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Affirmative Action In College Admissions: The Past, Present, and Future

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INTRO

I pledge Allegiance to the flag
of the United States of America
and to the Republic for which it stands,
one nation under God, indivisible,
with Liberty and Justice for all.

(The Pledge of Allegiance, 1892)

The Pledge of Allegiance, which supposedly captures the core values of America, is a nostalgic hymn known by virtually all citizens of the U.S. We recite it in public schools, at football games, and a wide range of ceremonies and celebrations. From the time we are young, these words become engrained in us, so much so that reciting them becomes second nature. Do we, though, truly practice the concepts held in the Pledge of Allegiance? When we pledge that the U.S. embodies "liberty and Justice of all", do we stop and think of the implications the term carries? Can we, as a society who accepts this phrase, honestly support the claim that all U.S. citizens have been granted such equality? According to this phrase, American justice pays no mind to color, sexuality, nationality, religion, gender, or disability. Unfortunatley, the lived reality for many people is very different. To those who disagree, I suspect that those individuals have been living a sheltered life, and quite frankly they should spend some time in any minority dominated housing project and read a book.

Though the Pledge of Allegiance is not a law in and of itself, it is a virtue accepted by society; something we are taught to buy into as true, and perhaps even comforting. The false reality it instills in us is clearly represented in the affirmative action debate. If the U.S. did in fact provide liberty and justice for all, affirmative action cases would, arguably, cease to exist.

However, the injustices faced by many in the U.S., throughout history to present day, are the backbone of affirmative action cases. Subsequently, two seemingly natural questions arise. First, do these injustices warrant a remedy? Second, can remedial action be taken without damaging those historically unharmed, who in turn are not granted this remedy? The answer to this question is complex, as it involves a sort of Catch-22 situation. Throughout this paper, this Catch-22 situation will prove to be the driving force of reverse discrimination. This paper will present affirmative action cases in regards to college admission, which will illustrate that reverse discrimination has resulted from the good intentioned affirmative action policies set forth by various educational institutions in effort to remedy injustices faced by minority applicants. Furthermore, this paper will present valuable insight from a plethora of scholars in regards to the unpredictable future of affirmative action college admissions cases. Through these opinions, it will become clear that the future of affirmative action is subjective, depending in large part on the Supreme Court Justices in power. Furthermore, such opinions suggest the future will hold the daunting task of formulating affirmative action policies that work to increase minority presence on college campuses, while also respecting the rights granted to non-minority applicants.

BRIEF INTRODUCTION: AFFIRMATIVE ACTION TERMS AND BACKGROUND INFORMATION

Before diving into the complex legal explanations of affirmative action cases, it is important to understand what the term actually means. Many have proposed definitions; a fact which illustrates just how subjective the term is. For the purposes of this paper, renowned author

and professor John Skrentny offers a stable and unbiased definition of affirmative action. In his book *The Ironies of Affirmative Action*, Skrentny explains

> The term [affirmative action] predates the civil rights movement. The basic idea comes from the centuries-old English legal concept of equity or the administration of justice according to what was fair in a particular situation, as opposed to rigidly following legal rules, which may have a harsh result. The phrase affirmative action first appeared as part of the 1935 Nation Labor Relations Act. Here, it meant that an employer who was found to be discriminating against union members or union organizers would have to stop discriminating and also take affirmative action to place those victims where they would have been without discrimination. (Skrentny, 6)

Skrentny elaborates on the meaning of affirmative action in the realm of civil rights. He explains, "In the civil rights context, affirmative action has come to mean much more than this, and has become a very politically loaded term. []"It came to mean [ ] "race conscious [ ]"(Skrentny, 6,7). Here, Skrentny explains that the concept of affirmative action was a method to promote anti-discriminatory practices in the work place. The initial goal of affirmative action was to provide blacks with employment opportunities they would have otherwise been denied; a denial which was ultimately thought to be the effect of the historical discrimination and injustice faced by blacks in the U.S. *With this policy in place, what then, happens to other spheres in which blacks are disproportionately represented?* Under the similar circumstances under which blacks were given employment opportunities, affirmative action snuck its way into *other spheres*, specifically college admissions. Given that in American society, higher education is practically a prerequisite for advancement, affirmative action inevitably expanded to include college admissions.

Skrentny's definition raises an important point that the term "affirmative action" is politically loaded. This makes it highly vulnerable to unstable interpretation, strong opposition and support, and debate, which will prove to be one of the themes throughout this paper. To this day, 78 years after the term was introduced, there remains immense controversy over the topic; controversy reflected in landmark affirmative action court cases and the opinions of authors and legal scholars which will soon come to light.

This basic definition of affirmative action gives way to the foundational issue of college admissions affirmative action cases: reverse discrimination. If it is accepted that affirmative action was a way to actively include minorities into spheres where their presence was minimal at that, it becomes clear that in order to achieve this goal, certain policies prompting the inclusion of these individuals will inevitably grant them a leg up on their competition. The "competition" here, is the majority; those who have previously dominated those spheres nearly absent of minorities. Consequently, these [affirmative action] policies have the potential to both impose damages upon, and violate the rights of the majority. For example, 2 candidates apply for admission to a university; one is black, and one is white. The black candidate has a lower GPA and lower SAT scores than the white candidate. However, the university denies the white candidate and offers the black candidate admission because he or she is a minority held to lower admissions standards. The white candidate in turn finds this a violation of his or her rights. Of course, an affirmative action case is far more complex that, however this example provides a basic idea of reverse discrimination, which is important to understand prior to exploring the following cases.

Carl Cohen, a stark opponent of affirmative action, puts an interesting spin on the role affirmative action plays in college admissions, which illuminates the concept of reverse discrimination. In his book *Naked Racial Preference*, Cohen explains,

> In the sphere of college admissions it may almost be said that the condition for receiving affirmative action favor is being entitled to it. That persons are in a position to accept preferential admission is normally a consequence of the fact that they come from good homes and schools, making their university admission feasible. But those in the racial minority who really had been discriminated against are very unlikely to be qualified for admission to any college, however extreme its affirmative action program; the compensatory device is useless to them. And whoever it is that may have discriminated against blacks and other minorities in early education, it is certainly that the guilty parties are not the white students who are displaced by preferential affirmative action. Those displaced, it turns out, are seldom well-prepared children of the affluent middle class who will not likely be denied, but most often the marginal white applicants, who like their black counterparts, had struggled to achieve the social mobility that higher education might at last provide –only to learn that they had the misfortune to bear the wrong skin color. (Cohen, 216)

Though some may disagree with Cohen's somewhat radical explanation, his input is helpful here in that it provides insight into the minds of victims of reverse discrimination. In order to adequately analyze the following court cases involving claims of reverse discrimination, it is important to keep an open mind and acknowledge the stance of the individuals on both sides of the affirmative action debate; those who are alleged victims of discriminatory affirmative action programs, and those who intend to remedy past injustices with these programs.

LEGAL BASIS FOR AFFIRMATIVE ACTION ADMISSIONS CASES

Throughout the cases that will follow, there are two civil rights concepts that alleged victims of reverse discrimination appeal to. In effort to prove universities' admissions policies

have violated their individual rights, subjects appeal to the Title VI of the Civil Rights Act of 1964 and The Equal Protection Clause of the Fourteenth Amendment. Additionally, there is one major legal concept frequently used by the courts in affirmative action college admissions cases known as "strict scrutiny."

Generally, the Civil Rights Act of 1964 "prohibits discrimination on the basis of race, religion, sex or national origin" in the categories of employment, education, and contracts (Civil Rights Act (1964)). The above categories are broken down into specific titles, though for the purpose of affirmative action college admissions cases, Title VI demands attention. Title VI of the Civil Rights Act of 1964 "prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance" (Title VI, Civil Rights Act (1964)). Given that the language of Title VI does not explicitly refer to college and universities, the applicability of the statue to college admissions cases may be somewhat easy to overlook. However, since many public state colleges and universities are given federal assistance, Title VI is entirely relevant to applicants of these institutions.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is another area in which many alleged victims of reverse discrimination in college admissions cases have sought refuge. According to the Library of Congress, the Equal Protection Clause, ratified on July 9, 1868,

> [G]ranted citizenship to all persons born or naturalized in the United States, which included former slaves recently freed. In addition, it forbids states from denying any person life, liberty or property, without due process of law or to deny to any person within its jurisdiction the equal protection of the laws. By directly mentioning the role of the states, the 14th Amendment greatly

> expanded the protection of civil rights to all Americans and is cited in more litigation than any other Amendment

In comparison to Title VI of the Civil Rights Act of 1945, the Fourteenth Amendment is somewhat broader, making it applicable in many instances; a claim which is supported by the fact that it is *cited in more litigation than any other amendment.* In regards to college admissions cases, this opens the door to many alleged victims of reverse discrimination. In the instance that an institution did not receive federal funding, alleged victims of racial discrimination have utilized the Fourteenth Amendment. It is strikingly ironic that the Fourteenth Amendment of 1868 was (arguably), initially established, at least in part, to help protect freed Black Slaves from the more than likely racial discrimination that would follow. The irony lies in the fact that as equal protection laws expanded to *all* Americans, the historically preferred majority began to seek refuge from discrimination in the Amendment. Essentially, this makes the Amendment a prime target for non-minority individuals who have been damaged by the disadvantageous affirmative action policies of particular institutions. With this, who is helped, who is hurt, and who is justified for these benefits and injuries becomes deeply intertwined and complicated.

Lastly, it is important to develop an understanding of strict scrutiny before delving into the following cases. Strict scrutiny has often played an important role in affirmative action cases, as it prioritizes the importance of individuals' constitution rights. On a surface level, strict scrutiny has been explained as the court's obligation to handle individuals' constitutional rights with great care and consideration. However, the term has several important elements that will prove important throughout the court cases presented in this paper. Therefore, the term must be carefully deconstructed. According to the Cornell University School of Law,

> Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. To pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest. [ ]. For a court to apply strict scrutiny, the legislature must either have significantly abridged a fundamental right with the law's enactment or have passed a law that involves a suspect classification. Suspect classifications have come to include race, national origin, religion, alienage, and poverty. (Legal Information Institute of Cornell University Law School)

In the American Journal of Legal History, Stephen A. Siegal extrapolates on the requirements of the strict scrutiny test. According to Siegal, the narrow tailoring aspect of affirmative action "is the oldest branch of strict scrutiny" and can be traced back to the Gilded Age[1] Commerce Clause adjunction and the Lochner-era[2] police power cases (Siegal, p. 361, 2006). Further explaining the "narrowly tailored" aspect of the rule, Siegal writes,

> Strict scrutiny's "narrow tailoring" requirement provides a means to examine the government's "precision of regulation," allowing the Court to uphold government action "only if ... it is necessary to achieve... [the] compelling interest" that the government has asserted as the purpose of its action. Narrow tailoring demands the fit between the government's action and its asserted purpose be "as perfect as practicable." Strict scrutiny's narrow tailoring

[1] The Gilded Age was a "period of gross materialism and blatant political corruption in U.S. history during the 1870s that gave rise to important novels of social and political criticism. The period takes its name from the earliest of these, The Gilded Age (1873), written by Mark Twain in collaboration with Charles Dudley Warner. The novel gives a vivid and accurate description of Washington, D.C., and is peopled with caricatures of many leading figures of the day, including greedy industrialists and corrupt politicians" (The Britannica Encyclopedia).

[2] The Lochner Era is often used in reference to the social and political climate of the time period in which *Lochner v. New York* took place. *Lochner v. New York* was a case in which "the U.S. Supreme Court struck down a New York state law setting 10 hours of labour a day as the legal maximum in the baking trade" (The Britannica Encyclopedia). According to the Farlex Legal Dictionary, the case introduced a "new era of constitutional interpretation" (Farlex Legal Dictionary).

> requirement means that legislation must be neither overinclusive nor underinclusive.

The narrow tailorings requirement given by Siegal is important for 2 main reasons. First, it highlights the fact that strict scrutiny sets a very high standard for legislation to meet when compromising individual rights. Second, Siegal raises the important point that in correctly applying strict scrutiny, the legislature is obligated to find a fair balance between overinclusive and underinclusive; a task which will become quite problematic in affirmative action cases regarding college admissions.

The policy of strict scrutiny becomes especially important to affirmative action when applied to one's Fourteenth Amendment rights, and/or those rights granted by the 1964 Civil Rights Act. It is inevitable that strict scrutiny shares overlapping implications with the above rights, as these rights establish what strict scrutiny ensures. Throughout this paper, the inevitable bond between strict scrutiny and the previously mentioned Civil Rights documents will become clear, and the logic of strict scrutiny will prove valuable to those who claimed to have been victimized in affirmative action policies.

Throughout the following cases, the above explanations will prove important. They will be manipulated, utilized, and examined to the highest degree. It is important to keep in mind the plain text of these concepts; it often becomes easy to drift away from these established standards of evaluation. By this, I mean to say that it is neither rare nor unnatural to rebut the following opinions with often instinctive counterargument. For example, when someone challenges a racial preference imposed by an affirmative action policy, one may argue "Yeah but, what about the difficulties minorities face[ed] in our country that limit[ed] their access to higher education?" On the other hand, one may react to the same policy with "Yeah but, Title VI explicitly prohibits

this admissions practice." These understandable arguments are potentially distracting from the debate at hand, which essentially explores the tension between the Constitutional rights of U.S. citizens, and the tremendous interpretive power of Supreme Court Justices.

AFFIRMATIVE ACTION IN THE COURT ROOM: *CALIFORNIA V. BAKKE, CHERYL J. HOPWOOD, ET AL. V. STATE OF TEXAS, ET AL., GRATZ V. BOLLINGER, GRUTTER V. BOLLINGER, AND FISHER V. UNIVERSITY OF TEXAS AT AUSTIN.*

In discussing affirmative action in the U.S., it is important to look to Supreme Court cases in order to understand the complexity of the issue. Over the past decade, there have been several landmark cases involving affirmative action in the academic admissions process. Among these cases are, collectively, California v. Bakke, Cheryl J. Hopwood, et al. v. State of Texas, et al., Gratz v. Bollinger, Grutter v. Bollinger, and Fisher v. University of Texas at Austin. These cases illustrate that affirmative action is a highly sensitive and debatable topic, which inspires a wide range of opinions

CALIFORNIA V. BAKKE

In 1978, Allan Bakke, a white male applicant to the University of California Medical School, took legal action against the University after he was denied admission to the institution. Bakke applied to the University twice; once in 1973, and once in 1974. The admissions board granted his application status no exception, he was placed under the "general admissions" category; the common area of the vast majority of applicants (Lexus Nexus *California v. Bakke*: Case in Brief, 8). In 1973, though Bakke received a high benchmark score, he applied late in the

rolling admissions process. The following year, Bakke was given a low interview rating by the general admissions committee (Lexus Nexus *California v. Bakke*: Case in Brief, 8).

Though Allan Bakke did have gaps in his application in both instances, he found ground for legal action within the university's "special application" process. The University of California admissions board had a special admissions program, which set aside applicants from the general admissions category where Bakke's application was placed. The special admissions program was developed in order to ensure a certain number of disadvantaged minority students would be granted admission. Applications of these individuals were viewed under a rather different scope than the general application pool. Within special admissions applications, the admission committee looked for economic and education deprivation. Furthermore, they looked at whether or not the applicant preferred to be viewed as a member of a minority group. If these conditions were met, the applicant was excused from meeting the minimum 2.5 applicant GPA; a standard to which the general applicant pool was held to. When Allan Bakke applied, 16 out of 100 members of the incoming class were accepted under special admission (whole paragraph: Lexus Nexus *California v. Bakke*: Case in Brief, 8).

After being denied of admission twice, Bakke sued the University of California Medical School in the California Superior Court. According the case brief, he "[s]ought mandatory, injunctive, and declaratory relief compelling his admission to the medical school. The university cross complained for a declaration that its special admissions program was lawful." (Lexus Nexus *California v. Bakke*: Case in Brief, 8) In other words, Bakke sought admission to the university on the grounds that his dismissal was unlawful. In response, the University held their ground, maintaining that the special admissions program was indeed lawful, and in turn rejected

of Bakke's admission. The court ruled that the special admissions program practiced by the University of California was essentially a racial quota system. Minorities in the special admissions program had less competition amongst themselves, as well as a competitive edge against the general applicant population, collectively making admission far more achievable. The California Superior Court held that the special admissions program violated the Federal Constitution, the State Constitution, and Title VI of the 1964 Civil Rights Act. Though these results may lead us to believe that Bakke was in turn granted admission, the court did not order the university to admit Bakke. Rather, they held that he could not prove that he would have been admitted if he had been viewed through the scope of the special admissions applicants. Because Bakke could not provide sufficient proof that he would have been admitted if he had been granted the exceptions made to those in the special admissions program, the court did not find it necessary to grant him admission (Lexus Nexus *California v. Bakke*: Case in Brief, 8). The case then moved to the California Supreme Court, under which it was viewed under the lens of strict scrutiny. Similar to the Superior Court's ruling, the California Supreme Court declared racial consideration in admissions unlawful, yet still refused to grant Bakke admission to the University.

To no surprise, Bakke was rather unsatisfied with the verdict of the Superior Court. As stated before, he sought the admission he felt was unfairly denied. Obviously and less colloquially put, the case reached the United States Supreme Court. The case was handled by U.S. Supreme Court Justices Lewis F. Powell, Jr., William H. Rehnquist, John Paul Stevens, and Potter Stewart. They first decided that Bakke had qualifications for admission and that he "[w]as injured by his inability to compete for all 100 places in the medical school class simply because of his race" (Lexus Nexus *California v. Bakke*: Case in Brief, 8). This was a step in the right

direction from Bakke's perspective, as it granted him a third of what he initially sought in the Superior Court. With this leverage, Bakke's potential for success increased.

Similar to the California Superior Court, the U.S. Supreme Court applied the concept of strict scrutiny to further examine the case. The Supreme Court found that Bakke's fundamental rights were infringed upon by the University of California Medical School. According to the Supreme Court, "[t]he selection of minority applicants in the special admissions program drew a line on the basis of race and ethnic status. The equal protection guarantees of the Fourteenth Amendment extend to all persons" (Lexus Nexus *California v. Bakke*: Case Brief, 8). Furthermore, the Court found the special admissions program implausible. The University could not constitutionally hold admissions preferences for individuals simply because of race or ethnicity, and the condition that special admissions applicants were victims of societal discrimination and disadvantage was not justifiable as the university could not prove past discrimination. Lastly, the court found the University of California Medical School unable to prove a very simple requirement in medical school admission consideration: that admitting disadvantaged minorities would result in improved health care services for the community. This is not to say that minorities were seen as incapable of such duties; rather, it simply means it is invalid to assert that their presence would benefit society if they were favored over non-minority graduates. While the Court acknowledged that the university had the freedom to admit students that would in turn promote a diverse student body, it held that in doing so, the university had to respect the individual rights of applicants (Lexus Nexus *California v. Bakke*: Case in Brief, 8).

After 3 levels of Court, the Supreme Court ruled in Bakke's favor. This case was the first prominent affirmative action college admissions case in the Supreme Court, and the cases that

follow will prove similar in regards to the precedents set forth here. The concept of strict scrutiny, the Fourteenth Amendment, and the Civil Rights Act of 1964 will be common themes throughout the remainder of the cases.

CHERYL J. HOPWOOD, ET AL. V. STATE OF TEXAS, ET AL

A few years later in 1996, we see another affirmative action case in regards to college admission appealed to the Supreme Court. In *Hopwood et al. v. State of Texas et al.*, University of Texas Law School applicants and white Texas natives Cheryl J. Hopwood, Douglas Carbell, Kenneth Elliott, and David Rogers sued the institution on grounds that their denial of admission was a decision made in the wake of racially selective admissions policies that violated their civil rights. During the admissions for the 1992 class for which they applied, all four were placed in the "discretionary zone" of candidates. This meant they were at the mercy of the review board; their applications lacked special characteristics insuring their admission. To provide some background regarding the applicants' academic status, Hopwood was a valid candidate; she had a 3.8 undergraduate GPA, and a 160 LSAT score, while not exceptional, these numbers were still competitive. (:*Hopwood et. al v. Texas et. al*, 1,2)

The University of Texas Law School admissions board practiced an admissions process similar to that of the University of California Medical School in *California v. Bakke*. The admissions board generally categorized applicants by "TI number"; a numerical value dictated by a mathematical combination of an individual's LSAT score and GPA. Though GPA and LSAT scores were important to the admissions board, they were not everything; the university looked at other factors such as undergraduate difficulty, life experience, and personal background, and most important for this case, race. The University developed a process that

separated minority applicants, generally blacks and Mexicans, from their white counterparts. According to Judge Jerry E. Smith of the District Court of the Western District of Texas, Black and Mexican American applicants were treated differently than other candidates. (:*Hopwood et. al v. Texas et. al*, 6) Smith explained,

> First, compared to whites and non-preferred minorities, the TI ranges that were used to place them into the three admissions categories were lowered to allow the law school to consider and admit more of them. In March 1992, for example, the presumptive TI admission score for resident whites and non-preferred minorities was 199.5 Mexican Americans and blacks needed a TI of only 189 to be presumptively admitted.6 The difference in the presumptive-deny ranges is even more striking. The presumptive denial score for "nonminorities" was 192; the same score for blacks and Mexican Americans was 179. (*Hopwood et. al v. Texas et. al*, 3)

Though this policy was implemented with good intentions, it racially preferred minorities. This, of course, was grounds for legal action by Hopwood and her peers.

Hopwood, Carbell, Elliott, and Rogers believed the admissions process violated their Fourteenth Amendment rights under the Equal Protection Clause. According to Judge Smith, the clause is to prevent the states from purposefully discriminating between individuals on the basis of race, and it seeks to make race irrelevant in governmental decision-making. (*Hopwood et. al v. Texas et. al*, 6) As the basis of the case, Judge Smith set forth three important principles for the case: benign and remedial intent, strict scrutiny, and guaranteed rights. Smith explained that in order to preserve the principles set forth in the Equal Protection Clause,

> [T]he Supreme Court recently has required that any governmental action that expressly distinguishes between persons on the basis of race be held to the most exacting scrutiny. Furthermore, there is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those

> characterized by their proponents as "benign or "remedial" (*Hopwood et. al v. Texas et. al*, 6).

The point of remedial intention is important here; though the action of including minorities likely seems remedial and benign, there, in the eyes of the Court, is no *actual* way of knowing the intention of the action. The District Court cited *City of Richmond v. J.A. Cronson Co.* in order to develop this point for the basis of the argument, stating

> Absent searching judicial inquiry into the justifications for such race- based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. (*City of Richmond v. J.A. Cranson Co.*, 488 U.S. 469, 493 (1989)) (*Hopwood et. al v. Texas* et. al,6)

With this, the District Court supported the notion that the university's admissions process was flawed. Smith continued to build the case with the concept of strict scrutiny, stating that we must pay mind to two important questions to which he cites the *Adarand Constructors v. Peña* case, stating, "Under the strict scrutiny analysis, we ask two questions: (1) Does the racial classification serve a compelling government interest, and (2) is it narrowly tailored to the achievement of that goal?" (*Hopwood et. al v. Texas et. al*, 6) (*Adarand Constructors v. Peña*, 115 S. Ct. 2097, 2111 (1995)).

The last principle set forth by the Court was rather general, yet important. In regards to the Fourteenth Amendment, The Court explained,

> [W]hen evaluating the proffered governmental interest for the specific racial classification, to decide whether the program in

> question narrowly achieves that interest, we must recognize that the rights created by the Fourteenth Amendment are, by its terms, guaranteed to the individual. (*Hopwood et. al v. Texas et.* al, 6)

Simply put, the individuals denied admission from the University of Texas were *guaranteed* their rights; a guarantee which is hard to diminish.

As previously explained, the University of Texas Law School justified their admissions process as one that increased the number of disadvantaged minorities in their class. In order to defend this in court, the university called upon an argument set forth in *California v. Bakke*; that the policy promoted diversity. The university held that they employed a racially sensitive admissions process for the purpose of educationally benefitting the school via a diverse student body. (*Hopwood et. al v. Texas et. al*, 24) This claim was rejected on the basis that consideration of diversity is no longer justifiable for violation of Fourteenth Amendment rights (*Hopwood et. al v. Texas et. al*, 24). As with *Bakke*, promotion of diversity was found valid yet improvable once again.

After all said and done, the District Court found the University of Texas Law School at fault. They ruled the institution could not use race as a factor in determining candidate acceptance or rejection, or to eliminate present effects of past discrimination against minorities. (*Hopwood et. al v. Texas et. al*, 23) As the university's admissions process violated these principles, Hopwood et al. proved they were denied their constitutional right. As a result, the four denied students were allowed to reapply to the institution under conditions void of racial preference. It is important to note that after the District Court verdict, the case was appealed to, and subsequently rejected by, the Supreme Court.

GRATZ V. BOLLINGER AND GRUTTER V. BOLLINGER

The year 2003 brought two important affirmative action cases to the Supreme Court. Once again, the protection provided to U.S. citizens under the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964 are of high importance in the following cases. In *Gratz v. Bollinger,* and *Grutter v. Bollinger*, 2 parties sought justice from the University of Michigan. Though the two cases occurred simultaneously they yielded different outcomes, and each case held crucial implications for the other. According to the Case in Brief,

> The *Gratz* case is important because, even though it was issued at the same time as *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court determined that the undergraduate admissions practices used by the university were in Violation of the Equal Protection Clause and that such policy had narrowly tailored the use of race in admissions decisions to further the law school's compelling interest in obtaining the education benefits that flowed from diversity. Therefore, the *Gratz* case, when analyzed with the *Grutter* case, provides a comparison as to when an admissions policy, despite achieving a compelling state interest in diversity, is not issued in accordance with the Equal Protection Clause (Lexus Nexus Case in Brief: *Gratz v. Bollinger*, 2)

Here it is evident that the cases, though unsynchronized in nature, were complementary and important to each other's outcome. As explained above, *Gratz* is important to our understanding of *Grutter*; therefore, *Gratz* will be focused on first.

In 1995 and 1997, white Plaintiffs Jennifer Gratz and Patrick Hamacher, applied to the University of Michigan's College of Literature, Science, and the Arts. The two filed a suit against Lee Bollinger and James Duderstadt, consecutive Presidents of the University of Michigan at the time. The University of Michigan practiced an admissions procedure that gave minorities an advantage over white applicants. The University's undergraduate admissions policy followed a point system that automatically granted a 20 point bonus, 1/5 of the points needed for admission, to applicants from underrepresented minority groups. Gratz and

Hamacher held that this system violated their Fourteenth Amendment Rights under the Equal Protection Clause and Title VI the Civil Rights Act of 1964. (Lexus Nexus Case in Brief: *Gratz v. Bollinger*, 5) More specifically, Plaintiffs held that

> [T]he Supreme Court had only sanctioned the use of racial classifications to remedy identified discrimination. In addition, petitioners argued that even if respondents' interest in diversity could have been viewed as constituting a compelling state interest, the district court erroneously concluded that respondents' use of race in its current admissions policy was narrowly tailored to achieve such an interest. (Lexus Nexus Case in Brief: *Gratz v. Bollinger*, 5)

In response, the Supreme Court maintained the position that racial classifications, under the scope of the Equal Protection Clause, were to be analyzed under strict scrutiny. Under the analysis of strict scrutiny, the university had to demonstrate to the Supreme Court that its policy "[e]mpolyed narrowly tailored measures that furthered compelling governmental interests" (Lexus Nexus Case in Brief: *Gratz v. Bollinger*, 5). With proof that the University of Michigan automatically granted 20 points to every single applicant considered an underrepresented minority, the Court found the university's policy absent of a narrowly tailored interest to achieve educational diversity (Lexus Nexus Case in Brief: *Gratz v. Bollinger*, 5).

In order to build their point, the Supreme Court cited *California v. Bakke*, which established that "[e]ach particular applicant was to be viewed as an individual, and all of the qualities that each individual possessed were to be assessed while evaluating that individuals ability to contribute to the unique setting of higher education" (Lexus Nexus Case in Brief: *Gratz v. Bollinger*, 5). In simpler terms, this means that according to the precedent of *Bakke*, applicants must be viewed as *individual entities, irrespective of their racial demographic.* Under

this established reasoning, the justification for the University of Michigan's minority application review point system crumbles, which is reflected in Court's verdict.

After much deliberation, the Supreme Court reached a verdict. On June 23, 2003, they ruled that

> [B]ecause respondents' use of race in the freshman admissions policy was not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violated the Equal Protection Clause and the Civil Rights Act. The Supreme Court reversed that portion of the district court's decision granting respondents' summary judgment motion with respect to liability and remanded the case for proceedings consistent with the opinion. (Lexus Nexus Case in Brief: *Gratz v. Bollinger*, 5-6)

The verdict, offering relief to Jennifer Gratz and Patrick Hamacher, demonstrates the importance of the common themes surrounding affirmative action in college admissions. The Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964 were cited for proof of the rights violations imposed upon Gratz and Hamacher by the University of Michigan. Furthermore, previous affirmative action cases proved important. When the Supreme Court cites *California v. Bakke* in order to support their decision, it affirmed that each college applicant must be judged individually rather than by measures of a particular racial group.

The concurring opinion of Supreme Court Justice O'Connor, and the dissenting opinion of Justice's Stevens and Souter highlight the controversy surrounding affirmative action, as well as the subjectivity such cases entail. Joining the Court's opinion to reverse the decision of the District Court, Justice O'Connor believed that the current undergraduate admissions policy used by the University of Michigan was nonindividualized and mechanical. She felt as though the university's application review practices failed to support the notion that they provided for

individualized consideration of admission. (Lexus Nexus Case in Brief: *Gratz v. Bollinger*, 5, 15-16) On the other hand, Justices Stevens and Souter expressed the belief that the Plaintiffs' case should have been dismissed, because both individuals had already enrolled at other colleges prior to filing their complaint, though this did not stop them from developing an opinion on the verdict of the case. Stevens and Souter found the verdict incorrect. Rather, they believed that Plaintiffs had to prove that they faced an imminent threat of future injury, which they were unable to do because when they instituted the action, neither petitioner faced an impending threat of future injust based on the University of Michigan's applicant review process. (Lexus Nexus Case in Brief: *Gratz v. Bollinger*, 5-6) It is interesting to consider both concurring and dissenting opinions in affirmative action cases, as it demonstrates just how much division these cases hold.

Within the same time frame as *Gratz v. Bollinger*, yet another affirmative action case out of the University of Michigan reached the Supreme Court. In 1996, Barbara Grutter applied to the Michigan Law School with a 3.8 grade point average and a 161 LSAT score. She was first placed on the waiting list, and later notified that she had been rejected from the school. At the time, Michigan Law School, headed by president Lee Bollinger, received more than 3,500 applications, only 350 of which would be offered admission (Lexus Nexus Case in Brief: *Grutter v. Bollinger*, 1,2)

The Michigan Law School had taken special measures to consider race in effort to increase the minority presence on their campus. According to the University of Michigan Law School's policy explained in the case brief, the

> [L]aw school admitted 10 percent of all applicants each year. According to the law school's expert, 35 percent of underrepresented minority applicants were admitted for the year

> 2000. If race were not considered, the expert testified, only 10 percent of those applicants would have been admitted and underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent. By enrolling a "critical mass" of underrepresented minority students, the law school sought to ensure their ability to make unique contributions to the character of the law school. (Lexus Nexus Case in Brief: *Grutter v. Bollinger*, 4)

The policy explained here is important for the support of Barbara Grutter, as it demonstrates the fact that had racial preferences been removed, more admissions spots would have opened up to more qualified applicants. The numbers above indicate that admissions requirements were lowered for the purpose of admitting minority applicants; a theme that was also prevalent in Michigan's undergraduate admissions policies as explained in *Grats v. Bollinger.*

Barbara Grutter alleged that these policies were a form of racial discrimination. To support this allegation, she held that the University of Michigan Law School had violated the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d; and 42 U.S.C.S. § 1981 (Lexus Nexus Case in Brief: *Grutter v. Bollinger*, 6) The Fourteenth Amendment and title VI of the Civil Rights Act of 1964 have previously been explained, though the statues held specifically by Grutter have not. 42 U.S.C.S. § 2000d holds that "Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin", while 42 U.S.C.S. § 1981 holds that

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and

> exactions of every kind, and to no other. (42 U.S.C.S. § 2000d; and 42 U.S.C.S. § 1981)

Grutter further alleged that "her application was rejected because the law school used race as a predominant factor giving applicants who belonged to certain minority groups a greater chance of admission than students with similar credentials from disfavored racial groups.", and that "the law school and respondents, its officials, had no compelling interest to justify their use of race in the admissions process." (Lexus Nexus Case in Brief: *Grutter v. Bollinger*, 5)

With these allegations, the Supreme Court began deliberating the verdict. Unlike *Gratz v. Bollinger* in which applicants Jennifer Gratz and Patrick Hamacher were granted relief, the Supreme Court now ruled in favor of Bollinger. The Supreme Court ruling, issued by Justice Sandra Day O'Connor, found compelling state interest Michigan Law School's policy to promote a racially diverse student body and that their admissions program maintains a narrowly tailored plan. According to the Case Brief,

> The Court rejected the notion that remedying past discrimination was the only permissible justification for race-based governmental action. The Court held that the law school had a compelling interest in attaining a diverse student body, deferring to the law school's educational judgment that such diversity was essential to its educational mission. It stated that its scrutiny of the interest asserted by the law school was no less strict for taking into account complex educational judgments in an area that lay primarily within the expertise of the university. The Court found the following benefits that diversity was designed to produce:
>
> 1. The promotion of cross-racial understanding, helping to break down racial stereotypes, in a society in which race unfortunately still mattered, and enabling students to better understand persons of different races, resulting in livelier and more interesting classroom discussion.
>
> 2. The promotion of learning outcomes, the better preparation of students for an increasingly diverse workforce and society, and the better preparation of them as professionals.

> 3. The cultivation of a set of leaders with legitimacy in the eyes of the citizenry.

(Lexus Nexus Case in Brief: *Grutter v. Bollinger*, 5-6)

Furthermore,

> The Court held that the law school's admissions program was narrowly tailored and did not operate as a quota. It stated that the law school's goal of attaining a critical mass of underrepresented minority students did not transform its program into a quota, noting that the number of African-American, Latino, and Native-American students in each class at the law school in the years at issue varied from 13.5 to 20.1 percent, a range, it stated, that was inconsistent with a quota. The Court found that the law school's race-conscious admissions program adequately ensured that all factors that might contribute to student body diversity were meaningfully considered alongside race in admissions decisions. The Court stated that narrow tailoring did not require exhaustion of every conceivable race-neutral alternative, and it stated that the law school sufficiently considered workable raceneutral alternatives which would have required a dramatic sacrifice of diversity, the academic quality of all admitted students, or both. The Court was satisfied that the law school's admissions program did not unduly burden individuals who were not members of the favored racial and ethnic groups. The Court took the law school at its word that it would terminate its raceconscious admissions program as soon as practicable. (Lexus Nexus Case in Brief: *Grutter v. Bollinger*, 6)

As per usual, this decision was not agreed upon by every member of the Supreme Court. It is important to take into consideration the dissenting opinions of Supreme Court Justices in order to understand the other side of the debate.

According to the case brief, Chief Justice Rehnquist was quite dissatisfied with the outcome of the case. He published a dissenting opinion, which was supported by Justices Scalia, Kennedy, and Thomas. Justice Rehnquist stated that "stripped of its 'critical mass' veil, the law school's program was revealed as a naked effort to achieve racial balancing." (Lexus Nexus Case in Brief: *Grutter v. Bollinger*, 6) He further explained that

> In order for the actual pattern of admission to be consistent with the law school's explanation of 'critical mass,' one would have to believe that the objectives of 'critical mass' offered by respondents were achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. Surely, he said, strict scrutiny could not permit those sort of disparities without at least some explanation. Also, he concluded, the tight correlation between the percentage of applicants and admittees of a given race at the law school had to have resulted from careful race-based planning by the law school. Finally, the Justice stated, he believed that the law school's program failed strict scrutiny because it was devoid of any reasonably precise time limit on the law school's use of race in admissions. (Lexus Nexus Case in Brief: *Grutter v. Bollinger*, 6)

Under the circumstances set forth in Justice Rehnquist's dissenting opinion, the outcome of *Grutter v. Bollinger* would have, presumably, been very different. This demonstrates the great difficulty and subjectivity surrounding the affirmative action debate; a concept which is important to keep in mind while exploring these cases.

FISHER V. UNIVERSITY OF TEXAS AT AUSTIN

The most recent affirmative action case to reach the Supreme Court was *Fisher v. University of Texas at Austin Et. Al.* According to the Supreme Court, petitioner Abigail Fisher applied to the University of Texas at Austin in 2008 alongside 29,501 other applicants (507 U.S., 2 (2013)). Of 12,843 applicants admitted, Fisher was not among them.

The university has a history of race-based programs for applicant evaluation, which helps construct an understanding of their 2008 policy. To begin, prior to 1996, the admissions board "considered 2 factors: a numerical score reflecting an applicant's test scores and academic performance in high school, the applicants race" (507 U.S., 2 (2013)). With the guidance of *Hopwood v. Texas*, the United States Court of Appeals for the Fifth Circuit found this process unconstitutional, as it "violated the Equal Protection Clause because it did not further any

compelling government interest" ((507 U.S., 2 (2013)). In this case, the pre-1996 admissions program used by the University of Texas was found unconstitutional under the precedent of the *Hopwood* decision, illustrating the concept that affirmative action cases, and court cases in general, rely heavily on precedent.

The precedent of the *Hopwood* decision further impacted the University of Texas' admissions program. In lieu of their previous program, the university formulated an admissions program that would comply with the standards set forth in the *Hopwood* decision. In doing so,

> The University stopped considering race in admissions and substituted instead a new holistic metric of a candidate's potential contribution to the University, to be used in conjunction with the Academic Index. This "Personal Achievement Index" (PAI) measures a student's leadership and work experience, extra-curricular activities, community service, and other special circumstances that give insight into a student's background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family. Seeking to address the decline of minority enrollment after Hopwood, the University also expanded its outreach programs. (507 U.S., 2-3 (2013))

Within this policy, the university does not mention racial classification. In response to *Hopwood*, this seems to conform to its principles. In conjunction with the University, the "Texas State Legislature also responded to the *Hopwood* decision." (507 U.S., 3 (2013)) The Texas State Legislature developed the Top Ten Percent Law, under which automatic admission is granted to "any public state college, including the university, to all students in the top 10% of their class at high schools in Texas that comply with certain standards." (507 U.S., 2-3 (2013)) Successfully, the conjunction of the new admissions policy and the Top Ten Percent Law created

a more diverse student body marked by pre-post Hopwood increases from 4.1% to 4.5% African American students, and 14.5% to 16.9% Hispanic students (507 U.S., 2-3 (2013)).

In 2004, the university established yet another admissions program, this time in conjunction with the *Grutter* and *Gratz* decisions. Interestingly, it was under this policy that the consideration of race reemerged; *this* is the program under which Abigail Fisher filed her claim (507 U.S., 6 (2013)). Throughout the explanation of this policy, it is important to bear in mind that *Grutter* set forth precedent that the use of race as one of many plus factors in an admissions program that considered the overall individual contribution of each candidate, while *Gratz* established the Univeristy of Michigan's automatic point system for minority applicants was unconstitutional (507 U.S. 6-7 (2013)).

With this in mind, the University of Texas constructed an admission practice called the "Proposal to Consider Race and Ethnicity in Admissions", which sought to work around the *Grutter* and *Gratz* decisions; presumably because in doing so, they justified the use of race in admissions. According to the Supreme Court, the policy

> [I]ncluded a student's race as a component of the PAI score, beginning with applicants in the fall of 2004. The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.
>
> Once applications have been scored, they are plotted on a grid with the Academic Index on the x-axis and the Personal Achievement Index on the y-axis. On that grid students are assigned to so-called cells based on their individual scores. All students in the cells falling above a certain line are admitted. All students below the line are not. Each college—such as Liberal Arts or Engineering—admits students separately. So a student is considered initially for her first-choice college, then for her second

> choice, and finally for general admission as an undeclared major. (507 U.S., 7 (2013))

In order to justify this practice, the university conducted a study later used to indicate lack of diversity in their classrooms. The new admissions policy

> [R]elied in substantial part on a study of a subset of undergraduate classes containing between 5 and 24 students. It showed that few of these classes had significant enrollment by members of racial minorities. In addition the Proposal relied on what it called "anecdotal" reports from students regarding their "interaction in the classroom." The Proposal concluded that the University lacked a "critical mass" of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program. (507 U.S., 6-7 (2013))

Within this justification, the university seems to rely on the promotion of diversity set forth in *Grutter*. Additionally, the court seems to use the precedent of *Gratz* in not giving race a numerical value in their admissions process.

It is in this 2004 policy that Abigail Fisher sought compensation for her subsequent damages. Fisher alleged the university's application review process violated her rights under the Equal Protection Clause. Prior to reaching the Supreme Court, "The parties cross moved for summary judgment" (507 U.S., 8 (2013)), which was granted by the District Court and affirmed by the United States Court of Appeals for the Fifth Circuit (507 U.S., 8 (2013)). The Summary Judgment relied on the *Grutter* precedent that "required courts to give substantial deference to the University, both the definition of the compelling interest of diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal" (507 U.S., 8 (2013)). Under this reasoning, the courts found the university innocent of the alleged violations.

After fighting a losing battle in the lower courts, Fisher's case was accepted and reviewed by the Supreme Court in 2012. The Supreme Court, whose opinion was delivered by Justice Anthony M. Kennedy, found that the lower courts failed to adequately apply the test of Strict Scrutiny to the case as they "confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications" (507 U.S., 15 (2013)). Relying heavily on Justice Powell's *Bakke* opinion, the Supreme Court looks to Justice Powell's explanation of Strict Scrutiny, explaining that "Strict scrutiny requires the university to demonstrate with clarity that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose" (Bakke, 438 U.S., at 306), (507 U.S., 11 (2013)). It was under this reasoning that the Supreme Court overturned the decisions of the lower courts.

The application of Strict Scrutiny under this terminology changed the way in which the admission policy of the university was viewed. Since the university could not effectively prove the necessity of their practices, the court ordered that,

> Strict scrutiny must not be "'strict in theory, but fatal in fact,'" *Adarand*, *supra*, at 237; see also *Grutter*, *supra*, at 326. But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact. In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that "encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U. S., at 315 (opinion of Powell, J.). The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion. (507 U.S. 15-16 (2013))

Finally, 5 years after Fisher was denied ~~from~~ admission to the university, she was granted admission by the Supreme Court in a 7-1 decision. There are 2 particularly interesting things about this case.

One, the fact that Strict Scrutiny can be applied both correctly and incorrectly, depending on how the definition is applied. Second, the fact that the Supreme Court decision, that of the lower courts, and the University of Texas' applicant review procedure relied so heavily on the precedents of previous affirmative action cases.

THE FUTURE: LEGAL SCHOLARS' THOUGHTS ON THE FUTURE OF AFFIRMATIVE ACTION CASES REGARDING COLLEGE ADMISSIONS

Given the highly debatable nature of affirmative action in college admissions, it is anyone's guess as to what the future of these cases will bring. Despite this unpredictability, opinions of legal scholars and authors of the topic are especially valuable here. Their experience and vast knowledge offers interesting, and sometimes conflicting opinons of the unpredictable future.

To begin, let us explore the opinion of Sheila Foster, the Vice Dean at Fordham University's School of Law and Co-Director at the Stein Center for Law and Ethics. Foster earned her Juris Doctorate degree from the University Of California Berkley School Of Law in 1988. Her legal interests include civil rights, anti-discrimination, environmental law, and land use. Dean Foster has authored and co-authored several important texts regarding antidiscrimination law including *Intent and Incoherence and Causation in Antidiscrimination Law: Beyond Intent Versus Impact, Intent and Incoherence, Breaking Up Payday: Anti-Agglomeration Zoning and Consumer Welfare, The Mobility Case for Regionalism, Collective Action and the Urban Commons, Urban Informality as a Commons Dilemma,* and *Integrative Lawyering: Navigating the Political Economy of Urban Development.* (law.fordham.edu) Foster's wide range of legal experience allows her to provide an interesting perspective on the

future of affirmative action. When asked her thoughts, from a legal perspective, on the future of affirmative action cases in regards to college admissions, Dean Foster stated,

> Affirmative action policies which are focused on race and ethnicity have been under considerable political and legal attack for the past two decades. Partly this is due to the growing societal discomfort with employing race alone as a proxy for social and economic disadvantage, but also because there is a sense that longstanding affirmative action policies exact too high a price on both their beneficiaries and others who are potentially impacted by such policies. As the Supreme Court has indicated just this past term, in *Fisher v. University of Texas*, federal courts are likely to continue subjecting race-conscious affirmative action policies to greater judicial scrutiny and thus they will be more difficult to justify. The question is whether universities and other institutions can find ways to continue to achieve the diversity necessary in a global, contemporary society and to assist disadvantaged socioeconomic groups and individuals without being race-conscious. It seems quite doubtful that reliance on just economic class, as some commentators have suggested as a reform, would produce the kinds of diversity that we have seen under traditional affirmative action plans. However, one outcome of the jurisprudence in this area will be to force institutions to come up with proxies for socioeconomic disadvantage that do not really heavily, or at all, on race and ethnicity. (Foster, 9/30/2013)

Dean Foster's opinion demonstrates an interesting viewpoint, as it reflects the opinion of one in the position of overseeing the law school candidate selection process, as well as one with legal experience. Dean Foster raised several key points. It seems as though, according to Foster, strict scrutiny will remain a highly important legal precedent in these cases. Foster worries whether "universities and other institutions can find ways to continue to achieve the diversity necessary in a global, contemporary society and to assist disadvantaged socioeconomic groups and individuals without being race-conscious" (Foster, 9/30/2013) is important. Under strict standards of assessment, it seems it will become more difficult for universities to diversify student bodies. Though some argue that socioeconomic disadvantage can result in diversity,

Foster suggests that this sort of disadvantage is not entirely effective in producing racially diverse results. For example, although the U.S. Census Bureau reports higher poverty rates among minorities[3], reflecting socioeconomic disadvantage which under certain conditions could be used to racially diversify the student body, the question then becomes how many of these minorities have the actual resources to attend a 4 year institution and subsequently apply to graduate programs. This is one instance in which the use socioeconomic disadvantage for diversification could prove insufficient.

Tanya Hernandez, professor at Fordham Law School and Yale Law graduate, adds value to the discussion at hand. Hernandez writes about discrimination, Latin American law issues, and employment, and has contributed to publications such as "The Long Lingering Shadow: Law, Liberalism and Cultures of Racial Hierarchy and Identity in the Americas" and "The Intersectionality of Lived Experience and Anti-Discrimination" (law.fordham.edu). Hernandez' opinion here is unique, as it calls into question the use of affirmative action in Latin America as well as the U.S. According to Hernandez,

> The current Supreme Court conservative majority has so little respect for the role of precedent in the area of racial equality jurisprudence that it is quite difficult to predict what will be the future picture for race based affirmative action in college admissions. You might find of interest a recent article I published comparing the current explosion of affirmative action in Latin America to its contraction in the US and what that portends for the future. (Hernandez, 11/14/2013)

[3] According to the U.S. Census Bureau report on poverty rates in the U.S. between 2007 and 2011, the "highest national poverty rates were for American Indians and Alaska Natives (27.0percent) and Blacks or African Americans (25.8 percent) (U.S. Census Bureau).

Hernandez seems to find the conservative majority a major obstacle to the success of affirmative action in college admissions. Her language regarding the conservative majority suggests that unless we see a change in the opinions and presence of the conservatives who hold great power in congress, the role of race in admissions will continue to be limited. Although she feels the future of affirmative action in the U.S. rather difficult to predict for this reason, she provides an explanation of a contradictory occurrence in Latin America.

In her article "Affirmative Action in the Americas", Hernandez contrasts the current role of affirmative action in the U.S. with that of Latin American countries such as Brazil, Columbia, and Ecuador. "The Americas present many contrasting approaches to affirmative action", she explains, pointing to the recent Fisher v. Texas case, in which the "Supreme Court side stepped a decision on whether a race-based admission policy is a constitutional right" (Hernandez, 1). Hernandez then compares this to the very different situation currently playing out in Latin America, explaining

> In contrast, several Latin American countries are beginning to explore more dynamic affirmative action policies. While many of these policies are recent and still developing, the new Latin American interest in affirmative action programs indicates how useful such programs can be in pursuing racial justice.
>
> In fact, Latin America has in some ways gone much further in broadly embracing affirmative action as a human right—a key perhaps to the growing support for the concept. [ ] [C]ountries in the Americas, such as Brazil, Colombia, Ecuador, Honduras, and Uruguay, are beginning to address the legacy of discrimination and the lack of economic opportunities that too often come with it. (Hernandez, 1)

From an informed American point of view, it is striking that affirmative action is beginning to flourish in Latin America, soley due to its taboo nature in the U.S. Hernandez brings to light

Latin American admissions policies that would without a doubt fail to satisfy various statutes and meet the test of strict scrutiny in the U.S. Columbia and Ecuador, for example, would likely be unlawful in the U.S. In Columbia,

> Several Columbian public and private universities created special admissions programs for ethnic minorities. The affirmative action programs began admitting Indigenous students first and then expanded to include Afro-Colombians. To be eligible for many of the programs, applicants must submit a certification of their Afro-descendant identity. (Hernandez, 4)

Furthermore, in Ecuador,

> [T]he government is planning to establish a 10 percent quota for Afro-Ecuadorian and Indigenous students in public and private secondary education. The policy is a response to Article 11.2 of the 2008 Ecuadorian Constitution: "The state will adopt affirmative action measures that promote equality in favor of those who find themselves in a situation of inequality." The government also plans to set quotas for faculty and research staff at institutions of higher education. (Hernandez, 4)

The policy in Columbia is similar to the special admissions system used by the University of California Medical School, found unlawful in *Bakke v. California*. Given the precedent of *Bakke* and the cases that followed, it is almost certain that the Columbian admissions policy would be face strong judicial opposition in the U.S. The plan established by the government of Ecuador would be found unlawful in the U.S., where the use of racial quotas for hiring and admissions is strictly forbidden. What is particularly interesting about the system in Ecuador is that it aims to assist those who have historically faced, and are *currently* facing inequality. This is quite different from the affirmative action approach in the U.S., which from its origin, aims to mend solely historical discrimination inflicted upon minority groups.

Nicholas Johnson, also a professor at Fordham Law School, contributes an opinion from a historical point of view. Prior to becoming an educator, Johnson was an active attorney at

Kirkpatrick and Lockhard and Morgan, Lewis and Bockius law firms. Johnson now focuses on constitutional law, and has recently published *Firearms Law and the Second Amendment*, as well as *Negros and the Gun*, which is to be released in March of 2014. Johnson suggests that affirmative action in the future will have remain in existence until major political changes take place, stating,

> Affirmative action is political spoils and will end when the political climate allows or demands it. As the modern civil rights era recedes from living memory, the odds increase dramatically that formal affirmative action measures will fade from the scene. But affirmative action will endure in effect because it is part of a range of polices and phenomena that have changed the culture. These legal and cultural phenomena have created a market for talented people of color and there is every reason to expect that this market will endure even after government mandated affirmative action has faded from the scene. The effect will be very much the same. Talented people will access premium opportunities that reflect the general demand for them in various markets. The long criticism of affirmative action – that it did not reach down to the underclass that has suffered more profoundly from the legacy of slavery, Jim crow and de facto segregation - will continue in the post affirmative action era. (Johnson, 11/1/13)

Here, Johnson insinuates that the further away we get from the times of which the injustices affirmative action has sought to remedy, the less likely we are to see affirmative action at the forefront of college admissions. In other words, affirmative action policies in the 1970's were likely to have appeared more frequently than they have in the so called "post-racial" society of 2013. Even so, Johnson suggests that affirmative action has helped create a market for talented people of color, a market which will continue, in turn preventing complete dismissal of all affirmative action policies. Johnson believes that the long criticism of affirmative action was its failure to "reach down to the underclass that has suffered more profoundly from the legacy of

slavery, Jim crow, and de facto segregation." This is different than reverse discrimination, which is often thought to be the mainstream criticism of affirmative action. The difference here seems to lie in the concept that Johnson approaches the topic of affirmative action from a historical point of view, while those who argue reverse discrimination approach the topic in the present. It is curious to ponder whether or not previous affirmative action cases would have had different outcomes, had those reviewing the case approached the subject with Johnson's point of view.

Barbara Perry, author and Senior Fellow Co-Chair of the Oral History Department of the University of Virginia, contributes more to this discussion. Perry has authored notable legal texts including *The Michigan Affirmative Action Cases*, *A Representative Supreme Court*, and *The Supremes: An Introduction to the U.S. Supreme Court Justices*. Perry also served as a judicial fellow for the Supreme Court from 1994-1995, where she "researched and drafted speeches for Chief Justice William H. Rehnquist" (www.millercenter.org). When asked her opinion on the topic at hand, Perry pointed to her yet to be released publication, *Bakke to the future: Affirmative action and the U.S. Supreme Court*, in *Politics, Groups, and Identities,* a journal of the Western Political Science Association, in which she explains,

> As the US grows ever more diverse, it is difficult to picture twenty-first century American society without some version of Justices Powell and O'Connor's commitment to expanding educational opportunities. Thus, the dilemmas and ironies of affirmative action will likely persist. From grassroots ballot initiatives to the US Supreme Court, American voters and jurists will face the challenge of resolving the prolonged tension between color-blind and color-conscious approaches to race and ethnicity in the nation's higher education system. (Perry, 6)

Here, Perry appears to value the importance of diversity holds in the U.S., while still acknowledging the difficulty it presents. Perry believes that some type of diversity promoting

practice will likely be developed, depending in large part on Justice Powell's *Bakke* opinion, and Justice O'Connor's *Grutter* decision. In *Bakke*, Justice Powell set the groundwork for the diversity argument, which provided important legal precedent exercised by Justice O'Connor in *Grutter*. According to Perry, it seems that the *Bakke* decision will remain highly important in the future as the U.S. diversity further expands.

Perry also touches upon an issue regarding the importance of Supreme Court Justices' political stances, and their impacts outcome of affirmative action cases. Interestingly, this issue will be raised in the opinion of John Skrentny in the following paragraph. While discussing *Fisher v. Texas*, Perry writes,

> The US Supreme Court accepted Fisher's appeal to answer whether the high court's decisions interpreting the 14th Amendment's Equal Protection Clause, including *Grutter*, permitted the University of Texas's use of race in undergraduate admissions decisions.
>
> What would be the impact of O'Connor's 2006 retirement, and replacement by conservative justice Samuel Alito, on the first affirmative action case to be decided by the court in a decade? A sure sign that the justices had been deeply split on the decision's reasoning was the fact that the case's oral argument occurred in October 2012, and nearly the entire term passed without a ruling.
>
> Justice Elena Kagan recused herself in Fisher because she had taken part in the case as President Barack Obama's solicitor general prior to joining the high court. Per Justice Kennedy's opinion for a 7:1 court, the majority vacated the 5th Circuit's ruling and remanded the case, ordering the appeals court to apply genuinely strict scrutiny, which "imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice" (Barnes 2013). The court also ordered the 5th Circuit to "assess whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." Although "[s]trict scrutiny must not be 'strict in theory, but fatal in fact,'" it should also not be

> "feeble in fact," Liberal justices Breyer and Sotomayor joined the opinion because it did not invalidate affirmative action. Their conservative colleagues, Chief Justice John Roberts and Justices Scalia, Thomas, and Alito, supplied four additional votes for requiring the 5th Circuit to review the UT program again, in hope that it will invalidate the university's policy. As in *Gratz*, Scalia and Thomas wrote separate concurrences to declare their continuing opposition to affirmative action as a per se equal protection violation. Writing in a 29 July 2013 letter, Scalia observed that "[t]he Court did the most it could in Fisher, given that Justice Kennedy's only reason for dissenting in *Grutter* was that it did not apply strict scrutiny properly." That is the power of a swing justice. Kennedy would not supply the fifth vote to make the four conservative justices victorious in voiding affirmative action on its merits. He, therefore, ruled the day in keeping affirmative action in university admissions alive by ruling on narrow procedural grounds. Scalia continued "Of course *Grutter* (and *Bakke*) ought to be overruled. I do not hold much hope that the tighter mushy language of Fisher will produce much of an improvement. By and large, the courts of appeals love affirmative action in academe, despite its well documented harmful effects upon minority students." (Perry, 4-5)

Above, Perry illustrates a situation in which the actions of the court were dictated, in large part, by the political tendencies of those in power. What is particularly interesting about this is the impact of Liberal Justice O'Connor's replacement with Conservative Justice Samuel Alito. Imaginably, Justice O'Connor would have joined the opinion Breyer and Sotomayor opinion regarding the validity of the University of Texas' admissions practices. However, with Justice O'Connor's replacement by Conservative Justice Alito, votes calling for further review of the university's practices reigned supreme. It is somewhat shocking that one's political position can impact such a decision, as it suggests the Supreme Court is a highly subjective body.

John Skrentny adds an equally valuable opinion to the discussion, somewhat similar to the above point from Perry. Skrentny, currently a sociology professor at UC San Diego, has authored numerous texts that explore the connection between race and institutional practices in

the U.S., including *After Civil Rights: Racial Realism in the New American Workplace*, *The Minority Rights Revolution, Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America*, and perhaps most relevant to the topic at hand, *The Ironies of Affirmative Action: Politics, Culture and Justice in America*, and *The Minority Rights Revolution.* In *The Ironies of Affirmative Action*, Skrentny provides an explanation of affirmative action that approaches the debate from a historical perspective, which portrays his argument in a rational and supportable fashion, as it analyzes the *big picture* of affirmative action. Skrentny's unbiased, rational, big picture thinking is reflected in his somewhat cautioned thoughts on the future of affirmative action. When asked his opinion, Skrentny explained,

> The future depends on the make up of the Supreme Court. With the current membership, I think we can see further tightening of the rules that limit when universities can use racial preferences in their admissions, without an outright ban. If a Democratic president is allowed to replace one of the current conservative members, I think we'd see fewer cases (because conservative organizations wouldn't want to bring them), but if we did get a case, we see more allowances for racial preferences. (Skrentny, 10/3/2013)

Here, Skrentny finds the future unpredictable in that we have no way of knowing who will comprise the Supreme Court in the years to come. This raises an important point about the affirmative action debate as a whole. It seems as though the flexibility the future holds, dependent upon those in power, reflects the idea that the affirmative action debate is open to different interpretations, which in turn can lead to different outcomes. In other words, the law can be manipulated, received and interpreted in different ways depending on the perspectives of those in power. To some, this may be discomforting, but as with any debatable topic, the

opinions set forth by those in power are taken as the accepted norm despite the general public's feelings towards the matter. Unfortunate; yes. Unavoidable; not so much.

When asked his opinion, Skrentny also encouraged exploration of his book *The Minority Rights Revolution.* To clarify, the term "Minority Rights Revolution" is defined by Skrentny as "a sudden growth of federal legislation, presidential executive orders, bureaucratic rulings, and court decisions that established nondiscrimination rights" and "targeted groups of Americans understood as disadvantaged but not defined by socioeconomic class" (Skrentny, 4). In other words, the Minority Rights Revolution refers to the emergence of affirmative action policies. Although many topics are covered in the text, Skrentny specifically speaks to the future of affirmative action in his conclusion. In attempt to foreshadow what is to come of such policies, Skrentny begins, stating,

> From our standpoint at the beginning of the twenty-first century, some aspects of the minorities rights revolution appear more durable than others. Classical liberalism in all probability will remain unassailable. Also most likely to survive are the rights policies for the disabled and for women. Those for ethnic and racial minorities have a less clear future. The spectacular growth of official minorities in the American population may have very different effects. (Skrentny, 354)

Here, Skrentny suggests that the future of minority rights is uncertain. The fact that Skrentny believes rights policies for women and the disabled will remain intact suggests that race is a highly sensitive category of its own; one that cannot be dictated with as much certainty as that of rights for women and the disabled.

Skrenty continues to explain that the increasing diversity in the U.S. has the potential to "lead to political and practical problems" (Skrentny, 354), which he suggests has already begun

as a result of the "growing numbers of Latinos in search of jobs [] confronted [by] the established African Americans in government employment" (Skrentny, 354). For example, Skrentny explains,

> In Los Angeles, where blacks were overrepresented in city government, Latino organizations demanded that city employment reflect Latino proportions in the population. On the federal level, Congressman Luis Gutierrez (D-IL), a Puetro Rican from Chicago, asked for a Government Accounting Office study of affirmative action in the postal service. The report found that nationally African Americans were overrepresented in postal service employment was four times greater than their proportion in the population, and in Los Angeles it was six. In contrast, Latino proportions were less than half. Meanwhile, blacks complained of Asian Americans displacing them in minority-capitalism programs. (Skrentny, 354-355)

Although the above example is about employment, the conflicts here can also impact college admission. For example, a federally funded university begins to receive an increasingly large number of applications from black individuals. After sifting through applications, several students are offered admission. *However, the demographic makeup of the incoming class fails to reflect the diversified field of applicants.* Here is where practical and political problems could emerge. To explore a non-hypothetical situation, let us look at the demographic make-up for Fordham University at Rose Hill. For the most part, the student body is white. However, beyond the gates, the surrounding Bronx community is primarily black and Puerto Rican. It is undeniable that the diversity outside the Fordham gates is not reflected in the student body. Here, practical problems do in fact arise. Many students develop a mentality towards the Bronx community that reflects a "them" and "us" pattern of thinking. For example, many students make discriminatory comments in regards to race and income in which they refer to non-

Fordham members of the Bronx community as "The Locals"; a title that carries significant negativity when used by the Fordham student body. Perhaps if Fordham's student body was more racially and economically diverse population, this poorly practiced discriminatory attitude would not be held by students. Though unfortunate, this example nicely demonstrates what Skrentny suggests could take place

Skrentny then raises another possible area of future conflict. Skrentny explains that in a "difficult and uncomfortable decision, policymakers or courts will have to decide just how much of a minority one has to be to qualify [for benefits programs] and how the government can verify minority status" (Skrentny, 355). For example, how and when do we identify someone as black? Does the one drop rule apply, or must one have been conceived by one or both parents who appear black to the naked eye? What about intraracial individuals who do in fact have a black parents, but appear white to the general public? Of course, these questions are not easy to answer, which is likely why Skrentny refers to this issue as "difficult and uncomfortable." The pointed questions above demonstrate just how sticky racial classification is. In the future, it is possible that racial classification will become even more problematic, as interracial marriages increase, and the offspring of such partnerships become more apparent.

As for his view of the fate of the minority rights revolution as a whole, Skrentny places the future in the hands of the nation's Judges; a conclusion that was reflected in his aforementioned response. "If the minority rights revolution is to be undone at the federal level", he explains, "it will most likely be at the hands of persons who do not have to worry about the next election—the nation's judges" (Skrentny, 357). He reasons that "if changes in the minority rights policies are undertaken by a president or a join action of Congress and the president", the

effort would grant affirmation to the minority rights revolution. Essentially, this means that the future of affirmative action is, as stated in his emails to me, in the hands of the Judges who will oversee future cases.

Peter Schmidt provides yet another thought on the future of affirmative action in college admissions. Schmidt is author of *Color and Money: How Rich White Kids Are Winning the War Over College Affirmative Action*, and "senior writer for The Chronicle of Higher Education, where he covers affirmative action, academic labor, and issues related to academic freedom" (www.chronicle.com). When asked his thoughts on the topic at hand, Schmidt pointed to his June 2013 publication, "Supreme Court Puts New Pressure on Colleges to Justify Affirmative Action" in The Chronicle of Higher Education. Within the article, Schmidt expresses his opinion that the *Fisher v. Texas* ruling "does not substantially alter the legal landscape for colleges, but it does put them under more pressure to justify such affirmative action policies than they had been under before" (Schmidt, 2013). Here, Schmidt suggests that the future of affirmative action will require educational institutions to provide a higher level of justification for their affirmative action admissions policies.

Schmidt later quotes Sherrilyn Ifill, president of the NAACP Defense and Educational Fund. Ifill suggests that *Fisher* has implications for the future of affirmative action in college admissions, stating that the "ruling added a wrinkle by sharpening the standard that universities must meet," requiring them to demonstrate the absence of workable race-neutral alternatives to their policies" (Schmidt, 2013). Here, similar to Schmidt, Infill suggests that the precedent of the *Fisher* case will subject universities to more demanding justifications for their admissions practices.

Last but certainly not least, Carl Cohen provides an opinion that adds quite a stir to this conversation. Cohen is the author of *Naked Racial Preference*, one of the most important books regarding the affirmative action debate. In *Naked Racial Preference*, Cohen shows his stark opposition to the use of racial preference in college admissions; an opinion which is reflected in his thoughts on the future of affirmative action. In a friendly response, Cohen offers a strong view of the issue at hand, stating,

> I am pleased that you are reading Naked Racial Preference. It is, I believe, a very good book. Please convey my cordial greetings to Dr. Mark Naison.
>
> You ask what I think about the future of affirmative action college admissions, by which I suppose you mean programs that give preference by race or ethnicity in university admissions. In my judgment such programs are doomed. Seven states have already forbidden such preferences. They are, for state universities, a plain violation of the great Civil Rights Act of 1964, which forbids discrimination by race in institutions receiving Federal financial assistance. They are (notwithstanding the tortured decision of the Court in *Grutter v. Bollinger*, 2003) a clear violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. They cut against the grain of American tradition and widespread American belief in the equality of persons of all races. The days of ethnic preference, however well motivated, are numbered. (Cohen, 9/27/2013)

Here, Cohen approaches the question with a seemingly definitive answer. Given Cohen's strong argumentative persuasion technique and his overall disapproval of the use of race in admissions demonstrated in *Naked Racial Preference,* this is no surprise. If Cohen is correct, future affirmative action policies are destined for failure, as they are clear violations of the civil rights act of 1964 and the Equal Protection Clause of the 14th Amendment. The last comment Cohen makes, however, seems somewhat problematic, in that it neglects the vast history of racial discrimination against minorities in the U.S. Although America *now supposedly* values racial

equality among all individuals, the previous and current injustices faced by blacks in the U.S. illustrate a factual contradiction to these so called American Values. Can one, in all honesty, attest to the statement that blacks were treated equally during slavery when blacks were treated as objects rather than humans, or when numerous unwarranted lynchings went unpunished throughout the mid to late 1900s? This loophole in Cohen's explanation, when we take history into account, entails a contradiction that warrants further explanation. Admittedly, I was too nervous to challenge Cohen on this point, which I feel is somewhat understandable to anyone who has read his strongly opinioned writing.

Up to this point, the voices of legal scholars and authors have been given the stage. Towards the end of my research, I realized that it is equally important to consider the viewpoints of those directly affected by the future of affirmative action: underrepresented minorities. I currently live on West End Avenue and 63rd Street in Manhattan. In order to get to my apartment from Fordham's Lincoln Center Campus, I walk through the Amsterdam Housing Projects; a predominantly black community. Over the past few months, I have become friendly acquaintances with several individuals in the neighborhood. Therefore, I figured the Amsterdam Housing Project was a great place to ask a few young adults their opinions on the future of affirmative action in college admissions. I questioned 10 individuals between the ages of 20 and 30. 3 out of the 10 did not have an opinion; they simply responded with different renditions of "I don't know." Whether this reflected apathy or lack of knowledge on the subject I do not know; either way, their limited responses suggests that neither they nor their peers had benefited from affirmative action policies. The remaining 7 individuals expressed a rather pessimistic message that voiced the reflection presented by those above. Generally, they suggested that affirmative action had not benefitted anyone they were acquainted with. For example, one individual, a 23

year old male, stated, "Whatever that shits doing it ain't working for none of us in here, I don't know man, that shit is wack." A similar response was given by a 28 year old female, who stated, "Most people I know who go to college attend community colleges or enroll in online classes. I haven't known anyone in this community who has gone to an Ivy League school or anything like that, you know?" Others offered similar renditions of these responses, which was rather upsetting to hear. It provoked a fear within me that if these individuals feel affirmative action has failed their community, it is truly not achieving its purpose. This made me question why affirmative action is so heavily debated; if it is not working, why do universities still try to create such policies. Could the Supreme Court not avoid such cases if the policies ceased to exist? Furthermore, would disadvantaged minorities *even slightly* feel the wrath of its removal? After grappling with these thoughts, I found myself hoping that it was a mere coincidence that the 10 I interviewed expressed such pessimism, though the reality of the harsh reality of the situation makes me weary of such positive thinking. Therefore, future policies to help disadvantaged minorities would not actually help the situation. It seems the opinions of those subjects have become somewhat tainted by the lack of apparent upward mobility in their community. The opinions here call into question the current utility of affirmative action in college admissions. In other words, if individuals supposedly directly impacted by these policies do not see any results, does that suggest the need to restructure policies that would in fact enable upward mobility in these communities? Unfortunately, the answer to this question only elicits contemplation, and further complicates the future of affirmative action in college admissions.

PERSONAL REFLECTION/ CONCLUSION

After investing a great deal of thought, time, and effort into this topic, it is only appropriate to that I explain why I chose to write about the topic, as well as my own opinion of the future of affirmative action college admissions cases (not to be confused with the future I *hope* to see, which is an equal presence of blacks and whites on all college campuses).

To begin, I find it important that I preface this with an explanation of my own racial background, as this is at the core of my decision to write on this topic. I come from an interracial family; my father is Black, and my mother is White. I have always been torn about the affirmative action debate. Part of me feels as though affirmative action is divisive because it creates a society that views individuals for their race rather than their individuality. For me, this is problematic; I was raised in a color-blind household, which was demonstrated through my parents' admirable color-blind love for one another. Had my parents seen race through the color-coded scope of affirmative action, I fear our family would simply not have been; a devastating thought to come to terms with.

On the other hand, part of me feels as though affirmative action is entirely justified, necessary, and important. I have always struggled greatly coming to terms with the harsh realities for Blacks in the U.S., historically and presently speaking. By this, I mean I am *deeply bothered* by racial injustice, and I constantly, unintentionally see the divisive effects of historical oppression on the black community. This is something that has become especially troublesome throughout my college career. As an African American Studies major, I have constantly been obligated to read, analyze, and think critically about racial injustice. At one point, I actually changed my major to Psychology, because I had such difficulty accepting the reality of race in America. After I realized that I needed to satisfy the burden I was faced with by the racial

reality, I switched my major back to African American studies, and continued hesitantly and courageously. Essentially, what all of this boils down to is that part of me supports affirmative action; strongly at that. My decision to write about this topic comes from this personal conundrum. Through my research, I hoped to settle my conflicting thoughts, and find my own voice in the topic. Unfortunately, I cannot honestly conclude that I have resolved this confliction; my opinion of affirmative action is still torn. However, my opinion is now torn in a different sense, a result of something I have realized in writing this paper. Now, I realize that *it is okay* to be conflicted on the affirmative action debate, because it is a deeply complex topic with strong arguments on both sides. I feel as though my ability to derive value from both sides of the debate is a reflection of my open-mindedness; an attitude which I strongly believe will prove important throughout my future.

My opinion as to the future direction of affirmative action college admission cases, I agree with John Skrentny in saying that it depends, in large part, on the members of the Supreme Court. After examining many of these cases very closely, I have come to understand that those who make the decisions are the ones with all of the control. For example, if in the future the Supreme Court is comprised of many Justices who side with Justice Powell, under whom the only argument for the use of race is to promote diversity, the rulings of affirmative action cases will be based, in large part, on the precedents set forth by Powell in *Bakke v. University of California*. On the other hand, if Supreme Court Justices disagree with Powell's Bakke decision, the direction of these cases could go the complete opposite way. However, I find it hard to imagine the latter scenario for two reasons. First, the strict scrutiny standard seems too strong to allow adverse decisions. Second, although I do not consider today's society "post-racial", I do believe those in power are working hard to achieve this goal. If affirmative action case decisions

reflect the violation of people's rights due to race, this progress would be jeopardized. For that reason, I also find validity in the question raised by Dean Foster, contemplating whether or not universities will be able to create admissions policies that promote diversity (which is growing, and will likely continue to do so), while respecting the individual rights of all individuals, and passing the test of strict scrutiny.

As mentioned before, what is most troublesome to me is the implication that underrepresented minorities do not see the benefits of these policies, as it suggests that current affirmative action measures being taken in an effort to include such individuals in higher education are ultimately failing. Although the future of affirmative action in college admissions is uncertain, it seems as though a daunting challenge lies ahead. If we as a society are committed to the advancement of underrepresented minorities, educational institutions must find a way to increase this demographic among college campuses. Of course, this is no easy task given the issue of reverse discrimination presented throughout this paper. This conclusion may come across somewhat incomplete or unsatisfying, but this is merely a reflection of the fact that future of affirmative action in the educational sphere only elicits mere contemplation. In a perfect world, all U.S. citizens would be given equal opportunity to achieve higher education, which they could acquire in lieu of varying levels of difficulty imposed upon them by the hierarchical society that is the U.S. However, this is not a perfect world, and the reality of such disadvantage demands swift attention that will ignite change across college campuses throughout the U.S.

Within this paper, it has been demonstrated that affirmative action in college admissions has been, and will remain, a hotly debated topic. The reverse discrimination imposed on majority applicants is difficult to disprove, given the 14th amendment, the Civil Rights Act of

1964, and the test of strict scrutiny. However, the lack of minority presence on many college campuses throughout the U.S. seems to be equally detrimental to the equality granted to U.S. citizens. The daunting task of remedying both of these ills lies ahead of those in power. Until such a solution emerges, I stand by my contention that in the midst of such injustice, we cannot fully support the claim that the United States of America is

[o]ne nation under God, indivisible,
with Liberty and Justice for all.

(The Pledge of Allegiance, 1892)

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