

From the Courtroom to the Voting Booth: Defending Affirmative Action in Higher Education Admissions

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In 2003, affirmative action survived its most important legal challenge to date.¹ At the end of this challenge, the now famous University of Michigan cases reaffirmed the use of race-based college admissions policies that are aimed at attaining student body diversity. However, three years later, a majority of Michigan voters approved an amendment to the state constitution that banned “affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, *education*, or contracting purposes.”² So far, anti-affirmative action initiatives have also passed in California and Washington, and will appear on ballots during the 2008 election cycle in Arizona, Colorado, Missouri, and Nebraska.³

So, while affirmative action in higher education admissions may have survived recent Courtroom challenges, it may not survive the voting booth. Put differently, it is becoming all too clear that legal victories alone cannot protect affirmative action in higher education admissions. The purpose of this essay is threefold. First, I attempt to carefully analyze current affirmative action case law as it applies to higher education admissions, paying special attention to the idea of student body diversity. Second, I demonstrate that the arguments used to successfully defend affirmative action *legally* are not sufficient to defend it *politically*. Finally, I make the case for a new approach to supporting affirmative action that is based on arguments that move beyond the legal reasoning offered by the Supreme Court.

AFFIRMATIVE ACTION IN HIGHER EDUCATION CASE LAW

The Supreme Court released both of its University of Michigan decisions, *Grutter v. Bollinger* and *Gratz v. Bollinger*, on June 23, 2003. These decisions represent the Court's most important statements on affirmative action since it decided *University of California v. Bakke* in 1978.⁴ Due to space constraints, I will limit my focus to *Bakke* and only one of the two University of Michigan cases: *Grutter v. Bollinger*.

UNIVERSITY OF CALIFORNIA V. BAKKE

In *Bakke*, the Court sought to answer the question of whether or not a state university could use race as a factor in its admissions process. The University of California, Davis, (UC Davis) Medical School had twice rejected Alan Bakke's application for admission, even though his grades and test scores were higher than many of the applicants who were accepted. As part of its admissions procedures, the medical school had set aside sixteen seats (out of 100) for qualified minorities. Among the stated reasons for this were: (1) to redress past unfair exclusion of minorities from the medical profession, (2) to counter the effects of social discrimination, and (3) to attain a diverse student body (*B* at 300). Bakke argued that this

affirmative action program violated his Equal Protection rights under the Fourteenth Amendment of the U.S. Constitution because it excluded him from consideration for the sixteen “set aside” seats solely on the basis of his racial background.

In a plurality opinion where there was no single majority, four of the Justices, plus Justice Lewis Powell, concluded that the university’s use of a rigid quota system, where a set number of seats is isolated from the general pool of candidates, *was not constitutionally permissible*. Four other Justices, plus Justice Powell, concluded that the use of race as a plus-factor in admissions decisions *was constitutionally permissible* (see table 1).

The so-called “*Bakke* plurality opinion,” with its less than definitive statement, has guided affirmative action law for thirty years (*G* at 2335). Three ideas that Justice Powell articulated in his opinion stand out. The first is the idea that admissions procedures that amount to rigid quota systems are unconstitutional. Justice Powell argues that the fatal flaw of UC Davis’s process was that it “tells applicants who are not Negro, Asian or Chicano that they are totally excluded from a specific percentage of seats in an entering class” (*B* at 320). In response, universities across the nation adopted admissions policies that were more flexible, that considered race as only one plus-factor among many, and that allowed each applicant to be considered for every available seat.

The second idea that deserves attention is Justice Powell’s affirmation of the use of “strict scrutiny” as the appropriate level of review for race-conscious laws and policies, even if they are based on “benign” forms of discrimination (that is, they are designed to include minorities, as opposed to excluding them). He writes, “Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination” (*B* at 291). This set a high bar for affirmative action programs to overcome before they can be deemed constitutional. As a result, the idea that “benign discrimination” may deserve a lesser form of scrutiny (which was advocated by Justice William Brennan in his concurring opinion in *Bakke*) never got off the ground.

TABLE 1 *Bakke* Plurality Opinion

	<i>Admissions Procedure Is Unconstitutional</i>	<i>State Can Use Race as a Factor</i>
Justice Powell	Yes	Yes
Justice Brennan (plus Justices White, Marshall, and Blackmun)	No	Yes
Justice Stevens (plus Justices Stewart, Rehnquist, and Burger)	Yes	No

The third noteworthy idea is Justice Powell's argument that student body diversity counts as a "compelling state interest" under strict scrutiny review. Moreover, according to Justice Powell, "the attainment of a diverse student body" is the *only* constitutionally permissible purpose for race-conscious admissions procedures (*B* at 311–12). At the heart of this argument is the idea that affirmative action may be used to improve the educational process, but not to address racial inequality.

GRUTTER V. BOLLINGER

The facts in the *Grutter* case are similar to those in the *Bakke* case. Barbara Grutter, a white applicant to the University of Michigan Law School, was denied admission. In her lawsuit, she asserted that, due to the Law School's race-conscious admissions process, she had been discriminated against on the basis of race. As a result, she claimed that the Law School had violated the Equal Protection Clause of the Fourteenth Amendment. The University openly admitted that, following the *Bakke* opinion, it used race as a factor in its admissions process in order to achieve student body diversity (*G* at 2330).

However, unlike the rigid point system used in the University of Michigan's undergraduate admissions (which was rejected in the *Gratz* opinion), the University's Law School used a more flexible, individualized assessment. Applicants received neither an automatic admission nor an automatic rejection. While test scores and grade point averages were considered in admissions decisions, so were a host of other "soft variables," including the applicant's racial background, and the quality of his or her recommendations and essays.

In a 5–4 opinion, the *Grutter* Court held that the Law School's use of race did not violate the Constitution. In writing the majority opinion, Justice Sandra Day O'Connor relied on Justice Powell's reasoning in *Bakke*. She asserted: "Today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions" (*G* at 2337). Justice O'Connor also found the Law School's use of race narrowly tailored, meaning that its admissions program included an individualized review of each applicant, and did not mechanically accept or reject an applicant based on his or her race.

STUDENT BODY DIVERSITY

So far, I have shown that, since the *Bakke* decision, the Supreme Court has justified race-conscious university admissions programs by arguing for the importance of student body diversity. In this section, I carefully examine how the Court has articulated this idea, and how it may have changed in 2003 with the release of the *Grutter* opinion.

THE *GRUTTER* SHIFT: A DIFFERENT UNDERSTANDING OF STUDENT BODY DIVERSITY

Some of the reasons Justice O'Connor offers in support of student body diversity refer to the impact that such diversity can have *beyond* the walls of the classroom. These extraeducational reasons seem to depart from the more limited, strictly education-based view of student body diversity that was articulated by Justice Powell in the *Bakke* opinion. For example, O'Connor seems to suggest that student body diversity helps to shore up national unity: "Effective participation by

members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized” (*G* at 2340–41). While student body diversity may reasonably work to ensure effective civic participation by minorities, which, in turn, may increase national unity, Justice O’Connor’s use of a link between student body diversity and national unity to justify a race-conscious admissions program seems conspicuously out of sync with Justice Powell’s statements on the matter.

Justice O’Connor also says, “It is necessary that the path to leadership be open to talented and qualified individuals of every race and ethnicity” (*G* at 2341). She continues by arguing that the education of minority students strengthens our government, and that “universities, and in particular, law schools, represent training grounds for a large number of our Nation’s leaders” (*Ibid.*). She then suggests that this body of leaders gains legitimacy when it is racially diverse (*Ibid.*). Again, while increasing the legitimacy of our national leaders may be a very important result of student body diversity, Justice Powell would likely not have used this reason to justify the constitutional significance of student body diversity.

These statements by Justice O’Connor hint at a different justification for race-conscious university admissions policies, one based on the premise that educating racial and ethnic minorities is undeniably important for society.⁵ However, Justice Powell’s discussion of the importance of student body diversity was intentionally focused on *educational* benefits (as opposed to social benefits), or what might be thought of as learning benefits, such as those that come from exposure to the views of students whose cultural backgrounds differ from one’s own. When Justice Powell expands on the idea of student body diversity, he writes that it contributes to an academic atmosphere that is conducive to “speculation, experiment and creativity” (*B* at 2759–61), that it offers students a “wide exposure to a robust exchange of ideas” (*Ibid.*), and that there is power in “learning through diversity” (*B* at 2760). He does not, however, mention what student body diversity might do for society. In fact, Justice Powell explicitly states that affirmative action cannot be legally justified on the basis that it produces social benefits, such as countering the effects of societal discrimination and increasing the number of minority doctors who work in underserved communities (*B* at 2758–59).

My argument in this section is that Justices O’Connor and Powell seem to offer two different understandings of student body diversity. While Justice Powell limits this concept to the educational process, Justice O’Connor recognizes its larger, extraeducational implications. While Justice Powell argues against the idea that student body diversity can be justified because it might increase the number of minority doctors, Justice O’Connor argues that increasing the number of minority leaders is an important result of student body diversity. The upshot is that the *Grutter* opinion represents a shift in the way that the Court recognizes the social benefits of student body diversity. This shift suggests the need for an adjustment in the way in which affirmative action proponents justify race-conscious admissions policies. Before arguing for this adjustment, I will explain *why* the legal arguments made in support of affirmative action, while necessary, are now insufficient.

THE LEGAL ARGUMENTS SUPPORTING AFFIRMATIVE ACTION ARE UNPERSUASIVE

For the past thirty years or so, the American voting public has accepted the use of affirmative action in higher education admissions. However, more and more states now are voting to ban affirmative action. Why? Perhaps it is because our universities have become sufficiently diverse. Or perhaps it is because we have accomplished all that can be done to make our universities more diverse. Or, perhaps, student body diversity no longer is considered an important part of the educational process. But if these reasons do not ring true, why are a majority of Americans voting to ban affirmative action in state after state? More to the point, what should we do, now that the Supreme Court has reaffirmed the use of race-based university admissions policies at the same time as state level anti-affirmative action initiatives are demonstrating that a majority of the voting public is unwilling to follow suit? In response, I argue that one of the first things that proponents of affirmative action need to do is to recognize that the legal arguments offered in support of affirmative action are politically unpersuasive.

STUDENT BODY DIVERSITY IS UNPERSUASIVE

Before showing how student body diversity is an unpersuasive justification for affirmative action, I want to recognize one important reason that may have led Justice Powell to rely on it in his decision. This reason is that, following *United States v. Carolene Products Co.*,⁶ a “more searching judicial inquiry” has been applied to state laws and policies that discriminate according to race. This put the *Bakke* Court in the position of having to either apply strict scrutiny to affirmative action or else offer arguments to show how a program of affirmative action in higher education admissions, which openly discriminates according to race, somehow escapes strict scrutiny review. Justice Powell chose the first option.

Here, Justice Powell faced another problem. He needed to explain how a race-based admissions program might serve a compelling state interest. Justice Powell met this challenge with the ingenious idea of student body diversity. By limiting the benefits of student body diversity to those that are educational in nature, Justice Powell avoided having to argue, in a confusing and circular fashion, that the state may use policies that discriminate according to race, in order to remedy the negative effects of a society that discriminates according to race.

However, despite the problems that Justice Powell may have avoided by employing the justification of student body diversity, his argument laid the groundwork for another problem. This problem is that the persuasive power of the student body diversity justification has begun to fade. Put differently, the general public no longer seems to agree with the argument that universities ought to be allowed to suspend the Equal Protection Clause of the Fourteenth Amendment in order to discriminate among applicants according to race, solely for the purposes of increasing student body diversity.

Perhaps the main reason that student body diversity is a politically unpersuasive justification for affirmative action is that it is a small idea (limited to the educational realm). Accordingly, it never touches on the big reasons (for example, racial segregation and inequality) that people instinctually think that affirmative action

should address. However, I argue that there are additional reasons that the student body diversity justification is unpersuasive. For one thing, it is conceptually awkward, and can generate odd implications. For example, the educational benefits that flow from student body diversity (such as cross-racial understanding and exposure to a variety of different cultural views) seem, in one sense, only to apply to nonminority students. After all, it is only this class of students that benefits from the *otherwise unavailable* experience of learning with minority students that is brought about through affirmative action programs designed to obtain student body diversity. Put differently, affirmative action is not needed in order to provide a specific form of educational diversity for Black or Hispanic students. Such students can go to practically any college in the nation and learn with students who are of European ancestry and who, therefore, come from backgrounds that are different from their own. To be sure, the vast majority of Black and Hispanic students in this nation *have always* learned in institutions that are populated with people from backgrounds that are different from their own. In this sense, Justice Powell's limited view of student body diversity leads to an awkward implication: the race-based admission of minority students can only be justified by the idea that it improves the educational experiences of *non-minority students*.

NARROW TAILORING IS ALSO UNPERSUASIVE

The second facet of strict scrutiny review requires the state to prove that any race-conscious law or policy it employs is "narrowly tailored." To be narrowly tailored essentially means that the policy is "no broader than absolutely necessary."⁷ The Court has argued that one way universities can show that their affirmative action admissions policies are narrowly tailored is by proving that they have first exhausted a search for programs that achieve the goal of student body diversity through *non-affirmative action, race-neutral efforts* (*G* at 2345). The obvious message here is that affirmative action is legally distasteful and should only be used as a last resort.

This makes it painfully clear how the legal arguments for affirmative action are designed in a way that makes them ineffective tools for rousing endorsement of race-conscious university admissions programs. There is a straightforward reason for this. The Court's task when analyzing a race-conscious program is to determine exactly how harmful and illegal the program is, so that it can effectively decide whether or not it violates the Constitution. Because the Court is solely concerned with *violations* of law, it tends to focus on the worst (legally speaking) aspects of the program or policy.

Given this, affirmative action case law amounts to a reluctant legal compromise, where the decision to uphold a race-conscious admissions policy is no more than a cautious concession to the fact that, even though such policies are constitutionally distasteful, they may be used as long as they are employed in very limited ways (that is, as long as they are narrowly tailored) in order to achieve one limited aim (that is, student body diversity). Obviously, arguments based on the suggestion that affirmative action is legally distasteful and may only be used as a last resort are unlikely to inspire political support for race-based admissions programs.

TOWARD MORE PERSUASIVE ARGUMENTS

Other commentators have recognized weaknesses in the reasoning offered by the Supreme Court when justifying affirmative action. Some have tried to shore up the Court's reasoning with adjustments that they believe strengthen the original arguments. One representative example of this kind of work is found in *Leveling the Playing Field*, by Robert K. Fullinwider and Judith Lichtenberg.⁸ In this section, I examine two of their arguments.

THE INTEGRATION ARGUMENT

Fullinwider and Lichtenberg offer an adjustment to the *Bakke-Grutter* line of argumentation. Instead of a limited view of the educational benefits that flow from student body diversity, they suggest that affirmative action is better justified by what they call the "integration argument."⁹ The integration argument is as follows:

P1: For the good of the state, the university must graduate integrated classes.

P2: To achieve integrated classes, the university must employ racial and ethnic preferences.

C: Therefore, the university is justified in giving such preferences.¹⁰

Fullinwider and Lichtenberg say that their argument is much more straightforward than the student body diversity argument offered in current affirmative action case law, in that there is "no slack between means and ends."¹¹ They are right: it is more straightforward. But it is so precisely because it strays, intentionally or unintentionally, from the legal tightrope created by *stare decisis* (legal precedent) and constitutional interpretation. For example, their argument directly ties a larger noneducational benefit (that is, what is good for the state) to race-preference admissions programs. However, the Court cannot make this move. It is bound by *stare decisis* and the accepted standards of constitutional interpretation, upon which the Court has long held that race-conscious laws and policies that are pursued for noneducational social benefits are not legally valid.

So the integration argument does not strengthen the legal arguments that are used by the Court to justify affirmative action. However, this is not a crime, for our purposes, as long as it works to make the legal arguments more *politically persuasive*; and the integration argument is a good start toward this end. It highlights exactly what most people think is fundamentally important about affirmative action admissions programs: they improve the chances that universities will graduate racially and ethnically integrated classes, and that this, in turn, will help to alleviate racial segregation and inequality. Moreover, the problems of racial segregation and inequality are simply more tangible and pressing than the problem of inadequate student body diversity and, thus, a focus on how affirmative action addresses these problems tends to carry more persuasive weight.

THE INDIVIDUALISM ARGUMENT

In addition to developing arguments that tease out the ways that race-based university admissions programs work to reduce tangible and pressing social

problems, proponents of affirmative action also might develop arguments that challenge the ideas and criticisms that weaken support for affirmative action. One such idea is that affirmative action wrongly treats people as racial group members, rather than as individuals. Out of this idea grows the contentious claim that affirmative action somehow punishes some individuals simply because they are members of a certain racial group in order to remedy harms that they themselves did not commit (*B* at 2751).

Fullinwider and Lichtenberg address this troubling criticism of affirmative action by first analyzing the way that the Court conceptualizes the principle that people should be treated as individuals.¹² In response, they suggest an alternative understanding that the Court might use to justify affirmative action. They write, “Where a person’s most basic interests are involved, and where her standing as a citizen, and, more crucially, as a person are at stake,”¹³ she must be treated as an individual. This standing cannot be traded off for some social gain. Following this, Fullinwider and Lichtenberg argue that race-based admissions programs fall short of encroaching upon anyone’s most basic interests and of putting anyone’s standing as a citizen and as a person at stake. Therefore, such programs, properly understood, do not violate, in a morally problematic manner, the principle that people should be treated as individuals.

Again, like the integration argument discussed above, the individualism argument offered by Fullinwider and Lichtenberg is of questionable legal significance. In another affirmative action case, *Adarand v. Peña*, Justice Antonin Scalia cuts to the essence of the problem, legally speaking, of treating individuals as racial group members: “Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a debtor or creditor race.”¹⁴ Two key ideas are captured here. The first is that any legal justification for burdening an entire race in order to benefit another must be based solely on its constitutional merits, as opposed to its moral merits. This does not deny the possibility that moral reasoning such as that offered by Fullinwider and Lichtenberg does not or cannot influence legal thinking — only that its influence is strictly limited by how well it fits with established legal analysis.

Second, Justice Scalia highlights the fact that, from a constitutional perspective, talk about “racial group harms” and “racial group remedies” is suspect. “Harm” and “remedy” are legal terms of art (that is, they have specific legal meanings and implications). Generally speaking, the status of the individual plays a central role in the standard harm/remedy formula, which can be expressed this way: X may not receive a remedy from Y, unless Y harmed X. The individualism argument seems to violate this legal principle. It seems to suggest that, as long as certain conditions are met, a member of one racial group *may* receive a remedy at the expense of a member of another racial group, regardless of whether or not the second member harmed the first.

But again, for our purposes, it is not a crime that the individualism argument is of questionable legal significance, as long as it effectively offsets criticism of affirmative action and, therefore, helps to make the case for race-based admissions

policies more politically persuasive. And I think it is a step in this direction. At a minimum, the individualism argument offers a feisty challenge to the persistent and troubling claim that affirmative action programs *wrongly* treat people as racial group members, rather than as individuals.

While Fullinwider and Lichtenberg may not have intended it, their individualism and integration arguments point to a new approach for defending affirmative action: an approach built on a wider and more aggressive focus on bold and creative arguments that are unconstrained by legal reasoning.

CONCLUSION

Over the past thirty years or so, the Supreme Court has offered a careful and effective line of argumentation supporting the constitutionality of race-based higher education admission programs. While legally effective, this line of argumentation seems less and less politically persuasive. To date, three state referendum initiatives to ban affirmative action have succeeded; four more will be included in the 2008 election cycle. Affirmative action opponents have vowed to keep pursuing referendum initiatives until affirmative action no longer is a part of American life.¹⁵ Thus, saving affirmative action in higher education admissions is now dependent on winning over the American public, rather than on winning in court.

Affirmative action is a legal concept. As such, arguments for and against it have focused on the technical legal language and constitutional reasoning offered by the Supreme Court. In this essay, I have tried to make the case for new, more politically persuasive arguments that depart from this specialized approach. While academically interesting and important, I argue that legal defenses of affirmative action, such as those that look to clarify the original meaning of the Fourteenth Amendment,¹⁶ or those that ponder the meaning of, the merits of, or the logic of student body diversity,¹⁷ are unavoidably and unnecessarily constrained by legal reasoning.

Today, we need arguments that convince voters. These arguments must be straightforward and not diminishingly legal. Most importantly, they must be creative and authentic. For example, they need to be vigorous enough to yank some members of the voting public out of the delusional daydream that racial segregation and inequality do not negatively affect their families, educational institutions, and communities. They also need to be sincere enough to stir the inherent fairness and goodness that resides in the hearts of every member of the American voting public. And, ultimately, they need to persuade a majority of people in every state where anti-affirmative action initiatives are brought to a vote that their families, educational institutions, and communities will not benefit in the short term, and will suffer in the long term, if their state votes to ban affirmative action.

1. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Gratz v. Bollinger*, 539 U.S. 244 (2003). *Grutter* will be cited as *G* in the text for all subsequent references.

2. Approved Ballot Language, Michigan Board of State Canvassers, January 20, 2006, http://www.michigan.gov/documents/Bal_Lang_MCRI_152610_7.pdf (emphasis added).

3. These initiatives are being headed by the American Civil Rights Institute, <http://www.acri.org/>.

4. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). This decision will be cited as *B* in the text for all subsequent references.
5. See Jack Greenberg, "Examining Diversity in Education: Diversity, the University, and the World Outside," *Columbia Law Review* 103, no. 6 (2003).
6. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
7. Bryan A. Garner, ed., *Black's Law Dictionary* (St. Paul, Minn.: West, 1999), 1045.
8. Robert K. Fullinwider and Judith Lichtenberg, *Leveling the Playing Field: Justice, Politics, and College Admissions* (Lanham, Md.: Rowman and Littlefield, 2004).
9. *Ibid.*, 178.
10. *Ibid.*
11. *Ibid.*
12. Justice Powell, for example, places particular emphasis on this idea. See *B* at 2751–52 and at 2763–64.
13. Fullinwider and Lichtenberg, *Leveling the Playing Field*, 179.
14. *Adarand v. Peña*, 515 U.S. 200 (1995).
15. The motto of the American Civil Rights Initiative is, "Race has no place in American life or law." See <http://www.acri.org>.
16. See James Anderson, "Race-Conscious Educational Policies Versus a 'Color-Blind Constitution': A Historical Perspective," *Educational Researcher* 36, no. 5 (2007).
17. See Gary Orfield and Michael Kurlaender, eds., *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Cambridge, Mass.: Harvard Education Publishing Group, 2001); and Mitchell Chang, Daria Witt, James Jones, and Kenji Hakuta, eds., *Compelling Interest: Examining the Evidence on Racial Dynamics in Higher Education* (Palo Alto, Calif.: Stanford University Press, 2003).