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Cover Page Footnote

John H. Bunzel is a senior research fellow at Stanford's Hoover Institution. He is a past president of San Jose State University and a former member of the U.S. Commission on Civil Rights.

THE DIVERSITY DIALOGUES IN HIGHER EDUCATION

John H. Bunzel*

I. INTRODUCTION

In the early 1970s, advocates of affirmative action regarded it as a democratic principle wrapped in a moral command.¹ For years it was promoted as adhering to the policy of the 1964 Civil Rights Act²—to eliminate discrimination by making it illegal to deny or award opportunities on the basis of race, color or creed. In 1971, the Department of Labor charted a new course by issuing Affirmative Action Guidelines Revised Order No. 4,³ which stipulated that affirmative action obliged companies to create timetables to increase hiring of minority workers.⁴ College admissions officers quickly interpreted the order to mean that race-conscious preferences were now acceptable.⁵ Later, affirmative action was met with resistance as the growing, and often secretive,⁶ practice of using racial preferences confronted core American values like equality,⁷ fair play,⁸ and individual opportunity.⁹

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1. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 705-07 (1990) (arguing that affirmative action represents the "democratic principle" that institutions should represent the people they have power over and calling for the recruitment of minority academics to improve the quality of legal scholarship).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994).

3. 41 C.F.R. § 60-2.1 (1999). For further discussion, see Michael Braswell, Gary Moore & Stephen Poe, *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 369-71 (1993).

4. Daniel Seligman, *Where Quotas Came From*, FORTUNE, May 30, 1994, at 174. The REVISED ORDER NO. 4 extended this protection to women. *Id.*

5. See generally PHILIP G. ALTBACH & KOFI LOMOTÉY, *THE RACIAL CRISIS IN AMERICAN HIGHER EDUCATION*, 109 (10th ed. 1991) (discussing various legislative attempts to encourage special efforts to admit, retain, and graduate underrepresented groups).

6. But see Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CAL. L. REV. 1299, 1390 (1999) (arguing that the open nature of affirmative action makes it preferable to the secretive manner in which many university faculties act).

7. See, e.g., Allen O., *One Step Forward, Three Steps Back*, INT'L EXAMINER, Aug. 18-31, 1999, at 15 (criticizing the California Appellate Defense Counsel for

The use of race-based preferences preceded the multiculturalism movement¹⁰—a movement embodying the egalitarian efforts of administrators, faculty, and students to “diversify” campus life. Today the “diversity” mantra is invoked on seemingly any occasion. In inauguration addresses, for example, new college presidents not only speak of “diversity” as a personal commitment but virtually proclaim it as the most compelling value of the university.¹¹ Of course, our universities, especially our public universities, are responsible for serving increasingly diverse constituencies. We too often witness, however, the celebration of diversity as if it rested on a set of basic assumptions shared by all groups. Diversity has become a universal good presumed to be so self-evident that it need never be defined or can conveniently be redefined according to the occasion.

Not surprisingly, black and white students have concerns when they hear university officials extol tolerance and diversity. Black students appreciate that while diversity sounds good, white administrators will ultimately make all the decisions.¹² In the early 1970s, a group of black undergraduates seeking affirmation of their iden-

“send[ing] the wrong message that Asian Americans will fight for equality and equal access only when it benefits them”).

8. See generally Troy Duster, *Individual Fairness, Group Preferences, and the California Strategy*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 111, 112-13 (Robert Post & Michael Rogin eds., 1998) (discussing the idea of fairness, particularly fairness to the individual).

9. Anthony D. Taibi, *Racial Justice in the Age of the Global Economy: Community Empowerment and Global Strategy*, 44 DUKE L. J. 928, 954 (1995) (noting that the civil rights focus shifted in the 1970s from an emphasis on individual opportunity and ending racial categories to disparate impact theories and affirmative action”); Todd S. Purdom, *Senator Deals Blow to Affirmative Action*, N.Y. TIMES, Mar. 10, 1995, at A10 (“You can’t defend practices that are based on group preferences as opposed to individual opportunities . . . [affirmative action] is un-American . . . America is about individuals, not about averages or groups.”) (quoting Connecticut Senator Joe Liberman).

10. See generally BHIKHU PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY 2-3 (2000) (“Multiculturalism is not about difference and identity *per se* but about those that are embedded in and sustained by culture. . . . Multiculturalism, then, is about cultural diversity or culturally embedded differences.”)

11. John H. Bunzel, *Affirmative Action in Higher Education: A Dilemma of Conflicting Principles*, in HOOVER INST. ESSAYS IN PUBLIC POLICY (1998). See, e.g., President Jack Preus, Inauguration Speech to Concordia University, Irvine (Oct. 17, 1998), http://www.cui.edu/general/inaug_text.html (“[L]et’s be clear on this: the people who populate our offices and our dormitories, as diverse as they may be, are not a problem to be overcome—nor are they a challenge to be faced nor are they merely an opportunity to be grasped, but rather they are a blessing to be received . . .”)

12. JOHN H. BUNZEL, RACE RELATIONS ON CAMPUS: STANFORD STUDENTS SPEAK (1992).

tity and self-esteem, asked Stanford University to house a substantial number of black students in one “concentration” dorm.¹³ The proposal was accepted.¹⁴ In the name of diversity, blacks wanted to create a “comfortable home” where they could be “free to be black,” a haven distinguished by its separation from “white Stanford.”¹⁵

Prior to this fundamental change, Stanford’s policy (and that of many other universities) had been to scatter black students as widely as possible among the various campus residences.¹⁶ The idea was to give the maximum number of white students a chance to get to know black students and black culture and to encourage black students to learn about white culture as well.¹⁷ College administrators felt that this was the goal of integration. But times were changing. Official race barriers began to fall at colleges and universities during the 1960s.¹⁸ Only a few years later, however, black pride, black power, and black nationalism were in the air.¹⁹ Black students were now demonstrating (sometimes violently) to help define “black consciousness.”²⁰ College was a period of cultural shock for many black students who felt isolated and inadequate upon arriving at a predominantly white campus.²¹

13. *Id.*

14. *Id.*

15. *Id.*

16. STEVAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 386 (1997) (noting that Stanford used to insist on a quota of fifty percent white students for each dormitory and did not permit entirely black dorms).

17. For general information, see <http://www.stanford.edu/dept/hds/has/newstu/freshmen.html> (discussing Stanford’s policy of making each residence a microcosm of the freshman class).

18. See Paul B. Foreman, *Race Confronts Universities: A Preface For Policy*, 20 J. OF GEN. EDUC. 81 (1968) (challenging colleges and universities to evolve with the changing racial composition of the university itself); James Petras, *Politics of Democracy: The Free Speech Movement*, 46 PHI DELTA KAPPAN 343 (1965) (detailing Berkeley’s movement to create a “Free University” where new ideas about politically relevant community problems were discussed).

19. Trina Jones, *Shades Of Brown: The Law Of Skin Color*, 49 DUKE L.J. 1487, 1518 (2000) (explaining that at that time the celebration of anything Black—black beauty, black history, and the use of the word ‘black’ instead of ‘Negro’—comprised a major portion of the Black Power agenda).

20. Steve Biko, *The Definition of Black Consciousness*, in *I WRITE WHAT I LIKE* 48, 49 (Father Aelred Stubbs ed., 2d ed., 1979) (noting that Black Consciousness seeks to instill the black community with a new-found pride in its value system, its culture and its outlook on life).

21. Frank Adams, Jr., *Why Brown v. Board of Education and Affirmative Action Can Save Historically Black Colleges and Universities*, 47 ALA. L. REV. 481, 496 (1996) (citing studies showing that black students are more likely to succeed at all-black campuses).

Universities across the country, meanwhile, committed themselves to greater minority-group representation. They firmly believed an ethnically diverse student body would benefit students of different races and backgrounds by enabling them to study and learn together.²²

Perhaps due to my years as president of San Jose State University, I can sympathize with efforts to put a good face on the unexpected consequences of "forward-looking policies" on diversity.²³ But we also need straight talk about how these policies have been administered. As Harvard economist Robert Klitgaard noted in his authoritative book *Choosing Elites*, college administrators have been "conspicuously vague" about their admissions policies.²⁴ They prefer to point to the "diversity" they create in the student population, rather than specifically state how many students of which type they admit.²⁵ But invoking an imaginary consensus on "diversity" is no substitute for open discussions by campus officials about what they seek to achieve. Is the goal of "diversity to achieve an ethnic mix of undergraduates that matches the applicant pool? The state population? The national population? None of these? What is the underlying reason for ethnic diversity? *Is it indispensable as an educational goal?* Admissions officers should do more than simply affirm their commitment to "diversity," especially since that nebulous term can mask the controversial criteria these officials use in making their selections.

II. AFFIRMATIVE ACTION GONE AWRY

I will not review the hackneyed arguments for and against affirmative action. Nevertheless, it should be noted that the all-out push for diversity has reopened thirty-year-old questions about affirmative action's purpose in higher education: Should it be targeted towards groups like African Americans, who have suffered pernicious discrimination and perhaps should be given pref-

22. *E.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (finding that an ethnically "diverse student body" was a proper justification for a special admissions program); *see also* Kevin Brown, *Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments*, 34 AKRON L. REV. 37, 68 (2000) (noting that a racially and ethnically diverse student body creates a speculative and experimental atmosphere that gives students a richer learning experience).

23. Bunzel, *supra* note 11, at Part 4 (discussing Bunzel's role as University President in administering affirmative action programs).

24. ROBERT KLITGAARD, *CHOOSING ELITES* 189 (1985).

25. *Id.* This also permits them to avoid any suggestion they set rigid quotas in violation of equal opportunity laws.

erence for college admission? Should it be geared towards promoting diversity across the racial and ethnic board, even at the expense of blacks? These are not rhetorical questions. The freshman class entering the University of California in 2001 has an 18.2% increase of Hispanic students and an 8.7% increase of Asian-American students.²⁶ "Such jumps in campus diversity," Steven A. Holmes reports in the *New York Times*, "are generally considered cause for celebration."²⁷ The University of California's change of policy, now disallowing race or gender based preferences as admissions factors,²⁸ has resulted in a more ethnically and linguistically diverse campus.²⁹ The new policy may also benefit Hispanic immigrants who may not have been historically oppressed but face contemporary discrimination. Nevertheless, many African Americans (and those who speak on their behalf) remain unhappy. Their presence on the flagship campuses of Berkeley and UCLA not only lags far behind that of whites and Asian-Americans, but affirmative action, which they regarded as a remedy for centuries of cultural deprivation, has been trumped by diversity.³⁰ Diversity, originally intended to be a secondary benefit of affirmative action, has now become the primary objective.³¹

I am frustrated with the lack of candor of campus officials who support diversity in almost unqualified terms. Too often, there is not even the slightest intimation that diversity comes with a cost. I recall the white Stanford students who lamented that while administrators talk in terms of inclusion, the reality of campus politics had little to do with either inclusion or diversity. These students agreed with a Carnegie Foundation national survey indicating that "students are separating themselves in unhealthy ways."³² Across the bay at Berkeley, a sixteen-month report on racial attitudes entitled the "Diversity Project" revealed there is far less mingling of cultures at Berkeley than its ethnic and racial diversity might suggest.³³

26. Steven A. Holmes, *Leveling the Playing Field, but for Whom?*, N.Y. TIMES, July 1, 2001, § 4, at 6.

27. *Id.*

28. See *infra* note 85.

29. Holmes, *supra* note 26, at 6.

30. See James Traub, *The Class of Prop. 209*, N.Y. TIMES, May 2, 1999, § 6, at 44 (interviewing students throughout the University of California system).

31. Holmes, *supra* note 26, at 6.

32. CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, CAMPUS LIFE: IN SEARCH OF COMMUNITY 2 (1990).

33. INST. FOR THE STUDY OF SOC. CHANGE, UNIV. OF CAL. BERKELEY, DIVERSITY PROJECT (1991). For a more extensive discussion of black and white perspec-

My argument should not be misconstrued. I am not arguing against diversity and inclusion or calling for a color-blind campus.³⁴ I am instead questioning identity politics that foster suspicion and create misunderstandings. My concerns arise not only from the splintering of student groups along racial and ethnic lines, but also from the emergence of separate academic departments dominated by race—departments that frequently do not meet sound academic standards. I am similarly alarmed by the call for speech codes designed to offer special protections to racially sensitive minorities. These are a few of the developments that too frequently have been rationalized away by administrators invoking “diversity” without openly acknowledging that diversity has become “untethered from integration” to the point of becoming “integration’s rival.”³⁵

For the last twenty years, the term “diversity” has been used in so many different ways it now means whatever one wants it to mean. Take, for example, “A Diversity Action Plan for The Ohio State University” which set precise numerical goals for ethnic and gender groups and stipulated that quotas be used not just for the University as a whole but for each individual department.³⁶ Declaring its short-term goal as the creation of “a faculty, student and staff profile that reflects the demographic profile of the state,” the plan also states the University must eventually look like the rest of the nation and reflect national demographics.³⁷ These goals put the “diversity rationale”³⁸ to a very stern test inasmuch as Ohio’s demographic profile differs from that of the whole country.³⁹

tives, see STANFORD ALUMNI ASS’N, RACE RELATIONS ON CAMPUS: STANFORD STUDENTS SPEAK (1992).

34. See Bunzel, *supra* note 11 (clarifying his position on current policy hampering trust among racial and cultural groups).

35. Ward Connerly, Symposium, *Diversity of Viewpoint, Not Racial Set-Asides Based on Stereotypes, Should Guide the Admissions*, INSIGHT MAG., May 14, 2001, at 40.

36. See OHIO STATE UNIVERSITY, A DIVERSITY ACTION PLAN FOR THE OHIO STATE UNIVERSITY, http://www.osu.edu/diversityplan/index_1.html (June 12, 2000) (setting, for example, goals to increase faculty over the next five years, by 197 females, 28 African Americans, 21 Asian Americans and 13 Hispanic Americans).

37. *Id.*

38. The “diversity rationale” refers to Justice Powell’s opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) in which he states that race may be considered when trying to foster a diverse environment. Justice Powell also states that ethnic diversity is only one factor among many a university may consider in seeking a heterogeneous student body. *Id.* at 314.

39. United States Census 2000, Profiles of General Demographic Characteristics: 2000, at 3, 1061 (reporting Ohio versus nationwide demographics as: White: 85.0%/75.1%; African American: 11.5%/12.3%; Hispanic: 1.9%, 12.5%; Asian 1.2%, 3.6%),

The elasticity of the term “diversity” has masked many kinds of questionable conduct. When asked why Asian Americans’ admissions rates in the 1980s were so low, many university officials said their goal was to achieve “ethnic diversity” and that Asian Americans were “overrepresented.”⁴⁰ Harvard’s former Dean of Admissions, Fred Jewitt, was concerned that a “terribly high proportion of the Asian students are heading toward the sciences.”⁴¹ It follows, then, that “in the interests of diversity, more of them must be left out.”⁴² The Vice-Chancellor for Student Affairs and Special Programs for the entire State University of New York system went so far as to claim that “diversity is excellence.”⁴³ Some faculty members wish to elevate diversity above all other values, including merit and excellence. A Harvard education professor has observed that excellence should not be the primary concern of the university because such a focus excludes minorities.⁴⁴ He believes the university should instead be more concerned with “adequacy,” adding that many academically distinguished whites will have to make room for those qualified on the basis of other kinds of “intelligence.”⁴⁵ He justifies turning away white and Asian students with straight A averages at places like Berkeley to foster “diversity.”⁴⁶ In hiring their faculties, he says, universities should not choose the “best” but should give precedence to minority candidates who fall within the range of adequacy.⁴⁷

When some Department of Health, Education and Welfare (HEW)⁴⁸ officials realized that long-standing professional stan-

http://www2.census.gov/census_2000/datasets/demographic_profile/0_National_Summary/2khus.pdf (last visited on Oct. 5, 2001).

40. John H. Bunzel, *Are There: A) Too Many or B) Too Few Asian-Americans Admitted To College?*, L.A. TIMES, June 21, 1987, § 5, at 2.

41. Daniel A. Bell, *The Triumph of Asian-American; America’s Greatest Success Story*, NEW REPUBLIC, July 15, 1985, at 24 (quoting Fred Jewitt).

42. *Id.*

43. Carl Cohen, *Affirmative Action in Higher Education: Preference by Race in University Admissions and the Quest for Diversity*, 54 WASH. U. J. URB. & CONTEMP. L. 43, 50 n.28 (citing 11 ACADEMIC QUESTIONS 52 (Winter 1998)).

44. John H. Bunzel, *Should UC Admissions Set Ethnic And Racial Goals?; Standards Must Remain High*, L.A. TIMES, July 1, 1990, § M, at 5 (citing Charles Willie, a critic of proposed state legislation requiring the University of California to approximate the ethnic composition of recent high school graduating classes in its classes).

45. *Id.*

46. *Id.*

47. *Id.*

48. The Department of Health, Education and Welfare was created in 1953. In 1980, HEW officially became the Department of Health and Human Services. U.S. Dep’t of Health and Human Servs., HHS: Historical Highlights, at <http://www.os.dhhs.gov/about/hhshist.html> (last visited on Oct. 11, 2001).

dards⁴⁹ might inadvertently keep minority faculty appointments down, they were willing to shirk the standards and even discredit them.⁵⁰ I have never forgotten the directive HEW's Midwest civil rights director issued to all universities in the region.⁵¹ It stipulated that neither minority nor female candidates "should be required to possess qualifications *better than the least qualified member presently employed by a department.*"⁵² I would have liked to have hidden in the woodwork when the department met to decide which of their colleagues was to be bestowed with the honor of being "least qualified." (The order was eventually withdrawn.)

I took more seriously the intention of the U.S. Commission on Civil Rights⁵³ to decisively bring higher education into compliance with government regulations. One morning in 1972, the chancellor's Council of Presidents of the California State University system met for two hours with the Commission's staff members.⁵⁴ The director opened the meeting by explaining that affirmative action had no meaning unless it was result oriented.⁵⁵ A new set of hiring criteria was needed in the faculty hiring process that would lead to more diversity.⁵⁶ Since only a few black Ph.Ds were available, we were told we should drop the doctorate as a requirement and consider black recipients of master's degrees for faculty ap-

49. These standards include, but are not limited to, the competence to teach, perform research, explore ideas and transmit knowledge. Hoover Institution, at <http://www-hoover.stanford.edu/publications/epp/89/89b.html> (last visited on Oct. 14, 2001).

50. See generally David Cazares, *U. of L Will Use Cash for Departments, Other Incentives to Lure Black Faculty*, *COURIER-JOURNAL*, June 3, 1990, at 1B (describing University of Louisville's minority recruitment plan, which included waiving a full search process when a fully qualified black candidate was available, always interviewing the best black candidate, and offering the job to fully qualified blacks unless granted a waiver); Alison Schneider, *Two Professors Who Charged Cheyney U. With Reverse Bias Win \$2.2 Million*, *CHRON. OF HIGHER EDUC.*, Oct. 9, 1998, at A14 (describing the violation of a long-standing scoring system, changed to consider an Asian job applicant).

51. This directive is on file with the author.

52. *Id.*

53. United States Commission on Civil Rights Act of 1983, 42 U.S.C. § 1975 (1994) (establishing the committee).

54. John H. Bunzel, Notes from Council of Presidents of the California State University Meeting (on file with author). The staff members of the Civil Rights Commission present were John Buggs, staff director; Jess Miller, director of the Office of Federal Evaluations; and Maywanda Michael, whose duties involved the monitoring of HEW-related matters. For a more extended discussion of affirmative action in faculty hiring, see John H. Bunzel, *Minority Faculty Hiring: Problems and Prospects*, 59 *AM. SCHOLAR* 39 (1990).

55. Notes from Council of Presidents of the California State University Meeting, *supra* note 54.

56. *Id.*

pointment in order to acquire a statistically acceptable representation of black and other minority candidates.⁵⁷ Other Commission staff members repeatedly emphasized the need to consider “equivalency criteria.”⁵⁸ All the guidelines our campuses had followed for years with respect to job requisites would be reviewed and higher education would be called on for a “job redesign.”⁵⁹ It was not the last time impassioned diversity consultants would regard numbers as ends in themselves. Such activists would rely heavily on a “numbers” definition of discrimination, looking only at the number of people employed instead of the numbers of applicants or the number of qualified applicants.⁶⁰

In the 1980s and 1990s, many universities voluntarily established new ways to hire more minorities, ways often running afoul of their public promises to accord equal treatment to all candidates on a nondiscriminatory basis.⁶¹ Many of these techniques have since been ruled unconstitutional.⁶² For example, a faculty memo, circu-

57. *Id.*

58. *Id.*

59. *Id.*

60. The University of Vermont, for example, adopted an affirmative action strategy requiring the University to determine the number of minorities or women actually employed in each department and compare that number with an *estimated* number of equally qualified minorities or women in the job pool. The actual number of qualified minorities or women applicants is not taken into consideration. When the actual number of minority or women currently employed is less than eighty percent of the estimated number of minority or women applicants in the job pool, the department is said to be “underutilizing” minorities and women. When a department discovers it is “underutilizing” minorities and women, the department creates hiring “targets.” In other words, the department is then required to set goals and timetables to remedy the underutilization problems. See *Honadle v. Univ. of Vt. & State Agric. Coll.*, 56 F. Supp. 2d 419, 421-22 (D. Vt. 1999).

61. The Supreme Court has ruled that some affirmative action hiring policies that do not accord equal treatment to all candidates are constitutionally permissible if they meet certain requirements. *Johnson v. Transp. Agency, Santa Clara County, CA*, 480 U.S. 616, 632 (1987). The employer must demonstrate a “manifest imbalance” between the percentage of minorities or women in the employer’s work force and the percentage of minorities or women in the labor market who possess the necessary qualifications. *Id.* According to the Supreme Court, the Constitution does not permit voluntary affirmative action plans when implementing the plan would “unnecessarily trammel” the rights of non-minority or male applicants. *Id.* at 630. The Constitution only permits universities to adopt voluntary affirmative action hiring plans that allow minorities and women to be chosen over other qualified candidates if such a “manifest imbalance” exists. *Id.* at 632.

62. *Hayden v. County of Nassau*, 180 F.3d 42 (2d Cir. 1999) (finding that the employment plan did not involve racial classification, rendering the application of strict scrutiny unnecessary); *Honadle*, 56 F. Supp. 2d at 427-29 (finding university’s minority faculty incentive fund unconstitutional to the extent that it served as an inducement to hire as well as recruit minorities). See also *United States v. City of Hialeah*, 899 F. Supp. 603 (S.D. Fla. 1994), *aff’d*, 140 F.3d 968 (11th Cir. 1998) (finding that although

lated in the School of Behavioral and Social Sciences at San Francisco State, stressed the importance of a person's non-academic experience and non-traditional patterns of accomplishment in seeking more minority faculty members.⁶³ The memo, however, did not stop there. It went on to say that absent a suitable number of qualified affirmative action candidates, the faculty position would be re-opened and the search continued.⁶⁴ Simply stated, the faculty position was only for a minority candidate. In 1984, the provost approved the English Department's request for two new faculty appointments. He insisted that the faculty appointment "[must] be nonwhite. Let me underscore that the stipulation is an absolute condition."⁶⁵ The message: diversity at any cost. It was the major justification for achieving "rainbow representation for its own sake."⁶⁶

It is hard to be an enemy of diversity. Most Americans recognize diversity as one of the nation's proudest attributes.⁶⁷ Beyond that, however, there is confusion over the term's meaning. No matter how often people say the word, or how strongly they believe in it, they continue to ignore the way diversity has become an all-embracing concept. The term "diversity" has become a code word that fails to define precisely what it allegedly exalts and what exactly is to be accomplished by those who extol its virtues.⁶⁸

the employment plan was a permissible racial classification it nonetheless was rejected for extra-constitutional "fairness" considerations).

63. This file is on file with the author.

64. *Id.*

65. Samuel Taylor, *Racial Preferences Go to College*, AM. RENAISSANCE, Feb. 1991, at 5, 5.

66. Charles Krauthammer, *Affirmative Action Fails Again*, WASH. POST, July 13, 2001, at A21.

67. See, e.g., Sam Fulwood III & Kenneth R. Weiss, *Public Values Ethnic Diversity, Survey Finds*, L.A. TIMES, Oct. 7, 1998, at A14 (describing the results of a survey on diversity in the nation and on the benefits of diversity on campus).

68. A political scientist acquaintance contends that diversity lies at the heart of our constitutional government. He maintains that James Madison's use of the word diversity in the *Federalist Papers* refers to multiculturalism. It may be, as some have argued, that Madison's definition of diversity in the *Federalist Paper No. 10* is not entirely clear or persuasive. But does any one seriously believe he had race or ethnicity in mind when describing the "diversity in the faculties of men" that should be overcome or neutralized by the intervention of government because it would mean the end of republicanism? See THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) ("The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government.").

III. THE DIVERSITY RATIONALE

The banner of racial diversity has recently been raised in two lawsuits against the University of Michigan. In the first case, District Judge Patrick J. Duggan upheld the University's race-conscious undergraduate admissions policy, ruling that the government has a "compelling interest" to support the educational benefits stemming from a diverse student body.⁶⁹ Three months later, a different judge on the same court struck down a similar policy at the university's law school.⁷⁰ Both cases pose the same question: Is ensuring a diverse student body an adequate reason for a state university to give preferential treatment to minority students? These two disparate rulings (and several conflicting lower court decisions)⁷¹ have muddled the legal status of affirmative action in college admissions, suggesting the U.S. Supreme Court will likely take a case to clarify this area of the law.⁷²

Although the Supreme Court has rolled back racial preferences in government contracting and employment,⁷³ it has not recently confronted affirmative action in higher education. Lower courts have therefore attempted to apply the Court's 1978 case of *Regents of The University of California v. Bakke*.⁷⁴ In *Bakke*, the Court, in a five-vote judgment presented in Justice Powell's opinion, allowed

69. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 821-22 (E.D. Mich. 2000).

70. *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

71. See *Johnson v. Bd of Regents*, Nos. 00-14340 & 00-14382, 2001 U.S. App. LEXIS 19154 (11th Cir. Aug. 27, 2001) (invalidating race-conscious admissions program because it was not narrowly tailored, but stating such policy may be a compelling state interest); *Smith v. Univ. of Wa. Law Sch.*, 233 F. 3d 1188 (9th Cir. 2000) (upholding a race-conscious admissions policy and stating that race may be considered as one element in pursuing a diverse student body); *Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996) (invalidating a race-conscious admissions program aimed at fostering diversity).

72. "I think that predicting what the Supreme Court is going to do or why it has done it without their saying is a fool's errand, [but] if and when the Supreme Court revisits this issue, I believe it will be in the Michigan cases." Michael A. Fletcher, *Justices Won't Review Affirmative Action Case*, WASH. POST, May 30, 2001, at A3 (quoting Theodore M. Shaw, associate director-counsel of the NAACP Legal Defense and Educational Fund). See also Tom Stabile, *Michigan Thrust into Minority Admissions Battle: School's Case May Go to Supreme Court*, NAT'L JURIST, Sept. 2001, at 15.

73. See *Adarand Const., Inc. v. Pena*, 515 U.S. 200 (1995) (invalidating affirmative action incentives in federal contracting procedures); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating municipal requirement that prime contractors subcontract a percentage of the project to minority business enterprises); *Wygant v. Jackson Bd. Educ.*, 476 U.S. 267 (1986) (invalidating race-conscious preferential treatment by municipality when making layoff decisions). But see *U.S. v. Paradise*, 480 U.S. 149 (1987) (upholding state race-conscious promotion plan that sought to ameliorate specific racial imbalance in state agency).

74. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

colleges to consider an applicant's race as a "plus" factor in admissions to ensure a diversity of viewpoints in the student body.⁷⁵ Race could only be considered, however, if race-consciousness did not prevent all candidates from receiving full consideration.⁷⁶ Since the Court has not heard any affirmative action cases on college admissions since *Bakke*, public colleges generally assume Justice Powell's opinion to be the law of the land. Unfortunately, Powell's opinion had many fuzzy edges and was never fully joined by his fellow justices.⁷⁷ Furthermore, the court's subsequent rulings suggest *Bakke's* logic may have been superceded altogether.⁷⁸ Without examining all of *Bakke's* legal arguments, I would simply note that Justice Powell's opinion made diversity a shibboleth; diversity is now the only way to justify racial preferences in college admissions.

Many questions cannot be brushed aside when trying to judge the significance of racial diversity in the education of college students. That today's campuses, open to all cultures, ethnic groups, and religions, are far superior to the monochromatic student bodies of past generations is not in dispute. Important questions, however, remain: is racial diversity a proxy for educational enrichment? How much diversity does it take to enrich a campus environment? Are the educational benefits of diversity significantly greater in a student body that is eight percent African American as opposed to four or five percent? If one acknowledges the importance of intellectual diversity, are its needs best met when a university privileges race above factors like age, work experience, or country of origin?

At the heart of the debate over the "diversity rationale" is whether diversity should be treated like other college admissions criteria or whether the need to achieve a diverse campus should compel giving (mainly) African American and Hispanic students preferential treatment. Is being black the same as achieving high SAT scores, excelling at varsity soccer, or playing the flute, or should it carry more weight? A recent proposal to change Berkeley's admission policy to consider more non-academic factors has

75. *Id.* at 317.

76. *Id.* at 317-20.

77. See *United States v Miami*, 614 F. 2d 1322, 1337 (5th Cir. 1980) ("We frankly admit that we are not exactly sure what to make of the various *Bakke* opinions. In over one hundred and fifty pages of *United States Reports*, the Justices have told us mainly that they have agreed to disagree.").

78. See *supra* note 73.

sparked intense debate.⁷⁹ Supporters of the proposal claim academic achievement is not the sole measure of a desirable group of students and believe the proposal will result in a more interesting and lively campus.⁸⁰ Others, however, see the proposal as a “thinly veiled attempt to increase the University’s share of under-represented minority students.”⁸¹ Indeed, Jack Citron, a political science professor at Berkeley and opponent of the proposal⁸² is “very worried about any proposal that would diminish the value of academic criteria at a place like Berkeley.”⁸³ Berkeley’s Chancellor Robert Berdahl disagrees, insisting the proposal is not a back door to racial preferences: “We are not about to take race into consideration,” he maintains, “and we won’t.”⁸⁴ Professor Citron, in turn, claims those running the University are simply trying “to get more Hispanic and black students into Berkeley and UCLA because otherwise the Legislature might cut the budget.”⁸⁵

They may be right. According to the *Los Angeles Times*, ever since affirmative action was banned, legislators, civil rights groups, and students have pressured universities to find legal methods of increasing the number of black, Latino, and American Indian students.⁸⁶ The UC Regents’ action, however, will not end the debate over how best to admit more minority students; in the words of Professor Citrin, “merit is out and diversity is in.”⁸⁷ When educators and politicians committed to diversity lose in court or at the

79. Rebecca Trounson, *UC Berkeley Urges Changes in Admissions*, L.A. TIMES, May 24, 2001, at B1.

80. *Id.*

81. *Id.*

82. *See infra* note 87.

83. Trounson, *supra* note 79, at B1.

84. *Id.*

85. *Id.*

86. *Id.* On July 19, 2001 (in full recognition of Proposition 209 which prohibits race or gender-based preferences), the University of California Board of Regents approved a “Dual Admissions” program providing a new way to admit more disadvantaged and minority students from under-resourced high schools. Under the new policy, students between the top 4% and 12.5% of the class in each California high school (based on grades in U.C.-required courses) will be granted U.C. eligibility and admission, provided they complete a transfer program at one of the state’s community colleges. According to estimates by the University, about 40% of the “Dual Admissions” pool will be white, 29% Latino, 18% Asian American, 6% African American and 1 percent American Indian, with other ethnicities accounting for 6%. Press Release, University of California Office of the President, Regents Approve “Dual Admissions” Plan, Expanding U.C. Access for High-Achieving Students (July 19, 2001), available at <http://www.ucop.edu/news/archives/2001/july19art2.htm>.

87. Jack Citrin, Op-Ed, *For True Diversity, Universities Should Consider a Lottery*, SACRAMENTO BEE, July 22, 2001.

polls, Citrin claims, they lower standards by expanding the pool of eligible high school students and reducing the use of objective measures of ability like standardized tests.⁸⁸ Citrin argues that through the “magic of sampling,” the class admitted would represent genuine diversity, “diversity of thought, interests, personality, religion, and geography, as well as of race and ethnicity.”⁸⁹

The argument for campus diversity was central in Judge Duggan’s opinion in *Gratz v. Bollinger*.⁹⁰ Duggan accepted the University of Michigan’s contention that considering race in admissions decisions is essential to the educational richness attained when students experience racial and ethnic diversity in the classroom and informal campus interactions.⁹¹ Exposure to a mixture of racial backgrounds will encourage the development of active thinking, intellectual engagement and motivation, and intellectual and academic skills.⁹²

So testified University of Michigan psychology and women’s studies professor Patricia Y. Gurin. Professor Gurin told the court that “solid evidence”⁹³ adduced from her survey of Michigan students clearly showed a diverse classroom made them better equipped to understand multiple perspectives, deal with the conflicts arising from such perspectives, and appreciate common values.⁹⁴ In the 1978 *Bakke* case, by contrast, Justice Powell did not assert there was clear evidence of the educational benefits of diversity.⁹⁵ The importance of the Michigan court decision is that Judge Duggan added the imprint of social science data to Justice Powell’s opinion.⁹⁶ As former Harvard president Derek Bok noted, “Courts

88. *Id.*

89. *Id.*

90. *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

91. *Id.* at 822 (quoting Patricia Y. Gurin, professor of psychology at the University of Michigan and interim dean of the College of Literature, Science, and the Arts). The full text of the report of Patricia Y. Gurin, can be found in “The Compelling Need For Diversity In Higher Education,” *Gratz v. Bollinger*, 122 F.Supp. 2d 811 (E.D. Mich. 2000) (No. 97-75231) (a collection of testimonies by witnesses on behalf of the University of Michigan in *Gratz v. Bollinger*, No. 97-75231 (E.D. Mich. 2000)) [hereinafter “Gurin Report”].

92. *Gratz v. Bollinger*, 122 F. Supp. 2d at 822 (quoting Patricia Y. Gurin from the Gurin Report).

93. *Id.*

94. *Id.* (quoting Patricia Y. Gurin from the Gurin Report).

95. *Regents of The Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978). Justice Powell argues that “our tradition and experience lend support to the view that the contribution of diversity is substantial. *Id.* He does not, however, assert that clear evidence of the benefits of diversity in education exists. *Id.*

96. Jacques Steinberg, *Defending Affirmative Action with Social Science*, N.Y. TIMES, Dec. 17, 2000, at 41.

are now able to look to data in order to see how much weight to put on this claim.”⁹⁷

That, indeed, is the core question: Has it been proven that racial diversity in the classroom produces substantial education benefits and, as the research that Judge Duggan cited indicates, that students who experience the most diversity exhibit “sharper critical thinking skills” and are “more motivated”?⁹⁸ Intuitively, perhaps, one might agree, or wish to agree. The data in question, however, were not sufficiently convincing to settle the issue. The social science data introduced in court were virtually uncontested because both sides were seeking summary judgment rather than a trial. Now that the data are crucial, they will face rigorous scrutiny. We now have a hypothesis in search of proof.

The uncertainty over how “solid” the evidence is regarding the educational benefits of a racially diverse student body has produced a predictable chorus of accord and dissent. Proponents of race-based preferences embrace diversity wholeheartedly; opponents of such preferences try to limit it. The major methodological problem is that diversity is a diffuse concept that is difficult to measure and whose benefits are more likely to be discerned in the long run, with more research having been done. Time will be needed for scholars with an analytical focus and objective approach to define and assess the nature of diversity and show how it has worked in practice at different institutions over a period of years.

Meanwhile, we can expect little more than a continuing exchange of accusations and counter-charges. One side will claim the University of Michigan manipulated the weight assigned to race to reach a preconceived enrollment target and that there is no evidence of educational value in diversity. The other side will maintain that a mixed campus improves education because students learn better when their classmates are not exactly like them. The causal links between racial diversity and students’ academic performance are, however, ultimately empirical questions.

I taught at Stanford in the late 1950s and early 1960s when the student body was virtually all-white. The students were among the best in the country, well-prepared academically and intellectually demanding. My political science classes provided the most “robust exchange of ideas”⁹⁹ I ever experienced as a teacher. Never did

97. *Id.*

98. *Id.*

99. *Bakke*, 438 U.S. at 312 (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943)).

anything close to a dull or spiritless orthodoxy hover over the classroom. In the late 1960s, when I taught at San Francisco State, I relished that my classes had many Asian, Hispanic and African American students. It seemed natural and unremarkable that the college reflected the heterogeneity of the San Francisco Bay Area and that the students moved about the campus together easily and casually. But none of the standard measures—grades, term papers, class discussion—could support Professor Gurin's claim that interracial contact brought about "effortful thinking" rather than "automatic thinking," or that the students' academic performance was markedly improved by having members of minority groups in the classroom.¹⁰⁰

University of Minnesota Law School professor David P. Bryden makes a different point. Professor Bryden claims the net effect of affirmative action is not to promote vigorous classroom discussion but to strengthen the dominance of politically correct ideas.¹⁰¹ Within our major universities, he says, "where the culture is already dominated by the Left, blacks simply reinforce white-liberal orthodoxies concerning race."¹⁰² He further reports that in over twenty years of teaching racially diverse classes, "only one class comment by a member of a racial minority . . . was noticeably different from what one might expect from a white student of the same ability and political orientation."¹⁰³ Even when it comes to such issues as affirmative action and black crime, the views of black students "hardly differ from those of white liberals."¹⁰⁴

But Bryden's classroom observations, like my own, are merely anecdotal and hardly constitute empirical data. Other professors will have had very different experiences. This only underscores the difficulty of determining if racial diversity is closely connected to viewpoint diversity and if increasing the former will enhance the latter to some measurable degree.¹⁰⁵ I would disagree with Profes-

100. Gurin Report, *supra* note 91, at 364-65.

101. David P. Bryden, *The False Promise of Compromise*, 130 PUB. INT. 50, 50-63 (1998).

102. *Id.*

103. *Id.*

104. *Id.*

105. America's best-known black colleges do not claim that racial diversity on campus is a basic requirement for educational excellence. Diana Jean Schemo, *Black Colleges Lobby Hard to Lure the Best and Brightest*, N.Y. TIMES, Mar. 8, 2001, at A10. Convinced that they have something important to offer that predominantly white institutions cannot, recruiters tell prospective black applicants that their campuses (to quote a black admissions director) "will put you in an environment where there are people who look like you . . . and will help you continue on that track of self-confi-

sor Bryden if his concern about the dominance of politically correct ideas was meant to suggest that having black students (or more black students) will throw a pall of conformity over classes.¹⁰⁶ If it were true that black students unanimously embrace “correct thinking”¹⁰⁷ and introduce nothing but trite comments or clichés, then one might argue (with tongue in cheek) that some kinds of diversity are bad for education. But many feel that having different faces and voices adds considerably to what takes place in the classroom. This is clearly the view of many anonymous students in elite universities (as reported by William Bowen and Derek Bok in *The Shape of the River*)¹⁰⁸ and of law students at Harvard and Michigan who overwhelmingly say that the presence of minority students has been good for their education.¹⁰⁹

It seems perfectly obvious that if different kinds of people live together (particularly on a residential campus), they are going to learn from each other. But does it follow that the spirited exchange of diverse ideas I found so exhilarating in my Stanford classes comes from racial diversity in the student body or classroom (which didn’t exist at Stanford at the time)? That, for me, is an open and separate question. I am prepared, therefore, to entertain two thoughts simultaneously: 1) admitting students from different geographical regions, races, and social backgrounds is a desirable goal and a university’s public responsibility, but 2) diversity of viewpoints in the classroom comes principally from intellectual effort on the part of students and professors working together to explore ideas, test arguments, and question assumptions, with one’s race or ethnicity rarely the determinative factor. Although a long supporter of a university’s commitment to seek a mosaic of races and colors in the student body, I am unable to affirm that diversity has a direct and positive impact on academic performance or, more

dence and esteem.” *Id.* (quoting Theodora Riley, interim director of admissions at Spelman College). Their efforts to attract African American high school seniors who are top achievers are not based on the belief that interracial contact is a basic condition of a first-rate educational quality. *Id.* These recruiters believe that their students learn best in a homogeneous environment. *Id.*

106. *Id.*

107. Clayton Dumont, *The Analytical and Political Utility of Poststructuralism: Considering Affirmative Action*, 23 CANADIAN J. SOC. 217, 217-37 (1998).

108. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 252 (1998).

109. *Expert Report of Derek Bok*, *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (E.D. Mich. 1998), available at <http://www.umich.edu/~urel/admissions/legal/expert/bok.html> (last visited on Oct. 5, 2001) (stating that the presence of minority students enhanced the education of over 60,000 college students).

specifically, that having members of different racial groups in the classroom will foster intellectual development and motivation, or prepare students better for future career opportunities.¹¹⁰

Any case that goes to the Supreme Court arguing for racial preferences in college admissions will claim that educational excellence and campus racial diversity are closely linked—that the former requires the latter. This was Professor Gurin's argument in the University of Michigan case.¹¹¹ My reservations about Professor Gurin's conclusions have been influenced by reports by other researchers seeking to correlate racial diversity with final student outcomes. Prominent among these studies was Mitchell Chang's UCLA doctoral dissertation of 1996.¹¹² The purpose of his study was to test the educational efficacy of student diversity which, he concluded, was only partly supported by the findings.¹¹³ After controlling for student backgrounds, college environmental factors, and college experiences, he found that racial diversity positively impacted the white students' inclination to both socialize with someone of a different racial group and to discuss racial issues.¹¹⁴ "This implies," says Chang, "that a racially diverse student body is a direct causal factor in how frequently white students socialize cross-racially and discuss racial issues."¹¹⁵ Chang also notes that there was "no parallel positive effect observed among students of color, and [there was] even the suggestion of a weak negative effect."¹¹⁶

Chang states that white students who attend colleges with diverse student bodies, compared with those who attend predominantly white institutions, are more likely to discuss racial issues and to socialize with nonwhite students. This is hardly surprising. But Chang also found that black students are less likely to discuss racial

110. Nicholas Lemann, *The Empathy Defense; Can the University of Michigan Save Affirmative Action?*, NEW YORKER, Dec. 18, 2000, at 46 (citing Walter Dellinger, a former assistant attorney general). See also BOWEN & BOK, *supra* note 108, at 252 ("We believe that our students benefit significantly from education that takes place within a diverse setting. In the course of their university education our students encounter and learn from others who have backgrounds and characteristics very different from their own.").

111. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 822-23 (E.D. Mich. 2000) (citing Patricia Y. Gurin's report).

112. Mitchell J. Chang, *Racial Diversity in Higher Education: Does A Racially Mixed Student Population Affect Educational Outcome?* (1996) (unpublished Ph.D. dissertation, UCLA).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

issues or socialize with non-black students on campuses with increased racial diversity and that students of color become more inclined to socialize with members of their own race.¹¹⁷ In addition, Chang's results show that diversity negatively effects overall students of color and has a weak, indirect negative effect on college retention for all students.¹¹⁸ Moreover, Chang concludes that "diversity does not affect students' college GPA, intellectual self-concept, or social self-concept."¹¹⁹ Nonetheless, Chang maintains that racial diversity is associated with other variables (e.g., cross-racial socializing) that have positive effects on these outcomes.¹²⁰

However, it is these indirect variables that raise questions. Discussing racial issues and socializing with students across racial lines are desirable goals that likely lead to other favorable results. But the crucial question is whether racial diversity has an educationally significant impact on learning outcomes.¹²¹ Or, to put it differently, how much difference does the racial diversity of a campus have on students' academic work in the classroom? In the *Bakke* case, Justice Powell suggested that a diverse student body promotes an "atmosphere of 'speculation, experiment and creation'—essential to the quality of higher education."¹²² Even if one agrees with Powell that a university must have the right "to select those students who will contribute the most to the 'robust exchange of ideas,'"¹²³ there is wide disagreement over whether more racial diversity, and therefore race preferences in admissions, is the fairest or most efficient way to achieve increased viewpoint diversity.¹²⁴

One way to begin considering if and how classroom diversity yields "academic benefits" would be to compare the performance of students in racially homogenous classes to the performance of those in racially mixed classes. This is not what Professor Gurin did in her study of University of Michigan students. Instead she defined "classroom diversity" as participation in an "ethnic studies course or a racial/cultural awareness workshop,"¹²⁵ regardless of

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. See Gurin Report, *supra* note 91.

122. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

123. *Id.* at 313.

124. Some have suggested that a more straightforward way would be to question applicants about their views on various issues and to consider their responses in the admissions process, but this strikes me as a proposal fraught with "Big Brother" overtones.

125. Gurin Report, *supra* note 91.

the racial makeup of the class. She then questioned a group of students who had chosen to take such a course or workshop and compared them with another group of students that had chosen not to. This makes it difficult to evaluate her findings by traditional research standards. In a typical research experiment, Gurin would have relied on some random method for choosing and assigning students to both a control group and an "experimental" group. What Gurin has measured, therefore, is not the impact of racial diversity on "learning outcomes," but the effect of taking multiracial classes in which students of any race may or may not be enrolled.¹²⁶ Whatever value one places on taking ethnic studies courses, a positive evaluation of a black studies course is not the equivalent of hard evidence showing the effects of racial diversity in the classroom on students' overall academic performance.¹²⁷

One needs to note what those researching the effects of diversity are actually measuring, as well as how their results are interpreted. An excellent example is the work of Alexander Astin, director of the Higher Education Research Institute at UCLA, whose findings

126. It is worth noting that when Gurin talks of the importance of having "best friends of a different race or ethnicity" or attending "multiethnic campus events," she does not indicate how many students of how many other races must be on campus to bring about the positive outcomes she reports. *Id.* Furthermore, one cannot tell from her study if the "academic benefits" she enumerates require more student racial diversity than would occur without racial preferences. See Brief for Amicus Curiae National Association of Scholars in Support of Affirmance, *Grutter v. Bollinger*, 247 F.3d 631 (6th Cir. 2001) (No. 01-1447); see also Shikha Dalmia, *The Diversity Defense*, 6 WKLY STANDARD 26 (Mar. 26, 2001).

127. Black studies means different things on different campuses. Gerald Early, director of the African and African American Studies program at Washington University in St. Louis, has cautioned proponents of black studies not to see their mission as antithetical to that of the university as a whole but, rather, to recognize "truthful knowledge, non-colorized knowledge, non-rationally aggrandizing knowledge as their only legitimate and ennobling source of power." John H. Bunzel & Anita Susan Grossman, *Black Studies Revisited*, PUB. INT, Spring 1997, at 71. The programs that follow this model as their guide differ significantly from those who espouse a separatist ideology enunciated by such spokesmen as Asa Hilliard at Georgia State University, Molefi Asante at Temple University, or Leonard Jeffries at City College of New York. *Id.* The model also differs from that of San Francisco State, whose black studies program (from its inception in 1969) proclaimed a radical political agenda that would "unite all of the revolutionary forces of all the College . . . and serve as a base from which to move like a mighty storm on all the other departments to revolutionize them." *Id.* Over a period of more than three decades at San Francisco State, there has been a common orientation that may be described as black-separatist multiculturalism. *Id.* More generally, an adversarial stance is taken toward American life, in which the wrongs done to minorities by "white America" and the European culture that produced it are stressed. *Id.* Professor Gurin, it seems fair to say, would be hard-pressed to argue that the degree of student racial diversity in these kinds of "racial/ethnic studies courses" would produce the educational benefits she cites.

have been used by both sides in the University of Michigan court case.¹²⁸ In his book, *What Matters in College*, Professor Astin, a supporter of racial preferences in college admissions, examined the effects of student racial diversity on grades, dropout rates, and performance on seven standardized tests, using the same database Gurin herself used.¹²⁹ Astin reported that academic outcomes are typically not affected¹³⁰ by student racial diversity and any effects are indirect and weak.¹³¹ From this, as the National Association of Scholars has noted, Astin concluded that “[t]he values, attitudes, self-concept, and socioeconomic status of the peer group are much more important determinants of how the individual student will develop than are the peer group’s abilities, religious orientation or racial composition.”¹³²

However, the University of Michigan viewed Astin’s work in a very different light, persuading the district court to declare in its summary judgment that “Astin associates diversity with . . . promoting racial understanding and participation in cultural activities, leadership, and citizenship.”¹³³ The issue that remains in question is whether Astin’s findings and the Gurin Report have clearly established strong evidence to support the University’s contention that student racial diversity is directly linked to positive educational outcomes and the district court’s conclusion that the University’s use of racial classification to achieve student racial diversity is a “compelling” governmental interest.¹³⁴

There is no doubt that the diversity rationale has become the defining issue of affirmative action and, in particular, an institution’s use of race in its admissions policies. The question of whether diversity academically benefits all students will now be left for the Supreme Court to decide. The justices will likely be sharply divided over (1) whether race has been convincingly shown to matter in a fundamental way; (2) if race must be taken into account to make a university truly more diverse; and (3)—the central research

128. ALEXANDER W. ASTIN, *WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED* (1993).

129. *Id.* at 186-244 (examining the impact of the college experience on these areas).

130. *Id.* at 362.

131. *Id.*

132. *Id.* at 363 (*emphasis added*).

133. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 823 (E.D. Mich. 2000).

134. Worth noting is what Astin has recently observed: “That more-diverse campuses better educate their students ‘is yet to be convincingly demonstrated.’” Astin also acknowledges that “The research still needs to be done that would demonstrate the link.” Peter Schmidt, *Debating the Benefits of Affirmative Action*, *CHRON. OF HIGHER EDUC.*, May 18, 2001, at A25.

question—whether racial diversity in the classroom is essential to a quality education.

The stage is already set for a new round of arguments. Reporting on a conference sponsored by the Harvard Civil Rights Project in May 1997, the *Chronicle of Higher Education* noted that “participants at the day-long session were not impressed with the social-science research on the value of diversity.”¹³⁵ Legal experts poked holes in the research, “disheartening some of the academics in attendance, who were confronted with the need to justify a concept they believe in implicitly.”¹³⁶ This has led some educators to argue that it is unreasonable to expect a university to produce “hard data” that will show racial diversity has educational value.¹³⁷ Others have shifted the emphasis to what researchers Malcolm J. Sherman and Thomas E. Wood call the “in turn” hypothesis: the assertion that the racial diversity of the student body is correlated with other “student involvement variables [that] in turn, are correlated with positive educational outcomes.”¹³⁸

Professor Gurin appears to agree.¹³⁹ Colleges and universities that provide opportunities for positive interactions among different racial and ethnic groups on campus, she believes, create the setting for positive effects of diversity.¹⁴⁰ She refers to these mediating conditions as “campus experience variables”¹⁴¹ that make it possible for all students to experience the benefits of diversity and opportunities for interaction, which have positive effects.¹⁴² Given her own strong belief in the need for race-based preferences in college admissions, it is perhaps not surprising she would seek to demonstrate that a racially diverse campus environment will lead, either directly or indirectly, to academic benefits for all students. The question is whether her findings will be accepted by the Supreme Court as “solid evidence.”¹⁴³ The answer may depend on

135. *Backers of Affirmative Action Seek Research to Bolster Cause: At Meeting at Harvard, Sympathetic Lawyers Tell Scholars That Their Work Will Not Sway Many Judges*, CHRON. OF HIGHER EDUC., May 23, 1997, at A28.

136. *Id.*

137. *Id.*

138. THOMAS E. WOOD & MALCOLM J. SHERMAN, NAT'L ASS'N OF SCHOLARS, IS CAMPUS RACIAL DIVERSITY CORRELATED WITH EDUCATIONAL BENEFITS? 7, 9 (2001) (demonstrating that there is no connection between campus racial diversity and educational benefits).

139. See *supra* notes 93-94 and accompanying text.

140. Gurin Report, *supra* note 91.

141. *Id.*; Ronald Roach, *Challenging the Racial Diversity Argument; National Association of Scholars Report*, BLACK ISSUES IN HIGHER EDUC., Apr. 26, 2001, at 10.

142. Gurin Report, *supra* note 91.

143. See *supra* note 93 and accompanying text.

still another argument the Court may consider—whether universities need only meet relaxed, non-rigorous standards of evidence in order to defend race preferences, which, in turn, will depend on the Court's post-*Bakke* interpretation of affirmative action and whether it is persuaded that racial diversity is compelling enough to justify the use of race in college admissions.¹⁴⁴

I am disheartened about the Court having the final word on these complex issues. I would prefer admissions officials be given the authority to use their own judgment in selecting unspecified (not quota-driven or predetermined) numbers of African Americans or Hispanics who clearly meet the institutions' academic standards and can be expected to earn a degree at rates not dramatically lower than those of whites and Asians. But that option is no longer possible, due in large part to the way many admissions officials have dealt with race, equality, and affirmative action. The perception that race was being used as a dominant consideration in student admissions led to an aroused public opinion that stopped the practice in its tracks by statewide referendum, first in California,¹⁴⁵ and then around the country.¹⁴⁶ Voters were sending a political message echoed by Justice Powell in *Bakke*. They wanted their universities to put "all applicants in the same pool and choose, on an individual basis, who is acceptable and who is not,

144. For a comprehensive and critical analysis of the constitutional and educational issues of diversity, including a detailed examination of Professor Gurin's research methods and conclusions, see MALCOLM J. SHERMAN & THOMAS E. WOOD, N.Y. ASS'N OF SCHOLARS, *RACE AND HIGHER EDUCATION: WHY JUSTICE POWELL'S DIVERSITY RATIONALE FOR RACIAL PREFERENCES IN HIGHER EDUCATION MUST BE REJECTED* (2001).

145. Proposition 209, Cal. Const. Art. I, § 31. The California electorate passed Proposition 209 by a 54-46 percent vote on November 5, 1996. It prohibits discrimination or preferential treatment based on race, sex, color, ethnicity, or national origin in public employment, education, and contracting. The key operative provision of this measure states: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Id.* at § 31(a).

146. Missouri Senate Bill 681 decided to nullify any "law, executive order, policy or rule that uses race, sex, color, ethnicity or national origin as a criterion for either discriminating against or granting preferential treatment to any individual or group of persons." Steven E. Ehlmann, *Another Approach to Racial Preferences*, 54 WASH. U. J. URB. & CONTEMP. L. 93, 96 (1998); see also Advisory Opinion to the Atty Gen. ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ., etc., 778 So. 2d 888 (Fla. 2000) (rejecting proposed ballot initiative that would prohibit minority scholarships because its substantial effect on local government entities, combined with its effect on Florida's legislative and judicial branches, conflicts with provision in state constitution that requires initiatives to embrace but "one subject and matter").

with race no more decisive than 'other qualities and qualifications deemed important.'"¹⁴⁷ As virtually all of the polls have consistently shown, that is what most Americans mean by equal treatment.¹⁴⁸

IV. CONCLUSION

Whatever the Supreme Court decides about the data regarding the effects of diversity on students' academic performance, it is not likely to satisfy all of our college administrators, faculty, and students. For one thing, faculty members have very different views about the importance of diversity, depending primarily on their discipline. Thus, not surprisingly, faculty in mathematics and science do not think that diversity does much of anything for their classes and their teaching. Not only does it matter in which field the teaching occurs, but much also depends on the kind of institution involved. Community colleges, state colleges, and universities all vary widely in their social settings and practices. These tangled and fiercely debated issues are not likely to be settled through research, important as some of it will be. We have already seen how the sharp, bitter division of views has haunted the long-standing controversy over affirmative action. Is there any reason to believe that future research findings about the effects of diversity will not be similarly affected by what one wants to see or hear—in short, by one's values? Liberals will look at the newest data and see a justification for racial preferences; conservatives will look at the same numbers and claim that diversity is too spongy a concept to sanction race-based admissions policies. It would be unreasonable to expect the results of the research, once in the public domain, to escape the same political and moral pressures that have for so long permeated our politicized atmosphere.

147. John H. Bunzel, *Race and College Admissions*, PUB. INT., Winter 1996, at 49.

148. Numerous polls indicate "overwhelming majorities of Americans oppose special preferences based on race or sex and agree that federal law should embody the principle of equal treatment under the law." MICHAEL G. FRANC, HERITAGE FOUND. WORKING GROUP ON CIVIL RIGHTS, COMMITTEE BRIEF; A SPECIAL REPORT TO THE CONGRESS, No. 17, 2 (1995); see also, Myriam Marquez, *Seeking Equal Opportunity For All*, ST. LOUIS POST-DISPATCH, Jan. 21, 1998, at C7 (pointing out that "polls show most Americans in all racial categories agree that preferences for some amount to discrimination for others").