ABSTRACT

The Effect of Gratz and Grutter in Higher Education: The Role of the Courts

In Creating Social Change

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This thesis explores the question, "To what extent can the Supreme Court create social change?" By looking at the affirmative action cases *Gratz* and *Grutter,* I determine whether these decisions made by the Court produced the intended outcome (i.e., achieving a diverse student body). To examine this phenomenon, I conducted an empirical study, pulling data from fifty higher learning institutions and noting whether each school saw an increase or decrease in Black and Latino student enrollments. If *Gratz and Grutter* made a significant difference, we would expect an increase or decrease in Black and Latino student enrollment to be commensurate with the overall Black and Latino population figures of each state. Schools with a positive *Net Change* showed an overall increase in Black and Latino enrollment, while schools with a negative *Net Change* showed an overall decrease in Black and Latino enrollment. My study aims to add to the conversation on the Court's role in producing social change by using affirmative action cases as my unit of measure. Ultimately, I believe that although the powers of the Court may be limited, when the justices speak, society responds.

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# THE EFFECT OF GRATZ AND GRUTTER IN HIGHER EDUCATION: THE ROLE OF THE COURTS IN CREATING SOCIAL CHANGE

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# CHAPTER ONE

## Introduction and Literature Review

"American courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To ask them to produce significant social reform is to forget their history and ignore their constraints. It is to cloud our vision with a naive and romantic belief in the triumph of rights over politics. And while romance and even naivete have their charms, they are not best exhibited in courtrooms."

Gerald N. Rosenberg

One ironic legacy of *Brown v. Board* was the slew of reverse discrimination suits that followed. Imagine after the justices ruled that separate was, in fact, unequal, white plaintiffs emerged seeking justice against the unfair and discriminatory treatment they were receiving from college admission boards. From Bakke (1978) to Fisher (2016), the implementation of diversity as a compelling state interest has been questioned. How can states go about creating more diverse classrooms without falling prey to racial quota systems? Recently, Harvard University has been brought before the Court to justify their decision to continue admitting the same number of Asian American students, despite a growing Asian American applicant pool. The task of determining how colleges should pursue diversity has been thrust upon the Court, forcing the justices to make decisions that directly impact societal interactions. The pursuit of diversity is very nuanced, resulting in varying responses from colleges when balancing how one should versus how one does pursue diversity. This begs the question, "To what extent can the Court create social change?" This thesis sparks conversation on this topic, using a pair of 2003 decisions (*Gratz v. Bollinger* and *Grutter v. Bollinger*) to examine if the Court's rulings had the kind of effect that the majority coalition of Justices intended. In what follows, I study Black and Latino student enrollments across the fifty states (excluding Vermont) and Washington DC, selecting one school as a

representative of each state. If there was a significant increase in Black and Latino student enrollments, then it is probable the Supreme Court's decision in *Gratz* and *Grutter* had an impact; if not, the Court's impact is less likely.

*Gratz* and *Grutter* are landmark affirmative action cases, fundamental to our understanding of race-based admissions policies. Both cases were brought before the Supreme Court from the great state of Michigan — *Gratz* from the University of Michigan and *Grutter* from the University of Michigan Law School. In *Gratz*, the Court ruled against the undergraduate admissions office, claiming their use of racial preferences violated the Equal Protection Clause of the 14th Amendment. The policy did not provide individual consideration of every applicant (Oyez 2021). In *Grutter*, the Court ruled in favor of the University of Michigan Law School's use of racial preferences in student admissions, asserting the Law School neither violated the Equal Protection Clause of the 14th amendment nor violated Title VI of the Civil Rights Act of 1964. Since the Law School conducted highly individualized reviews of each applicant, race did not trigger automatic admission (Oyez 2021). Thus, the Law School escaped the consequences that befell the University of Michigan undergraduate programs. I will be conducting an impact assessment of the Court's effectiveness by using affirmative action cases as my unit of analysis. My thesis objective is to note Gratz and Grutter's observable effects to ascertain how much an effect if any, the Supreme Court's decision had on higher education regarding affirmative action policy.

Former Justice Ginsburg gave a Keynote Speech in 2009, addressing the rationale behind her opinion in *Gratz* and *Grutter*. She said, "Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day

when entrenched discrimination and its aftereffects have been extirpated. If honesty is the best policy, affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises" (Ginsberg 2009). Here, I believe Justice Ginsburg grapples with the question, "How can America atone for past wrongs that subjugated a race to the margins, not allowing them to fully participate in the benefits of a democracy?" In order to go forward to an age where race no longer matters, we must first go backward to address the foundations that continue to foster the inequitable treatment of minorities. Before starting this salient conversation on racial reconciliation, my thesis investigates the role of a primary institution, the Supreme Court, in fixing vestiges of slavery from the past. Empirically, I study the Court's role in being an effective promulgator of social change.

To start the discussion, I begin with a review of literature that seeks to answer, Whether the Court can produce significant social reform. I cover *The Hollow Hope* by Gerald Rosenberg, critiques of Rosenberg's work by Feeley and McCann, several impact studies (covering Supreme Court decisions in Roe, Miranda, Escobedo, Gideon, and Japanese tobacco policy), law reviews (studying the jurisprudential impact of *Gratz* and *Grutter*), and research articles (delving into the social impact of *Gratz* and *Grutter*). In Rosenberg's book, *The Hollow Hope*, he [sorts through] two central questions: "Can courts produce significant social reform? If so, when and under what conditions will the US courts be effective producers of social reform?" (McCann 1992) Rosenberg relies on both the direct (the coercive powers of the courts to back up their commands and enforce their rules) and indirect (the extra-judicial path that invokes the court powers of persuasion legitimacy and the ability to give salience to issues) factors to answer the [aforementioned] questions. From there, Rosenberg models his argument from the perspective of both a constrained and

dynamic view of the courts, introducing a list of constraints and conditions for when the courts can be effective political actors (McCann 1992). He admits the constrained court view more closely approximates the roles of the courts in the American political system. To test his model/theory, he focuses on the direct and indirect effects of important court decisions in the last half-century; the decisions most [salient] to my study are *Brown v. Board* and *Roe v. Wade* (McCann 1992). Ultimately, Rosenberg determines Court decisions are neither necessary nor sufficient for producing significant social reform (McCann). Connecting back to my thesis, I focus on assessing the direct effect of *Gratz and Grutter* on higher education. I will be adding to Rosenberg's body of work by expanding the conversation on the Court's role in producing social change to include affirmative action.

Further proving the lack of sufficiency in Supreme Court decisions, Rosenberg supports this conclusion in his two chapters, "Civil Rights" and "Abortion and Women's Rights." The "Civil Rights" chapter studies the effects of the Supreme Court's famous desegregation rulings, including *Brown v. Board*, while the "Abortion and Women's Rights" section studies the effects *of Roe v. Wade*. Based on his findings, he concludes the Courts' desegregation rulings had no effect on social reform. "The Court [simply] followed and reflected the change, it did not create it. The Court contributed little to it"(McCann 1992, 719). In Rosenberg's analysis of *Roe*, he concludes the Courts' ruling impacted the availability of legal abortions. However, this impact, typically exaggerated by observers, primarily resulted from unanticipated market responses of private clinics offering medical services for profit. Looking at women's rights, Rosenberg also points out there was little direct or indirect impact from court decisions. He says, "Cases were argued and won, but litigants aside, little was accomplished"(McCann 1992, 719). It was grassroots movements and elite

support, not Court decisions, that led to a positive change. In both instances, Rosenberg determines the Court's ruling had little to no effect in promoting social change (McCann 1992). Considering Rosenberg's grim conclusion, it is difficult to prove a causal relationship between the Court's decisions and social change, but hopefully, my study continues to add to the body of data being collected to determine the Court's role in creating social change.

The impact studies I pulled also look at the effect of Supreme Court decisions, determining the Court's role in promoting significant social reform. Although the studies do not discuss *Gratz and Grutter* directly, they do form a basis for how other researchers operationalize the effectiveness of Courts. Before delving into [the collection] of impact studies, I will briefly cover the critiques of *The Hollow Hope*, given by Feeley and McCann, ending with Rosenberg's response to those critiques. Feeley (1992) argues Rosenberg's book relies too heavily on lawyers' rhetorical formulations rather than the social science analysis when Rosenberg frames and develops his central concerns. Feeley calls for a more subtle examination of the "indirect" effects that explore whether the courts can bring about social change (Feeley 1992). He subscribes to the belief if Rosenberg had lowered his expectations, he would have seen the power of the courts relative to other governmental agents was not insubstantial (Feeley 1992). Moving to McCann's critique, he [believes] neither the court-centered nor the dispute-centered analytical framework is adequate to determine the courts' effectiveness in promoting social change. He calls for more studies to be conducted using frameworks but adds the stipulation that these future studies must only be undertaken by those who take the task of investigation as seriously as Rosenberg (McCann 1992). In response to Feeley's and McCann's critiques, Rosenberg (1992) admits the imperfections of his model/theory because knowing every single detail about how the courts, law, and society

interact is not feasible (Rosenberg 1992). Scholars have to combine both top-down and bottom-up approaches to reach a broader audience and come closer to fully understanding the role of the courts in American society. When writing *The Hollow Hope*, Rosenberg's goal was to stimulate debate about the role and function of the courts and their significance in furthering social reform (Rosenberg 1992). My study seeks to contribute to this growing debate on whether the Courts can produce social change. I am prepared to admit this question may never be answered. Nevertheless, my work promises to yield fruitful results, showcasing how Court decisions alter the lives of regular citizens.

From critiques to impact studies, I will cover the effect of several major Supreme decisions: *Roe*, *Miranda*, *Escobedo*, *Gideon* (and Japanese tobacco policy). When discussing *Roe*, Bond and Johnson (1982) conclude organizational norms offer the best insight when considering hospital abortion policies. Internal rather than external factors exert more influence over abortion policies, not Court decisions (Bond and Johnson 1982). Hansen (1980) concludes five years after the *Roe* decision, minor changes were present regarding the access to abortions throughout the United States. Interestingly, the most significant increase in abortion rates happened in the most restrictive states - Louisiana, Mississippi, North, and South Dakota (Hansen 1980). Hansen also notices limits on public financing appeared to accentuate the redistributive implications of abortion policies, but as a whole, the impact of these new limits (instituted by *Roe*) on abortion availability remains unknown (Hansen 1980).

Next, several authors (Leo, Alexander et al., Romans, and Ayres et al.) contribute to the conversation surrounding *Miranda* and *Escobedo*. Leo (1996) argues *Miranda's* enduring impact has increased the level of professionalism during the criminal process's investigatory stage and transformed modern detective work culture and discourse. Some other highlights

include the professionalization of police practices, the transformation of culture and discourse regarding police detecting, the widespread awareness of constitutional rights, and the specialization and sophistication of police interrogation techniques (Leo 1996). Alexander et al. (1968) wrote on the difficulties of implementing *Miranda*, suggesting the bar should start an education campaign on citizen rights to help curb egregious police practices. They also call for the use of law students in the police station houses to help with legal staffing (Alexander et al. 1968). Romans (1974) looks at the influence of both the *Escobedo* and *Miranda* decision, showing how they build off each other. He looks at the power of state supreme courts in influencing the Supreme Court's actions; Romans concludes state supreme courts are generally unable to positively influence the thrust of Supreme Court policymaking since Court policies tend to regard the policy positions of the state courts as secondary (Romans 1974). For example, although the state courts were able to pressure the Supreme Court into a conservative interpretation of *Escobedo*, this only prompted the Supreme Court to set a more clear-cut position in *Miranda* with highly noticeable liberal overtones (Romans 1974). As a result, Romans calls for the Supreme Court to be more explicit when stating its views, so there is less room for evasion; the more explicit the Supreme Court is on its decisions, the more narrow the boundaries for state courts (Romans 1974). Similar to Hansen's determination of *Roe's* effect, Ayres et al. (1967) also argues little has changed since the Court's ruling in *Miranda*; its overall impact in law enforcement has been relatively [small]. He speculates this is because interrogations play a secondary role in solving crimes in New Haven and the ineffectiveness of *Miranda* rules on those said interrogations (Ayres et al. 1967). Wald points out mere warnings cannot provide concrete

assurance of a fundamental understanding and intelligent exercise of the privilege of silence. He calls for a fresh examination of the goals prompted by *Miranda* (Ayres et al. 1967).

Ending my review of impact studies with *Gideon* and Japanese tobacco policy, these cases end with similar outcomes. Levine's (1975) analysis of *Gideon* calls for the Supreme Court to make both administrative and legal changes adjustments that align their visions of the criminal justice process with reality (Levine 1975). He makes several suggestions to make the "right of counsel" more meaningful protection for indigent defendants: better facilities for interviewing poor defendants, a more flexible salary schedule for public defenders, give prisoners awaiting trial better information about the effectiveness of Legal Aid and get trial judges to devote more attention to discerning whether guilty pleas are predicated on sound legal advice (Levine 1975). To discuss Japanese tobacco policy, Feldman (2001) establishes three overlapping explanations for how the social framework surrounding tobacco control laid the groundwork for a legal regime to take control. He points to the emergence of domestic pressure to conform to the United States norms and standards, the impact of lawyers and litigation bringing media attention to tobacco conflicts, and the importance of informality in Japanese law and policy (Feldman 2001). Feldman demonstrates the benefits of replacing formal law with informal expectations and how this shift sets out a normative behavior template for individuals and institutions alike. There should be a reciprocal relationship between the formal and informal, the legal and social, between mandates and manners; together, these varying combinations should most likely bring about behavioral change (Feldman 2001).

After covering various impact studies, I move to discuss law reviews and other research articles, studying the jurisprudential and social impact of *Gratz* and *Grutter*. To

begin, discussing the jurisprudential impact, Ayres and Foster (2006) ponder the question, "Was the Court wrong to uphold the Grutter system and strike down the Gratz system?" (Ayres and Foster 2006) Ayres and Foster conclude there is not enough information available to determine this fact; however, they believe the Court erred by turning its back on the core requirement – racial preferences must be narrowly tailored to the government's objectives (Ayres and Foster 2006). They push for the narrowly tailored standard to include three dimensions of racial preferences: quantification, differentiation, and size. Moving forward, the Court should also require defendants to quantify the overall marginal costs and benefits of granting racial preferences (Ayres and Foster 2006). In this, the Court can best determine if a university uses minor preferences to achieve its diversity objectives (Ayres and Foster 2006). Caldwell (2005) also chimed in, [admitting] that although the Court correctly stated the purpose of narrowly tailoring in future race-conscious admissions policies (prevent an undue burden on non-minority applicants), the Court fails by making the narrowly tailored formula too rigid (Caldwell 2005). Not to mention, the Court's ruling in *Grutter* only extends to public universities, which leaves private universities with the discretion to continue pursuing practices that may or may not result in the inclusion of underrepresented minorities. Caldwell points out *Gratz*, combined with *Grutter*, sends mixed messages to the university community as a whole; I will explain this fact in the upcoming chapters (Caldwell 2005). Caldwell believes there needs to be further clarification between these two rulings. As time progresses, the Court will need to seize the opportunity to reformulate *Grutter*, setting up a foolproof system of constitutional minority admissions (Caldwell 2005).

Elliot and Ewoh (2005) also explore Gratz and Grutter's jurisprudential impact, addressing the ambiguity of these rulings. They positively highlight that at least the Court

opened a window for colleges and universities to use affirmative action policies to achieve diversity in adherence to the guidelines laid out by the Equal Protection Clause of the 14th amendment and other constitutional guarantees (Elliot and Ewoh 2005). This caveat required universities to narrowly tailor their programs, incorporating an individualistic review of each application instead of using racial quotas. Elliot and Ewoh acknowledge the ongoing tension that will remain for the foreseeable future regarding the traditional American ideal of equal opportunity and compelling arguments made for the desirability and necessity of government action in creating a more inclusive society (Elliot and Ewoh 2005). Building on Elliot and Ewoh, Raines (2005) attacks the University of Michigan's plan in its adherence to the narrowly tailored guidelines set by the Court; he believes Michigan's plan fails in three ways: it does not account for individuals who are similarly situated to those benefited under its terms, does not consider race-neutral alternatives before enacting its plan, and does not impose a time limit on its racial preferences; these downsides in Michigan's plan, does not pass the narrowly tailored standard (Raines 2005). Pushing against the typical affirmative action plan, Raines presents an economically driven affirmative action plan which grants preferences to poor white individuals and disadvantaged minorities. This plan is more inclusive because it does not just benefit minority races. Raines believes adopting this economic affirmative action plan will advance the constitutional precept that all members of our society should be inherently equal (Raines 2005).

Wrapping up the jurisprudential impact, Siegel (2006) believes the relationship between balkanization, individual consideration, and the use of race as a selection criterion will help [analyze] instances of race-conscious decision-making that have arisen in the past and will occur in the future. He advocates school districts can use racial criteria to make

assignments if race is one factor among several other factors – race can neither impose substantial burdens on individual students and families nor can it predominate district-wide disposals of assignment transfer requests (Siegel 2006). Siegel supports the concerns brought up by the Rehnquist Court - race still matters in American society, and the people should encourage the transition to a society where race no longer matters (Siegel 2006). Epermanis et al. (2007) also investigates *Gratz* and *Grutter*'s implications past its effects on higher education (public colleges and universities. Robinson applies the Court's ruling, specifically the Equal Protection Clause, to how the government interacts with citizens, like awarding contracts and eligibility for benefits (Epermanis et al. 2007). He highlights that changing the standards for a "compelling government interest" trickles down, regulating government action. The Supreme Court sets a precedent that allows universities to achieve some diversity goal to meet the "compelling government interest" standard (Epermanis et al. 2007). Thus, [reducing the power] of the strict scrutiny test under the Equal Protection Clause. *Gratz* and *Grutter* set into motion preferential affirmative action, strengthening the cause and becoming a permanent fixture in government selection processes (Epermanis et al. 2007).

To offer more insight into *Gratz* and *Grutter*'s effect, I will transition from the jurisprudential impact to the social impact. Brennan (2003) examines the impact of these cases–particularly concerning the permissibility of race-used by public universities–focusing on the scope of public policy prohibition against racial preferences regarding private tax-exempt entities (Brennan 2003). Brennen concludes the IRS has taken the position the Court's constitutional law decisions have a significant bearing on whether race-conscious affirmative action policies violate tax law's public policy limitation (Brennan 2003). The decisions made in *Gratz* and *Grutter* signal the IRS will not deny or revoke the tax-exempt

status of charities practicing race-based admissions policies similar to the University of Michigan Law School. The IRS is not bound to the deterministic interpretation of constitutional law; instead, it has some wiggle room in deciding the limitation of public policy (Brennan 2003). Green (2004) also explores *Gratz* and *Grutter*'s social impact, focusing on the changes made by executive leadership at the University of Michigan. He discovered four response strategies contributing to Michigan's institutional engagement: developing the educational benefits [of the diversity argument], openly and effectively communicating [Michigan's stance on the affirmative action debate], mobilizing allies [separate from senior leadership at Michigan that supported race-conscious policies], and developing and promoting normative research (Green 2004). Together, these strategies create an understanding of how Michigan responded to two legal challenges while engaging in a national debate on race-conscious policies in admissions. The University of Michigan came out with a multi-pronged, comprehensive strategy to make and ultimately won the argument that racial diversity does meet the compelling interest standard (Green 2004). Green also illustrates the impact of public discourse, institutional change, and public policy associated with diversity through the dimensional application of leadership, organizational values, communication strategies, and coalition building (Green 2004).

After an extensive review of the literature, I will end by justifying *Gratz* and *Grutter's i*mportance and how I plan to contribute to the Rosenberg debate over the Court's role to create social change through these affirmative action cases. *Gratz* and *Grutter* are foundational in that they showcase the complexities of the precedent set in *Bakke* – how do universities admit a critical mass of minority students without succumbing to racial quotas? *Gratz* and *Grutter* navigate this question, offering somewhat of a guide for schools when

narrowly tailoring their affirmative action programs. These cases set the precedent that race can be used as a factor in race-based admissions, but it cannot be the only factor. College admissions offices must conduct an individualized review of each applicant and be prepared to back their decisions when race is involved to avoid Court interference. *Gratz* and *Grutter* expose the cracks in implementing affirmative action policies, forcing schools to decide whether or not to take the risk of using race-based admissions policies or doing away with them together. Together, these cases also showed the Court's ambiguity when it came to deciding affirmative action cases. There was no clear pattern that demonstrated the Court's divided mind when it came to this issue.

My contribution to the Rosenberg debate uses affirmative action cases, *Gratz* and *Grutter*, as a window to determine the Court's role in creating social change. I operationalize the effectiveness of the Court's decisions in *Gratz* and *Grutter* by looking at whether there was an increase or decrease in Black and Latino enrollments across the fifty states. One caveat, my study only investigates the direct effect of these Supreme Court decisions, unlike Rosenberg's study, which looks at both direct and indirect effects. Later, I make some suggestions regarding possible indirect measures, but my focus is on these two Court decisions' measurable effects. Ultimately, I add to the conversation by providing more data in hopes of someday proving a causal relationship between Supreme Court decisions and social change. Holistically, affirmative action is an extension of civil rights, redressing past wrongs to create a more equitable future. My study adds to the already existing body of work that considers the Court's ever-growing role in setting social policy.

# CHAPTER TWO

## History of Affirmative Action

*Regents of the University of California v. Bakke* (1978)*:* The Supreme Court first addresses an affirmative action case in the courts. In this case, Allan Bakke applied twice to the University of California Medical School. The University of Michigan rejected Bakke both times (Oyez, Gratz 2021). Despite the fact, his GPA and MCAT score exceeded those of any of the minority students admitted in the two years, Bakke's applications were rejected. The School had reserved 16/100 seats in each entering class for "qualified minorities" to redress longstanding, unfair minority exclusions from the medical profession (Oyez, Gratz 2021). The question brought before the Supreme Court was whether the University of California's set-asides violated the Equal Protection Clause of the 14th amendment or violated the Civil Rights Act of 1964 (Oyez, Gratz 2021). Ultimately, the Bakke decision was highly contentious, for there was little the justices agreed on. The four more liberal justices ruled California's plan was valid and did violate the Equal Protection Clause of the 14th amendment or the Civil Rights Act of 1964. They said, "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on racial minorities by past racial prejudice" (Naff 2004, 408). The four more conservative justices argued against this, saying it was unnecessary to even rule on California's admission process because it violated the Civil Rights Act of 1974 (Oyez, Gratz 2021).

Justice Powell bridged the gap of both positions, presenting the Supreme Courts' judgment. Powell sided with the conservative justices, agreeing the medical School's set-

asides or racial quotas were unconstitutional and sided with the conservative justices (Oyez Gratz, 2021). The use of race as one of the admission factors did pass the constitutional threshold. He applied the standard of strict scrutiny to race-based admissions policies, which meant the program had to serve a compelling government interest (Oyez, Gratz 2021). The program had to be narrowly tailored to achieve that purpose. Justice Powell set the precedent using racial quotas was unconstitutional. However, he also set the precedent normative was a compelling state interest and race could be used to further normative so long as it was not the only factor. In the end, the Court minimized opposition to the goal of equality by admitting Bakke into medical School while extending rights for racial minorities (Oyez, Gratz 2021).

From *Baake*, several other significant Supreme Court decisions emerged, non-education related:

*United Steelworkers of America v. Weber* (1979): The United Steelworkers of America implemented an affirmative action-based training program in order to increase the number of black skilled craft workers in their company. This training program was brought under scrutiny when Weber was denied entrance into the program because half of the positions were reserved for blacks. Weber sued United Steelworkers, claiming reverse discrimination. His case made it all the way to the Supreme Court. The question at hand was whether United Steelworkers' training program violated Title VII of the Civil Rights Act of 1964 (prohibition of discrimination based on race). The Court ruled in favor of Steelworkers United, arguing their training program was legitimate because 1) it sought to eradicate

patterns of racial segregation and 2) it did not prevent white employees from advancing (Oyez 2021). (Upheld)

*Fullilove v. Klutznick* (1980): Congress passed legislation, requiring ten percent of federal funds be set aside for local public works programs used to obtain services or supplies from minority business group members. Earl Fullilove filed suit against the Secretary of Commerce, claiming he was economically harmed by the enforcement of this statute. The question brought before the Supreme Court was whether the statute favoring minority businesses owners violated the Equal Protection Clause of the 14th amendment. The Court decided this set-aside program was within the power of Congress (Spending Power and Commerce Clause) who was not required to act in a color-blind fashion (Oyez 2021). (Upheld)

*Firefighters v. Stotts* (1984): Respondent Storrs and Jones, both black members of the Fire Department, filed suit against the Tennessee Fire Department, claiming they had been denied promotions based on race. To address this issue, the Department set out to remedy this issue, but were confronted with implementing layoffs due to government cutbacks. In compliance with a court order, the Department modified their layoff plan, protecting black employees from getting fired. This modified plan angered the white employees who were being laid off, even though they had seniority. The Supreme Court ended up invalidating the

layoff plan; African American employees were subject to layoffs like their white counterparts (Oyez 2021). (Struck Down)

*Wygant v. Jackson Board of Education* (1986): Both the Jackson Board of Education and the teachers' union reached an agreement that a certain percentage of minority personnel would not laid off. As a result, Wendy Wygant, non-minority personal, was displaced, despite having seniority. The case brought before the Court came a certiorari. The question being discussed was whether this collective bargaining agreement provision for race-based layoffs violated the 14th amendment, Equal Protection Clause. The Court argued that this agreement was in violation of the Equal Protection Clause because the Board of Education failed to justify why racial classification was a compelling state interest and they failed to remedy the discrimination (Oyez 2021). (Struck Down)

*Sheet Metal Workers v. EEOC* (1986): the Court upheld the court-imposed hiring plan. The federal district court found Steel Metal Workers guilty of racial discrimination. The court set a 29% minority membership goal and got the union involved to make sure procedures were implemented that brought his goal to fruition. The union did not meet their goals and were convicted of civil contempt for disobeying an order from the court. A new goal was set for the union in which they had to bring in 29.23% nonwhite, so their membership goal increased by 0.23%. The Court ruled on whether the lower courts were empowered to order race-conscious membership programs via Title VII of the Civil Rights

Act of 1964; the justices determined this was not case because Title VII does not prohibit the courts from ordering affirmative race-conscious relief to remedy past discrimination. The court's injunctions were warranted, since the mere warning provided under Title VII (prohibiting discrimination) was no match for chronically discriminatory employers/unions (Oyez 2021). (Upheld)

*US v. Paradise* (1987): The Alabama Department of Public Safety was forced to implement a one-for-one rule when it came to promotions. Every time they promoted a white employee, they then had to promote a black one, or vice versa. This promoting scheme was in response to a series of NAACCP lawsuits that had been initiated in the 1970s. Before the Courts was the question., "Did one-black-one-white promotion scheme violate the Equal Protection Clause of the 14th amendment?" (Oyez 2021) In a 5-4 decision, the Court upheld the promotion plan since it did not stop white advancement and the scheme was narrowly drawn to include specific ranks in the department. The promotion scheme was necessary to address the unconstitutionality of the Department's promotion practices for black employees; the Department had a long record of relay and resistance (Oyez 2021). (Upheld)

*Johnson v. Santa Clara County* (1989): The Transportation Agency in Santa Clara County, an affirmative action employer, decided to hire Diane Joyce over Paul Johnson; both candidates were equally qualified but the Agency used the sex of the applicants as a one of the factors to make their final promotion decision. The question raised, "Did the Agency impermissibly take into account the sex of applicants in the promotion process and violated

Title VII of the Civil Rights Act of 1964?"(Oyez 2021) The Court affirmed the Agency's promotion procedures, arguing it was not unreasonable to consider sex as one factor among many when making promotion decisions. Not to mention, men were not barred from absolute advancement (Oyez 2021). (Upheld)

*Richmond v. Croson* (1989): The City of Richmond adopted regulations, requiring companies who were awarded city contract to subcontract thirty percent of their business to minority businesses. As a result of this new set-aside policy, J.A. Croson Company lost its contract so they sued the city. The question before the Courts was whether Richmond's regulation violated the Equal Protection Clause of the 14th amendment. The Court sided with Croson, arguing that "generalized assertions of past racial discrimination (Oyez 2021)," did not justify the use of racial set-asides for the awarding of public contracts. The thirty percent quota was not tied to a specific injury, so claims of racial discrimination could no longer be the rationale for racial quotas; these quotas greatly subverted constitutional values: "The dream of a Nation of equal citizens in a s society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs (Oyez 2021)." (Struck Down)

*Wards Cove v. Atonio* (1989): Wards Cove Packing Company primarily hired nonwhite workers to perform unskilled seasonal jobs for canning fish. As a result of this hiring trend, a group of minority workers came together and filed suit against Ward Cove, claiming their

hiring practices violated Title VII of the Civil Rights Act of 1964. The nonwhite seasonal workers presented evidence showing the high percentage of nonwhites in unskilled work versus the high percentage of whites in skilled work. It is important to note that Wards Cove received its seasonal employees through a hiring agency that enrolled primarily nonwhites. The Court's had to decide whether an employer has to justify racial disparity as a "business necessity" to avoid a "disparate impact" lawsuit under Title VII of the Civil Rights Act of 1964 (Oyez 2021). The Court sided with Ward Cove, claiming that finding a hiring pattern where a higher percentage of nonwhites were enlisted to work in temporary, unskilled jobs did not prove discriminatory hiring. Races cannot be compared across different job classes which can lead to wrongfully blaming the employer when the scrutiny should be placed on the racial differences that exist in the current job market. Comparisons must be made within the same class of jobs; only then can racial composition be applied across the board (Oyez 2021). (Upheld)

*Metro Broadcasting v. FCC* (1990): The Federal Communications Commission adopted two minority preference policies – one of those policies giving minority applicants preference for broadcast licenses when all other applicants were equivalent in other factors; minority status was the determining factor. As a result of this preferential policy, Metro Broadcasting, Inc filed suit against the FCC. The question before the Court, "Did the FCC's minority preference policy violate the Equal Protection Clause of the 5$^{th}$ Amendment?" (Oyez 2021) The Court this policy did not violate the Equal Protection Clause because the FCC was providing appropriate remedies for discrimination victims, made to advance a

legitimate congressional object – program diversity (available to both minorities and non-minorities). Congress had a legitimate interest in providing the public with diverse programming options so the FCC was justified in offering minority preferences. Also, the FCC's preference policy did not "unduly burden non-minorities" (Oyez 2021). (Upheld)

*Adarand v. Pena* (1995): A subcontracting clause was instituted by federal law, additionally compensating prime contractors for hiring small business that were controlled by "socially and economically disadvantaged individuals" (Oyez 2021). The clause stated, "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities…" (Oyez 2021) This clause was standard in most federal agency contracts. Adarand brought suit against the U.S. Transportation Department after Gonzales Construction Company was awarded the work because he was certified as a minority business and Adarand was not. Adarand submitted the lowest subcontractor bid and would have been accepted if the Department had not received additional payment for hiring Gonzales. The Court had to determine whether race alone presumed a disadvantage and whether this disadvantage should be followed by favored treatment; did this discriminatory practice violate the Equal Protection Clause of the 5th Amendment? The Court determined the subtracting clause did violate the Equal Protection Clause. The justices overturned their ruling made in *Metro Broadcasting*, claiming that "All racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review. In other words, they must serve a compelling government interest, and must be narrowly tailored to further that

interest" (Oyez 2021). Race was not a sufficient condition in determining one's disadvantaged status. The Court also established that "proof of past injury does not in itself establish the suffering of present or future injury" (Oyez 2021). (Struck Down)

Out of the eleven affirmative action related cases brought before the Supreme Court, the justices upheld seven of the affirmative action policies/programs and struck down the other four. Although, more affirmative action programs were upheld than struck down, more than half (*Wygant, Sheet Metal Workers, Paradise, Wards Cove, Metro Broadcasting, and Adarand*) of these case were decided with a 5-4 split, so the decision could have gone either way. The Court's ambiguity when it comes to race-based programs is not linear; the justices are constantly going back-and-forth when it comes to determining the constitutionality of affirmative action programs. Some important criteria for shaping affirmative action programs/policy 1) must pass the strict scrutiny test (program must be narrowly tailored to advance a compelling government interest 2) justification cannot be to remedy past wrongs 3) a person's disadvantaged status cannot be solely based on race and 4) cannot unduly burden non-minorities.

### *Case Analysis of Gratz and Grutter*

Before getting in the Supreme Court decision of *Gratz v. Bollinger*, here are the case facts. In 1997, Jennifer Gratz and Patrick Hamacher, Caucasian residents of the State of Michigan, challenged the University of Michigan's undergraduate admissions policy based on a points system (Oyez, Gratz 2021). Under this policy, the University of Michigan made admission decisions based on an individual applicant's rank on a 150-point scale. There were

several factors University of Michigan took into account - academic factors (GPA, school factor, curriculum factor, SAT/ACT score) and non-academic or "other" factors (geography, alumni status, essay caliber, personal achievements, leadership & service, and miscellaneous). (Epermanis 2007) When it came to the academic factors, an applicant could be awarded a max of 110 points: GPA (up to 80 points), school factor (up to 10 points), curriculum factor (up to 8 points), and SAT/ACT scores (up to 12 points). (Epermanis 2007) The other 40 points could be earned from non-academic factors. The most significant category in *Gratz* was under "Miscellaneous," in which the applicant would be awarded 20 points if they were an underrepresented racial-ethnic minority. In other words, minority undergraduate applicants would receive a 20-point bonus based on race alone which totaled one-fifth of the points needed for admission (Epermanis 2007). In 1999 and 2000, University of Michigan added to its admission policy system, going as far as to separate the minority and non-minority applicants by "flagging" underrepresented minority applicants, placing them in a review pool for further consideration (Epermanis 2007). In Gratz and Hamacher's case, the University of Michigan admissions office told them they were not competitive enough applicants for admission on the first review, so they created a class action suit and pleaded their case before the lower courts eventually, the Supreme Court (Oyez, Gratz 2021).

The Court had a decision to make regarding the University of Michigan's use of racial preferences in student admissions and whether it violated the Equal Protection Clause of the 14th amendment or Title VI of the Civil Rights Act of 1964. When evaluating this question, the Courts applied the standard of strict scrutiny, which requires the state to demonstrate a compelling state interest and show the classification in question is narrowly tailored to achieve that interest (Epermanis 2007). It is important to note when creating a

program that is narrowly tailored, “such actions will only be permissible provided that the government agency in question can demonstrate that it has taken measures to minimize the effect of such discrimination against the non-favored group or groups” (Epermanis 2007, 39). Ultimately, the Courts concluded in a 6-3 majority University of Michigan 's admissions policy failed to meet the strict scrutiny standard because the policy was not sufficiently tailored. Their policy did not provide individual consideration of each applicant but instead resulted in nearly every applicant of "underrepresented minority" status (Oyez, Gratz 2021). Looking forward, this was contrary to what happened in *Grutter* in which University of Michigan ’s Law School did complete a competitive and individualized review of each applicant; race was only a plus factor. Back to University of Michigan ’s undergraduate admissions policy, it was not narrowly tailored in the manner required by previous jurisprudence on this issue, *Baake* (Oyez, Gratz 2021). Chief Justice Rehnquist, the justice who delivered the majority opinion, declared University of Michigan ’s system that resulted in the automatic distribution of points to every underrepresented minority applicant did not fit the individualized consideration requirement established in *Bakke*, nor was it a narrowly tailored consideration of race (Oyez, Gratz 2021). The majority also struck down the argument normative cannot constitute a compelling state interest. Chief Justice Rehnquist wrote, “Moreover, unlike Justice Powell's example, where the race of a 'particular black applicant' could be considered without being decisive, the [University of Michigan's] automatic distribution of 20 points has the effect of making 'the factor of race … decisive’ for virtually every minimally qualified underrepresented minority applicant” (Oyez, Gratz 2021) This point system violates the second-part of the strict scrutiny standard - the narrowly tailored requirement, which calls for the government to “minimize the effect of

discrimination." The University of Michigan's policy fails to do so. The Court ruled the university's admission system was unconstitutional, and both violated the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act of 1964 (Oyez, Gratz 2021).

Justices also gave both concurring and dissenting opinions, so I will briefly cover those. Three Justices — O'Connor, Thomas, and Breyer — wrote concurring opinions. Justice O' Connor argued although each applicant's individualized consideration only came through the Admission Review Committee, which only played a small part in the overall admissions process, this was still sufficient to satisfy the strict scrutiny standard (Oyez, Gratz 2021). Justice Thomas argued the Equal Protection Clause prohibits any racial discrimination for higher education admission; University of Michigan 's admissions policy failed to comply in that it did not allow for sufficient consideration of non-racial factors in determining the admissibility of underrepresented minority applicants (Oyez, Gratz 2021). Last, Justice Breyer concluded the Court should distinguish between inclusion and exclusion policies in cases dealing with the Equal Protection Clause because the former is much more likely to prove consistent with the intent of the Equal Protection Clause (Oyez, Gratz 2021). Transitioning to the dissenting opinions, Justice Stevens, Justice Souter, and Justice Ginsburg wrote. Justice Stevens argued since neither Gratz nor Hamacher would benefit from the relief requested, the case should be dismissed because while the petitioners were entitled to relief from past wrong, they cannot seek injunctive relief to prevent future harms to other parties (Oyez, Gratz 2021). Justice Souter added making race only one of the factors in consideration, the admissions policy met the requirement established by previous Equal Protection Clause jurisprudence; since the point system and the Admission Review

Committee operated in conjunction with each other, there cannot be the phenomenon of "holding seats" the majority opinion feared (Oyez, Gratz 2021). Justice Ginsberg ended by arguing there is no evidence that University of Michigan 's admissions policy attempted to limit or decrease enrollment for any particular racial or ethnic group and because there is no evidence of University of Michigan "holding seats," their admissions policy does not violate the Equal Protection Clause (Oyez, Gratz 2021). Justice Ginsberg expressed racial information helps make admission considerations about an applicant because it paints a complete picture of what the applicant has accomplished and why they should be considered for admission (Oyez, Gratz 2021). That being said, these concurring and dissenting opinions only added more layers to the complexity of race-based admission policies while showcasing the Court's ambiguity on this issue.

Transitioning to the next case, here are the facts of *Grutter v. Bollinger*, which was brought before the Court in the same year. Barbara Grutter, a Caucasian female, alleged the University of Michigan Law School rejected her because it used race "as a predominant factor, giving minority applicants (African Americans and Hispanics) a greater chance of admissions than students with similar credentials from disfavored racial groups [White Americans]" (Epermanis 2007, 34). For instance, with an LSAT score of 159-160 and a 3.00 undergraduate GPA, all African American applicants would be accepted (Epermanis 2007). Take these same qualifications and apply them to Asian or Caucasian applicants and their admittance numbers drop - 59 Asian applicants and 190 Caucasian applicants; what is significant is not every Asian and Caucasia applicant gets admitted despite having the same credentials as the African American applicant (Epermanis 2007). To make admission decisions, the University of Michigan Law School pulled from both objective and subjective

criteria. Included under objective criteria, the Law School looked at LSAT scores and undergraduate course work and performance; included under subjective criteria, the Law School looked at the applicant's particular strengths, attainment, or characteristics. Other miscellaneous information the Law School considered as an applicant's employment experience, non-academic performance, and personal background (Epermanis 2007). When asked to explain their decision to admit certain applicants based on their admissions policy, the Law School's only justification was their preference of race and ethnicity were necessary to admit a "critical mass" of minority students to achieve diversity in the classroom. They had previously stated their objective was "to make their [Law School] a better and livelier place in which to learn and improve service to the profession and public" (Epermanis 2007, 34). Ethnic diversity was the end-all-be-all. As previously mentioned, the University of Michigan Law School denied Barbara Grutter admission, so she decided to plead her case before the lower courts, then the Supreme Court.

Like the *Gratz* case, the question brought before the Supreme Court was whether the University of Michigan Law School's use of racial preferences in student admissions violated the Equal Protection Clause of the 14th amendment or Title VI of the Civil Rights Act 1964 (Oyez, Grutter 2021). The strict scrutiny standard still applied in this case as it did in *Gratz*. Justice O'Connor addressed this issue of strict scrutiny, saying, "[C]ontext matters when reviewing race-based governmental action and that [n]ot every decision influenced by race is equally objectionable and strict scrutiny is designed to provide the framework for carefully examining the importance and the sincerity of the reasons advanced by the government decision-maker for the use of race in that particular context" (Naff 2004, 466). With this in mind, Justice O' Connor gave the majority opinion, adhering to the level of strict scrutiny as

mentioned above. In the end, the Court decided the Law School did have a compelling state interest in attaining a diverse student body. The Court determined "[Their] scrutiny of interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area lies primarily within the expertise of the university" (Naff 2004, 469). The Court was willing to defer to the Law School's decision that normative was essential to bring their educational mission. When it came to the standard of having a narrowly tailored admissions policy, the Law School passed in the eyes of the Court (Oyez, Grutter 2021). The Law School did not use the type of mechanical criteria (racial quotas or set-asides) struck down in the companion *Gratz* case; they did not admit non-minority candidates who had diversifying characteristics, even though they had lower academic indicators than the rejected minority applicants (Oyez, Grutter 2021). All of these factors led to the Court's decision that the Law School did not violate the Equal Protection Clause, nor did they violate the Civil Rights Act of 1964 because the Law School used factors other than race to decide admissions (Oyez, Grutter 2021).

In the majority opinion of Justice Sandra Day O'Connor, the Court concluded in a 5-4 decision the Equal Protection Clause did not prohibit the Law School's narrowly tailored use of race in admission decisions; the Law School was furthering a compelling interest in the educational benefits of a diverse student body (Oyez, Grutter 2021). The Court's reasoning behind this ruling was because the Law School conducted a highly individualized review of each applicant, no acceptance was based automatically on a variable such as race; the Law School's admissions process considered all factors contributing to a diverse classroom setting along with race (Oyez, Grutter 2021). Justice O' Connor wrote, "In the context of its individualized inquiry into the possible normative contributions of all the

applicants, the Law School's race-conscious admissions program [did] not unduly harm non-minority applicants" (Oyez, Grutter 2021) In contrast, Justice Thomas delivered the dissent, arguing that since the state did not have a compelling interest in promoting normative and the Law School was within the state's jurisdiction, the Law School also did not have a compelling state interest. Justice Thomas stated his opinion:

> As the foregoing [case] makes clear, Michigan has no compelling [state]interest in having a Law School at all, much less an elite one. Still, even assuming a State may, under appropriate circumstances, demonstrate a cognizable interest in having an elite law school, Michigan has failed to do so here. [...] The equal protection obligation is imposed by the Constitution upon the States [as] severally as [government] entities– each responsible for its own laws [and] establishing the rights and duties of persons within its borders. It is an obligation [of that] burden of which cannot be cast by one state upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each state within its own sphere is of the essence of statehood maintained under our dual system (Oyez, Grutter 2021).

Casting a vision for the future, Justice O'Connor remarked the Court expected the use of racial preferences will no longer be necessary to further the interest of normative 25 years from now (Oyez, Grutter 2021). When this day comes, the Law School will terminate its use of racial preferences as soon as practicable.

Reconciling Gratz and Grutter, I have compiled a list, laying out what universities may or may not do in race-based admission policies; it also covers how the Court will respond in some cases. When it comes to what universities may do, the list is pretty straightforward: universities may use racial preferences in admission processes in institutions of higher education — constitutional; race may be used as a factor so long as an individualized and competitive review is completed, taking other relevant diversifying factors

into account; an institution may use racial preferences if it also considers just as much race-neutral alternatives that will serve its mission, and the Court may defer to the university academic judgment so long as they are acting in good faith and have not been shown contrary of this fact (Bloom 2004).

Using racial preferences still requires strict scrutiny, but it will rely more on the expertise and judgment of educational institutions. Also, normative will continue to be considered a compelling state interest so long as higher learning institutions claim to be using normative - general or racial - to further educational benefits. To help meet this requirement, a university might consider creating a mission statement that explains what the university is trying to achieve in the system it has created (Bloom 2004).

Employing race as a factor in the admissions process is permissible, as long as it is not the only factor being considered. In some instances, race can even be given greater weight than other diversifying factors so long as it is not the only factor being considered. (Bloom 2004) Race can be used as a plus-in-the-file, as long as the race in question is otherwise underrepresented in the applicant pool, usually due to past discrimination. Also, a "critical mass" of minority students can be created by an institution, so students do not feel isolated in their academic interchange. (Bloom 2004) However, the institution must make sure they are not maintaining a quota. As mentioned above, institutions still have to take in other diversifying factors, so the admission process is both competitive and individualized. If challenged, it is helpful universities show non-minorities admitted with lower academic indicators than those underrepresented minorities who were rejected (Bloom 2004).

Although racial preferences may be used in the admissions process, universities still must consider race-neutral alternatives as vigilantly as using racial preferences. This does not

mean academic requirements have to be lowered or a lottery system instituted; the university's academic reputation remains a top priority (Bloom 2004). Instead, institutions can apply other methods to ensure other alternatives have been considered instead of race-based admissions: place sunset provisions or transparency provisions in racial preference policy, conduct frequent reviews over the racial preference policy to make sure it is creating normative, and work toward developing race-neutral alternatives that are also geared at promoting normative (Bloom 2004).

For the last point, the Court will defer to the university's judgment regarding their reasoning (advancing normative) enacting race-based admission policies so long as the Courts feel the institution is acting in good faith (Bloom 2004). The Court will assume the institution is adhering to the following: presenting a compelling interest, attempting to achieve the aforementioned compelling interest, not attempting to fulfill a racial quota or set-asides, having an individualized and competitive admissions program, not misusing the concept of "critical mass," creating admission policies that are achieving their intended results, and considering other race-neutral alternatives (Bloom 2004).

When it comes to what universities do not permit actions regarding race-based admissions policies, the list is not as extensive as what universities can do. Universities may not employ racial preferences in quotas or set-asides or employ a two-track admissions program in which minorities are insulated from competition with non-minorities (Bloom 2004). Even if an institution is trying to achieve a racial balance or proportionality, quotas and two-track admission programs are unconstitutional. Speaking directly about the admissions process itself, if it does not include relevant non-racial factors, then the admissions process is subject to review under violation of narrowly tailored grounds (Bloom

2004). Also, predetermined weights cannot be assigned to the factors considered; instead, it must engage in a holistic evaluation, taking into account all relevant factors. Although race can be weighted differently, it cannot be placed high above all other diversity factors, which would also be unconstitutional (Bloom 2004). Rectifying social discrimination does not justify the use of racial preferences; this reason does not serve as a compelling interest. "The use of race for purposes of providing a remedy for identified past discrimination would need to meet the rigorous standards outlined in the Powell in *Bakke*, and the *Croson* and *Adarand* opinions" (Bloom 2004, 9497). With these constraints above, universities still have a wide berth when properly constructing normative programs. If institutions remain within the boundaries mentioned above, then the institutions' processes will not likely result in judicial second-guessing (Bloom 2004).

Some key takeaways from *Gratz* and *Grutter* 1) racial quotas or set-asides are unacceptable and will be struck down 2) an individualized review must be performed for each applicant that considers more than just race 3) race cannot be the deciding factor that grants an applicant admission 4) both minority and non-minority applications must be kept together – equal consideration 5) diversity as a compelling government interest is comprehensive 6) be prepared to defend admission decisions – schools must make sure they can qualitatively show their decision-making process 7) minority students cannot be admitted over non-minority students with the same qualifications 8) the "critical mass" threshold is the maximum number of minority students that can be admitted and 9) attempts must be made to implement race-neutral alternatives.

# CHAPTER THREE

## Did Gratz and Grutter Make A Difference?

### *Methodology*

I conducted an empirical study to determine if a causal relationship existed between the Supreme Court decisions in *Gratz* and *Grutter* (dependent variables) and Black and Latino student enrollment in higher learning institutions (independent variable). To investigate this causal relationship, I sampled fifty schools, including a single school from each state (excluding Vermont) plus Washington DC. When choosing my sample of fifty schools, I chose to collect enrollment statistics from mostly flagship schools. If statistics were not available for the state flagship school, I expanded my data to include other private universities, public universities, and public colleges; I chose schools with the second-highest enrollment for which I could find data.

To gather the enrollment statistics I needed, I pulled from several secondary sources, including Common Data Set (CDS) Reports, Facts Sheets, and Email Correspondence. The CDS Reports involve "a set of standards and definitions of data items rather than a survey instrument or set of data represented in a database. Each of the higher education surveys conducted by the participating publishers incorporates items from the CDS as well as unique items proprietary to each publisher" (CDS Initiative). I was particularly interested in the *Enrollment and Persistence* section of the Report that broke down student enrollment by racial/ethnic categories. When I could not find enrollment statistics in CDS Reports, I turned to University Fact Sheets, where schools list relevant information about their program, including class size, student-to-teacher ratio, availability of athletic facilities, and

other miscellaneous facts. My interest was in the School's enrollment statistics broken up by undergraduate/graduate program, major, race/ethnicity, and gender. If all else failed, I searched through the School's email correspondence, specifically when the School communicated with its Board of Regents to discuss updates.

Parsing out my data collection process from the aforementioned secondary sources, I pulled enrollment numbers from two school terms: 2000-2001 and 2006-2007, concerning myself only with data from Black and Latino populations. These two-term limits allowed me to measure three years prior and three years after the Supreme Court's decisions in *Gratz and Grutter* to best determine whether the Court's decision affected Black and Latino student enrollment. I also collected data from 2000 and 2010 Census Reports that determined the total state population, the total state Latino population, and the total state Black population before-and-after *Gratz and Grutter*. To account for extending the time frame to include 2010 Census data, I halved the population to offer a more accurate estimate of the varying state populations in 2006. From the enrollment statistics, I calculated two additional statistical measurements: Expected value and Net Change. I derived the *Expected* value by considering the Black and Latino university enrollment numbers in 2000 concerning the total state population change halved, and the total Black and Latino state populations halved. I determined the *Net Change* by taking the difference of the Black and Latino university enrollment numbers minus the *Expected* value, leaving me with either a positive or negative percentage. Refer to (Table 1) for a more detailed explanation.

| Description | Formula |
|---|---|
| LatUni Change | L After G&G - L Before G&G |
| LatUni Change % | LatUni Change/L Before G&G |
| Expected | L Before G&G + (L Before G&G*Pop Change % halved) + (L Before G&G*LatPop Change % halved) |
| Net Change | L After G&G - Expected |
| Net Change % | Net Change/Expected (Latino) |
| BlUni Change | B After G&G - B Before G&G |
| BlUni Change % | BlUni Change/B Before G&G |
| Expected | B Before G&G + (B Before G&G*Pop Change % halved) + (B Before G&G*BlPop Change % halved) |
| Net Change | B After G&G - Expected |
| Net Change % | Net Change/Expected (Black) |
| Pop Change | Pop After G&G - Pop Before G&G |
| Pop Change % | Pop Change/Pop Before G&G |
| Pop Change % halved | Pop Change % / 2 |
| LatPop Change | L Pop After G&G - L Pop Before G&G |
| LatPop Change % | LatPop Change/L Pop Before G&G |
| LatPop Change % halved | LatPop Change % / 2 |
| BlPop Change | B Pop After G&G - B Pop Before G&G |
| BlPop Change % | BlPop Change/B Pop Before G&G |
| BlPop Change % halved | BlPop Change % / 2 |

Table 1: Formula Sheet

The question guiding my research is "Whether *Gratz and Grutter* make any measurable difference?" To summarize, I looked at the changes in Black and Latino enrollments three years before *Gratz and Grutter* and three years after *Gratz and Grutter*. If these Supreme Court decisions made a difference, we would expect a modest increase because it seemed like the Court was promoting an overall holistic increase in a diverse student body. I made sure to account for the natural population increases in the state as a whole and specific to Black and Latino populations. If the *Net Change* is positive, the School showed an overall increase in Black and Latino enrollment. If the *Net Change* is negative, the School showed an overall decrease in Black and Latino enrollment.

I ask and answer and answer several questions below:

1) How many states showed an increase/decrease in Black and Latino student populations?
2) Was there a regional trend among the states that demonstrated an increase in Black and Latino student populations?
3) Was there a partisan trend among the states that demonstrated an increase in Black and Latino student populations?

In response to the above-mentioned questions, I have drawn several hypotheses for which I believe the data will support:

> $H_1$: States with the highest Black and Latino populations tend to have the highest enrollment of Black and Latino students.
>
> $H_2$: States with the lowest Black and Latino populations tend to have the lowest enrollment of Black and Latino students.
>
> $H_3$: Black and Latino enrollments will increase at least 25/50 schools, so roughly 50%.

$H_4$: Black and Latino enrollments will increase more among flagship schools than non-flagship schools (public universities, private universities, and public colleges).

$H_5$: Black enrollment will increase more than Latino enrollment among the 50 states.

$H_6$: Liberal states will enroll more Latinos and Blacks than conservative states.
$H_7$: States in the West, Midwest, and Northeast will see a more significant increase in Black and Latino enrollment than the Southwest and Southeast.

$H_8$: States in the Southwest and Southeast will see a more significant decrease in Black and Latino enrollment than the West, Midwest, and Northeast.

*Results*

The research question guiding my study was "Did the Supreme Court decisions in *Gratz* and *Grutter* have an effect on higher education? Was there an increase in normative?" To operationalize normative, I collected data from fifty higher institutions of learning to determine whether there was an increase or decrease in Black and Latino enrollment after *Gratz* and *Grutter*. Latino enrollment increased among twenty-seven out of fifty (54%) of the schools, with a decrease in enrollment among twenty-three out of fifty (46%) of the schools. The greatest increase in Latino enrollment was South Carolina which saw an increase of one hundred and twenty-four percent. The greater decrease in Latino enrollment was in South Dakota, decreasing their enrollment by seventy percent. The average increase in enrollment was thirty-one percent, while the average decrease in enrollment was twenty percent (see Figure 1).

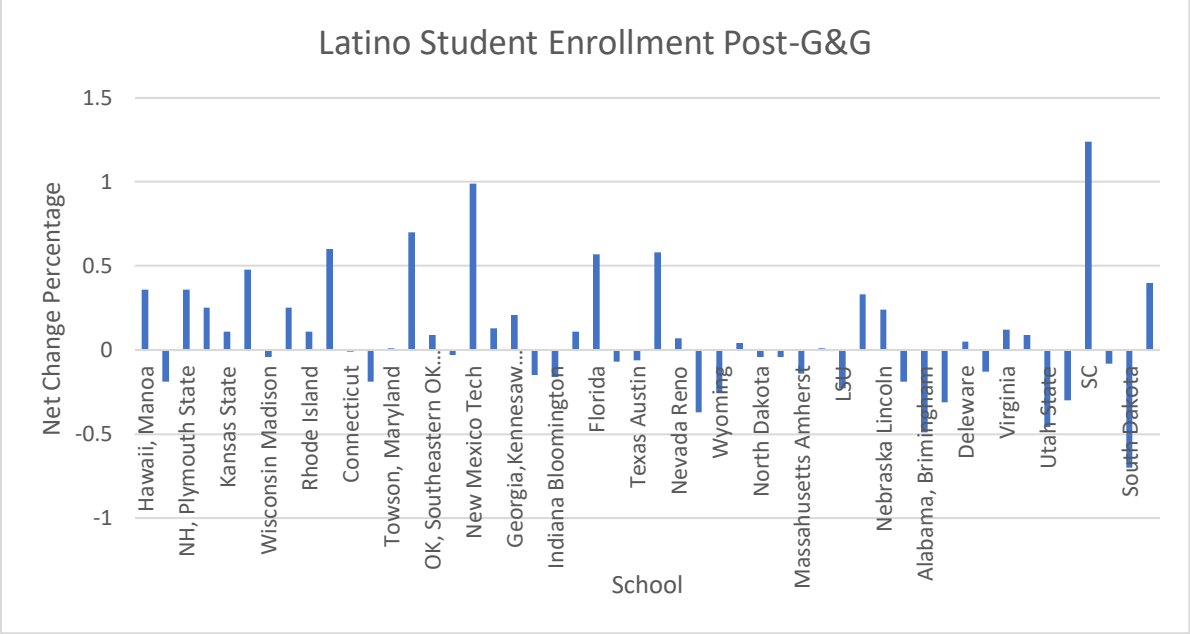


Figure 1: Latino Student Enrollment Post-G&G

Black student enrollment increased among twenty-four out of fifty (48%) of the schools, with a decrease in enrollment among twenty-five out of fifty (50%) of the schools. Florida was the only School that enrolled the targeted number of Black students, so there was no change, making this value an anomaly. The greatest increase in Black enrollment was West Virginia which saw an increase of five hundred twenty-seven percent. The greatest decrease in Black enrollment was in California, decreasing their enrollment by thirty-five percent. The average increase in Black enrollments was eighteen percent, excluding the outlier (5.27). The average decrease in Black enrollments was thirteen percent (see Figure 2).

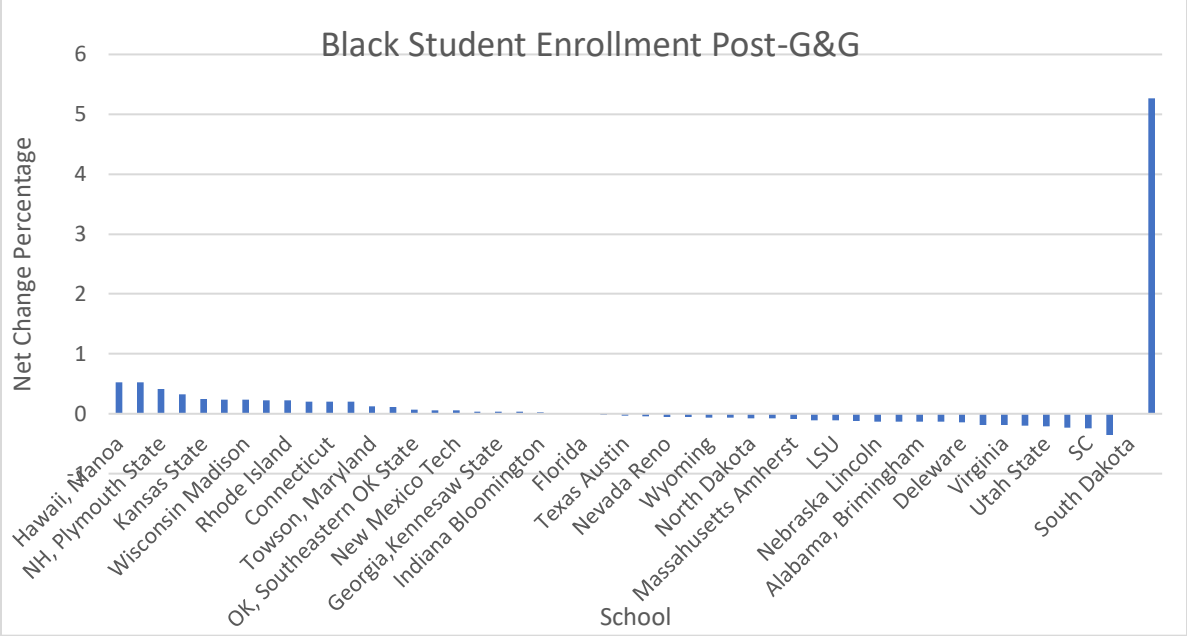


Figure 2: Black Student Enrollment Post-G&G

Comparably, Latino enrollment saw a greater increase of six percent than Black enrollment. As a whole, Black and Latino student enrollment increased by roughly fifty percent across the fifty schools (see Figure 3). This percentage counts as a significant increase; thus, there was a significant increase in normative across the fifty states after *Gratz* and *Grutter*. Whether or not the Court decisions impacted these results are indeterminate from this data, but there was an increase in Black and Latino enrollments.

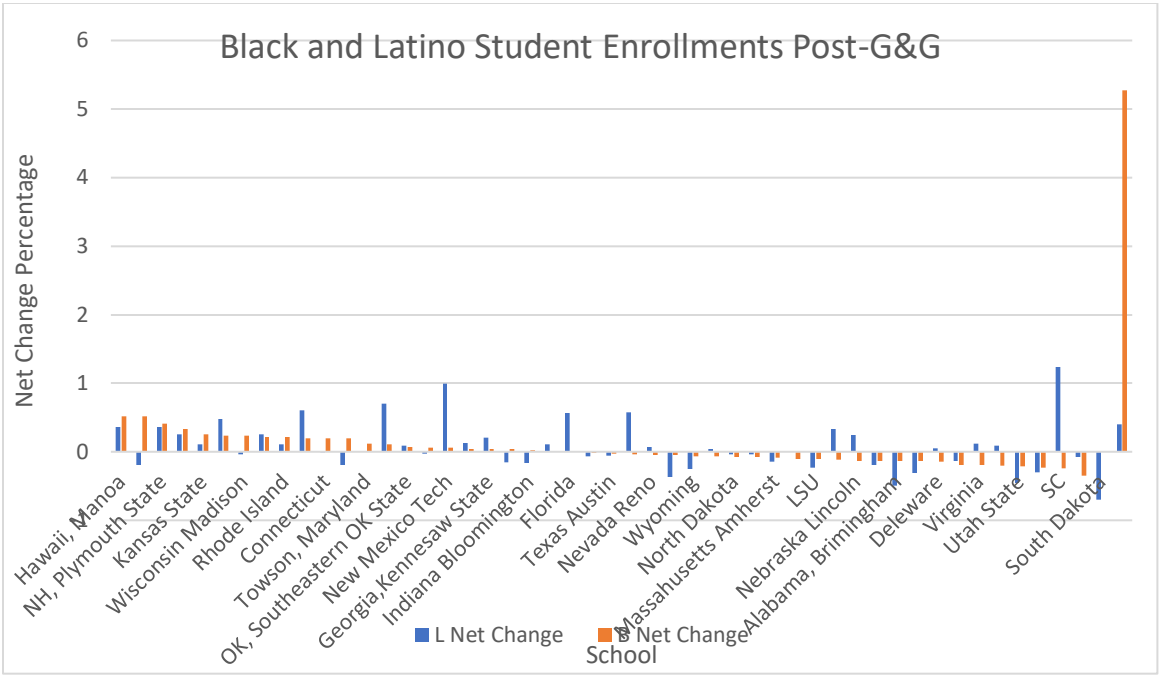


Figure 3: Black Student Enrollment vs. Latino Student Enrollment

After reviewing some of the general trends in my data, I will first respond to the three questions I outlined above then discuss the accuracy of each my eight hypotheses.

1) *Population Trend*: The admittance of Blacks and Latinos was pretty evenly split among the fifty states. Black student admission increased by forty-eight percent while Latino student admission increased by fifty-four percent. Pertaining to Black student enrollment, most schools increased Black student admittances by seventeen percent, with one exception – West Virginia. West Virginia increased its Black student population by five hundred twenty-seven percent. This

outcome is surprising given a study released in March 2015 by the College Board that showed out of the ten four-year universities located in West Virginia, only one university considered race in admissions. For Latino enrollments, most schools increased their Latino admittances by thirty percent, with exception to South Carolina who increased their Latino student population by one hundred twenty-four percent. Similar to West Virginia, South Carolina only reports of having two four-year public universities consider race in their admissions process. Both West Virginia and South Carolina may have been preemptive in increasing Black or Latino enrollments. In general, it seems that most of the states were on the same page about affirmative action policies, seeing as the increase or decrease in Black and Latino enrollments were fairly similar. Gratz and Grutter seemed to have mixed results, leading some schools to increase their admittances of Blacks and Latinos while other schools refused to touch on race as a factor at all. Although, the increase in admittances were smaller than expected, the data proves statistical significance of Gratz and Grutter having some effect on race-based admissions in the United States, after 2003 (Refer to Figure 4) .

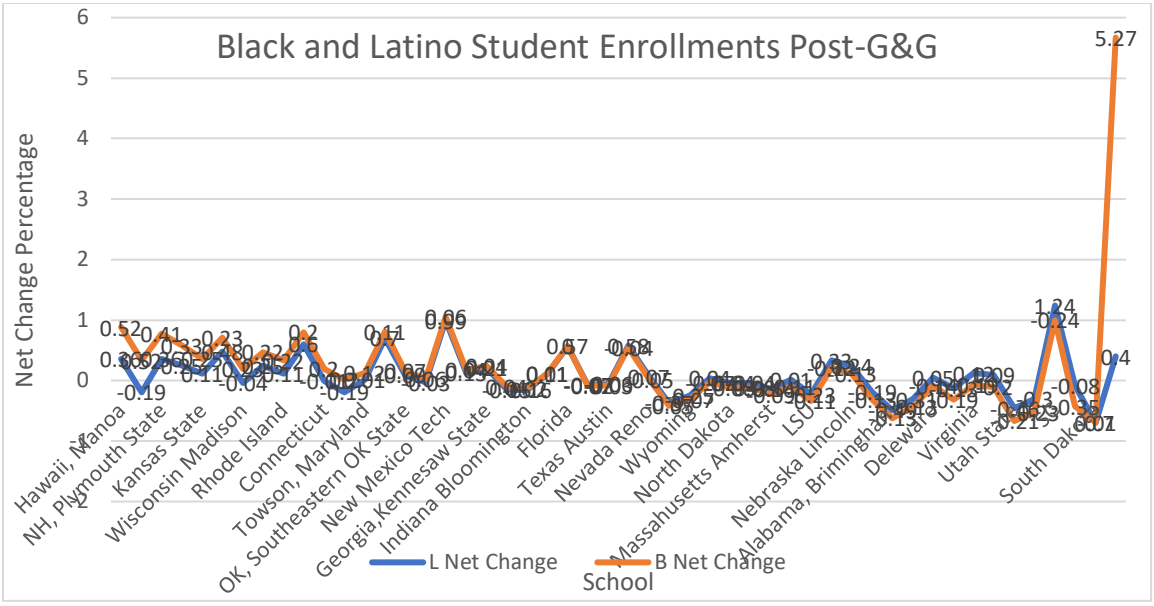


Figure 4: Black and Latino Enrollments Post-G&G

2) *Regional Trend*: After breaking the United States into five regions (West, Midwest, Northeast, Southwest, and Southeast), some significant trends emerged. The Northeast had the greatest enrollment of Blacks and Latinos among the states; Sixty-four percent of the states increased their Black and Latino student populations with an average increase of twelve percent for Blacks and thirteen percent for Latinos. In contrast, the Midwest has the small enrollment of Blacks and Latinos; thirty-three percent of the states increased their Black and Latino student populations with an average decrease of four percent for Blacks and eight percent for Latinos. Geographically speaking, I would have expected Black and Latino student enrollment to increase more in the North (W, MW, and NE), but this was not the case. Taking into account the forty-five percent increase in

Black and Latino enrollment for the West, this still put the North's average forty-seven percent. Surprisingly, the South (SW and SE) showed more of an improvement, increasing Black student enrollment by forty-six percent and Latino enrollment by seventy-one percent. The South saw a twenty-four percent more increase than the South, breaking apart the notion that the North is more liberal than the South. The receptiveness of schools to affirmative action programs was all over the place. *Gratz* and *Grutter* seemed to have an effect in South more than the North. I would have expected the Midwest to see the greatest increase in Black and Latino enrollments, since Michigan was a part of this batch, but these cases most likely scared other institutions into taking the safe route, leaving race alone during the admissions process (Refer to Figure 5).


Figure 5: Breakdown of Regions
https://www.ducksters.com/geography/us_states/us_geographical_regions.php

3) *Partisan Trend*: According to data collected from Electoral College Maps, the partisanship breakdown for the United States after Bush defeated Kerry in 2004, was thirty-five Republican (conservative) and fifteen Democrat (liberal). Affirmative action had been slowly building momentum after the *Brown* ruling and signing of the Civil Rights Act of 1964; it was basically an extension of the civil rights movements. Considering the overwhelmingly conservative leaning of the nation after the rulings in *Gratz* and *Grutter*, it is surprising that the increase in Black and Latino enrollment for the liberal states was only slightly higher than their conservative counterparts. Both Black and Latino student populations

increased among sixty-seven percent of the liberal states. For the conservative states, Black enrollment increased by forty-three percent and Latino enrollment increased by fifty one percent. Comparably speaking, liberal states only saw a sixteen to twenty-four percent increase higher than conservative states. This is significant, but not impressive. Again, we see that most states, whether liberal or conservative, had a divided mind about affirmative action programs. Despite more states being conservative, the enrollments of Black and Latinos was occurred at a pretty consistent rate across the United States. *Gratz* and *Grutter* seem to have an effect, but affirmative action becomes more of a bi-partisan issue, less about one's political leanings (Refer to Figure 6).

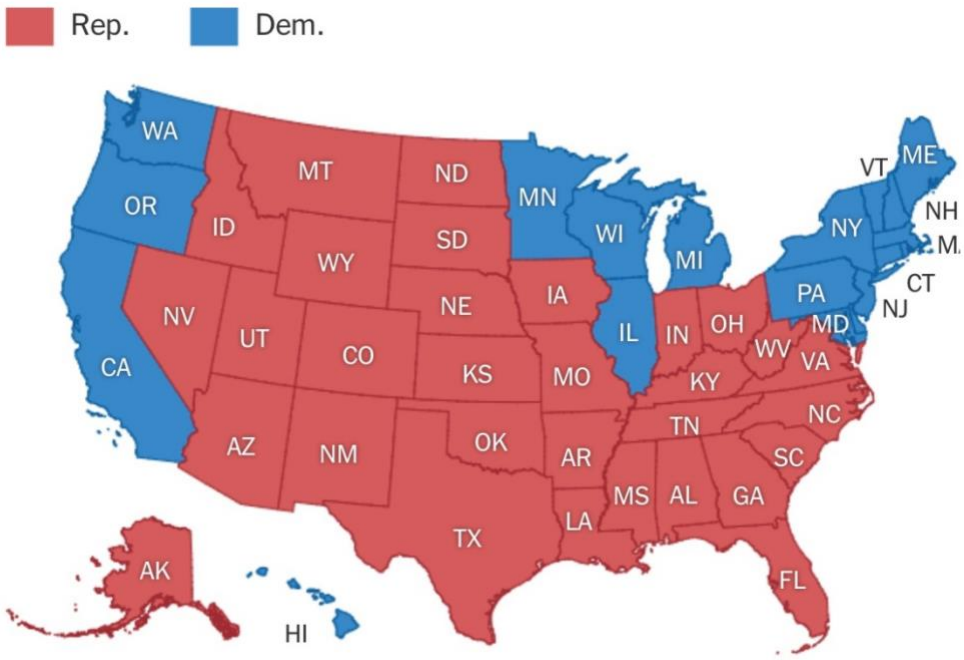


Figure 6: Partisan Breakdown of states
https://www.nytimes.com/2016/08/23/upshot/50-years-of-electoral-college-maps-how-the-us-turned-red-and-blue.html

$H_1$: States with the highest Black and Latino populations tend to have the highest enrollment of Black and Latino students.

No. I took the top fifteen states with the highest Black and Latino student populations to determine whether there was a correlation between the states with the highest populations and the states with the highest enrollments. Out of the fifteen states, seven states (47%) had the highest Latino student populations and Latino student enrollments. These states included California, Texas, New Jersey, Florida, Washington, Nevada, and Massachusetts. For Black enrollment, six out of the fifteen states (40%) had the highest

Black student populations and Black student enrollments. These states included Florida, Texas, Georgia, Maryland, Louisiana, and South Carolina. Both Texas and Florida had the highest Black and Latino populations and highest Black and Latino enrollments. My threshold for statistical significance was fifty percent, so, unfortunately, this hypothesis was proven wrong.

$H_2$: States with the lowest Black and Latino populations tend to have the lowest enrollment of Black and Latino students.

Yes. I took the top fifteen states with the lowest Black and Latino student populations to determine whether there was a correlation between the states with the lowest populations and the states with the lowest enrollments. Out of the fifteen states, eight states (53%) had the lowest Latino student population and Latino student enrollment. These states included Kentucky, Mississippi, Alaska, New Hampshire, Montana, South Dakota, North Dakota, and Maine. For Black enrollment, eleven out of fifteen states (73%) had the lowest Black student populations and Black student enrollments. These states included Oregon, New Mexico, Utah, Hawaii, Maine, New Hampshire, Idaho, South Dakota, North Dakota, Montana, and Wyoming. Both New Hampshire, Montana, South Dakota, North Dakota, and Maine had the highest Black and Latino populations and highest Black and Latino enrollment. Fortunately, this hypothesis met the statistical significance threshold, which shows some correlation between schools with the lowest Black and Latino populations having the lowest Black and Latino student enrollment.

$H_3$: Black and Latino enrollments will increase at least 25/50 schools, so roughly 50%.

Yes and No. Twenty-seven out of fifty (54%) schools saw an increase in Latino enrollments, thus meeting the fifty percent threshold. Black student enrollments fell short, coming in at a forty-eight percent increase; twenty-four out of fifty Schools saw an increase in Black enrollments. As a whole, Latino enrollments increased more than Black enrollments, but only by a small margin.

$H_4$: Black and Latino enrollments will increase more among flagship schools than non-flagship schools (public universities, private universities, and public colleges).

Yes and No. Regarding Latino enrollments, eighteen out of thirty-one (58%) flagship schools compared to ten out of nineteen (52%) non-flagship schools saw an increase in Latino enrollments. For Black enrollments, only fourteen out of thirty-one (45%) flagship schools than eleven out of nineteen (58%) non-flagship schools saw an increase in Black enrollments. Latino enrollment increased by a greater percentage for flagship schools than non-flagship schools, but this was not the case from Black enrollment, which increased more among non-flagship schools than flagship schools. Meaning my hypothesis was confirmed for Latino enrollments but not for Black enrollments.

$H_5$: Black enrollment will increase more than Latino enrollment among the 50 states.

Yes. Although more states saw an increase in Latino enrollment, Black enrollment increased by a greater percentage, thus putting Black enrollment slightly above Latino enrollment. Black enrollment saw an average increase of twelve percent, while Latino enrollment saw an average increase of seven percent. My hypothesis was proven true; Black

enrollment did increase more than Latino enrollment. As a whole, Black and Latino enrollment increased by similar margins.

$H_6$: Liberal states will enroll more Latinos and Blacks than conservative states.

Yes. Out of the fifteen, ten (67%) of the liberal states saw an increase in Latino enrollment, the same percentage for Black enrollment. Eighteen out of thirty-five (51%) conservative states saw an increase in Latino enrollment, while fifteen out of thirty-five (43%) saw an increase in Black enrollment. In comparison, liberal states saw more of an increase in both Black and Latino enrollments than conservative states. It is important to note when determining whether a state was considered liberal or conservative, I looked at a political ideology map taken after the 2004 midterm elections. My hypothesis was proven correct.

$H_7$: States in the West, Midwest, and Northeast will see a greater increase in Black and Latino enrollment than the Southwest and Southeast.

Yes and No. The West, Midwest, and Northeast saw a greater decrease in Latino enrollments, but not in Black enrollments than the Southwest and Southeast. In the W, MW, and NW, sixteen out of thirty-four (47%) states increased Latino enrollment; the same goes for Black enrollment. In the SW and SE, eleven out of sixteen (69%) states increased Latino enrollment while seven out of sixteen (44%) increased Black enrollment. In the W, MW, and NE, both Black and Latino enrollment increased by forty-seven percent in sixteen states. Not as high as the percentage of states saw a decrease in Black and Latino enrollment but

still a significant margin. My hypothesis was correct for the Latino population in the W, MW, and NE, but not for the Black population.

$H_8$: States in the Southwest and Southeast will see a greater decrease in Black and Latino enrollment than the West, Midwest, and Northeast.

Yes and No. The Southwest and Southeast saw a greater decrease in Black enrollments but not in Latino enrollments than the West, Midwest, and Northeast. In the SW and SE, five out of sixteen (31%) states saw a decrease in Latino enrollment, while nine out of sixteen (56%) states saw a decrease in Black enrollments. Comparably, the W, MW, and NE saw a decrease in Black and Latino enrollment by fifty-three percent. Black enrollment won out, decreasing the most in the SW and SE, but Latino enrollment decreased significantly more in the W, MW, and NE. My hypothesis was valid for Black enrollment in the SW and SE, but not for Latino enrollment.

# CHAPTER FOUR

## Aftermath and Conclusion

Although difficult to prove a causal relationship, after the Supreme Court decisions in *Gratz* and *Grutter*, there was a significant increase in enrollment among Latinos and Blacks. Roughly fifty percent of schools increased Black and Latino enrollment by an average of thirty-one percent among Latinos and eighteen percent among Blacks. In light of my findings, I have drawn a correlation between increased enrollments of Latinos and Blacks to mean increased diversity efforts from higher education institutions. Judging Court efficacy is much trickier. My study adds to the conversation by offering a close look at the direct effect of affirmative action policies impressed upon by the Supreme Court decisions *Gratz* and *Grutter*'s Supreme Court decisions. My study aimed not only to determine Court efficacy but also to determine the efficacy in affirmative action policies promoting normative. My interest lies more with the latter. I believe the Courts have the power to effect social change, but my study alone does not prove this fact. Bringing in Feeley's critique of Rosenberg's book, my study does not hit upon any indirect effects, which would paint more of a holistic picture when determining Court effectiveness in bringing about social change. My study only focuses on one aspect, but it does get the conversation started by expanding the cases used to determine Court efficacy to included affirmative action cases. Eighteen years have passed since the Supreme Court passed its rulings in *Gratz* and *Grutter,* and still, more trend data needs to be collected better to determine the impact of these two affirmative action cases.

Moving forward, I believe for the Supreme Court to effect any real kind of social change, the public has to be on board. In terms of affirmative action policies regarding

higher education, public universities and colleges (most importantly donors) have to be willing to make the necessary adjustments to improve normative efforts without breaking the bounds laid out in *Gratz* and *Grutter*. As the Romans article points out, for the public to respond adequately to the Supreme Court's wishes, the Court must first explicitly state its views in its decisions. On the one hand, universities can reach a critical mass, which is not easily definable, but on the other hand, universities have to avoid using racial quotas. This task seems near impossible without more direction. With the Court deciding affirmative action cases inconsistently, there is no discernible pattern to interpret whether an institution's policies are protecting or violating the Equal Protection Clause of the 14th amendment. Not to mention, private universities are not held to the same standards as public universities. Private institutions can make their own decision whether to use race as a deciding factor, watering down the impact of *Gratz* and *Grutter*. These two affirmative action cases set the stage for using normative as compelling state interest, so long as race was not the only deciding factor and the School completed an individualized review of each applicant. The question remains, "How to avoid racial quotas?" After studying enrollment numbers, I am aware schools track students' race/ethnicity, so what is the line universities cannot cross? My study does not answer these questions, but it does draw on the difficulties in determining whether the courts could promote normative with their rulings.

Addressing my study's limitations, I chose a relatively small sample of fifty schools to examine normative trends. I could not obtain information on student enrollment for all the flagship schools, so I had to expand my school paraments to include some public colleges and private universities. As previously mentioned, private universities are not bound to the same regulations as public universities, which does alter the results by a small margin. Going

outside of the token flagship school also means some of the institutions' population sizes were quite limited, which skews the data. For the most part, my sample offers a great representation to operationalize something as complex as normative. In terms of this study, an increase in Black and Latino enrollments means increasing normative; therefore, *Gratz* and *Grutter* impacted, and the Courts can produce social change. The causal link is difficult to prove with my study's limited scope, but I offer a jumping-off point for further research. To improve upon my study, I would expand the schools' pool to include three public universities from each state. More schools equal more data, and we can see if the trend holds steady. My study's results were lackluster at best, but the increase and decrease in Black and Latino enrollments occurred at the same rate. This is not surprising since there is no consensus on affirmative action policies, even in the Courts. I believe the Court must take a unified stand before any real change can be produced. How can the states agree on methods for increasing normative if there is no exact formula for getting the desired results?

To also improve upon my study, I would expand the scope to include indirect effects: public opinion, newspaper editorials, presidential/congressional responses, *Fisher* briefs, lower federal/state rulings, a tally of Blacks running for political office, NAACP membership, and donations, top-grossing films, professional group memberships, state party platforms, and minority applications to colleges. When gauging public opinion or public sentiment regarding affirmative action policies, looking at Thermometer questions (ANES and GSS) and newspaper editorials is a great way to see if the public stance has changed. The same goes for reviewing presidential and congressional responses because their response will likely determine how they respond. The *Fisher* briefs offer insight on how pro-affirmative action or anti-affirmative action businesses in the Texas community. Lower and federal state

rulings help set a baseline for how the lower courts and state supreme courts interpreted the Supreme Court's decisions. Did the Supreme Court's ruling translate? Tracking the number of Blacks running for political office, professional group memberships, and NAACP membership and donations help determine if normative efforts increased in other institutions, not limited to higher education. Noting the top-grossing films also looks for the pervasiveness of normative. State party platforms showcase whether or not affirmative action was an essential matter for the people. How important was this issue? Last, minority applications to colleges are much more challenging to track than enrollments, but this highlights whether schools saw more Latinos or Blacks apply at their school, which also shows a push for normative efforts. Together, these ideas for indirect effects paired with my study of direct effects help draw a more causal link between increased Black and Latino enrollment (more normative) and Gratz and Grutter's Supreme Court decision.

Before wrapping up, I would like to end by discussing the most recent affirmative action cases brought before the Supreme Court, related to higher education: Fisher v. University of Texas and Students for Fair Admissions, Inc. v. Harvard University.

*Fisher v. University of Texas* (2013): The Texas legislature enacted legislation that required the University of Texas to admit all high schools who graduate in the top ten percent of their class. After noticing differences between the state population and their student population, the University of Texas decided to modify its race-neutral admissions policy. "The new policy continued to admit all in-states students who graduated in the top ten percent of their high school classes. For the remainder of the in-state freshman class the

university would consider race as a factor of admission" (Oyez 2021). Abigail Fisher applied for admission to the University and her application was denied. As a result, Fisher filed suit against the University, claiming their admissions policy (considering race as a factor in admissions) violated the Equal Protection Clause of the 14th amendment. The Court determined the University of Texas consideration of race in admissions did violate the Equal Protection Clause but only under strict scrutiny. The justices upheld previous judicial precedent (Gratz and Grutter) that stated "[cases] must be reviewed under a standard of strict scrutiny to determine whether the policies are precisely tailored to serve a compelling government interest. If the policy does not meet this standard, race may not be considered in the admissions process" (Oyez 2021). The Supreme Court held it was the duty of the reviewing court to make sure the University's policy was the only way to achieve diversity and that all race-neutral alternative had been considered. The Supreme Court felt the lower courts had failed to sufficiently apply the strict scrutiny test to the University's policy (Oyez 2021).

*Students for Fair Admissions v. Harvard* (2020): The Students for Fair Admissions (SFFA) filed suit against Harvard University calling into questions Harvard's "holistic" admissions process and its consideration of race and ethnicity when reviewing undergraduate applications. This organization claimed that Harvard discriminates against Asian-American students; Harvard believes their policy is in agreement with the decision made in *Bakke*. So far, the District Courts and the Court of Appeals has ruled on this suit. The Court of Appeals held that Harvard's policy does not discriminate Asian Americas, thus, reaffirming

the importance of race-conscious admission in creating diverse campuses. The *SFFA* is hoping to take their case all the way to the Supreme Court. The President, Ted Mitchell, of the American Council on Education released a statement:

> Today's ruling is a clear win for Harvard University and is just the latest federal court decision that unambiguously respects more than four decades of U.S. Supreme Court precedent that race and ethnicity can be considered within a narrowly tailored framework as one factor in a holistic admission review to help colleges and universities achieve the goal of a talented, diverse incoming class. We applaud in the strongest terms this ruling by the First Circuit Court of Appeals and are confident that if and when this case goes to the Supreme Court, the justices will continue to uphold the vital principle that student body diversity is a compelling governmental interest. In the meantime, colleges and universities continue to have the autonomy to define the intangible characteristics like diversity that are central to each institution's identity and educational mission (American Council on Education 2021).

These fairly recent affirmative action cases upheld the precedence set in *Bakke* and *Gratz and Grutter*, which showcases the durability in these rulings. The Court is not budging on the strict scrutiny standard. Universities must be able to prove their race-based admission policy is narrowly tailored to advance the compelling government interest of a diverse classroom; the school must also be able to prove they considered all possible race-neutral alternatives. In a way, *Gratz and Grutter* exposed the simplicity, yet intracity of the strict scrutiny standard, as universities are still grappling with how to balance wanting to promote diversity but not succumbing to set asides or racial quotas; how to conduct individualized reviews of applicants while valuing race in their admission decisions? Quoting Theodore Roosevelt, "Nothing in the world is worth having or worth doing unless it means effort, pain, difficulty…" (Goodreads 2021) The same mindset applies to affirmative action programs. There is no one-size fits all policy that the Court's will always accept. The future of the Court's in promoting social change rests in unity of mind. Until, the justices are able

to make consistent rulings on affirmative action cases, specifically cases dealing with higher education, their ambivalence will trickle down to the people. The Court must take charge and set the tone for this groundbreaking conversation on the importance of diversity in the classroom, even through "artificial" means.

Overall, this project has sparked discussion about determining the Court's effectiveness in bringing about social change. I firmly believe race still matters and producing the most diverse classroom should be the aim for all higher learning institutions. I agree with the words of William Sloane Coffin Jr., an American Christian chaplain, who says, "Diversity may be the hardest thing for a society to live with, and perhaps the most dangerous thing for society to be without" (Pisters 2016). The Court's decision to make normative a compelling state interest was an intelligent move. Apart from the Court's decision in *Brown v. Board*, *Gratz and Grutter* made significant strides in "[removing] all vestiges of slavery." In answering the question, "Under what conditions can the Court produce social change," my study is insufficient alone, but it does offer a great supplement in a much more extensive discussion of Court efficacy.

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