributaries to the legal profession. In fact, in 1997-98 the institutions that produced the highest number of law school applicants nationally were UCLA (859), UC Berkeley (843), U. of Texas-Austin (818), U. of Michigan-Ann Arbor (778) and the U. of Florida (662).<sup>262</sup> Alarming, all five of these universities are either currently prohibited from taking race into account in admissions, or face legal challenges to their affirmative action plans.

## **B. Proposition 209 and the University of California Law Schools**

Within the UC system, the end of race-sensitive affirmative action had severe consequences for students of color applying to law school. Both Chart 2 (percentages) and Chart 3 (enrollment counts) combine first-year data from Boalt Hall, UCLA Law School and UC Davis Law School for 1997-2000, which are the four years *after* the ban on affirmative action.<sup>263</sup> Chart 4 (percentages) and Chart 5 (enrollment counts) each combine first-year data from Boalt Hall, UCLA Law School and UC Davis Law School for 1993-1996, which are the four most recent years *before* the ban on affirmative action.<sup>264</sup> The overall data reveals a severe post-affirmative action drop in enrollments for African American, Native American and Chicano/Latino students, negligible differences for Asian Americans, and a substantial increase in White enrollments. African Americans were 7.5% of UC Law School enrollments in 1993-1996 (220 students), but only 2.2% of UC Law School enrollments in 1997-2000 (65 students). Native American went from 1.4% of the class (40 students) to 0.7% of the class (20 students). Chicano/Latino students went from 13.4% of the class (391 students) to 7.2% of the class (216 students).

The consequences of SP-1 and Prop. 209 can also be appreciated by measuring how long has it been since UC Law Schools have had such a small proportion of under-represented minority students. Boalt Hall’s first post-affirmative action class (1997) turned back the clock 30 years. 1967 was the last time there were so few African

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<sup>261</sup> This phrase refers to Bowen and Bok’s important study of higher education affirmative action. See WILLIAM G. BOWEN AND DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998). It should also be acknowledged, however, that several years before Bowen and Bok’s landmark text, Professor Michael Olivas urged scholars to replace the educational pipeline metaphor with that of the river. See Michael A. Olivas, *Trout Fishing in Catfish Ponds*, in *MINORITIES IN GRADUATE EDUCATION: PIPELINE, POLICY, AND PRACTICE* 46, 47 (J.M. Jones et al. eds., 1992); Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1115-16 (1997).

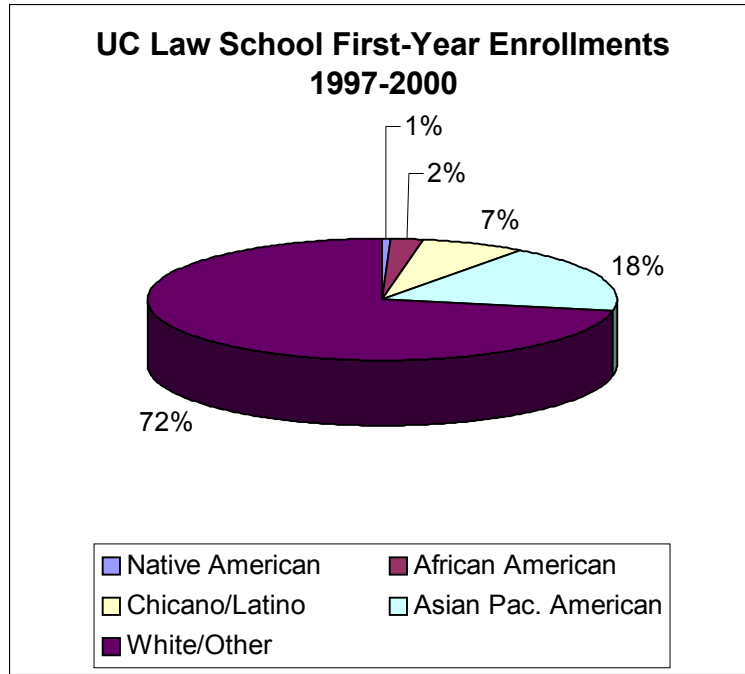
<sup>262</sup> *The Leading Undergraduate “Feeder Schools” for Black and White Law School Applicants*, J. BLACKS HIGHER EDUC. 85, 85 (Winter 1999/2000).

<sup>263</sup> University of California Office of the President, Law School Applicants, Admits and First-Year Class Enrollments (2000), <http://www.ucop.edu/acadadv/datamgmt/lawdata/lawschl2.html> [hereinafter UC Office of the President Statistics] (visited Nov. 29, 2000). These figures exclude UC Hastings College of the Law in San Francisco because Hastings was not subject to the UC Regents’ SP-1 resolution, and did not employ explicitly race-conscious admissions prior to SP-1 and Prop. 209. See Kidder, *Situating Asian Pacific Americans*, *supra* note 257, at 38 n.47.

<sup>264</sup> UC Office of the President Statistics, *supra* note 263.

American and Chicano/Latino first-year students at Boalt.<sup>265</sup> Likewise, UCLA Law School's 1997 class turned back the clock 29 years. 1968 was the last time there were so few African American and Chicano/Latino first-year students at UCLA.<sup>266</sup>

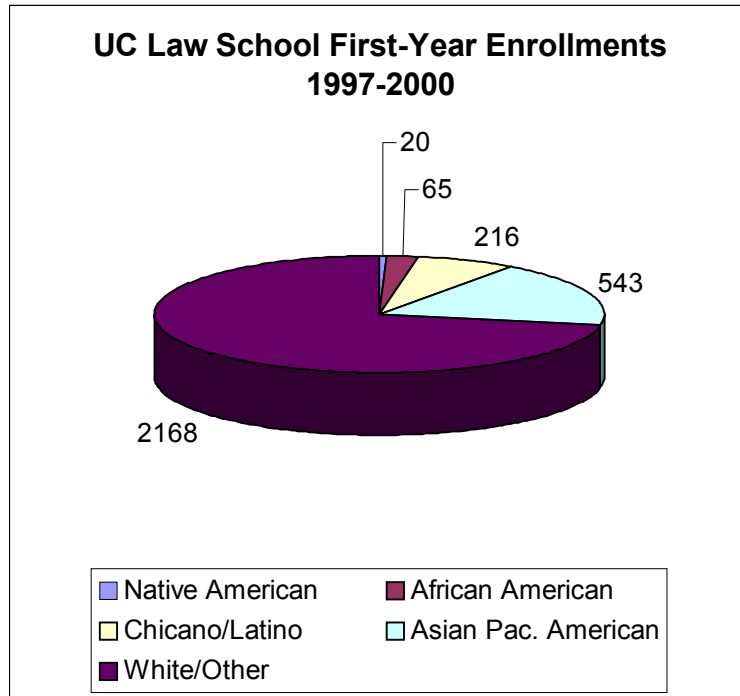
**Chart 2: Post-209 (in Percent)**



<sup>265</sup> See Jerome Karabel, *The Rise and Fall of Affirmative Action at the University of California* 9, tbl.11 (1999) (unpublished manuscript) (on file with the UC Berkeley Institute for the Study of Social Change).

<sup>266</sup> See *id.*

**Chart 3: Post-209**



**Chart 4: Pre-209 (in Percent)**

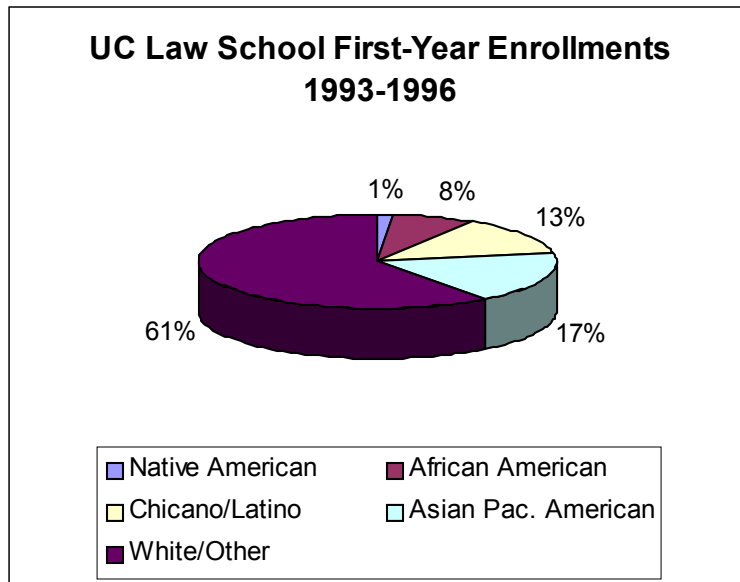
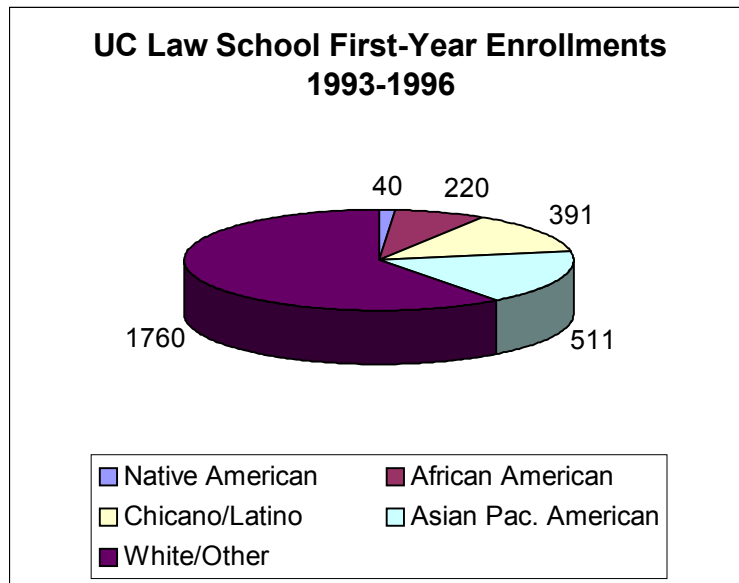


Chart 5: Pre-209



The UC Law School enrollment data shed light on two other important issues related to the larger political contest over affirmative action: the consequences of substituting race-based affirmative action with class-based affirmative action, and the position of Asian Americans under post-affirmative action admissions.

### 1. UCLA and Class-based Affirmative Action

Beginning in 1997, the UCLA Law School adopted a sophisticated, numbers-driven, socioeconomic status-based affirmative action policy for 40% of its incoming class.<sup>267</sup> In 1997, Boalt Hall created a small pilot program based on class-based affirmative action, but declined to adopt such a program on a large scale.<sup>268</sup> Rather, Boalt modestly expanded the discretionary (non-LSAT/UGPA) components of its admission program in 1997 and made more substantial changes in this direction in 1998.<sup>269</sup> In 1997, there were 10 African Americans in the entering class at UCLA Law School (2.6% of the class), compared to only 1 African American at Boalt (0.4%).<sup>270</sup>

Thus, it appeared in 1997 that UCLA was much more successful than Boalt in preserving some modicum of racial diversity through its class-based admissions program. However, this pattern has reversed since 1997. In 1998-2000 there were 16 African

<sup>267</sup> For analysis of UCLA Law School's class-based affirmative action plan, see, e.g., Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452 (1997); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997); Deborah C. Malamud, *A Response to Professor Sander*, 47 J. LEGAL EDUC. 504 (1997); Richard H. Sander, *Comment in Reply*, 47 J. LEGAL EDUC. 512 (1997); Richard D. Kahlenberg, *In Search of Fairness: A Better Way*, WASH. MONTHLY, June 1998, at 26.

<sup>268</sup> Herma Hill Kay, *The Challenge to Diversity in Legal Education*, 34 INDIANA L. REV. 55, 73 n.101 (2000). Kay, Dean of Boalt at the time, reports that the experimental class-based program eventually yielded 11 underrepresented minority enrollments out of Boalt's 1997 entering class of about 270. *Id.*

<sup>269</sup> *Id.* at 73-76

<sup>270</sup> UC Office of the President Statistics, *supra* note 263.

American first-year students at UCLA (1.8% of total enrollments) compared to 22 at Boalt Hall (2.7%). The rebound at Boalt in 1998 is most likely attributable to its decision to place slightly less emphasis on LSAT scores, to end its practice of “adjusting” undergraduate grades based on an LSAT-driven ranking of institutional quality, to enlarge the pool of applicants selected by faculty/student admissions committee, as well as other discretion-enhancing changes in its admission policy.<sup>271</sup> Therefore, at least based on this limited data, it appears to be the case that “squishy” qualitative admission criteria will admit as many or more under-represented students of color compared to quantitatively oriented class-based affirmative action programs.

## 2. Asian Americans: The Right’s Manipulation of the “Model Minority” Thesis

Affirmative action critics like Harvard historian Stephan Thernstrom often claim that the end of affirmative action at UC Law Schools produced the greatest benefits for Asian Americans.<sup>272</sup> Similar “Asian Americans as victims of affirmative action” claims are interlaced in the Center for Individual Rights’ pleadings and public relations rhetoric. The UC Law School data in Charts 1 through 4 lend scant empirical support to Thernstrom’s assertion.<sup>273</sup> In the post-affirmative action landscape (1997-2000), Asian Americans comprised 18.0% of first-year enrollments.<sup>274</sup> In the last four years with race-conscious affirmative action (1993-1996), Asian Americans comprised 17.5% of first-year enrollments to UC Law Schools.<sup>275</sup> In contrast, White enrollments jumped from 60.2% in 1993-96 to 72.0% in 1997-2000. The small increase in Asian American enrollments at UC Law Schools is even less impressive considering that it did not keep pace with national Asian American application and enrollment trends at ABA schools during the same time period.<sup>276</sup> Moreover, the end of affirmative action has significantly curtailed enrollments among Asian American subgroups that tend to be under-represented in higher education. For example, at Boalt Hall there were 13 Filipino Americans in the 1994-96 first-year classes, but only 3 in the 1997-99 classes.<sup>277</sup>

## C. The *Hopwood Chill*<sup>278</sup> at the University of Texas Law School

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<sup>271</sup> Kay, *supra* note 268, at 74-75; BOALT HALL SCHOOL OF LAW, 1998 ANNUAL ADMISSION REPORT (1998) (describing changes adopted by the admissions committee).

<sup>272</sup> See Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1629 (1999); Stephan Thernstrom, *Farewell to Preferences?*, 130 PUB. INTEREST 34, 49 (1998).

<sup>273</sup> For a more extensive elaboration of this criticism, see Kidder, *Situating Asian Pacific Americans*, *supra* note 257, *passim*; Nanette Asimov, *Asian American Students Trickle In to Law Schools*, S.F. CHRON., Feb. 23, 2001, at A2.

<sup>274</sup> UC Office of the President Statistics, *supra* note 263.

<sup>275</sup> *Id.*

<sup>276</sup> In 1998-99 Asian Americans were 6.8% of all applicants to ABA law schools, and 6.7% of all enrollments, whereas in 1992-93 the corresponding figures were 5.5% and 5.5%. See LAW SCHOOL ADMISSION COUNCIL, 1998-99 NATIONAL DECISION PROFILES (2000); LAW SCHOOL ADMISSION COUNCIL, 1992-93 NATIONAL DECISION PROFILES (1994).

<sup>277</sup> See Kidder, *Situating Asian Pacific Americans*, *supra* note 257, at 42-43.

<sup>278</sup> This phrase is borrowed from Susanna Finnell, *The Hopwood Chill: How the Court Derailed Diversity Efforts at Texas A&M*, in CHILLING ADMISSIONS 71 (Gary Orfield and Edward Miller eds., 1998).

At the University of Texas Law School (UTLS), the effects of the *Hopwood* decision on admission opportunities for students of color are severe, particularly for African Americans. Professor Thomas Russell points out that the first three post-*Hopwood* classes (the 1997-1999) included only 19 African Americans out of 1,387 J.D. students (1.4% of the student body).<sup>279</sup> This is a smaller percentage than in the fall of 1950, when Heman Sweatt and five other trailblazing African Americans were first permitted to enroll at UTLS after the Supreme Court, in *Sweatt v. Painter*,<sup>280</sup> declared unconstitutional the Law School's mandated policy of *de jure* segregation.<sup>281</sup>

Chart 6 (percentages) and Chart 7 (enrollment counts) display first-year enrollments at UTLS for 1994-2000 (*Hopwood* took effect in 1997). The data reveal a precipitous drop in African American enrollments, from an average of 34 before *Hopwood* to an average of 10 after the decision.<sup>282</sup> Latino enrollments dropped from an average of 59 before *Hopwood* to an average of 40 after the decision, with a trend line in an upward direction since 1997. Prior to *Hopwood*, Chicanos, but not other Latinos, were included in UTLS' affirmative action policy.<sup>283</sup> In 1996 there were 42 Chicanos at UTLS (I suspect there were higher numbers in 1994-95), compared to an average of 30.5 in 1997-2000.<sup>284</sup> Consistent with the UC Law School data, Asian American enrollments were unaffected by *Hopwood* (an average of 30 before versus 31 after). However, there is a *downward* enrollment trend for Asian Americans since 1997. Native American enrollments are down slightly, but the baseline was quite low to begin with, and Native Americans were not included in the UTLS' pre-*Hopwood* affirmative action plan.

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<sup>279</sup> Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood*, 25 L. & SOC. INQUIRY 507, 507-08 (2000).

<sup>280</sup> 339 U.S. 629 (1950). More information about *Sweatt v. Painter* is available at a website set up by Professor Russell. See <http://www.law.du.edu/russell/lh/sweatt> (last visited Mar. 14, 2001).

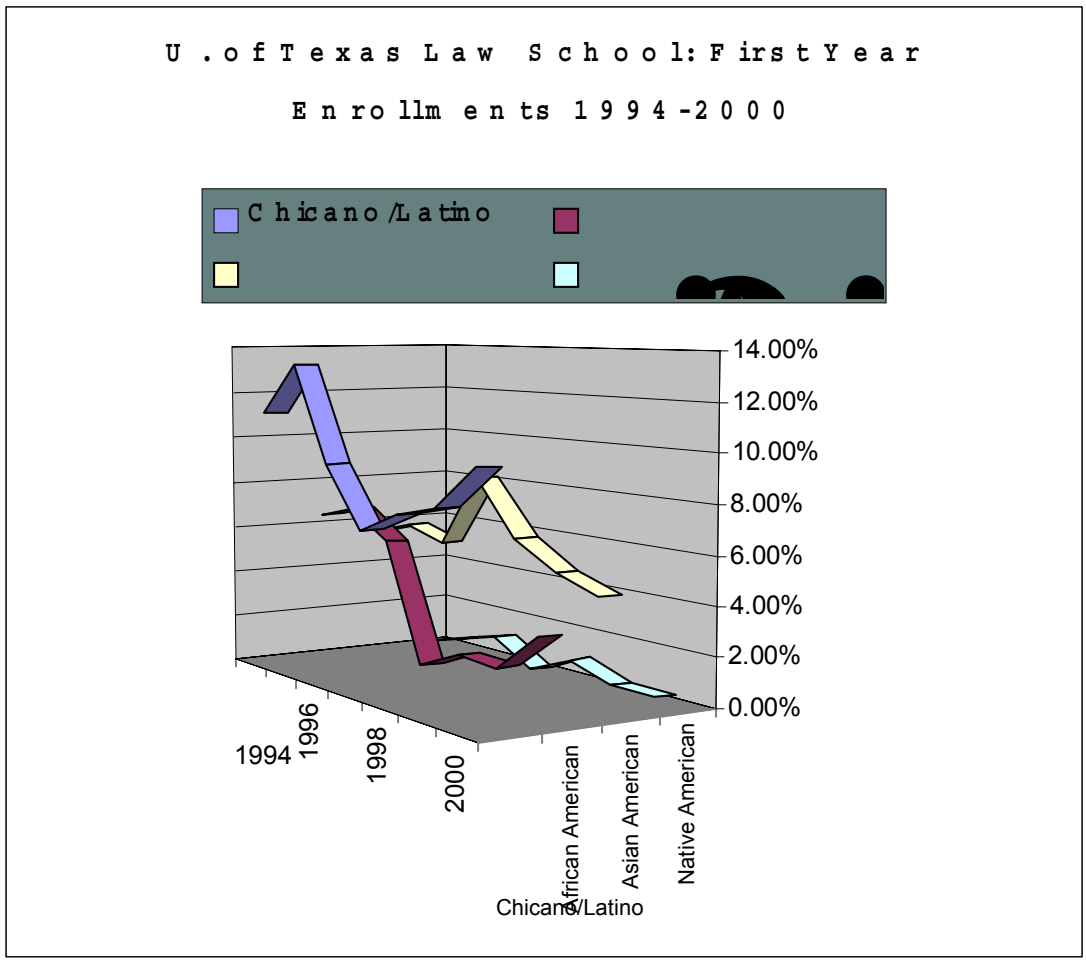
<sup>281</sup> Russell, *supra* note 279, at 507. Since the 1950 class was smaller overall, those six African American students comprised 2.1% of the entering class.

<sup>282</sup> In the decade prior to *Hopwood* there was an average of 36 African Americans first-years enrolled at UTLS. See *Black Law School Enrollments: A Virtual Eviction in Texas and California*, J. BLACKS HIGHER EDUC. 8 (Summer 1997). The 2000 total of 17 Blacks is higher than any other post-*Hopwood* class, but I am not certain if this change will persist in the future, or to what it can be attributed (chance, recruitment, scholarships, admission policy changes, etc.).

<sup>283</sup> I could only obtain separate data on Chicanos for 1996-2000, but the pattern is the same as the aforementioned data on Latinos overall.

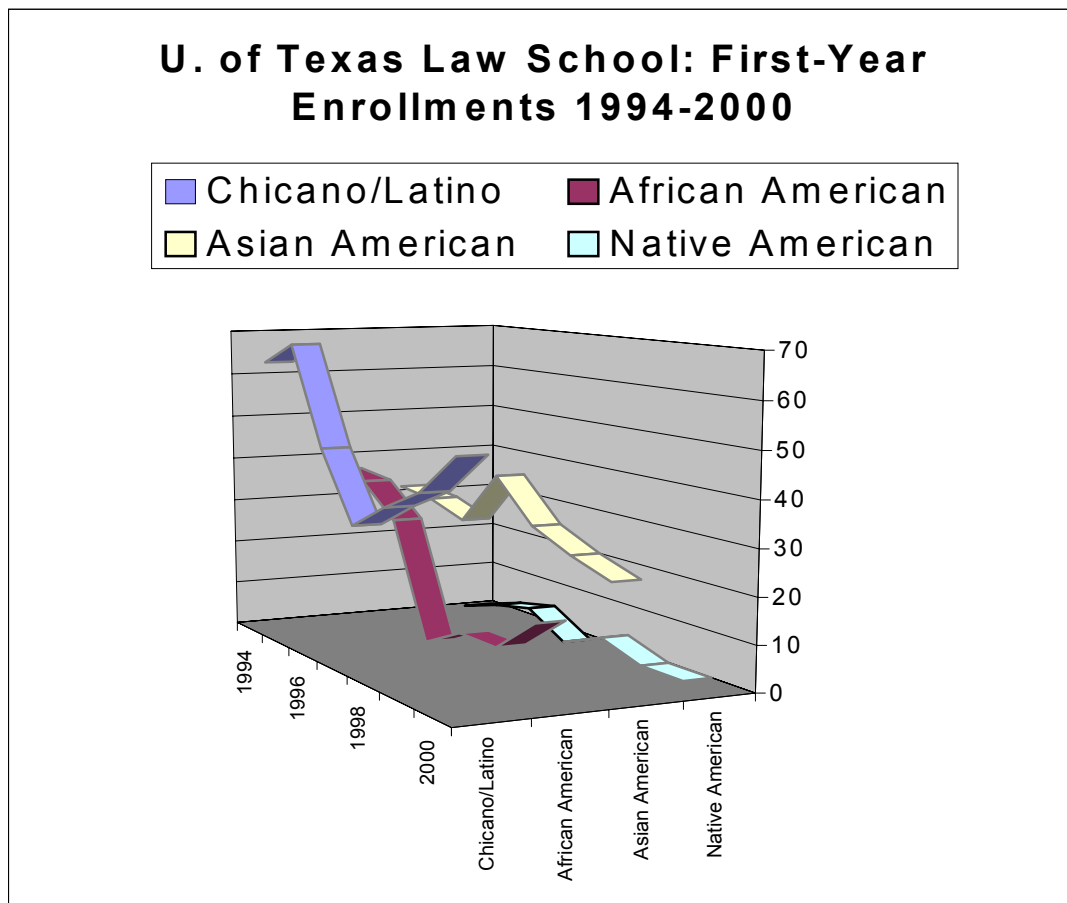
<sup>284</sup> See Shelli Soto (Assistant Dean for Admissions at UT Law School), Statistics on JD Entering Classes 1996-2000 (document faxed on December 5, 2000). The rest of this report relies on UT Office of Institutional Studies data rather than data from the Law School Admission Office for two reasons. First, the Admissions Office did not provide me with data prior to 1996, making reliable pre- and post-*Hopwood* comparisons more difficult. Secondly, the Admissions Office data categorize U.S. applicants as White, Black, Chicano, Asian American and Other Minority, and I thought that the "Other Minority" category, which combines Latinos, Native Americans, etc., was too broad. The main drawback of the Office of Institutional Studies, other than not separately reporting Chicanos, is that it appears to combine J.D. enrollments with about 40-50 first-year L.L.M. students.

Chart 6<sup>285</sup> (in Percent)



<sup>285</sup> See UT-Austin Office of Institutional Studies, Preliminary Fall 2000 Enrollment, [http://www.utexas.edu/admin/opa/news/00newsreleases/nr\\_200009/enrollment2.html](http://www.utexas.edu/admin/opa/news/00newsreleases/nr_200009/enrollment2.html) (visited Dec. 6, 2000) (listing 1997-2000 enrollment counts and percentages); UT-Austin Office of Institutional Studies, 1994-1996 New Students by School, Ethnicity, and Sex, IPEDS Cohort (document faxed on Dec. 7, 2000); UT-Austin Office of Institutional Studies, Fall 2000 Enrollment (document faxed on Dec. 7, 2000) (providing final rather than preliminary 2000 data).

Chart 7<sup>286</sup>



In June 2001, Texas Governor Rick Perry signed into law a bill prohibiting graduate and professional schools from using standardized tests as the sole basis for excluding applicants.<sup>287</sup> The bill, sponsored by Representative Irma Rangel and supported by civil rights organizations such as MALDEF, requires that standardized tests be considered alongside other factors, such as socioeconomic status and region of residence.<sup>288</sup> At the present time, however, it is not clear if the new law will significantly alter UTLS admission practices, and specifically opportunities for students of color. UTLS' dean, William C. Powers, asserts that the Law School is already compliant because it does not "use LSAT scores as an exclusive or an eliminating factor."<sup>289</sup> Nonetheless, admission data reveals that the LSAT still figures prominently in UTLS admission decisions in recent years. For example, in four recent admission cycles (combined), applicants with 3.5-3.74 UGPAs and 160-164 LSAT scores were admitted

<sup>286</sup> See *id.*

<sup>287</sup> Dan Curry, *Texas Law Limits Use of Standardized Tests in Graduate Admissions*, CHRON. HIGHER EDUC., July 13, 2001, at A23.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

57% of the time, whereas applicants with the same UGPAs but LSAT scores about five points lower (155-159) were only offered admission 33% of the time.<sup>290</sup> Thus it may be possible for UTLS and other schools to avoid running afoul of the new law, while continuing to over-rely on the LSAT.<sup>291</sup>

#### **D. Jeb Bush's "One Florida" Plan: A Fair Count or Fuzzy Math?**

While this article is largely focused on legal education, one place where undergraduate admissions recently involved substantial political consequences (and, as it turned out, legal consequences as well) is in Florida. Governor Jeb Bush's "One Florida" plan, adopted in November 1999 by executive order, discontinues race-conscious affirmative action within Florida's 10-campus public university system. It will also guarantee admission to at least one of the ten universities in the system—though not necessarily to students' top choice—for all applicants in the top twenty percent of Florida's high school graduates regardless of standardized test scores of other factors such as school quality. In this respect, the "One Florida" plan resembles the "Ten Percent Plan" in Texas<sup>292</sup> and the "Four Percent Plan" at the University of California<sup>293</sup> (which are not analyzed in this article).

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<sup>290</sup> LAW SCHOOL ADMISSION COUNCIL, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 1998 EDITION 361 (1997); LAW SCHOOL ADMISSION COUNCIL, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 1999 EDITION 359 (1998); LAW SCHOOL ADMISSION COUNCIL, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 2000 EDITION 363 (1999); LAW SCHOOL ADMISSION COUNCIL & AMERICAN BAR ASSOCIATION, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 2002 EDITION 673 (2001). 537 of 942 applicants with 3.5-3.74/160-164 credentials were admitted, whereas 284 of 851 3.5-3.74/155-159 applicants were offered admission to UTLS.

<sup>291</sup> Here I am using the lay concept of over-reliance, rather than the technical, psychometric definition. For a more detailed analysis of appropriate standards for using LSAT scores, see Kidder, *Portia Denied*, *supra* note 257, at 19-24.

<sup>292</sup> The Texas Legislature approved the "Ten Percent Plan" soon after *Hopwood II*. Unlike percentage plans in California and Florida, applicants in the top ten percent of their class are assured admission at each of the public universities in the Texas system, including UT-Austin. For analysis and background material, see Danielle Holley & Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1999); William E. Forbath & Gerald Torres, *Merit and Diversity after Hopwood*, 10 STAN. L. & POL'Y REV. (1999); David Orenlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181 (1998); Susanna Finnell, *The Hopwood Chill: How the Court Derailed Diversity Efforts at Texas A&M*, in CHILLING ADMISSIONS 71 (Gary Orfield and Edward Miller eds., 1998).

<sup>293</sup> The Regents of the University of California approved the "Four Percent Plan" in March 1999. The "Four Percent Plan" is a scaled-down version of a constitutional amendment proposed by Senator Teresa Hughes (D-Inglewood) in 1997 that would have offered admission to the top 12.5% of California's high school graduates. It is expected to have little effect on racial diversity. For background information, see Pamela Burdman, *UC Regents Rethinking Use of SAT—Newly Approved 4% Admissions Policy May Still Need Tweaking*, S.F. CHRON., Mar. 20, 1999, at A22; V. Dion Haynes, *U. of California Alters its Policy on Admissions—Change Aims to Increase Number of Minority Students*, CHI. TRIB., Mar. 20, 1999, available at 1999 WL 2855179; Kenneth R. Weiss, *Plans Seek More UC Pupils From Poorer Schools*, L.A. TIMES, May 12, 1997, at A1.

In July of 2001 the UC Regents approved a type of 12.5% provisional admission plan. Under the proposed change, students in the top 12.5% of their high school who were not initially admitted to a UC campus could still be admitted as junior transfers (without having to reapply) if they completed two years of community college and met a certain GPA requirement specified by the UC campus. Tanya Schevitz,

Governor Bush's executive order was largely an effort to fend off an anti-affirmative action ballot initiative championed by UC Regent Ward Connerly.<sup>294</sup> Although Prop. 209 in California and I-200 in Washington both received approval from a majority of voters, they harmed the Republican Party overall—which had hoped affirmative action would prove a costly wedge issue for Democrats—in part because they sparked high voter turnout in minority areas.<sup>295</sup> Even though the “One Florida” plan also contributed to increased African American turnout compared to the previous presidential election,<sup>296</sup> Jeb Bush was probably astute in calculating that a Prop. 209-style ballot initiative would have turned out the vote even more. As it turned out, the Florida Supreme Court held that the anti-affirmative action referendum was unconstitutional because it could mislead voters and was too sweeping in scope.<sup>297</sup>

The “One Florida” plan took effect at the undergraduate level with the entering class of 2000. While the ultimate consequences of the “One Florida” plan will take a few more years to assess, some preliminary conclusions are possible at this time. On the one hand, at the end of August 2000 Jeb Bush declared the plan a resounding success because system-wide there were 1,234 additional students of color in this year's crop of freshmen, and because the flagship campuses of the University of Florida and Florida State University also demonstrated increases in underrepresented minorities.<sup>298</sup>

On the other hand, evidence suggests that Bush's claims stem from pre-election spin based on incomplete and misleading information. One factor is that the Florida legislature allocated additional funding, allowing for an 11 percent overall increase in

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*UC Widens Chance of Gaining Admission*, S.F. CHRON., July 20, 2001, at A1. There would apparently still be no assurance that applicants could secure a spot at the most selective campuses like Berkeley and UCLA, but UC officials estimate that the pool of transfer students to the UC system would include a higher proportion of underrepresented minorities than is currently the case. *Id.*

<sup>294</sup> University percentage plans like those in Texas and other states have been criticized and praised by both liberal and conservative scholars. For analysis of percentage plans from a variety of perspectives, *see, e.g.*, UNITED STATES COMMISSION ON CIVIL RIGHTS, TOWARD AN UNDERSTANDING OF PERCENTAGE PLANS IN HIGHER EDUCATION: ARE THEY EFFECTIVE SUBSTITUTES FOR AFFIRMATIVE ACTION? (April 2000), <http://www.usccr.gov/percent/main.htm>; Mary Francis Berry, *How Percentage Plans Keep Minority Students Out of College*, CHRON. HIGHER EDUC., Aug. 4, 2000, at A48; Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution'*, CHRON. HIGHER EDUC., June 3, 2000, at A31; *Why the "One Florida" Plan Would Remove Blacks From the Best Campuses of the University of Florida*, 27 J. BLACKS IN HIGHER EDUC. 29, 29-30 (Spring 2000); Shelby Steele, *X-Percent Plans*, NAT'L REV. Feb. 7, 2000, available at 2000 WL 11593512; Rebecca Zwick, *Eliminating Standardized Tests in College Admissions: the new affirmative action?* 81 PHI DELTA KAPPAN 320 (1999); T. Vance McMahan & Don R. Willett, *Hope from Hopwood: Charting a Positive Civil Rights Course for Texas and the Nation*, 10 STAN. L. & POL'Y REV. 163 (1999).

<sup>295</sup> *See, e.g.*, David Royse, *Florida Judge Deals Blow to Minority Admissions*, BLACK ISSUES IN HIGHER EDUC. Aug. 3, 2000, at 12; LYDIA CHAVEZ, THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION, *passim* (1998).

<sup>296</sup> *Scholars Say Florida Governor's Plan to End Affirmative Action Hurt Bush in Election*, CHRON. HIGHER EDUC., Nov. 24, 2000, at A21.

<sup>297</sup> *See Fla. Court Rejects Measures Against Affirmative Action*, L.A. TIMES, July 14, 2000, available at <http://www.latimes.com:80/cgi-bin/print.cgi>.

<sup>298</sup> *See* Governor's Communication Office Press Release, *One Florida Yields Big Gains in Minority Enrollment*, Aug. 29, 2000, at [http://www.state.fl.us/eog/one\\_florida/...cles/one\\_florida\\_gains\\_in\\_minority.html](http://www.state.fl.us/eog/one_florida/...cles/one_florida_gains_in_minority.html) (visited Nov. 29, 2000); Rick Bragg, *Minority Enrollment Rises in Florida College System*, N.Y. TIMES, Aug. 30, 2000, at A18.

freshmen enrollments.<sup>299</sup> Thus, the percentage of African Americans in the class stayed constant at 17.6% compared to the previous year, and the percentage of Latino students actually went down slightly from 14.0% to 13.6%.<sup>300</sup> Another consideration is that the announced undergraduate figures were based on preliminary rather than final data. This is cause for concern because the Jeb Bush administration also boasted about large increases in minority contracting after “One Florida,” yet it now appears that the governor’s figures were inflated.<sup>301</sup>

When the Florida Board of Regents released more complete data in May 2001, the figures were less rosy than Jeb Bush had earlier claimed, and there was far less media attention devoted to the story. The Florida Regents’ data reveals that the pool of “Talented 20” students who enrolled in Florida’s public university system in 2000 included a higher proportion of Whites and a lower proportion of Blacks and Latinos, compared to the system’s overall student population (most of whom were admitted when affirmative action was in effect).<sup>302</sup> Enrolled students in the “Talented 20” were 68% White, 13% Black and 12% Latino, whereas overall enrollments were 61% White, 15% Black and 15% Latino.<sup>303</sup> These numbers are even less encouraging considering that people of color are, year by year, becoming a greater percentage of the overall Florida population.<sup>304</sup> Thus, it would not have been meaningful progress even if students of color had maintained the same percentage of enrollments in Florida’s public university system.

Moreover, an NAACP lawsuit challenging the “One Florida” plan delayed its implementation until July 2000. The Provost for the University of Florida acknowledged that 90% of the 2000 entering class was already admitted before the governor’s initiative took effect (that is, when affirmative action was still permissible).<sup>305</sup> Thus, the numbers released so far reflect the benefits of “One Florida”—such as increased funding for student recruitment and race-targeted scholarships, picking up the tab for college entrance tests, university/high school partnerships, etc.—without the bite of a complete prohibition on affirmative action.

The “One Florida” plan will apply to graduate and professional schools, including the law schools at the University of Florida and Florida State University, starting with the entering class of 2001.<sup>306</sup> There is nothing analogous to the “Talented 20” plan with respect to law, medical, business and graduate schools. Unlike at the undergraduate level, the Council of Presidents of Florida’s public universities will likely adopt a decentralized policy whereby each professional school or graduate department develops its own “race-blind” admission criteria.<sup>307</sup>

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<sup>299</sup> See David Wasson, *Bush, Democrats Differ on One Florida Results*, TAMPA TRIB., Aug. 30, 2000, at 1.

<sup>300</sup> *Id.*; Scott Powers & Linda Kleindienst, *Bush Declares Victory for One Florida Plan*, ORLANDO SENTINEL, Aug. 29, 2000.

<sup>301</sup> Diane Rado, *Minority Contracting Data Overstated*, ST. PETERSBURG TIMES, Oct. 27, 2000, at 1B.

<sup>302</sup> Scott Powers, *Diversity Tumbles in Freshman Class*, ORLANDO SENTINEL, May 17, 2001, at A1.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *All Things Considered* (National Public Radio, Aug. 31, 2000), available at 2000 WL 21471793.

<sup>306</sup> Email from J. Michael Patrick, Dean of Admissions at Florida State University School of Law, to William C. Kidder (Nov. 29, 2000) (on file with author).

<sup>307</sup> Scott Powers, *Policy Isn’t Black, White: Gov. Jeb Bush’s Affirmative-Action Replacement Provides No Direction for Recruiting Minority Grad Students*, ORLANDO SENTINEL, Oct. 11, 2000, at A1.

### III. RESEARCH ON THE EDUCATIONAL BENEFITS OF RACIAL DIVERSITY IN HIGHER EDUCATION

#### A. Research Linked to the University of Michigan Litigation

In order for educational diversity to act as a compelling governmental interest, courts must be persuaded that race-sensitive affirmative action programs produce important educational benefits. Despite the record attention that *Bakke* received—at least in terms of the number of amici briefs filed—there has been surprisingly little substantial empirical research on affirmative action and educational outcomes until recently. The backlash against affirmative action has inspired comprehensive and sophisticated efforts to measure the impact of affirmative action on short-term and long-term success. This part of the article, intended as a resource for scholars and attorneys, is an annotated catalog of major contemporary studies, rather than a detailed evaluation of those studies.

##### 1. How has *The Shape of the River* Shaped the Debate?

The affirmative action research that has received the most widespread attention (both by scholars and the media) in the last few years is undoubtedly *The Shape of the River*, by William Bowen and Derek Bok.<sup>308</sup> Bowen and Bok used the Andrew W. Mellon Foundation's College and Beyond ("C&B") database to track the pathways of African Americans and Whites who enrolled in 28 elite colleges and universities (about 70% of the students were from 24 private and 30% were from four large public institutions) in 1976 and 1989.<sup>309</sup> Bowen and Bok focus on long-term outcomes like advanced degree attainment, employment, earnings, job satisfaction, civic participation and views on race relations. Bowen and Bok served as expert witnesses for the University of Michigan in the *Gratz* and *Grutter* cases.

Among the principal findings in *The Shape of the River* is that for the 1989 cohort, 75% of Blacks and 81% of Latinos graduated within six years.<sup>310</sup> Bowen and Bok point out that these figures are substantially higher than national averages for large universities in the same time period (graduation rates of 40% for African Americans and 59% for Whites).<sup>311</sup> Since the highly selective institutions in Bowen and Bok's database practice affirmative action to a much greater extent than the broader group of less selective schools, the authors argue that their results discredit the conservative

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<sup>308</sup> BOWEN AND BOK, *supra* note 261. For a short summary of Bowen and Bok's *The Shape of the River* findings as they relate to the legal profession, see Derek Bok & William G. Bowen, *Access to Success*, A.B.A. J. 62 (Feb. 1999).

<sup>309</sup> BOWEN AND BOK, *supra* note 261, at xxxvii, 54.

<sup>310</sup> *Id.* at 56 fig.3.1. These figures are six-year graduation rates for students who graduated from the same schools at which they matriculated as freshmen. Overall graduation rates (adding students who transferred and graduated elsewhere) are slightly higher: 79% for African Americans and 90% for Latinos. *Id.*

<sup>311</sup> *Id.* at 57.

“mismatch” critique of affirmative action.<sup>312</sup> The influence of institutional selectivity on graduation rates is apparent in the following statistic: at the *most selective* C&B schools (which have large endowments and small enrollments) African Americans with SAT scores under 1000 had graduation rates of 88%, whereas in the *least selective* C&B schools even African American students with SAT scores over 1300 had graduation rates of 75%.<sup>313</sup>

Bowen and Bok also found that among the C&B graduates in the 1976 cohort, a remarkable 40% of Blacks (and 37% of Whites) went on to obtain doctorates or professional degrees in law, business, or medicine.<sup>314</sup> Within this group, a higher proportion of Blacks obtained law and medical degrees.<sup>315</sup> By comparison, nationally only 8% of African American and 12% of White college graduates obtained professional/doctoral degrees.<sup>316</sup> Moreover, in the 1976 and 1989 cohorts, African Americans had significantly higher rates of leadership and participation in civic service than their White classmates (with larger differences among men than women).<sup>317</sup>

Bowen and Bok addressed the issue of the long-term educational benefits of diversity by surveying C&B graduates about their college experiences. Large majorities of Black and White C&B matriculants perceived the “ability to work effectively and get along well with people from different races/cultures” as important.<sup>318</sup> In the 1976 cohort 57% of African Americans and 46% of Whites believed that their undergraduate experience was of considerable value in developing this ability, figures which rose to 70% of African Americans and 63% of Whites in the 1989 cohort.<sup>319</sup> Bowen and Bok found high levels of interracial contact in the 1989 cohort, with 56% of Whites and 88% of Blacks indicating that they knew well two or more students from the other race.<sup>320</sup> Moreover, White students who established such contacts in college were more likely to know well two or more Blacks after college,<sup>321</sup> and they were also more likely to report being “very satisfied” with their undergraduate education.<sup>322</sup> Finally, at C&B colleges where African Americans comprised a larger percentage of the student body, White students were more likely to know well two or more African Americans.<sup>323</sup>

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<sup>312</sup> *Id.* at 258-59. The mismatch thesis posits that affirmative action harms students of color by placing them in an academic setting in which they are not prepared to compete. For expressions of the minority mismatch theory, *see, e.g.*, STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 391-97, 405-11 (1997); Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. TOL. L. REV. 377, 384.

<sup>313</sup> BOWEN AND BOK, *supra* note 261, at 61 fig.3.3.

<sup>314</sup> *Id.* at 98 fig.4.2.

<sup>315</sup> *Id.* at 100 fig.4.3 (reporting that 14% of Blacks and 11% of Whites earned J.D.s, and the 11% of Blacks and 8% of Whites earned M.D.s).

<sup>316</sup> *Id.* at 98 fig.4.2.

<sup>317</sup> *Id.* at 162-68.

<sup>318</sup> *Id.* at 220-21.

<sup>319</sup> *Id.* at 225-26.

<sup>320</sup> *Id.* at 231-34. In addition, C&B African Americans more frequently reported knowing well Latino and Native American students, whereas there were equivalent proportions of Blacks and Whites who knew well two or more Asian American students. *Id.* at 232 fig.8.3.

<sup>321</sup> *Id.* at 239.

<sup>322</sup> *Id.* at 240.

<sup>323</sup> *Id.* at 234-35.

Reviews of *The Shape of the River* have been generally positive.<sup>324</sup> Some critics from both the political Left and Right have criticized the elitism of Bowen and Bok's research. On the Left, Charles Lawrence, despite appreciating the pragmatism behind the diversity defense of affirmative action, is troubled that Bowen and Bok's case for diversity preserves the status quo without articulating a more radical critique of racial hierarchy.<sup>325</sup> Lawrence contends that it is necessary to link the diversity defense to deeper arguments about the need to remedy past discrimination, to question traditional notions of merit, and to probe the ways in which conventional admission criteria reinforce the effects of segregation and racism.<sup>326</sup> Clifford Adelman criticizes Bowen and Bok for not availing themselves of U.S. Department of Education national data in order to track outcomes for the 77% of students who receive college degrees from non-selective institutions (including 87% of Blacks and 75% of Latinos).<sup>327</sup> Michael Olivas criticizes Bowen and Bok's overemphasis on private colleges when virtually all affirmative action litigation has involved public universities.<sup>328</sup> Olivas also criticizes *The Shape of the River* authors for practicing "imperial scholarship" by largely ignoring the large body of relevant higher education scholarship by Black, Latino and Asian American authors.<sup>329</sup>

Unsurprisingly, given the book's relevance to the affirmative action debate, numerous conservative opponents of affirmative action have criticized *The Shape of the River*. On the Right, lengthy critiques of Bowen and Bok's methodology and conclusions have been launched by University of Michigan law professor Terrance Sandalow,<sup>330</sup> by Harvard historian Stephan Thernstrom and Manhattan Institute fellow Abigail Thernstrom,<sup>331</sup> and others.<sup>332</sup> In the context of the *Grutter* and *Gratz* lawsuits against the University of Michigan, CIR director Michael Greve published a critique of Bowen and

<sup>324</sup> See, e.g., Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697 (1999) (book review); Elizabeth Anderson, *From Normative to Empirical Sociology in the Affirmative Action Debate: Bowen and Bok's The Shape of the River*, 50 J. LEGAL EDUC. 284 (2000) (book review); Troy Duster, *Review of The Shape of the River*, ACADEME 72 (May/June 1999); Nathan Glazer, *The Case for Racial Preferences*, 135 PUB. INTEREST 45 (1999); Ronald Dworkin, *Affirming Affirmative Action*, N.Y. REV. OF BOOKS, Oct. 22, 1998, at 91; Ihan Kim, *College Admission and Affirmative Action—Consequences and Alternatives*, 4 MICH. J. RACE & L. 145 (1998) (book note).

<sup>325</sup> Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 940 (2001).

<sup>326</sup> *Id.* at 931, 941.

<sup>327</sup> Clifford Adelman, *The Rest of the River*, U. BUS. 42, 43-45 (Jan./Feb. 1999).

<sup>328</sup> Michael A. Olivas, *The Shape of the Class*, REV. HIGHER EDUC., 193, 195 (Winter 2001).

<sup>329</sup> *Id.* at 196-97. Richard Delgado developed the concept of imperial scholarship. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (identifying and criticizing a pattern whereby the most influential civil rights scholarship was produced entirely by white men, who, in turn, only cited the works of the other Anglo males in the same inner circle). See also Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

<sup>330</sup> Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874 (1999) (book review); Sandalow's review is followed by a response by Bowen and Bowen, along with Sandalow's rejoinder. William G. Bowen & Derek Bok, *Response to Review by Terrance Sandalow*, 97 MICH. L. REV. 1917 (1999); Terrance Sandalow, *Rejoinder*, 97 MICH. L. REV. 1923 (1999).

<sup>331</sup> Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583 (1999) (book review); Stephan Thernstrom & Abigail Thernstrom, *Racial Preferences: What We Know Now*, COMMENTARY 44 (Feb. 1999).

<sup>332</sup> Martin Trow, *California After Racial Preferences*, 135 PUB. INTEREST 64 (1999).

Bok, and the reports of two CIR expert witnesses were essentially rebuttals of *The Shape of the River*.<sup>333</sup>

## 2. Michigan's Expert Witnesses: Making a Case for a Compelling Interest

The University of Michigan's research-driven defense of the educational value of diversity in higher education is the most extensive litigation effort of its kind. In its December 2000 summary judgment ruling in *Gratz*, the court concluded: "The University Defendants have presented this Court with solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body."<sup>334</sup> In particular, Judge Duggan devoted several approving paragraphs to the University's expert witness report from Professor Patricia Gurin.<sup>335</sup>

Gurin conducted a comprehensive empirical analysis of education and diversity—including national data, as well as student surveys and classroom studies at the University of Michigan.<sup>336</sup> Based on her research, Gurin concluded:

Students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.<sup>337</sup>

In addition to learning outcomes in college, Gurin also found that diversity experiences in college correlate with having higher cross-racial experiences years after college.<sup>338</sup>

Many of the University of Michigan's expert reports are reprinted in the *Michigan Journal of Race and Law*.<sup>339</sup> Michigan's team of expert witnesses included Bowen and Bok, whose research is summarized above.<sup>340</sup> Thomas Sugrue, a sociologist at the University of Pennsylvania, described the causes and consequences of persistent residential segregation in America, especially in Michigan and Detroit.<sup>341</sup> Eric Foner, a Columbia historian, reported on the history of African Americans' struggle for equality in the U.S.<sup>342</sup> The Intervenor in *Grutter* called Foner to testify about the centrality of race in American life.<sup>343</sup> Albert Camarillo, a Stanford historian, reported on the history of

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<sup>333</sup> Michael S. Greve, *A River Runs Dry*, 94 POL'Y REV. 77 (April/May 1999); Expert Report of Charles L. Gesheker, *Gratz v. Bollinger* (E.D. Mich.) (No. 97-75231) and *Grutter v. Bollinger* (E.D. Mich.) (No. 97-75928) (Jan. 1999); Expert Report of Finis R. Welch, *Gratz v. Bollinger* (E.D. Mich.) (No. 97-75231) and *Grutter v. Bollinger* (E.D. Mich.) (No. 97-75928) (June 2000). Much of Gesheker's report is duplicative of a recent article he authored. Charles L. Gesheker, *Affirmative Action in Principle, Non-Discrimination in Fact: Higher Education After Proposition 209*, 10 STAN. L. & POL'Y REV. 205 (1999).

<sup>334</sup> 122 F. Supp. 2d at 822.

<sup>335</sup> *Id.*

<sup>336</sup> Expert Report of Patricia Gurin, *Gratz v. Bollinger* (E.D. Mich.) (No. 97-75231) and *Grutter v. Bollinger* (E.D. Mich.) (No. 97-75928), reprinted in 5 MICH J. RACE & L. 363 (1999)

<sup>337</sup> *Id.* at 365.

<sup>338</sup> *Id.* at 409.

<sup>339</sup> 5 MICH J. RACE & L. 243-519 (1999).

<sup>340</sup> See *infra* Part III.1. See also Expert Report of William G. Bowen, *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-75928), reprinted in 5 MICH. J. RACE & L. 427 (1999).

<sup>341</sup> 5 MICH J. RACE & L. 261 (1999).

<sup>342</sup> 5 MICH J. RACE & L. 311 (1999).

<sup>343</sup> 137 F. Supp. 2d at 860 n.50.

various Latino groups, explaining their marginalization in American society.<sup>344</sup> Kent Syverud, dean at Vanderbilt Law School (and an initial skeptic of affirmative action) described how he came to appreciate the ways in which diversity creates a better learning environment in law school.<sup>345</sup> Finally, Robert Webster, a former judge and president of the Michigan State Bar (and a UMLS graduate), reported on how diversity in legal education serves attorneys in legal practice.<sup>346</sup>

### 3. Affirmative Action and Success in the Legal Profession

In a work building upon Bowen and Bok's research, Richard Lempert, David Chambers and Terry Adams analyzed 1970-1996 Black, Latino, Native American and White graduates of the University of Michigan Law School.<sup>347</sup> Lempert et al. found that despite lower LSAT scores and UGPAs, the students of color that graduated from UMLS fared equally well in the legal profession, as measured by a log of current income and self-reported career satisfaction.<sup>348</sup> The authors found (as did Bowen and Bok) that their minority graduates tended to have statistically significant higher contribution levels to civic service, such as serving on the board of a non-profit, and hours dedicated to pro bono cases.<sup>349</sup> They also found that LSAT/UGPA index scores did not predict future career success, but there was a statistically significant *negative* correlation between LSAT/UGPA and civic service.<sup>350</sup>

The Michigan Law School study is very much a part of the *Grutter* litigation, and Professor Lempert served as an expert witness in the case. Lempert was called by the *Grutter* Intervenors to testify about his research findings.<sup>351</sup> This study's contribution to the literature is aided by five accompanying commentaries and a reply by the authors.<sup>352</sup>

### 4. Harvard Civil Rights Project Studies

In May 2001 the Harvard Civil Rights Project released *Diversity Challenged*, a compilation of studies bearing on the educational benefits of affirmative action.<sup>353</sup>

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<sup>344</sup> 5 MICH. J. RACE & L. 339 (1999).

<sup>345</sup> 5 MICH. J. RACE & L. 451 (1999).

<sup>346</sup> 5 MICH. J. RACE & L. 455 (1999).

<sup>347</sup> Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & SOC. INQUIRY 395 (2000). Two thirds of the minority graduates in the study are African American. *Id.* at 399.

<sup>348</sup> *Id.* at 468-79.

<sup>349</sup> *Id.* at 485-90.

<sup>350</sup> *Id.* at 463-71, 487.

<sup>351</sup> 137 F. Supp. 2d at 862-63.

<sup>352</sup> See Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood*, 25 L. & SOC. INQUIRY 507 (2000); Robert L. Nelson & Monique R. Payne, *Minority Graduates from Michigan Law School: Differently Successful*, 25 L. & SOC. INQUIRY 521 (2000); David B. Wilkins, *Rollin' On the River: Race, Elite Schools, and the Equality Paradox*, 25 L. & SOC. INQUIRY 527 (2000); Richard Sander, *The Tributaries to the River*, 25 L. & SOC. INQUIRY 557 (2000); Lani Guinier, *Confirmative Action*, 25 L. & SOC. INQUIRY 565 (2000); Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: Answers to Methodological Queries*, 25 L. & SOC. INQUIRY 585 (2000).

<sup>353</sup> DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield & Michal Kurlaender eds., 2001). See also <http://www.law.harvard.edu/civilrights/publications/Fepress.html> (last

Chapters include topics such as the impact of affirmative action on medical education and public health, school desegregation research, diversity and economic outcomes, and the impact of diversity on classroom climate and student development.<sup>354</sup> Coinciding with the release of *Diversity Challenged*, Americans for a Fair Chance announced a new poll showing that two-thirds of Americans support affirmative action. The poll of 3,000 found that 64% support affirmative action for minorities and women, and 66% agreed that colleges should look at applicants' entire background, rather than only relying on test scores and grades.<sup>355</sup>

*Diversity Challenged* includes a survey of law students conducted by Gary Orfield and Dean Whitla.<sup>356</sup> Orfield, co-director of the Harvard Civil Rights Project, presented these findings in his expert report in *Grutter*, and testified for the Intervenor at trial.<sup>357</sup> Orfield and Whitla worked with the Gallop poll to survey over 1,800 students at Harvard Law School and the University of Michigan Law School (81% response rate).<sup>358</sup> This data was supplemented with email surveys at several elite law schools (lower response rates).<sup>359</sup> Orfield and Whitla's survey delves into students' interracial contacts at various stages of their education, and explores how diversity impacts formal and informal learning environments. The authors found that a substantial majority of law students reported that racial diversity impacted how they think about problems in classes and their ability to work more effectively with members of other racial groups.<sup>360</sup> 69% of Harvard students and 73% of Michigan students stated that racial diversity was a "clearly positive" element of their law school educational experience.<sup>361</sup>

## B. Recent Institutional Studies

### 1. UCLA HERI Studies

The Higher Education Research Institute (HERI) at the UCLA Graduate School of Education collects a great deal of information related to diversity on both faculty and students.<sup>362</sup> HERI is the home of the Cooperative Institutional Research Program (CIRP), a national longitudinal study of American higher education that has been ongoing since 1966. Consequently, HERI research has been widely cited in the social science research and litigation over affirmative action.

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visited July 23, 2001); Jennifer Yachnin, *New Book Compiles Research Supporting Educational Value of Campus Diversity*, CHRON. HIGHER EDUC., May 18, 2001.

<sup>354</sup> DIVERSITY CHALLENGED, *supra* note 353.

<sup>355</sup> <http://www.law.harvard.edu/civilrights/publications/FCpress3.html> (last visited July 23, 2001).

<sup>356</sup> Gary Orfield & Dean Whitla, *Diversity and Legal Education: Students Experiences in Leading Law Schools* (1999), available at <http://www.law.harvard.edu/groups/civilrights/publications/lawsurvey.html>. Since I have not yet obtained a paper copy of *Diversity Challenged*, I am referencing the earlier online version of the law student survey.

<sup>357</sup> 137 F. Supp. 2d at 857-59.

<sup>358</sup> Orfield & Whitla, *supra* note 356, at 8. Two thirds of these students were White. *Id.*

<sup>359</sup> *Id.* at 7.

<sup>360</sup> *Id.* at 9-15.

<sup>361</sup> *Id.* at 15.

<sup>362</sup> <http://www.gseis.ucla.edu/heri/herihome.html>.

For example, HERI's 1998-1999 faculty survey research is significant because its sample size of 34,000 makes it the largest of its kind.<sup>363</sup> The HERI survey authors report that 91% of American faculty members agree with the statement "a racially/ethnically diverse student body enhances the educational experience of all students."<sup>364</sup> In addition, only 28% of faculty believes that "promoting diversity leads to the admission of too many underprepared students," which is down slightly from earlier HERI surveys.<sup>365</sup>

In addition, HERI director Alexander Astin's book *What Matters in College?*<sup>366</sup> was frequently cited in *Gratz* and *Grutter* by plaintiffs' and defendants' expert reports, as well as in amici. In *Gratz*, the district court cited Astin favorably in granting the University's motion for summary judgment on the question of diversity as a compelling governmental interest.<sup>367</sup> Using comprehensive national data, Astin found that diversity is associated with both increased satisfaction in most areas of college experience, as well as an increased commitment to promoting racial understanding and participation in cultural activities, leadership, and citizenship.<sup>368</sup>

## 2. The ACE/AAUP Report<sup>369</sup>

In May 2000 the American Council on Education (ACE) and the American Association of University Professors (AAUP) presented three research studies, including a faculty survey by Geoffrey Maruyama and Jose F. Moreno.<sup>370</sup> The Maruyama and Moreno study reports a national survey of faculty at Carnegie Research-I institutions, which are generally the kind of universities hardest-hit by affirmative action bans. Using a random sample of 1,500 full-time professors, the authors found that over 90% of faculty members across disciplines indicated that a diverse classroom environment diminishes neither student quality nor intellectual substance.<sup>371</sup> Over two-thirds of faculty thought that students benefit from learning in a racially and ethnically diverse setting.<sup>372</sup>

## 3. The AERA/Stanford Report<sup>373</sup>

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<sup>363</sup> An Overview of the 1998-99 Faculty Norms (2000), <http://www.gseis.ucla.edu/heri/faculty.htm>.

<sup>364</sup> *Id.* at 5.

<sup>365</sup> *Id.*

<sup>366</sup> ALEXANDER ASTIN, *WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED* (1993).

<sup>367</sup> 122 F. Supp. 2d at 823.

<sup>368</sup> *Id.*

<sup>369</sup> AMERICAN COUNCIL ON EDUCATION & AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS* (2000), <http://www.acenet.edu>.

<sup>370</sup> Geoffrey Maruyama & Jose F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom*, *id.* at 9-36 (2000); Roxane Harvey Gudeman, *College Missions, Faculty Teaching, and Student Outcomes in a Context of Low Diversity*, *id.* at 37-60 (2000); Patricia Marin, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms*, *id.* at 61-84 (2000).

<sup>371</sup> Maruyama & Moreno, *supra* note 370, at 15, 24.

<sup>372</sup> *Id.* at 15.

<sup>373</sup> COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGE AND UNIVERSITIES (Mitchell Chang et al. eds., 1999), at <http://www.stanford.edu/~hakuta/RaceInHigherEducation.html> (print version forthcoming 2001-2002).

*Compelling Interest*, a report sponsored by the American Educational Research Association (AERA) and the Stanford's Center for Comparative Studies in Race and Ethnicity, contains four studies covering current educational attainment, racism in higher education, standardized testing and the benefits of diversity. The chapter by Jeffrey Milem provides a valuable literature review of the benefits of diversity broken down into three categories: individual benefits, institutional benefits and societal benefits.<sup>374</sup> Milem's interdisciplinary chapter, ranging from critical race theory to health policy to social psychology, is an excellent place to dive into diversity research.<sup>375</sup>

## C. Conservative Critiques of Diversity/Affirmative Action Research

In the recent summary judgment motion in *Gratz v. Bollinger*, the court noted: "Plaintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students."<sup>376</sup> Time will tell if the absence of rebuttal evidence on the educational effects of diversity was a tactical error on the part of CIR. Nonetheless, social justice advocates must stay current on how affirmative action opponents are responding to evidence of the educational benefits of diversity.

### 1. The National Association of Scholars

The National Association of Scholars (NAS), a politically far-right faculty organization, submitted amicus briefs in *Gratz* and *Grutter* at both the district court and appellate court levels.<sup>377</sup> NAS attacked Bowen and Bok, Gurin, Astin, and the other University of Michigan evidence about the benefits of diversity. Judge Duggan devoted several paragraphs to the NAS amicus brief, and concluded that their criticism did not get to the "core issue of whether the educational benefits that flow from a diverse student body constitute a compelling governmental interest, but rather, whether the means employed to achieve that interest are narrowly tailored."<sup>378</sup>

Perhaps in response to Duggan's rebuke, NAS is stepping up its efforts in this area. In May 2001, NAS released a 150-page report authored by Thomas Wood (co-author of Proposition 209) and Malcolm Sherman.<sup>379</sup> Wood and Sherman argue that

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<sup>374</sup> Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, *id* at Ch. 5.

<sup>375</sup> See also Jeffrey Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education*, in AMERICAN COUNCIL ON EDUCATION, SEVENTEENTH ANNUAL REPORT ON MINORITIES IN HIGHER EDUCATION 39 (2000).

<sup>376</sup> 122 F. Supp. 2d at 823.

<sup>377</sup> Press Release, NAS Files Amicus Brief in Appeal of Law School Race Preference Decision (June 26, 2001), [http://www.nas.org/print/pressreleases/hqnas/releas\\_26jun01a.htm](http://www.nas.org/print/pressreleases/hqnas/releas_26jun01a.htm) (last visited Aug. 7, 2001); Brief of the National Association of Scholars, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich., 2000) (No. 97-75231).

<sup>378</sup> 122 F. Supp. 2d at 811.

<sup>379</sup> Press Release, NAS Releases Report on Race and Higher Education (May 10, 2001), [http://www.nas.org/print/pressreleases/hqnas/releas\\_10may01.htm](http://www.nas.org/print/pressreleases/hqnas/releas_10may01.htm) (last visited Aug. 7, 2001).

there are neither legal nor social science grounds for affirming Justice Powell's diversity rationale.<sup>380</sup>

There is a strong affinity between CIR and NAS, with several NAS members serving as CIR expert witnesses. For example, NAS member Gail Heriot (University of San Diego Law School) filed an expert report for CIR in *Gratz* and *Grutter* in which she celebrated the educational impact of Proposition 209. Heriot opined, "[E]nrollment changes like those experienced by the University of California in complying with Proposition 209 have a mainly positive impact on the educational and intellectual environment on the campus and in the classroom."<sup>381</sup>

NAS contracted with the Roper Center in a 1996 survey of American faculty.<sup>382</sup> The NAS/Roper poll, which is attached in the appendix of the NAS amicus brief, reports that a majority of faculty opposes affirmative action "preferences." The Roper poll, and an April 2000 poll by the Connecticut Association of Scholars (a chapter of NAS) reporting opposition to "racial preferences" among Connecticut university faculty, are repeatedly referenced in NAS' briefs. It should be noted, however, that the sample size in the Roper poll (n = 800) and the Connecticut poll (n = 1,341) are substantially smaller than polls which find broader support for affirmative action.<sup>383</sup>

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<sup>380</sup> *Id.* See also Ronald Roach, *Challenging the Racial Diversity Argument*, BLACK ISSUES IN HIGHER EDUC., April 26, 2001, at 10; Peter Schmidt, *Debating the Benefits of Affirmative Action*, CHRON. HIGHER EDUC., May 18, 2001, A25.

<sup>381</sup> Expert Report of Gail Heriot at 8, *Gratz v. Bollinger* (E.D. Mich.) (No. 97-75231) and *Grutter v. Bollinger* (E.D. Mich.) (No. 97-75928) (Aug. 29, 2000). See also Gail Heriot, *California's Proposition 209 and the United States Constitution*, 43 LOYOLA L. REV. 613 (1998).

<sup>382</sup> NAS National Faculty Survey, <http://www.nas.org/reports/roper/exsum.htm> (last visited May 26, 2000).

<sup>383</sup> See *infra* Part III.A.4 and Part III.B.1-2.