

“Mismatched” Objectives: Evaluating the Affirmative Action Debate

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“[T]he American Public embraces no coherent conception of what ‘affirmative action’ actually entails. . . . Investigators have concluded that this lack of coherence fostered an atmosphere of confusion about what these policies aimed to achieve and how they were implemented.”¹

Legal evaluation of affirmative action in higher education is structured as a two part analysis of means and ends.² Under this framework, the most legally defensible program would be one that is narrowly fashioned to meet a stated goal. Thus, one might expect affirmative action programmatic design to begin with the expression of some objective, or “interest,” followed by the necessary customization, or “tailoring,” of the program. However, both legal and empirical analysis suggest that presently the purpose of affirmative action, the end for which certain means are currently employed, has not been clearly articulated. This failure to articulate a coherent purpose leaves the public and administrators without a standard with which to evaluate the social utility and legal permissibility of existing and proposed programs.

Legally, the Supreme Court has failed to explicitly embrace a justifiable *end* to be accomplished through affirmative action programs. Beginning with *Regents of the*

¹ Roland G. Fyer Glen C. Loury, *Affirmative Action and Its Mythology*, 1 *at* <http://post.economics.harvard.edu/faculty://post.economics.harvard.edu/faculty/fryer>.

² Justice Powell’s discussion of legally valid affirmative action programs in *Regents of the University of California v Bakke*, 438 U.S. 265 (1978), referred to said programs as “means” employed to reach a particular “end.” *Id.* at 316. In *Grutter v Bollinger*, 539 U.S. 306 (2003), Justice O’Connor reverberates Powell’s language. *Id. passim*. See also *e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 498 (1980); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 (1986).

University of California v. Bakke,³ and more recently in *Grutter v. Bollinger*⁴ and *Gratz v. Bollinger*,⁵ the Court acknowledged diversity as a recognizable “compelling interest.” And yet, together these opinions suggest that diversity is not an end but rather a means to obtaining more concrete gains. Thus, while it may be possible to infer what lies beneath the Court’s reasoning, acceptance of diversity falls short of announcing cognizable goals that, from a legal standpoint, affirmative action should be designed to meet.

Ambiguity and disagreement surrounding an understanding of the ultimate goal of affirmative action hampers the public’s ability to evaluate various affirmative action proposals and the wealth of empirical data that has been produced on the merits—and disadvantages—of existing programs. Symptomatically, empirical analysis has developed into a disharmonious debate. In the wake of *Bakke*, there grew a new interest amongst sociologists, economists, and political scientists in evaluating the effectiveness of various programs. Without a settled agreement as to the purpose of affirmative action, social scientists have focused on different ends to support arguments that current programs are, or are not, working. For instance, those arguing success might examine the benefits provided to traditionally underserved members of the community by minority graduates,⁶ while those arguing that existing programs have failed might produce data suggesting that affirmative action in law schools reduces the number of minority professionals.⁷ Is the purpose of affirmative action to produce professionals uniquely aware and devoted to the needs of marginalized communities, or to produce a greater

³ 438 U.S. 265 (1978).

⁴ 539 U.S. 306 (2003).

⁵ 539 U.S. 244 (2003).

⁶ See e.g., Richard O. Lempert, David L. Chambers & Terry K. Adams, “*From the Trenches and Towers*”: *Law School Affirmative Action: An Empirical Study Michigan’s Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000)[hereinafter *From the Trenches and Towers*].

⁷ See e.g., Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

number of minority professionals? The legal endorsement of “diversity” is of limited assistance in identifying, amongst the many studied effects, those outcomes that are of particular relevance. At a time when elected officials and the general public are being asked to choose between color blind and race conscious programs, it is problematic that we lack the tools necessary for thorough assessment.

A legally articulated purpose of affirmative action would do more than lend perspective to one’s assessment of the wealth of empirical findings. Clear articulation of legal ends would ease administrators’ task of narrow tailoring programs in order to withstand legal challenges. Knowing, for example, that closing socioeconomic gaps between races is a compelling interest, while awarding professional degrees to more minorities is not, would enable administrators to adopt specific goals and effectively design. In light of the recent attacks on existing programs by the Department of Justice and the Center for Equal Opportunity, which focus on the failure to narrowly tailor affirmative action programs, the exiting impediment to efficient design is particularly troubling.

This Note examines the consequences of the Court’s failure to articulate legally permissive “ends.” Specifically, this Note argues that without a clear understanding of the purpose of affirmative action, the public lacks the tools necessary to identify legally relevant empirical information and administrators are handicapped in their efforts to design the most efficient or “narrowly tailored” programs. In Part I of this Note, I provide an overview of the legal treatment of “compelling interests” and demonstrate the Court’s failure to explicitly recognize an actual end. Focusing on diversity, the interest that has been successfully argued before the Court, I demonstrate that it is not an end but

rather a means to achieving a wide range of ends which I loosely classify as educational and societal benefits. In Part II, I will demonstrate that those who employ empirical analysis to support arguments for and against affirmative action have not assumed that diversity is an end, or “the goal.” Rather, researchers have made contradictory assumptions regarding the purpose of existing programs. This survey of social science research will show that failure to identify a legally permissible goal has left the literature muddled and confused. Thus, without a mechanism to sort through the conflicting claims the public is unable to fully benefit from the wealth of research, leaving them with an unmanageable debate. Finally, in Part IV, I demonstrate how a lack of clearly defined objectives frustrates administrators in their task of designing narrowly tailored affirmative action programs.

Part I: Legal Analysis

“When the Gratz and Grutter decisions came down, that was really kind of a mixed bag . . . [i]t’s still a very murky environment. . . .”⁸

In their analysis of affirmative action the Court has not clearly identified legally permissible or impermissible objectives. In *Bakke* the Court established that affirmative action programs challenged under the Fourteenth Amendment are subject to strict scrutiny,⁹ meaning that successful defense of a particular program requires demonstration that (1) a “compelling interest” for preferential treatment exists ; and (2) the program design is narrowly tailored” to meet said interest. Four concrete objectives have been

⁸ Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES.COM, March 14, 2006 http://www.nytimes.com/2006/03/14/education/14minority.html/?_r=1&oref=slogin&pagewanted=print (on file with author)(quoting Travis Reindl, director of state policy and analysis at the American Association of State Colleges and Universities).

⁹ 438 U.S. at 291-306 (rejecting the argument strict scrutiny was reserved for classifications disadvantaging “discrete and insular minorities.”).

involved in defense to Fourteenth Amendment challenges at the Supreme Court level: (1) correction of test and grading related bias; (2) provision of service to underserved communities; (3) reduction of societal discrimination; and (4) increasing the number of minority professionals. While in response to these arguments the Court has declined formal recognition, *Bakke* and *Grutter* are properly read as signaling openness to said objectives. Diversity is the lone interest which has received formal recognition, and yet is best understood not as an objective but as a tool for obtaining more concrete objectives. Additionally, the Court has treated favorably, but not explicitly recognized the pursuit of benefits which flow from equalizing access to higher education.

In sum, the Court has neither flatly rejected nor formally embraced the ends or concrete objectives that have come before them. All the Court has told us is that particular means; diversity and perhaps access, are acceptable.

A Diversity is a Means not an End

Suppose for a moment that Universities employ affirmative action for the sole purpose of achieving diversity. Success of a given program would be captured in the number of “diversity enhancing” students obtaining admission through the program. If a University were particularly interested in racial diversity, success would bear a direct relation to the number of racial minorities admitted.

In *Bakke* and *Grutter* the Court approved the use of affirmative action to “attain[] a diverse student body.”¹⁰ Accordingly, one might expect the “diversity rationale” advanced in these cases to prescribe augmentation of “diversity enhancing” student enrollment as a compelling interest. More specifically, one would expect a decision that approves of racial preferences for the purpose of attaining diversity to reason that

¹⁰ 539 U.S. at 328.

increasing the number of admitted minorities is in and of itself compelling.¹¹ If diversity is itself the judicially recognized end, then the Court's endorsement of that end should focus narrowly on racial compositions.

However, such is not the case. The Court's position with respect to racial quotas demonstrates that diversity is actually being treated as a *vehicle*. *Bakke* held that quotas are not sufficiently narrowly tailored to the diversity interest to survive Fourteenth Amendment strict scrutiny,¹² reasoning:

It may be assumed that the reservation of a specified number of seats in each class for individuals of the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity . . . *misconceives the nature of the state interest* that would justify consideration of race or ethnic background. *It is not an interest in simple ethnic diversity in which a specified percentage of the student body is in effect guaranteed to be members of a selected ethnic groups . . .*¹³

While Powell acknowledges that quotas would fit an interest in diverse representation as measured by percentage, he rejects them as inconsistent with the state interest he recognizes. The "diversity rationale" does not endorse diversity itself as an end. If it did, the pursuit of specified percentages would be acceptable, quotas would be the most narrowly tailored device.

¹¹ The jump between "diversity enhancing" and minority students made here admittedly involves an assumption that race might be used as a proxy for the diversity values which the university wishes to capture. Certainly there is an argument to be made that race should not serve as such a proxy. See PETER H. SCHUCK, *DIVERSITY IN AMERICA* (2003) ("[A]lthough race is surely quite salient for some students, the admissions office almost never asks about their ideas or points of view."); see also Sanford Levinson, *1999 Owen J. Roberts Memorial Lecture: Diversity*, 2 U. PA. J. CONST. L. 573 (2000) (observing that "critics of affirmative action . . . sometimes write as if supporters of affirmative action ignore the presence of intra-group diversity . . ."). However, at this point in the discussion the utility of race as a proxy is not relevant. Given that the Court upheld a racial preference on diversity grounds it would follow that if diversity is in fact an end the Court was approving the goal of a achieving a particular racial composition. If a diverse student body were the interest recognized in these cases one might also expect post-*Bakke* studies of diversity in higher education to involve nothing more than a breakdown of the racial composition of college populations. Such has not been the case. See *infra* Part II.A.4

¹² 438 U.S. at 315.

¹³ *Id.* (emphasis added).

The Court’s rhetoric implies that diversity is an *instrument* capable of yielding both educational and societal returns. Powell and O’Conner recognize the positive impact on classroom atmosphere and personal understanding. Powell observes that “[t]he atmosphere of ‘speculation, experiment and creation,’ – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body.”¹⁴ Underscoring the importance of this atmosphere to medical education Powell further explains “[p]hysicians serve a heterogeneous population. [Diversity] enrich[es] the training of [the] student body and better equip[s] . . . graduates to render with understanding their vital service . . .”¹⁵ Echoing Powell, O’Conner mentions that “numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”¹⁶

Looking beyond the classroom, Powell and O’Connor also recognize that diversity generates societal benefits. Powell explains that “[t]he nation’s future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection,”¹⁷ illustrating the ability of diversity to impact leadership in our society. In addition to locating a similar need for exposure in the business and military communities O’Connor further acknowledges that “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary to that path to leadership be

¹⁴ 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

¹⁵ *Id.* at 313.

¹⁶ 539 U.S. at 330 (quoting Brief for American Educational Research Association)).

¹⁷ 438 U.S. at 312.

visibly open to talented and qualified individuals of every race and ethnicity.”¹⁸ Together Powell and O’Connor’s observations illustrate the ability of diversity to strengthen leadership and legitimate democracy.

Formally, both *Bakke* and *Grutter* conceptualize diversity as an end. However, the treatment of quotas, and the Court’s explanation of why the state’s interest is compelling in both opinions, assumes that the goal of affirmative action is to obtain the benefits *provided by* diversity. Thus, neither *Bakke* nor *Grutter* stands for the proposition that diversity itself is the compelling interest.¹⁹ Discussion in both these cases focuses instead on educational, societal, and access – related benefits obtained *through* the acceptance of a diverse student body. The tension between the Court’s rhetoric and their formal treatment has created a problem for the lower courts,²⁰ the public, and the college administrators who wish to comply with the law.

B. Four Interests Still on the Table

¹⁸ 539 U.S. at 332. In addition to O’Connor’s opinion, it is also worth mentioning that many of the briefs filed in *Grutter* treated diversity as a means to a variety of ends. For instance The Leadership Conference on Civil Rights and the LCCR Education Fund argued that diversity was needed to correct for segregation at lower levels, Brief of the Leadership Conference on Civil Rights and the LCCR Education Fund as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-241 & 02-516), and the New York City Council Speaker and Council Members argued that diversity will close socioeconomic gaps. Brief of New York City Council Speaker A. Gifford Miller, New York City Council Members Bill De Blasio, Helen Foster, Hiram Monserrate, Charles Barron, William Perkins, Joel Rivera, Leroy G. Comrie and Other Individual Members of the New York City Council as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-241 & 02-516). While these arguments were not recognized in Justice O’Connor’s opinion, the Court did respond to the argument that diversity on campus was needed to satisfy a parallel need in the workforce.

¹⁹ If these cases could be read as standing for the proposition that boosting the number of minority applicants was in and of itself compelling then racial quotas would be permissible (as they are the most direct means of securing a diverse class). However, racial quotas are clearly not permissible under *Bakke*.

²⁰ Lower Courts have struggled with the Court’s embrace of “diversity” and not the actually benefits sought through diversity as a “compelling interest.” One approach has been to bundle together some of the benefits sought via diversity and recognize an interest in seeking those resembling the benefits mentioned in *Grutter*. See e.g., *Parents Involved in Community Schools v. Seattle School District*, No. 1, 377 F.3d 949 (2004); *Comfort v. Lynn School Committee*, 418 F.3d 1 (2005).

In *Bakke* the Court had the opportunity to opine on the legality of utilizing affirmative action to pursue five separate interests. Powell's plurality opinion, which has since been treated as controlling,²¹ rejected three interests as unsupported in this particular case, accepted diversity as compelling, and further hinted at the possibility of arguing a fifth compelling interest not advanced by UC Davis.

Although it is arguably possible to read Powell's opinion as silent with respect to the University's first compelling interest argument, Justice O'Connor has, alternatively, read Powell's treatment of UC Davis' second argument as incorporating the first.²² To the extent that O'Connor's interpretation, articulated in *Grutter*, is controlling, it stands that neither UC Davis' first argued interest in "reducing the historic deficit of traditionally disfavored minorities in medical school and in the medical profession,"²³ nor the second, "countering the effects of societal discrimination,"²⁴ were well enough supported to satisfy the first prong of the strict scrutiny test. Powell explains:

The state *certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination*

. . . .

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of *judicial, legislative, or administrative findings of constitutional or statutory violations* Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another.²⁵

²¹ *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244.

²² 539 U.S. 306 at 323 ("Justice Powell rejected an interest in 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession' as an unlawful interest in racial balancing.").

²³ 438 U.S. at 306.

²⁴ *Id.*

²⁵ *Id.* at 307-09(emphasis added); *see also* *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986).

Thus, it is not proper for an affirmative action program to aim at reducing a deficit of minority professionals (or, to state this in a manner more clearly related to discussion below, to aim at increasing the number of minority professionals), or remedy “societal discrimination” *absent formal identification of illegal discrimination*. Powell, then, has not eliminated the possibility that such interests might satisfy the compelling interest test, but rather attached specific requirements.

The third argument advanced in *Bakke*, that affirmative action was necessary to “increase[e] the number of physicians who will practice in communities currently underserved,”²⁶ was also rejected for lack of proof, confirming the lower court’s conclusion that “virtually no evidence in the record indicating that petitioner’s special admissions program is either needed or geared to promote that goal.”²⁷ Implicitly, however, Powell left open the possibility of arguing such an interest where the state carried its burden of proving (1) the need for outreach to an underserved community; (2) the likelihood that applicants receiving preferences were more likely to practice within this community; and *perhaps* (3) that preferences will substantially increase the number of minority professionals.²⁸

Mentioned in a footnote is the possibility of arguing an interest in “fair appraisal of each individual’s academic promise in the light of some cultural bias in grading or testing procedures.”²⁹ Although Powell stops short of recognizing said interest,³⁰ its

²⁶ *Id.* at 306.

²⁷ *Id.* at 311.

²⁸ *Id.* Unclear from the opinion itself is the necessity of demonstrating the third requirement. Justice Powell footnotes his finding of insufficient proof with the observation that “[i]t is not clear that petitioner’s [particular affirmative action] system, even if adopted throughout the country, would substantially increase the representation of blacks in the medical profession.” *Id.* at n.47. Delegation to a footnote may imply that such a showing would support, but is not necessary to one’s argument that this third interest exists. Either way, the success of such a claim will require invocation of empirical data.

²⁹ *Id.* at 306 n.43.

inclusion alone signals the Court's openness, as this argument was not made by the University.³¹ Presumably, then, Powell's reference is meant to acknowledge the future possibility of recognition. Subsequently, the only Supreme Court consideration of this argument has been Justice Marshall's dissent in *DeFunis v. Odegaard*.³² Entertaining a question not reached by the majority Marshall found that the state's interest in overcoming test bias satisfied strict scrutiny. Thus, Marshall's dissent, we learn not only that Powell indeed left the door open, but also that a persuasive argument in favor of recognizing this interest exists.³³

In sum, Court's prior opinions are perhaps most open to arguments regarding the correction of test and grading related bias. Claims involving the provision of service to underserved communities might also be honored, when empirically supported. Finally, interests in reducing either societal discrimination, or an existing deficit of minority professionals are not completely beyond argument, however said interests require specific judicial, legislative or administrative findings.

Supporters of affirmative action may be encouraged by the Court's openness in *Bakke* and *Grutter*. By neither expressly rejecting or denying correction of test and grading bias, provision of service to underserved communities, reduction of societal discrimination, and increasing the number of minority professionals, the Court leaves open the possibility of arguing these concrete interests. However, post *Bakke* and *Grutter* discussion suggests that the Court's ambiguity has set the stage for a confused and

³⁰ *Id.*

³¹ See William C. Kidder, *Law and Education: Affirmative Action Under Attack: The Struggle for Access From Sweatt to Grutter: A History of African American, Latino and American Indian Law School Admission, 1950-2000*, 19 HARV. BLACKLETTER J. 1, 22 (2003).

³² 416 U.S. 312 (1974).

³³ *Id.* at 327-45.

muddled debate. While those who defend affirmative action have directed attention to the aforementioned interests as measurable benefits, which illustrate the need for affirmative action, their argument would be even more powerful if the objectives they focused on received the Court's support. Moreover, it would be easier to diffuse the attacks on existing programs, which focus on an entirely different set of unrealized benefits, if one had a clearer sense of which goal or goals we should be focusing on. Currently, with so many open possibilities, the debate is messy and unpromising.

C. Access

In addition to diversity, and the interests previously discussed as remaining “on the table,” embedded in the Court's acceptance of diversity as compelling, is a separate class of interests properly understood as independent. These are the interests that flow from providing access to particular applicants.³⁴

According to O'Connor, one of the reasons that diversity is compelling is “the diffusion of knowledge and opportunity through public institutions of higher education must be *accessible* to all individuals regardless of race or ethnicity . . . ‘ensuring that public institutions are *open* and *available* to all segments of American society”³⁵

Used as support for O'Connor's central point that diversity is compelling, the Court's

³⁴ The NAACP Legal Defense and Education Fund has read the Court's decision in *Grutter* as “insisting that closing the opportunity gaps for African Americans and other minorities is an American imperative,” NAACP LEGAL DEFENSE & EDUC. FUND., INC., CLOSING THE GAP MOVING FROM RHETORIC TO REALITY IN OPENING DOORS TO HIGHER EDUCATION FOR AFRICAN-AMERICAN STUDENTS 1 (2005), and also more directly stated “[s]ignificantly, the Supreme Court in *Grutter* recognized that the very health of our democracy, the economic vitality of American business, and, indeed, our national security hinge on our ability to provide *access* to higher education for all . . .” *Id.* at 7 (emphasis added). This reading identifies within O'Connor's reasoning the Court's recognition of the importance of increasing the accessibility to African-Americans and minority students.

³⁴ See *supra* Part I. O'Connor cites both *Brown* and *Sweatt*. 539 U.S. 3331.

³⁵ 438 U.S. at 331 (emphasis added).

recognition of access related interests in *Grutter* is likely to be lost on the reader.³⁶

However, unpacking the Court's treatment of diversity, access is properly understood as a necessary consequence of diversity. Because acceptance of a more diverse student body will always increase the accessibility of higher education to minorities, it is possible for O'Conner to ignore distinction and treat access as merely a benefit of diversity. I would argue that access is instead properly understood as a separate means to goals unrelated to those obtained by diversity.

Elsewhere, in landmark decisions the Court recognizes the ability of access to (1) prepare students for participation in democracy; (2) prepare for a professional career; (3) adjust to their environment; and (4) develop networking relationships necessary to success after graduation. Although *Brown v. Board of Education* did not involve affirmative action, it was cited in both *Bakke*³⁷ and *Grutter*.³⁸ The argument in favor of affirmative action finds support in the *Brown* Court's observation that:

education is perhaps the most important function of state and local governments. . . . It is the very foundation of *good citizenship*. Today it is a principal instrument in *awakening the child to cultural values*, in *preparing him for later professional training*, and in helping him to *adjust normally to his environment*. In these days, it is doubtful that any child may reasonably be expected to *succeed* in life if he is denied the opportunity of education.³⁹

³⁶ It is possible that the Court's treatment of access as ancillary to diversity is responsible for similar confusion within the academic community. For example, following the Court's decision in *Grutter* Stanford Levinson read *Sweatt v. Painter* as involving diversity interests (despite the fact that the diversity rationale had not yet been articulated). Stanford Levinson *supra* note 24 at 575; *see also* Peter H. Schuck *supra* note 24 (citing Elizabeth Anderson's argument that "diversity is really 'another way of talking about integration').

³⁷ 438 U.S. at 307.

³⁸ 539 U.S. at 331.

³⁹ 347 U.S. at 493 (emphasis added).

Sweatt v. Painter elaborated on this reasoning, recognizing the networking benefits provided by equal access.⁴⁰

The most obvious and significant difference between access and diversity is the beneficiary. As I have shown above, diversity has the potential to deliver educational benefits to all students, and benefit all of society. Access, on the other hand is meant to more narrowly benefit those with particular access related needs. Furthermore, “diversity qualities,” one’s unique background or point of view, are entirely unrelated to access. Finally, while we would not expect the need for diversity to change over time, at least where educational benefits are concerned, the need for access might.

Given these differences; it is problematic that the Court collapses their discussion of access and diversity. In particular, the last distinction regarding change over time is completely lost in *Grutter*. Toward the end of her opinion in *Grutter* O’Conner loosely applies a time limit to racial preferences.⁴¹ If *Grutter* is read as exclusively embracing diversity as a compelling interest, this time limit makes little sense, for if the student’s education is enhanced by the presence of diverse voices today so will it be tomorrow. It

⁴⁰ Specifically the Court observed:

Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

399 U.S. at 634. Similarly Wilkins observes that [T]he value of [a] Michigan education consists of more than the sum of total human capital that they acquired through their classes and the prestige of attending one of the country’s premier educational institutions. It also inures in the relationships and contacts that are made David B. Wilkins, *Law School Affirmative Action: An Empirical Study Rollin’ On the River: Race Elite Schools and the Equality Paradox*, 25 LAW & SOC. INQUIRY 527, 535 (2000).

⁴¹ 539 U.S. at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interests approved today.”).

is not reasonable to expect this effect to expire. The best way to understand the time limit in *Grutter* is that it relates to access and not diversity. This is impossible to appreciate if access is not extracted from the discussion of diversity's compelling qualities. However, if access is separately and properly acknowledged, O'Connor's time limitations make sense. Optimistically, one hopes that one day the need to provide access-related assistance will expire.

Access and diversity are separate means. As the discussion below will demonstrate, social scientists have taken an interest in access implying the ends we reach by focusing on increasing the accessibility of higher education are related to both individual, and societal financial gain. Given O'Connor's favorable treatment of access, in the debate over affirmative action should arguments highlighting access related benefits receive more weight than those focused on interests which have not been explicitly recognized? Which are the legally relevant arguments?

Part II: Our Messy Conversation About Affirmative Action: Public Debate and Research

Following the Court's decision in *Bakke*, and especially during the period immediately preceding *Grutter* social scientists on both sides of the debate sought to measure the tangible effects of affirmative action programs. Before surveying the enormous wealth of data that has been produced, I pause to consider whether, beyond our personal values, there are any shared principals that might enable us to extract the "relevant" findings from this rich pool of research.⁴² Researchers have taken different

⁴² As an aside, the goal of identifying "relevant" effects is not premised on the assumption that certain findings are "irrelevant." If anything the debate surrounding affirmative action highlights the fact that we all have our own values, and thus, are likely to have differing opinions with respect to which effects are

approaches, each assuming a different purpose for affirmative action. Does law supplies us with the principals needed to sort through the research and identify valid assumptions? If not, what are the consequences?

Recall from Part I that the only end formally embraced by the Court is diversity, and that the Court seems to be most open to reduction of test bias and provision of service to underserved communities and benefits related to equal access. The reduction of societal discrimination and existing deficits in the number of minority professionals are permissible only where there have been judicial or legislative finding of illegal discrimination. Although the Court's signals are not clear, perhaps *Bakke* and *Grutter* offer us some guidance insofar as the call for legislative and judicial findings might mean that less attention should be paid to arguments against affirmative action which highlight the inability of existing programs to boost the numbers of minority professionals, or reduce societal discrimination. Absent the required findings perhaps we should assume that it is not the purpose of existing programs to meet these goals.

Having said this, the more important point is that openness or the possibility that a particular interest *might* be compelling is not recognition. All the Court has told us is that *diversity* is an acceptable end. Diversity rationale leaves us without a clear sense of the goals affirmative action is meant to reach. Diversity is a means, not an end, thus on a very basic level the Court has failed to identify a legally permissible objective.⁴³ This lack of an articulated objective confuses public debate.

relevant and which are not. Knowing this, my aim is simply to discover whether there are certain fundamental principals which might assist in sorting through the effects discussed above.

⁴³ Probing a bit further into the meaning of the *Grutter* opinion, some have pulled from O'Conner's opinions the ends she implicitly, although not formally, endorsed:

[T]he Court decisively supported efforts by institutions of higher education to bolster the participation of minority students and thereby provide training to future national leaders,

Empirical research plays a large role in both judicial and public analysis of affirmative action. Specifically, where the analysis of a compelling interest involves the argument that affirmative action is instrumental in either obtaining certain benefits or correcting existing problems, empirics are employed to demonstrate both the ability to obtain, and the need for correction. Thus, in both *Bakke* and *Grutter*, the Court relied on social science to inform their decisions.⁴⁴ For instance, the Court in *Grutter* cited Bowen and Bok's study of the positive effects of diversity at the college level, and in the eight years since publication their book *The Shape of the River* has continued to generate response⁴⁵ and inform discussion.⁴⁶ However, scholars on either side of the debate have different assumptions about the objectives affirmative action must satisfy, confusing academic debate and decreasing its utility to the courts and the public.

In this Part, I survey the literature, highlighting (1) the wealth of empirical information which might be used to inform decisions had we an understanding of which

enhance the legitimacy and effectiveness of critical governmental institutions, and contribute to desegregating a core realm of civic life. Race-conscious support programs play a critical role in opening the doors to higher education for minority students and in keeping those doors open.

NAACP LEGAL DEFENSE & EDUC. FUND., INC *supra* note 34 at 10. Although *Grutter* narrowly held that diversity was a recognizable compelling interest this read focuses on the actual ends mentioned within the opinion; increasing the accessibility of higher education, enhancing professional training, desegregating the professional community and democratic legitimacy. Thus, by this account all of these ends are proper objectives for affirmative action.

Does *Grutter* stand as an endorsement of these separate objectives? And if so, by elimination, are other objectives such as the closing of socioeconomic gaps, the reduction of test related bias, and the production of more minority professionals off the table? Again, the formal holding of *Grutter* (the state "has a compelling interest in attaining a diverse student body," 539 U.S. at 328) leaves us without answers to these questions, and without a clear way of sorting through the wealth of empirical discoveries.

⁴⁴ For instance, *Bakke* Justice Powell cites Sleeth & Mitchell's study entitled *Black Under Representation in United States Medical Schools*, 297 NEW ENG. J. OF MED. 1146 (1977). 438 U.S. at 311 n.47. In *Grutter* Justice O'Connor refers to "expert studies and reports" and "numerous studies" to support her claims regarding the benefits of diversity. 539 U.S. at 330.

⁴⁵ See e.g., Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001).

⁴⁶ See e.g., Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action*, 2002 U. CHI. L. F. 11 (2002).

speak to the appropriate goals of affirmative action and (2) the extent to which persons on either side of the debate are speaking past one another.

A. Studies Supporting the Need for Affirmative Action

1. Closing Socioeconomic Gaps and Improving Quality of Life

It should come of no surprise that empirics support the conclusion, articulated to the Court in *Grutter*, that “[d]espite measurable gains in the economic opportunities open to at least some members of minority groups, large gaps in socioeconomic status persist. The persistence of pejorative racial and ethnic stereotypes has greatly limited the opportunities available to blacks, Hispanics, and American Indians.”⁴⁷ A recent report by U.S. Department of Education Office of Civil Rights cited the following figures:

[Thirty-five] percent of African American female-headed households and 34 percent of their Hispanic counterparts live below the poverty line, compared with 17 percent of non-Hispanic whites in female-headed households. Moreover, 6 percent of married couple households that are African American and 14 percent of Hispanics in married households live below the poverty line, compared with 3 percent of non-Hispanic whites (see Figure 3). Poor African Americans are six times as likely to live in areas of concentrated poverty as poor whites.⁴⁸

The socioeconomic gap appears to be one of the most compelling forces driving the fight for affirmative action.

The relationship between affirmative action and the socioeconomic gap is intuitive. LDF reports: “[h]igher education unlocks doors to economic, social, and civic opportunities. . . . [E]ighty percent of the fastest-growing jobs in the 21st century require

⁴⁷ Expert Report of Thomas J. Sugrue, *Gratz v Bollinger* No. 97-75321 (E.D. Mich), *Grutter v Bollinger* No. 97-7575928 (E.D. Mich) available at www.ucmich.edu/urel/admissions/legal/expert/sugrotue.html.

⁴⁸U.S. DEP’T EDUC. OFFICE OF CIVIL RIGHTS, *ACHIEVING DIVERSITY: RACE NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION* 62 (2004). (citations to NATIONAL CENTER. FOR EDUCATIONAL STATISTICS, U.S. DEPARTMENT OF EDUCATION, *STATUS AND TRENDS IN THE EDUCATION OF BLACKS* 13 (2003) and RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION* at 170 (1996); Richard D. Kahlenberg, *In Search of Fairness*, WASH. MONTHLY, June 1998, at 27 (citing various studies) omitted).

post-secondary education or training.”⁴⁹ Work performed by social scientists supports this line of reasoning. For instance, Thomas J. Surge observes that “[t]he increase in the number of black professional after 1970 had roots in . . . the dramatic expansion of opportunities in higher education of African Americans,”⁵⁰ Bowen and Bok’s work suggests that one’s earning potential benefits from college attendance,⁵¹ and additionally Derek Neal has observed that “[i]t is clear that the relationship between employment and education is much stronger among black workers than white workers.”⁵² These observations reinforce the instinct that by furnishing educational opportunities, affirmative action will act to close socioeconomic gaps.⁵³

In addition to closing socioeconomic gaps, affirmative action might serve a closely related goal: improving quality of life. Returning to the LDF report, “a higher level of educational attainment has also been linked with greater life satisfaction and psychological well being,” and “[c]ollege graduates exhibit higher levels of civic

⁴⁹ NAACP LEGAL DEFENSE & EDUC. FUND., INC *supra* note 34 at 3.

⁵⁰ More specifically, Surge stated that there were two causes of the improved socioeconomic position of black persons in this country: (1) the expansion of educational opportunities and (2) changes in the private and public sector hiring practices. Tomas J. Surge *supra* note 42.

⁵¹ WILLIAM G. BOWEN DEREK BOK, THE SHAPE OF THE RIVER, 118-54 (finding more narrowly that the earning potential of minorities benefits from attendance at more prestigious Universities).

⁵² Derek Neal, Why Has Black-White Skill Convergence Stopped 22 (Jan. 2005)(on file with author) available at <http://papers.nber.org/papers/w11090>.

⁵³ Research also suggests the need for targeted efforts. Columbia Professor Robert B. Mincy recently told The New York Times that “[o]ver the last two decades, the economy did great . . . and low-skilled women, helped by public policy, latched onto it. But young black men were falling farther back.” Erik Eckholm, *Plight Deepens for Black Men*, *Studies Warn*, N.Y. TIMES.COM, Mar. 20, 2006 at http://www.nytimes.com/2006/03/20/national/20blackmen.html?_r=1&oref=slogin. Statistics support Mincy’s conclusion that in addition to gender differences *black* men are experiencing a plight unlike that of other racial groups:

In 2000 65 percent of black male high school dropouts in the 20’s were jobless—that is, unable to find work, not seeking it or incarcerated. By 2004, the share had grown to 72 percent, compared with 34 percent of white and 19 percent of Hispanic dropouts. Even when high school graduates were included, half of black men in their 20’s were jobless in 2004, up from 46 percent in 2000.⁵³

Id. This emerging body of work insinuates that efforts to close the largest socioeconomic gaps should focus on black males as the group who has fallen the farthest behind.

participation and lower incarceration rates.”⁵⁴ These observations suggest a moral and societal interest in affirmative action. If college improves the psychological well being of graduates, do we not have a moral obligation to insure that there are no racial barriers to these benefits? Additionally, doesn’t society have an interest in low crime and incarceration rates?⁵⁵

2. Stereotype Threat and Test Bias

Another gap receiving attention from supporters of affirmative action is the disparity in grades and testing scores between whites and minority applicants. Justice Marshall has acknowledged that “consideration of each application *in a racially neutral way*” requires consideration of race in admissions process in order to properly offset the bias introduced by standardized tests.⁵⁶ Considering such use of preferences by the University of Washington Law School, Marshall found that “[s]ince the LSAT reflects questions touching on cultural backgrounds the Admissions Committee acted properly in my view in setting minority applicants apart for separate processing. These minorities have cultural backgrounds that are vastly different from the dominant Caucasian.”⁵⁷

In *Grutter*, Claude M. Steele offered the following expert opinion in support of affirmative action:

⁵⁴ NAACP LEGAL DEFENSE & EDUC. FUND., INC *supra* note 34 at 4.

⁵⁵ As persuasive as socioeconomic and quality of life/societal arguments might be, it is natural, at this point, to ask – why, with these goals in mind, is it necessary to extend *racial* preferences. This is a valid question. The issues of socioeconomic status and historical disadvantage often become entangled with one another. For instance, in his *Grutter* testimony Surge observed that traditionally, throughout our history “minorities were excluded from many . . . jobs altogether. Whole sectors of the labor market, ranging from the unionized skilled trades to the sale positions were almost entirely closed to blacks.” Thomas J. Sugrue *supra* note 47. Why does this observation support the use of affirmative action today? My read is that, while we take socioeconomic disadvantage to be troubling, we are even more troubled by disadvantage with a history. Meaning that, if the cause of the socioeconomic gap can be tied to race, it seems that the appropriate way to repair the harm that has been done is the adoption of practices which will provide opportunities to those minorities whose socioeconomic position has been effected by a history of discrimination.

⁵⁶ 416 U.S. at 334.

⁵⁷ *Id.*

In recent years the media has made a great deal of the fact that minority students on a college campus often have lower SAT scores than whites and Asians on the same campus. The clear implication, presumably taken up by the public, is that SAT gaps of this size reflect that the minorities being admitted are ‘less qualified’ than the White and Asian students. . . . *Gaps of this size actually represent only a tiny difference in real skills needed to get good college or law school grades and they reflect the influence of a complex of factors tied to race in our society that, for reasons unrelated to real academic potential, depress minority students test scores.*⁵⁸

Two important points are made here. First, standardized tests are neither perfect predictors of academic success, nor perfect measures of individual capability. In fact, Steele has found that the ablest minorities with the most at stake might actually experience the greatest depressions in scores.⁵⁹ Second, Steele insinuates that these tests are racially biased. Together these observations suggest that one reason to employ affirmative action (which notably would not compromise entirely acceptance of the most qualified applicants) might be to overcome discrimination infused into the admissions process by improper dependence on standardized tests.

Why should we conclude that differences in performance reflect racial bias? Empirical analysis suggests at least three possible answers. First there may be a relationship between performance and one’s academic resources. The correlation between the socioeconomic gap discussed above and quality of education might disproportionately put minorities at a disadvantage.⁶⁰ Second, the test itself might be designed in such a way as to advantage certain races or cultures. And finally, stereotype threat might have a negative effect on minority performance.

⁵⁸ Expert Report of Claude M. Steele, *Gratz v. Bollinger* No. 97-75321 (E.D. Mich), *Grutter v Bollinger* No. 97-7575928 (E.D. Mich), 5 MICH. J. RACE & L. 439, 448-49 (2000)(emphasis added).

⁵⁹ *Id.* at 446; see also Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, AM. PSYCH. 613, 614 (June 1997).

⁶⁰For example, Philip Shelton, president of LSAC has explained that “[g]roup differences in performance on the LSAT almost certainly reflect differences in opportunities to acquire those skills.” Philip D. Shelton, “*Top Ten*” *Misconceptions about the LSAT*, Jan./Feb Law Services Rep. at 4 (1999).

Arguing that the language employed in both the verbal and the math sections of the SAT has a culturally bias effect, Roy O. Freedle has found support for a “cultural unfamiliarity” phenomenon. Analyzing numerous studies on SAT performance, including many of his own, Freedle finds the greatest performance disparities correspond with the most simplistic language. This is true for both verbal⁶¹ and quantitative questions.⁶² Again, drawing on the work of many researchers, Freedle explains that while “each cultural group assigns its own meanings to . . . common words,”⁶³ “precise meanings for rare words are probably most often encountered in the classroom.”⁶⁴ Thus, the SAT creates a cultural bias, and it does so with respect to what are meant to be the easiest questions.⁶⁵

A separate, but not mutually exclusive, theory is that of stereotype threat, defined as “the experience of being in a situation where one recognizes that a negative stereotype about one’s group is applicable to oneself.”⁶⁶ In collaboration with Joshua Aronson, Steele has found:

For black students, unlike White students, the experience of difficulty on the test makes the negative stereotype about their group relevant as interpretation of their performance, and of them. . . . this is an extra intimidation not experienced by groups not stereotyped in this way. . .

⁶¹ Roy O Freedle, *Correcting the SAT’s Ethnic and Social-Class Bias: A Method For Reestimating SAT Scores*, 73 HARV. EDUC. REV. 1, 3 (Spring, 2003).

⁶² *Id.* at 8.

⁶³ *Id.* at 3.

⁶⁴ *Id.* at 4. Freedle also explains that “Cultural communities have variable needs, which are reflected in their vocabularies.” *Id.* at 14

⁶⁵ Specifically Freedle concludes:

[O]ne cannot fully erase the pervasive influence of cultural linguistic background when examinees are asked to process ‘common’ words that occur on the test without ample context to help separate the various semantic sense of these common words. The various shards of meaning of common words are shaped by the cultures that make frequent use of these words.

Id. at 14.

⁶⁶ Claude M. Steele *supra* note 58 at 444.

Like many pressures it may not be fully conscious, but it may be enough to impair their best thinking.⁶⁷

What's worse, depression of performance "is greatest for those for those students who are the most invested in doing well on the test."⁶⁸ The consequence of this effect is that, even if the perfect "bias-free" *test* were designed, racial bias in the test taking *experience* would remain.⁶⁹

Regardless of the explanation, disparities in performance exist. Noting that "the potentially successful applicant's concern is often primarily that there be a fair chance of selection regardless of the group membership rather than a guarantee of success,"⁷⁰ social scientists have argued that affirmative action is needed so long as gaps persist. To put this another way, from the minority applicant's perspective the, use of a test on which they, as a minority, are expected to perform at a lower level, is unfair.

3. Interest in Serving an Underserved Community.

⁶⁷ *Id.*

⁶⁸ *Id.* at 446.

⁶⁹ See William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055, 1085 (2001) ("[M]erely making the content of the test the same for everyone does not guarantee that taking the test will be the same regardless of race or ethnicity."). There is a separate argument to be made that if these tests do not adequately measure one's capabilities, given the cultural disparity in performance, they should be abandoned. Consider the research that has been done with respect to law school admissions. There is strong support for the position that LSAT and UGPA are accurate predictors of law school performance. However, there is equal support for the position that "when success in the practice of law becomes the benchmark, rather than grades." *Id.* at 1104. These credentials are no longer accurate measures of ability. See e.g., Richard O. Lempert, David L. Chambers & Terry K. Adams *supra* note 6. Kidder also notes that, although there is a correlation between UGPA and LSAT score (indicating that LSAT does correlate with ability), when UGPA is controlled for the racial gap in performance remains (meaning that persons of different races with the same UGPA will perform differently on the LSAT). This seems to suggest that, even if the LSAT measures ability, it does so differently with respect to race. Kidder notes that, although there is a correlation between UGPA and LSAT score (indicating that LSAT does correlate with ability), when UGPA is controlled for the racial gap in performance remains (meaning that persons of different races with the same UGPA will perform differently on the LSAT). This seems to suggest that, even if the LSAT measures ability, it does so differently with respect to race. William C. Kidder *supra* note 40 at 1115. Elsewhere studies suggest that other standardized tests, such as the SAT and the ACT are "of limited value in evaluating 'merit.'" Steele *supra* note 58 at 440.

⁷⁰ *Id.* at 1100.

A “constituency that is often overlooked in the debate over affirmative action,” is “the people [] aspiring professionals intend to serve.”⁷¹ Fortunately, in recent years social scientists have done much to enrich our understanding of the employment or “service” patterns of affirmative action beneficiaries. We now know that minorities are more likely to serve the public, with a particular concern for traditionally underserved communities.

In a study of University of Michigan Law School alumni Richard O. Lempert, David L. Chambers, and Terry K. Adams found that in the legal field minority graduates are more likely to take public service positions. Specifically, they found that minorities are more likely to pursue careers in public interest, public service or government,⁷² and additionally that minorities do more pro bono work,⁷³ are more likely to sit on the board of a civil rights, charitable religious or other non-profit organization and are more likely to mentor younger attorneys.⁷⁴ They also found that “minorities seem more likely than white graduates to serve low-and middle-income individuals, while white alumni are more likely to serve small-and medium- sized businesses.”⁷⁵

Lempert, Chambers, and Adams also found that minorities are more likely to provide service to other minorities than white alumni.⁷⁶ Highlighting the importance of this discovery, Wilkins writes “[b]y any measure, the black community (like most

⁷¹ Wilkins, *supra* note 40 at 528.

⁷² Richard O. Lempert, David L. Chambers & Terry K. Adams *supra* note 6 at 401 (“[Minorities] are more likely than white alumni to begin their careers in government or other public service or public interests jobs and somewhat less likely than white alumni to begin their careers or to work today in the private practice of law.”).

⁷³ *Id.* at 401,407-08 (finding for instance that the average white graduate of the class of 1970 devoted an average of 94 hours per year to pro bono work whith the average minority graduate in this class devotes an average of 137 hours).

⁷⁴ *Id.* at 401.

⁷⁵ *Id.* at 436.

⁷⁶ *Id.* at 436-41.

communities) is badly underserved by the profession. Anything that increases this community's access to legal services should therefore be considered an important social benefit."⁷⁷ More directly, Lempert, Chambers, and Adams themselves make the point that "[c]olor blindness seems not to prevail in the world of law practice, and it seems unlikely to prevail as long as ethnicity plays a major role in structuring opportunities and relationship in the larger society."⁷⁸

Given the correlation between attorney and client ethnicity, affirmative action is necessary to insure that minorities have access to legal representation. Lempert, Chambers, and Adams concluded that:

[e]vidence in this study indicates that . . . [affirmative action] policies have increased the availability of legal services to members of disadvantaged minorities. They have also, if we can judge by Michigan's minority alumni, created a group of African American, Latino, and Native American lawyers who are . . . helping foster a degree of integration never before possible in the middle and upper reaches of American society.⁷⁹

Insofar as one might hope that integration of the profession will cause attorneys to feel more aware of, more responsible for, and more comfortable responding to the legal needs of clients of other races,⁸⁰ affirmative action benefits society (specifically minorities in need of legal services) not only by supplying lawyers who are likely to reach out to underserved communities, but also by removing the barrier of racially correlated representation.

The work discussed here focuses narrowly on the legal profession. Is it then proper to make the more general conclusion that one of the potential ends of affirmative

⁷⁷ David B. Wilkins *supra* note 40 at 540.

⁷⁸ Richard O. Lempert, David L. Chambers and Terry K. Adams *supra* note 6 at 440.

⁷⁹ *Id.* at 495.

⁸⁰ See WILLIAM G. BOWEN & DEREK BOK *supra* Part II(B) (finding that persons who have experienced diversity are more likely to feel comfortable working with persons of other races).

action is to provide service to underserved communities? Although intuition, and the fact that a similar argument was raised in *Bakke*⁸¹ would suggest that the patterns observed by Lempert, Chambers, and Adams are not unique to law, I do not attempt to answer this question here. Rather, my point is that social science suggests that outreach is an end which affirmative action might seek to reach.

4. Studies of the Effects of Diversity

Empirical studies of diversity support the conclusion that diversity is a means and not an end. Specifically, consistent with the analysis of *Bakke* and *Grutter* offered above, social scientists have found that diversity has positive effects on education and society.

Couched between *Bakke* and *Grutter* is perhaps the most comprehensive and authoritative study of affirmative action to date conducted by William Bowen and Derek Bok and detailed in *The Shape of the River*.⁸² At the outset, Bowen and Bok identify as one of the “principal objectives” of affirmative action “enrich[ment of] the educational experience for students of all races by enrolling and educating more diverse student bodies.”⁸³ Accordingly, they study two measures of educational enrichment: (1) the effect of diversity on one’s ability to both work and get along with persons of different races, or cultural backgrounds,⁸⁴ as reported after graduation and (2) the chance of cross racial or cultural interaction during and after graduation.⁸⁵

Bowen and Bok’s results indicate a positive correlation between the first factor and diversity, meaning that diversity has a positive effect on one’s ability to work and get

⁸¹ 438 U.S. at 306.

⁸² WILLIAM G. BOWEN & DEREK BOK, *supra* note 50.

⁸³ WILLIAM G. BOWEN & DEREK BOK *supra* note 50 at xxxi.

⁸⁴ *Id.* at 220-29.

⁸⁵ *Id.* at 229-40.

along with persons of different race ethnicity or cultural background.⁸⁶ Further, Bowen and Bok's findings suggest that where diversity is successful in facilitating cross racial or cultural interaction during education, it will also increase the chance of said interactions after graduation.⁸⁷ More importantly for the purposes of this analysis, these results suggest that diversity is a *means* capable of achieving these two ends.

Complete appreciation of Bowen and Bok's research might require some context. In his *Grutter/Graz* expert report, Sugrue spoke of current racial segregation in lower education which exists "as a result of longstanding official policies . . . in the real estate industry,"⁸⁸ powerfully characterizing the effects:

The costs of this persistent and pervasive racial separation are profound for minorities and non-minorities alike. . . . Residential educational distance fosters misconceptions and mistrust. It affords little or no opportunity to disrupt the perpetuation of *racial stereotypes* that are a basis and justification for racial separation. The high degree of separation by race reinforces and *hardens perceptions of racial differences*.⁸⁹

Understanding, then, that the segregation of our schools and our communities bears a relationship to racial stereotypes, Bowen and Bok's study of interaction takes on new significance. Putting Sugrue's observation that segregation "hardens stereotypes" together with Bowen and Bok's discovery that diversity

⁸⁶ Specifically, Bowen and Bok found that of the graduates in the 1976 class 46% of white students reported a strong relationship between diversity and their ability to work and get along with people of different races and cultures compared to 57% of black students and amongst graduates of the 1989 class 62% reported a strong relationship as compared to 70% of black students. *Id.* at 225.

⁸⁷ *Id.* at 238-39 ("At the most basic level . . . we would expect white students who had extensive interactions with black students in college to have the most extensive interactions across racial lines after college. And that is precisely what we find.").

Sugrue, *supra* note 47..

⁸⁹ *Id.* (emphasis added). Sugrue also notes that segregation has led to a "division in public attitudes and opinion," and observes that "blacks and whites differ significantly on their analysis of what is fair, or the extent of inequality and discrimination in American life, and of the desirability of public policies across a wide spectrum." *Id.*

increased interactions, we are able to appreciate diversity as a means of reducing prejudice.

Complementary research efforts have gone even further in identifying the precise ends diversity reaches, thus strengthening the argument that the enrichment of education is real and tangible, and extends beyond the simple achievement of “diversity.” Gary Orfield and Dean Whitla have found that, amongst other things, diversity is capable of positively impacting the way that topics are discussed in the classroom,⁹⁰ provoking students to rethink personal values, and changing career plans and career specific values.⁹¹ Alexander W. Austin has found that diversity is positively correlated with political involvement, cultural awareness, commitment to promoting racial understanding, and overall satisfaction with one’s education, but is negatively correlated with one’s belief that racial discrimination is no longer a problem in the United States.⁹²

Without creating an exhaustive summary of all of the ends that diversity has been said to reach, on a more general level the above discussion establishes two fundamental points. First, diversity is properly viewed as a means and not an end. Second the educational and societal benefits mentioned by Powell and O’Conner are real.

5. Access

Social Science has also focused on measuring one tangible benefit of access to higher education; increase in earning potential. Specifically, research suggests that in making prestigious universities more accessible to minorities, affirmative action provides

⁹⁰Gary Orfield & Dean Whitla, Diversity and Legal Education: Student Experiences in Leading Law Schools, *in* DIVERSITY CHALLENGED, 142-72 (Gary Orfield & Michal Kurlaender eds. 2001); *see also* Richard O. Lempert, David L. Chambers & Terry K. Adams, *supra* note 6 at 409-20 (2000) (suggesting that there is a relationship between the number of minority students and appreciation of diversity related benefits).

⁹¹Orfield & Whitla *supra* note 90.

⁹² Alexander W. Austin, *Diversity and Multiculturalism on the Campus How are Students Affected?* March/April 1993 CHANGE 44, 46 (1993).

financial gains. Bowen and Bok have found a correlation between school selectivity and earning potential.⁹³ Similarly, within the legal context David B. Wilkins observes “a minority lawyer’s success – like the success of his or her white peers –depends on gaining access to the right institutional structures and opportunities.”⁹⁴ Or, as one lawyer reported, “[i]f you’re not from Harvard, not from Yale, not from Chicago, you’re not adequate. You’re not taken seriously.”⁹⁵ By these accounts access is a means to financial gain.

Additionally, Carnevale and Rose find that selective colleges spend more on their students, have higher graduation rates, and increase the student’s chance of acceptance to graduate school.⁹⁶ Thus, in addition to increased earning potential, access to more prestigious Universities will provide students with a more valuable education (as measured by the University’s investment in the student) and a wider range of post graduate opportunities.

B. Studies Supporting the Argument Against Affirmative Action Focus on a Different Set of Outcomes

1. Affirmative Action Reduces the Number of Minority Professionals

⁹³ WILLAM G. BOWEN & DEREK BOK *supra* note 50 at 144 (“[A]fter holding SATs constant, black students who attended the more selective schools gained an earning advantage.”); *see also* David B. Wilkins, *supra* note 40 (postulating that “although ‘discrimination in legal job markets is today not a great problem for most . . . graduates’ of Michigan and other elite schools, minority graduates from non-elite schools continue to encounter barriers based on race”). *But See* Anthony P Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and College Admissions*, (March 2003).

⁹⁴ David B. Wilkins *supra* note 40 at 530. Wilkins surveyed the 250 largest law firms in the country and found that a larger majority of black attorneys than minority attorneys had graduated from one of the eleven most elite law schools. *Id* at 534.

⁹⁵ *Id.* at 535.

⁹⁶ Carvnedale & Rose *Supra* note 93.

Arguably, the most controversial study of affirmative action, which has received much attention and inspired several responses,⁹⁷ is a recent *Stanford Law Review* Article published by UCLA Professor Richard Sander.⁹⁸ As an initial point, it is worth mentioning that several of these responses call into question Sander's method of analysis and the assumptions that he makes regarding the presumptive choices of future applicants in a post- affirmative action world. Although space does not permit me to outline these arguments in detail, the reader should be aware that, in the least, these responses, and many preceding studies,⁹⁹ weakens the reliability of Sander's projections.

At first blush, Sander's study has the appearance of a comprehensive cost-benefit analysis. Early in his argument Sander takes the position that "[r]acial admissions preferences are arguably worth the obvious disadvantages . . . *if the benefits to minorities substantially exceed the costs to minorities.*"¹⁰⁰ Putting aside, for the moment, Sander's decision to focus narrowly on the costs and benefits *to minorities*,¹⁰¹ by his own characterization, we expect Sander to conduct a "systematic" balancing of affirmative action's positive and negative effects.

It is disappointing, then, that Sander focuses narrowly on projecting the number of black attorneys we might have if law schools did not utilize racial preferences. Roughly

⁹⁷ For instance Ian Ayres and Richard Brooks have analyzed Sander's data and called into question his conclusion that the awarding of racial preferences are responsible for performance disparities and also his assumption that if affirmative action were removed performance would improve. Ian Ayres & Richard Brooks, *Response & Reply: Does Affirmative Action Reduce the Number of Black Lawyers?* 57 STAN. L. REV. 1807 (2005); see also David L. Chambers, Timothy T. Clysdale et. al., *Response & Reply: The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1807 (2005); Michelle Landis Dauber, *Response & Reply: The Big Muddy*, 57 STAN. L. REV. 1807 (2005); David B. Wilkins, *Response & Reply: A Systematic Response to Systematic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1807 (2005); but see also Black Under Representation in United States Medical Schools, 297 NEW ENG. J. OF MED. 1146 (1977).

⁹⁸ Richard H. Sander, *supra* note 7.

⁹⁹ See e.g., Thomas J. Sugrue *supra* note 42; WILLIAM G. BOWEN & DEREK BOK *supra* note 50.

¹⁰⁰ *Id.* at 371.

¹⁰¹ The tension between Sander's exclusive focus on minorities, and the rhetoric of the *Grutter* opinion will be discussed in more depth below.

stated, the progression of Sander's argument is as follows: Examining Linda Wightman's data on the entering credentials, law school performance, and bar passage rates of former law students (along with some data of his own) Sander first finds that because (1) racial preferences place minority students in schools where they are more likely to perform at the bottom of their class¹⁰² and (2) law firms draw from the top of the class, racial preferences have a negative effect on minorities' ability to gain employment.¹⁰³

Additionally, observing that students who perform well in law school are more likely to pass the bar, Sander claims that, by placing minorities in schools which they are not qualified to attend, affirmative action undermines the ability of black students to pass the bar, thereby reducing the number of black attorneys.¹⁰⁴ "Weighing" these two costs against no mentioned benefits, Sander reports "[w]hen one takes into account the corrosive effects of racial preferences on the chances of all black law students to graduate and pass the bar, these preferences probably tend, system-wide to shrink rather than

¹⁰² Richard H. Sander *supra* note 7 at 425-42. Specifically, Sander observes that "the collectively poor performance of black students at elite schools does not seem to be due to their being 'black.' . . . The poor performance seems to be simply a function of disparate entering credentials, which in turn is primarily a function of the law schools' use of heavy racial preferences. It is only a slight oversimplification to say that the performance gap . . . is a by-product of affirmative action." *Id.* at 430. While Sander acknowledges the problems test bias imposes on his analysis he avoids the issue by reasoning that "[t]he battlefield staked out by these two critiques is bloody and littered with corpses. . . . [M]y approach in this article is to sidestep the field by presenting new, real, and systematic data on the actual consequences of affirmative action." *Id.* at 142. Thus, assuming that Sander is correct test bias is unquantifiable, a questionable assumption, *see* Claude M. Steele *supra* note 48; Roy O. Freedle *supra* note 62, Sander's reasoning provokes the question of whether we should narrowly focus on "quantifiable" costs.

¹⁰³ *Id.* at 479 ("[E]mployers weigh law school grades far more heavily in evaluating job candidates than most legal academics have assumed. . . . For at least two-thirds of black graduates, the harm preference do to a student's grades greatly outweighs the benefit derived from the more prestigious degree.").

¹⁰⁴ Sander reasons that because students who perform well in law school are more likely to pass the bar affirmative action practices which place students at schools where they are less likely to perform well actually reduce chances of passing the bar. *Id.* at 443-78. The obvious problem with this argument is that it requires a giant leap in faith. Why should we assume that the correlation between successful law school performance and bar passage rates indicates that students will be more likely to pass the bar if they simply attend less prestigious schools (and thus arguably receive lesser educations)? Sander does not address the possibility that the redirection of minorities to lower tier schools might actually depress minority performance even further (meaning that the present gap in scores would be even worse in the event of a downward shift).

expand the total number of black lawyers each year.”¹⁰⁵ Thus, Sander ultimately concludes that, “[t]he most obvious solution is for schools to simply stop using racial preferences.”¹⁰⁶

It is obvious from Sander’s argument that he has not, as he would have his reader believe, performed a comprehensive cost benefit analysis of affirmative action. Sander identifies one cost – the effect of racial preferences on the number of black attorneys, but mentions none of the benefits studied by his colleagues and recognized by the Supreme Court. There is nothing inherently problematic in Sander’s decision to focus exclusively on one particular cost; indeed almost all of the studies mentioned in this paper narrowly examine a particular cost or benefit. Rather, what is troubling about Sander’s approach is that he has characterized it as a complete and “systematic” cost-benefit analysis. Either Sander has decided for us affirmative action’s single or predominate objective, or he is hoping that his disregard for the more widely recognized benefits will escape the reader’s attention.

Sander’s failure to recognize and assign due weight to the full range of benefits offered by affirmative action is made clear in his discussion of *Grutter*. Evident in his criticism is his inability to appreciate the values O’Conner articulates:

The premise accepted by O’Connor is that racial preferences are indispensable to keep a reasonable number of blacks entering the law and reaching its highest ranks – a goal which is in turn indispensable to a legitimate and moral social system. The analysis in this Article demonstrates that this premise is wrong. Racial preferences in law schools, at least as applied to blacks, work against all of the goals that O’Conner held to be important.¹⁰⁷

¹⁰⁵ *Id.* at 480.

¹⁰⁶ *Id.* at 482.

¹⁰⁷ *Id.* at 481.

Sander's claim that his analysis "work[s] against *all of the goals* that O'Conner held to be important" fails because, as this statement itself reveals, he does not understand what those goals are. By this account all moral and societal goals served by affirmative action rely on the ability of black law students to reach the "highest ranks" of their classes. This reading suggests that Sander appreciates neither the educational benefits of diversity; the gains captured by *all students* from exposure to different view points, nor the societal benefits; the democratic legitimacy flowing from accessibility of particular educational institutions. Thus it is not surprising that he neglects to weigh these effects. What is surprising is, again, that he claims to have undermined *all of the goals* expressed in *Grutter*. Lifting some of the blame off of Sander, perhaps this is just another consequence of the Court's failure to cleanly define these goals, grouping them instead under the umbrella of "diversity."

Building on this last point, one valuable contribution Sander makes to the debate is that he illustrates the importance of clearly defined objectives. With them a truly comprehensive or "systematic" cost-benefit is possible. Without them, anyone claiming to identify the "overriding justification"¹⁰⁸ of affirmative action might launch an argument that, on balance, it is or is not effective.

2. Stigma

Justice Thomas, dissenting in *Grutter* argued that affirmative action programs "stamp minorities with at badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."¹⁰⁹ Thomas is

¹⁰⁸ *Id.* at 368.

¹⁰⁹ 539 U.S. 306. Similarly Shelby Steele has explained :

I think one of the most troubling effects of racial preferences for blacks is a kind of demoralization. . . . the quality that earns us preferential treatment is implied inferiority.

not alone, many opponents of affirmative action (often minorities themselves) direct our attention to stigmatization.¹¹⁰ Social Scientists have reacted by seeking to determine whether existing programs do in fact impose this cost.

Studying the effects of affirmative action on Harvard Law School students Ashley M. Hibbetf divided racial stigma into two categories; internal and external, explaining “external stigma is the burden of being treated or viewed differently by others, or as though one is unqualified Internal stigma is defined as the feeling of dependency, inadequacy and at times guilt.”¹¹¹ Focusing exclusively on black law students Hibbetf found that while the majority reported feeling as if they had “something to prove” there was not a distinguishable pattern indicating that that these beneficiaries of affirmative action suffer from the burden on internal and external stigmas.¹¹² Rather, although some students were thusly impacted, Hibbetf concluded that black students do not all experience affirmative action in one way; rather the impact varies between individuals.¹¹³

Putting aside the serious questions raised by Hibbetf’s study regarding the typicality of stigmatization, the fact remains that this cost is likely imposed on *some* beneficiaries. Thus opponents continue to highlight internal stigma, for instance when they argue that “many talented blacks resent the stain of preference on their abilities and

However this inferiority is explained . . . it is still inferiority. . . . And the fact must be borne by the individual as a condition apart from the explanation, apart even from the fact that others like himself also bear this condition.

Shelby Steele, *A Negative Vote on Affirmative Action*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION*, 37 (Nicolaus Mills ed. 1994)

¹¹⁰ See e.g., STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991).

¹¹¹ Ashley M. Hibbetf, *The Enigma of the Stigma: A Case Study on the Validity of the Stigma Argument Made in Opposition to Affirmative Action Programs in Higher Education*, 21 *HARV. BLACKLETTER J.* 75 (2005).

¹¹² *Id.* at 99. Hibbetf also found that there was no appreciable difference in response between students who had previously attended Historically black colleges (amongst whom she expected to see the greatest stigmatization) and those who had not. *Id.*

¹¹³ *Id.* (“I am reluctantly willing to admit that I made one of the most common mistakes that African Americans often accuse white America of committing – believing that I could ask a few people how they feel and walk away with a firm sense of how we all feel.”).

achievements,”¹¹⁴ and external stigma arguing “admitting underqualified black applicants only makes the situation worse: the more such admissions, the more opportunity for other students to experience black academic performance as substandard.”¹¹⁵ Whether, in a comprehensive cost benefit analysis this is a concern which tips the balance against affirmative action programs requires both further study of the effect, and a clearer understanding of the other factors that must be involved in the weighing process.

C. Whose Arguments Deserve Our Attention?

“There is a gap between the rhetoric of anti-affirmative action groups on the one hand and the law as stated by the Supreme Court on the other.”¹¹⁶

There is much to learn from the research presented above regarding the costs and benefits of affirmative action and also the interests one must keep in mind when considering design changes. However, presently we lack the tools need to capitalize on this information. Are current programs “working” or meeting their goals if they increase service provided to underserved communities, or “not working” if they fail to provide more minority professionals? Should we redesign existing programs to insure that they are more efficient at closing socioeconomic gaps, or do current educational benefits imply that no revision is necessary? Without a shared understanding of purpose, we cannot begin to answer these questions, thus the potential benefit of the research may not be realized.

It is particularly troubling that we lack the settled understanding of purpose necessary to sort through the research at a time when the public and elected officials face

¹¹⁴ Curtis Crawford, *Weighing The Benefits and Costs of Racial Preferences in College Admissions*, 37 SOCIETY 4 (May/June 2000).

¹¹⁵ *Id.*

¹¹⁶ NAACP LEGAL DEFENSE & EDUC. FUND., INC *supra* note 34 at 2.

important decisions regarding the future of existing affirmative action programs. Recently, Texas, Florida, and California have adopted “color blind” affirmative action policies, replacing racial preferences with percentage plans.¹¹⁷ These plans guarantee college admission to a certain percentage of top performing high school graduates. In Texas, the “pioneer” program of this sort, guarantees the top ten percent of high school graduates admission to the state’s public university system. Critics argue that by precluding the consideration of race these programs adopt inefficient means of closing socioeconomic gaps *between races*.¹¹⁸ Proponents such as the U.S. Department of Education Office of Civil Rights, counter that these programs are the preferred means of achieving diversity.¹¹⁹ How should the voters reconcile the argument that percentage programs do not serve socioeconomic goals with the (questionable) response that they will yield diversity benefits? What should we expect and require our affirmative action programs to do?

Part III: Narrow Tailoring

Another audience that would benefit from a settled definition of affirmative action’s objective(s) is college administrators. The potential value of empirical information to administrators cannot be realized unless they too know which arguments

¹¹⁷Before *Grutter* was decided the use of racial preferences was found to be unconstitutional under the Fourteenth Amendment by the Fifth Circuit Court of Appeals in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). The response of the Texas legislature was to adopt a percentage plan. TEX. EDUC. CODE ANN. § 51.803 (Vernon 2005). In Florida the use of racial preferences and the adoption of percentage plans was simultaneously ordered by Governor Bush and enacted by the Florida Board of Regents. FLA. ADMIN. CODE ANN. r. 6C-6.003 (2006). In California the ban on racial preferences was passed by popular vote; CAL. CONST. art. I § 31 (codifying Proposition 209). Subsequently the UC Board of Regents adopted. See THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, COMMITTEE ON EDUCATION POLICY (1999) available at <http://www.universityofcalifornia.edu/regents/minutes/1999/edpol799.pdf>.

¹¹⁸ See e.g., NAACP LEGAL DEFENSE & EDUC. FUND *supra* note 34 at 1 (“By its very nature, the only way a racial gap can be closed completely is through racial means.”); Roland G. Fryer, Jr., Glen C. Loury and Toga Yuret, Color Blind Affirmative Action (July, 2004) available at <http://post.economics.harvard.edu/faculty/fryer/papers/cbaa.pdf>.

¹¹⁹ U.S. DEP’T EDUC. OFFICE OF CIVIL RIGHTS, *supra* note 48 at v.

deserve attention. What’s more, it is unreasonable and perhaps impossible to expect educational institutions to respond to the U.S. Department of Education’s (DOE) pressure to narrowly tailor their programs so as to “minimize litigation risks,”¹²⁰ if they are not sure of the specific interests they are narrowly tailoring around.

In this Part I examine the problem of the Court’s ambiguity from the administrator’s perspective. Specifically, assuming the role of an administrator faced with the choice of adopting either the race neutral programs endorsed by the DOE,¹²¹ or the more widely employed system of racial preferences, I demonstrate how this choice might differ according to the objective I seek to satisfy with my program.

A. Race Neutral Programs

“The short-run efficiency losses of implementing color-blind affirmative action (relative to conventional affirmative action) can be substantial.”¹²²

1. Substituting Measures of Socioeconomic Status for Race

At least two postsecondary institutions, Texas A& M College of Medicine and The University of Florida Law School, have adopted “economic affirmative action” practices. Seeking to provide opportunities to socioeconomically disadvantaged individuals, these programs incorporate a mix of the following factors into the admissions process: (1) parents’ education; (2) family income; (3) parents’ occupation; (4) family’s

¹²⁰ Roland G. Fryer, Jr., Glen C. Loury and Tolga Yuret *supra* note 118 at 2.

¹²¹ The Department of education has lent public support to 4 race neutral approaches: (1) the substitution of socioeconomic status measures for racial considerations (2) the targeting of new “non-feeder” schools (3) strengthening college preparation efforts in underperforming schools and (4) percentage plans. U.S. DEP’T EDUC. OFFICE OF CIVIL RIGHTS, *supra* note 48. Space does not permit me to discuss each of these alternatives. I specifically chose to ignore the second recommendation because it is the least generalizable (it is likely that the set of feeder schools and the characteristics of those schools will differ enormously between institutions), and the third because of my focus on admissions practices.

¹²² Roland G. Fryer, Jr., Glen C. Loury and Tolga Yuret *supra* note 118 at 1.

net worth; (5) family structure; (6) school quality; and (7) quality of neighborhood.¹²³

These programs are premised on the belief that “a student from a single-parent family living in a neighborhood with high concentrations of poverty who has a B+ average and a 1100 score on the SAT is likely to be more resourceful and capable than a student from a wealthy suburban home who had access to expensive after-school tutoring programs and achieved an A- average with a higher GPA and SAT score.”¹²⁴ One criticism of these programs expressed to the Court in *Grutter* was that, because they would cause a decline in minority representation, they were not “narrowly tailored.”¹²⁵ Thus, again it is clear that persons on either side of the debate have different assumptions about the objectives affirmative action must satisfy. If rewarding ability to overcome obstacles is the goal these programs are successful, if instead we are seeking to obtain the benefits of diversity or access they fail.

As an administrator, my decision to employ “economic affirmative action” must depend on my goal. While the replacement of these factors for race seems appropriate, indeed for efficiency reasons preferable, if one’s goal is to close socioeconomic gaps, what if one’s goal is more specifically to close *race-related* socioeconomic gaps? One response to these programs has been the argument that “[b]y its very nature, the only way a racial gap can be closed completely is through racial means.”¹²⁶ Regardless of whether this is the *only* way to close a racial gap, logic informs that it cannot be the most direct

¹²³ *Id.* at 61

¹²⁴ *Id.*

¹²⁵ Brief of Social Scientists Glen C. Loury, Nathan Glazer, John F. Kain, Thomas J. Kane, Douglas Massey, Marta Tieda and Brian Bucks as Amici Curiae in Support of Respondents at 28-29, *Grutter v. Bollinger*, 539 U.S. 306, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-241 & 02-516).

¹²⁶ NAACP LEGAL DEFENSE & EDUC. FUND *supra* note 34 at 1.

means. Rather, if one's goal were to close socioeconomic gaps between races the most well designed program would include race as a factor.

Similarly, economic affirmative action is not well suited to most of the other affirmative action related goals mentioned throughout this paper. First, while given the overrepresentation of minorities in lower socioeconomic brackets, one would expect economic affirmative action to yield a racially diverse class; it hardly seems that this would be the most direct means of obtaining said representation.

What's more, if the ability of economic affirmative action to yield racially diverse classes is to be sustained over time, socioeconomic gaps must persist. If one's goal is the closing of socioeconomic gaps this is not problematic. If the gaps close and the yielding of diverse classes ceases we are not concerned because the goal has been met. However, if the administrator's goal is to enhance class discussion or reduce prejudice within society, there would be an ongoing need for the maintenance of this gap to satisfy the programs objectives. Thus economic affirmative action would be a poor choice.

If the administrator's goal is to provide service to underserved communities, or create more minority professionals the correlation between race and low socioeconomic status might benefit either of these objectives. However, again, a more direct method would be to employ race, and career related inquiries. Finally, economic affirmative action does not correct for racially bias tests, or create more minority professionals. These goals clearly require consideration of race.

2. Percentage Plans

Unlike "economic affirmative action," the basic premise of percentage plans (outlined above) is less clear. Beyond class rank, these programs do not involve any

factors whatsoever and in fact greatly restrict the flexibility of admissions practices by requiring automatic acceptances, which may compose the majority of an incoming class. For instance, in Texas “the proportion of the freshman class admitted through the Ten Percent Plan has risen to 75 percent.”¹²⁷ It defies reason that these programs, which appear to have no inherent “compelling interest” other than rewarding academic success, and further quite broadly (as opposed to narrowly) impact class composition, have received the DOE’s support.

Defendants of these programs argue that they are an effective means of obtaining diverse student bodies.¹²⁸ Regardless of how one defines diversity as either racial, geographic, socioeconomic, or view-point related, this hardly seems the most efficient means. Not only are percentage plans incapable of measuring and factoring in diversity related qualities, they also run the risk of restricting the administrator’s ability to incorporate these factors in the majority of admissions decisions. Further, looking narrowly at racial diversity, the success of percentage plans in drawing a racially diverse class would require a pattern of racial segregation on the high school level. As social scientists explained to the Court in *Grutter*, “in order to yield a significant number of students at the highest ranks, these minority students must be concentrated largely in schools in which they constitute the minority or supermajority. In other words, there must be a relatively high degree of racial segregation.”¹²⁹

¹²⁷ U.S. DEP’T EDUC. OFFICE OF CIVIL RIGHTS, *supra* note 48 at 74.

¹²⁸ Press Release, Department of Education, Colleges, Universities use Innovative Race-Neutral Ways to Achieve Diversity on Campus Report Says (March 26, 2004) (on file with author).

¹²⁹ Brief of Social Scientists Glen C. Loury, Nathan Glazer, John F. Kain, Thomas J. Kane, Douglas Massey, Marta Tieda and Brian Bucks as Amici Curiae in Support of Respondents at 27, *Grutter v. Bollinger*, 539 U.S. 306, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-241 & 02-516).

Further, these plans are incapable of correcting for racially biased tests, providing representation to underserved communities, or increasing the number of minority professionals. Assuming that persons of different socioeconomic backgrounds attend different high schools, it is possible that percentage plans might serve one's goal of closing socioeconomic gaps. However, again, this hardly seems the most efficient means.

B. Race Sensitive Programs

1. Race as a Factor in Scholarship Programs

Recently, the New York Times reported that “[f]acting threats of litigation and pressure from Washington, colleges and universities nationwide are opening to white students hundreds of thousands of dollars in fellowships, scholarships, and other programs previously created for minorities.”¹³⁰ One scholarship director reacted, “this makes our objectives more difficult.”¹³¹ However, the article did not provide a clear definition of these objectives. Is the consideration of race in the awarding of scholarships necessary to reach affirmative action goals? Is it the most efficient or narrowly tailored means of reaching those goals? Once again, the answer to this question depends on the goal in mind.

Assuming that qualification for financial assistance is need-based, an award process that also takes race into consideration is an effective approach to closing socioeconomic gaps between races. If this is one's goal, the obvious advantage that this approach has over the substitution of socioeconomic factors for race is that it allows for the consideration of both qualities. If, alternatively, ones goal is simply to close

¹³⁰Jonathan D. Glater, *supra* note 8.

¹³¹*Id.*

socioeconomic gaps the introduction of race might lead to inefficiencies. A more direct approach would be to exclusively examine the applicant's need.

The administrator who seeks educational or societal benefits of diversity will undoubtedly prefer to consider race when awarding scholarships. Given the patterns observed by Lempert, Chambers, and Adams,¹³² those who aim at providing service to underserved communities might share this preference. However, scholarships are not the optimal approach to reaching either of these goals. Considerations of race and needs do not gauge "diversity enhancing qualities," or the likelihood that an applicant will serve his or her community.

2. Race as a Factor in Admissions

Grutter allowed administrators to award points to applicants based on their race for the purpose of obtaining the benefits that flow from diversity.¹³³ Thus, perhaps the most important question, where racial preferences are concerned, is whether they are in fact narrowly tailored to the goal of obtaining diversity related educational and societal benefits. It is problematic, then that racial preferences alone do not appear to be the most efficient means of obtaining these benefits.

Beginning with educational goals, assume that the exclusive aim of a particular University is to enhance classroom discussion by introducing a diverse collection of voices. Are racial preferences narrowly tailored to meet this goal? Randall Kennedy has called into question the assumption that race might be used as a proxy for viewpoint. Is it correct to assume that all black persons will represent a "black point of view?" Kennedy

¹³² *Supra* Part III A3.

¹³³ 539 U.S. at 343 ("[T]he equal protection clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

comes to the intelligent conclusion that “we should articulate the substantive content of the perspectives to which we refer.”¹³⁴ Similarly, in reapportionment cases the Court has observed that utilizing race to develop districts:

reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.¹³⁵

Accepting Kennedy’s and the Court’s arguments, it is problematic that, as Peter H. Schuck has observed, “the admissions office almost never asks [students] about their ideas or points of view.”¹³⁶ Carefully designing an application to include questions measuring one’s viewpoints might yield a more *view point* diverse class than simply awarding points according to race.

Furthermore, racial preferences may not be well suited to the pursuit of societal benefits. Kennedy has also argued that the use of race as a proxy allows “race-conscious decisionmaking to be naturalized into our general pattern of academic evaluation,” and has the effect of causing “race-conscious decisionmaking to lose its status as a deviant mode of judging people or the work they produce.”¹³⁷ By this reasoning, affirmative action programs that assume a correlation between race and viewpoint are not only inefficient, but also might undermine societal interests in reducing prejudice.

Approaching the ability to capture societal benefits from another direction, assume that a University subscribes to the aforementioned “contact theory” that increasing cross cultural interactions will reduce prejudice. Bowen and Bok observed

¹³⁴ Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 at 1803 (1989); see also PETER H. SCHUCK *supra* note 11 at 168.

¹³⁵ *Shaw v. United States*, 509 U.S. 630 (1993)

¹³⁶ PETER H. SCHUCK *supra* note 11 at 168

¹³⁷ Randal L. Kennedy *supra* note 134 at 1804.

that students graduating in the earlier years of affirmative action were less likely to interact with persons of different races or cultures than students in proceeding classes,¹³⁸ and further posited the following explanation:

[C]olleges and universities may have become more adept at creating an environment in which students could learn from classmates who were different from themselves. When colleges first began to enroll much larger numbers of minority students, they sometimes assumed that the right kinds of interactions and educational experiences would occur more or less automatically. Subsequently, *college administrators learned that creating a productive learning environment required much thought.*¹³⁹

This explanation suggests that increased interaction between races is best achieved by supplementing preferred admissions policies with post acceptance attention to the student environment. Thus, it follows that if a University's goal is to increase cross cultural interaction during education or reduce levels of prejudice in society, the most efficient or narrowly tailored program would combine both efforts.

To drive this point home, let's return to the hypothetical University adhering to the "contact theory." If the engineers of the affirmative action program are told simply that they should design a program which promotes diversity it is possible they will fail to establish the supportive educational environment Bowen and Bok mention. However, armed with a more precise statement of the goal as enabling the cross cultural interaction necessary to reduce prejudice, the same engineers might not only seek to foster this environment, but might also once this environment has been created, decide that it is necessary to award fewer preferences to retain the desired level of interaction.

Failure to create such support structures might actually put the educational benefits of diversity out of reach. Once a diverse group has been assembled, what must

¹³⁸ William G. Bowen & Derek Bok *supra* note 27 at 226.

¹³⁹ *Id.* (emphasis added).

be done to honor the responsibility of incorporating minority voices into important conversations and decision making processes affecting the community and its norms? If, as the Court tells us, diversity “promotes ‘cross-racial understanding,’ [h]elps to break down racial stereotypes, and ‘enables students to better understand persons of different races.’”¹⁴⁰ And “[t]he nation’s future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues”¹⁴¹ we must realize that these benefits of diversity flow from the legitimate *incorporation* of minority viewpoints so that all voices are heard. When the majority fails to consult minority community members, the benefits of diversity are not realized. Furthermore, when there is a failure to incorporate, minorities are treated as tokens; organizations are immune from accusations of insensitivity because they appear diverse and yet the diversity they have achieved is meaningless and insulting.

Finally, imagine that a University is concerned with neither educational nor societal benefits, but instead is interested in establishing equal access between races. Here, it would seem appropriate to design a system discretely focused on awarding racial preferences. In fact, Linda F. Wightman, Vice President for Testing, Operations, and Research, for the Law School Admission Council (LSAC) has analyzed data available to LSDAS and LSAC and projected that abandonment of racial preferences would drastically reduce the percentage of minority applicants able to gain admission, suggesting that racial considerations are not only appropriate but necessary to achieve equality of access.”¹⁴² Furthermore, Stacy Berg and Alan B. Kruger have found that “the

¹⁴⁰ 539 U.S. at 330.

¹⁴¹ 438 U.S. at 312.

¹⁴² Linda F. Wightman, *The Treat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 NYU L. REV. 1

returns [on attending more prestigious schools] are greatest for students from disadvantaged backgrounds.¹⁴³ Accordingly, universities might take two steps: First, they might develop procedures enabling them to measure the applicant's level of disadvantage, and second they might restructure their financial aid program so that fewer disadvantaged students find cost prohibitive.¹⁴⁴

C. Choosing Amongst Existing Plans:

Which, amongst the plans discussed in this Part, is the most preferential? There is no blanket answer to this question. Instead the choice is conditioned on the particular

(1997) ; *see also* William C. Kidder, *supra* note 40 ([A] comprehensive review of the consequences of ending affirmative action at public law school in California, Texas and Washington reveal that there is little evidence that race-neutral alternatives of affirmative action are viable in legal education."). *But see* Stephan Thernstrom, *Diversity and Meritocracy in Legal Education a Critical Evaluation of Linda F. Wightman's "Threat to Diversity in Legal Education,"* 15 CONST. COMMENT. 11 (Spring 1998).

¹⁴³ Stacy Berg Dale and Alan B. Kreuger, *Estimating the Payoff to Attending a More Selective College: An Application of Observables and Unobservables*, Q. J. ECON. 1491, 1524 (Nov. 2002). Dale and Kreuger use SAT and tuition cost as measures of prestige. *Id.* Additionally, Wilkins has raised the point that "given that minority graduates appear to get more from their Michigan degrees than their white peers (given where each group of graduates would likely have ended up in the absence of a Michigan education), one could argue that a public institution like Michigan should increase the number of places going to those who can make the best use of this limited resource." David B. Wilkins *supra* note 40 at 554.

¹⁴⁴ The NAACP Legal Defense and Education Fund notes that "[e]ven for African American students who are academically prepared, college costs present a significant obstacle to enrolling in and graduating from college." NAACP LEGAL DEFENSE AND EDUCATIONAL FUND *supra* note 34 at 5. Thus it would appear that one way to increase accessibility would be to lower the cost of tuition.

What's more, it might be best if efforts to increase accessibility of postsecondary education were directed at preparation as well as admissions. The NAACP Legal Defense and Education Fund (LDF) reports:

The average African-American student attends segregated, high-poverty elementary and secondary schools that tend to have less qualified teaching staff, deteriorating facilities, fewer up-to-date textbooks, lower average test scores, and fewer advanced placement courses.

...

In comparison to their white peers, African-American students are also far less likely to have access to college information and resources within their families and communities. . . . Moreover, African American students typically attend schools that are unable to provide resources to fill gaps in parental knowledge of, and familiarity with, the college preparation process.

Id. at 4. Given these disturbing inequalities in lower education it seems inappropriate to expect preferences to do all the work in increasing accessibility. Instead, looking more comprehensively at the student's entire educational experience, a narrowly tailored program would be one that assisted in removing inequalities at the lower level and provided students with the information and preparation necessary to gain college admission.

“end” imagined. Furthermore, my analysis here suggests we should doubt the possibility of any of the existing plans to serve as an adequate vehicle for reaching even the most clearly defined of goals.

Existing programs are not narrowly tailored to meet particular ends. If the concern is closing socioeconomic gaps between the races administrators should measure both socioeconomic background and race. If overcoming test related racial discrimination is the objective racial preferences are useful but abandonment of said tests is more efficient. Educational diversity goals benefit from measures of applicant’s view points and societal diversity goals require post admission efforts to facilitate interaction between students of different races or ethnicities. In sum, the clearer the definition of the objective, the more efficient the administrator will be in serving that goal.

Conclusion

Affirmative action is capable of yielding many benefits. Carefully designed programs have the potential to create educational benefits, reduce prejudice, close socioeconomic gaps by increasing the earning potential of marginalized groups, correct for test related bias, and provide to underserved communities. However, the ideological defense of affirmative action, and the debate as a whole, has been hampered by our failure to reach a shared understanding of the objective or set of objectives existing programs are meant to reach. Those who argue in favor of affirmative action may refer to any of the benefits mentioned here to support their claims; however such arguments lack the force they might otherwise have if there were a clear legal identification of these benefits as relevant. Further, attacks on affirmative action tend to focus not on these benefits but instead on separate costs as a means of demonstrating failure. Without an understanding

of the “end” that should be reached, we will only talk past each other in or arguments for and against the “means.”

Opponents of affirmative action speak of “winning the debate in the court of public opinion.”¹⁴⁵ It is unrealistic to expect the public to weigh the opposing arguments without some standard by which to judge. We cannot evaluate the utility and necessity of existing programs if we do not know what they are meant to do. We cannot decide whether the ends justify the means until we agree on what they are.

Faced with the threat of legal attack, administrators are also in a difficult position. While they may have in mind many of the concrete benefits that have received attention from those who defend affirmative action, narrowly tailoring programs to meet those goals is not the safest approach. Rather, the most reasonable defense is to demote concrete objectives and instead articulate the diversity rationale while refraining from using quotas to obtain a diverse student body. This makes narrow tailoring difficult and it frustrates the ability of administrators to seek benefits that they, like social scientists, believe to be valuable but of questionable legal permissibility. The Court’s ambiguity has created an environment of inefficient design.

Ambiguity is stifling progress in achieving laudable goals. When these issues are before them, courts can remove uncertainty by explicitly recognizing the compelling interests in seeking benefits that social scientists have worked hard to demonstrate. In the absence of a clear articulation by the courts, administrators must take the lead and capitalize on the Court’s openness by designing more efficiently to obtain concrete

¹⁴⁵ Roger Clegg quoted in Peter Schmidt, *From ‘Minority’ to ‘Diversity,’* 52 CHRON. HIGHER EDUC. 24 (2006).

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benefits. If we continue treat diversity as not only an end, but *the end*, the debate will remain muddled and optimal design will be impossible.