
Narrative Highground: The Failure of Intervention as a Procedural Device in Affirmative Action Litigation

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Litigation provides an opportunity for parties to seek legal redress for wrongs, and to define their rights under the law. Litigation also provides a unique forum for the presentation of a party's story or narrative about a particular issue or set of facts.² The current debate surrounding the consideration of race and ethnicity in higher education admissions policies has largely been defined through litigation.

The stories of the parties in higher education affirmative action³ litigation are so well known that the

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² See generally Strickler v. Greene, 527 U.S. 263, 307 (1999) (Souter, J., concurring); Old Chief v. United States, 519 U.S. 172, 187 (1997) (explaining that trial testimony and evidence tell a story with "descriptive richness" creating a narrative that has the power to support conclusions and sustain the willingness of the fact finder to draw inferences); Anita F. Hill, *The Scholarly Legacy of A. Leon Higginbotham, Jr.: Voice, Storytelling and Narrative*, 53 Rutgers L. J. 641, 643-645 (2001) (discussing the frequent use of narratives and stories in the law through the presentation of witnesses, attorneys arguments, and the official narrative of a case presented in judicial opinions); Richard A. Posner, *Legal Narratology*, 64 U. Chi. L. Rev. 737, 738-39 (1997) ("Stories play a big role in the legal process. Plaintiff and defendant in a trial each tell a story, which is actually a translation of their "real" story into the narrative and rhetorical forms authorized by law, and the jury chooses the story that it likes better.")

³ This article uses the term "affirmative action" to refer to all university admissions policies that include the explicit consideration of race, ethnicity or national origin as a factor in the admissions process. The term "affirmative action" originated in a 1961 Executive Order issued by

average lay person may be able to describe the plaintiff's claims.⁴ The story of the litigation begins when a Caucasian applicant seeks admission to a college or graduate school.⁵ The Caucasian applicant is denied admission, but is aware that the college or graduate school has an affirmative action policy under which the school considers race or ethnicity in the admissions process. The Caucasian applicant files suit against the university and its officers claiming that the university's consideration of race in its admissions process is unconstitutional. It is the seemingly straightforward narrative that has come to define higher education affirmative action litigation.

President John F. Kennedy requiring government contractors to take "affirmative action" to prevent discrimination on the basis of "race, creed, color, or national origin" in hiring and employment practices. Exec. Order No. 10, 925, 3 C.F.R. 448 (1961). This executive order was superceded by a 1965 Executive Order issued by President Lyndon Johnson that established the Office of Federal Contract Compliance. Executive Order 11,246 established a nondiscrimination requirement for private firms performing work for the federal government, and stated that "[t]he contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during their employment, without regard to their, race, creed, color, or national origin." Lan Cao, *The Diaspora of Ethnic Economies: Beyond the Pale?*, 44 WM. & MARY L. REV. 1521, 1537 (2003); see also William W. Van Alstyn, *Affirmative Actions*, 46 Wayne L. Rev. 1517, 1527-30 & n.10 (2000) (tracing the history and evolution of the term "affirmative action").

⁴ There is a distinct contrast between the plaintiff's narratives in affirmative action cases, and the plaintiff's narratives in earlier desegregation cases. In the school desegregation cases African-American plaintiffs file suit to end de jure segregation policies in public schools and universities. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (African-American plaintiffs seek desegregation of public elementary and secondary schools); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (African-American graduate student challenges school policy requiring racially segregated facilities); *Sweatt v. Painter*, 339 U.S. 629, 631 (African-American applicant to University of Texas law school challenges state law allowing admission only to Caucasian applicants).

⁵ See, e.g., *Gratz v. Bollinger*, 123 S.Ct. 2411, 2417 (2003) (stating that plaintiffs were two white Michigan residents who were denied admission to the University of Michigan's College of Literature, Science, and the Arts) ("Gratz III"); *Grutter v. Bollinger*, 123 S.Ct. 2325, 2332 (2003) ("Grutter V") (describing plaintiff Barbara Grutter as a white resident of Michigan who applied for admission to the University of Michigan Law School, and after being denied admission filed suit claiming the law school's admission policy used race as a predominant factor in violation of the Equal Protection Clause of the Fourteenth Amendment); *Hopwood v. State of Texas*, 78 F.3d 932, 938 (5th Cir. 1996) ("Hopwood II") (describing four plaintiffs as white Texas residents denied admission to University of Texas law school).

The second narrative in higher education affirmative action cases is the narrative of the university defendant. The university defendant's narrative is almost as well known as the plaintiff's narrative. The university defendant's narrative centers around a defense of affirmative action on the basis that racial diversity is a compelling governmental interest as required under Fourteenth Amendment Equal Protection Clause analysis, because racial diversity is integral to the university's educational mission.⁶ Its narrative attempts to demonstrate that racial diversity allows different perspectives to be included in classroom discussions, and that producing a racially diverse group of graduates provides benefits to the state such as professionals that work in underserved communities. The university defendant's story rarely includes a discussion of the university or state's history of racial discrimination, or any connection between the university's current affirmative action program as a remedy for the university's past racial discrimination.

The third narrative of the higher education affirmation action lawsuit is not as well known, and has become marginalized in both the public and academic debate surrounding these cases. The third narrative is the story of minority⁷ students who are greatly affected by the race-conscious admissions policies as the direct beneficiaries of these policies.⁸ The minority students' narrative is

⁶ See, e.g., *Gratz III*, 123 S.Ct. at 1245 (describing the University of Michigan's defense that race-conscious admissions policies were necessary to create diverse student body and a rich educational experience); *Grutter V*, 123 S.Ct. at 2333-35 (detailing the testimony of the Law School's witness regarding diversity as a justification for the school's race-conscious admissions policy); *Hopwood II*, 78 F.3d at 941 (stating that the University Of Texas Law School defended its affirmative action admissions policy by claiming that the goal of the program was to obtain educational benefits that flow from a racially diverse student body).

⁷ This Article uses the term "minority students" to define the class of intervenors. The term "minority" is meant to include African-Americans, Native Americans, and Hispanics because these racial and ethnic groups are most often designated as the groups aided by the race-conscious admissions policies addressed herein. Although this Article refers to the intervenors' narrative as equivalent to the minority student's narrative, some of the intervenors in these cases include Caucasian students interested in preserving race-conscious admissions policies.

⁸ See Emma Coleman Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 Harv. C.R.-C.L. Rev. 31

introduced into the litigation through the procedural device of intervention, which allows a person or group with an interest in the lawsuit to become a party although the person or group has not been named as a party by the existing litigants.⁹ Federal Rule of Civil Procedure 24 allows either intervention as a matter of right or permissive intervention.¹⁰ Minority students and public interest organizations have sought to intervene to defend affirmative action admissions policies in every recent higher education affirmative action case.¹¹ Minority students and public interest groups were allowed to intervene in the two recent University of Michigan affirmative action cases, *Gratz v. Bollinger* and *Grutter v. Bollinger*.¹²

Similar to the university defendant, the minority

(1979) (stating that minorities have a significant interest in protecting affirmative action admissions policies); William Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions, and Diversity Research*, 12 La Raza L. J. 173, 174 (“Students of color—not university administrators—have the broadest, deepest and most urgent interests in preserving affirmative action.”)

One commentator has suggested that the benefit to minority students from affirmative action may have led to the erroneous perception that white applicants are being significantly harmed by these policies. Goodwin Liu argues that admissions policies that consider race as a factor may provide minority applicants with a significantly better chance of being admitted, but that there is no basis to infer that the improved chances of minority applicants means that white applicants would have a better chance of being admitted in the absence of affirmative action, because affirmative action may not be the actual cause of the white applicant’s rejection. This “causation fallacy” “erroneously conflates the magnitude of affirmative action’s instrumental benefit to minority applicants, which is large, with the magnitude of its instrumental cost to white applicants, which is small.” Goodwin Liu, *The Causation Fallacy: Bakke and The Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1046-49 (2002).

⁹ 7C Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1901 (2d ed. 1990 & Supp. 2002); 6 Edward J. Brunet, MOORE’S FEDERAL PRACTICE—CIVIL § 24.01 (1992).

¹⁰ See *infra* notes 13-14.

¹¹ See *Hopwood v. State of Texas*, 21 F.3d 603 (5th Cir. 1994) (“Hopwood I”) (affirming district court’s denial of motion to intervene); *Johnson v. Board of Regents University System of Georgia*, 263 F.3d 1234, 1238 (11th Cir. 2001) (“Johnson II”) (a group of African-American University of Georgia students permitted to intervene); *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (denying motion to intervene) (“Gratz I”); *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (reversing district court’s denial of motion to intervene) (“Grutter II”).

¹² See *Grutter II*, 188 F.3d at 396 (holding that minority students and public interest groups should be allowed to intervene in the litigation).

students' narrative focuses on defending the affirmative action policies. The minority student intervenors often tell a story about the value of racial diversity to a university community. However, the minority students' narrative diverges from the university defendant's in an important way. It often attempts to connect current affirmative action policies with the state and/or university's past and current racially discriminatory policies or practices.¹³

This narrative also serves as an alternative viewpoint on the individualized effects of affirmative action admissions policies. While the Caucasian plaintiff's narrative attempts to portray individualized harm associated with considering race in admissions, the minority student intervenors present a narrative of individualized harm associated with admissions programs that do not utilize affirmative action.¹⁴

This Article will argue that despite intervention in higher education affirmative action lawsuits, the minority students' narrative has been marginalized in these cases. In litigation, one party's narrative gains central importance or relevance and becomes reflected in the court's

¹³ See, e.g., *Hopwood I*, 21 F.3d at 605 (minority students argue that the their only interest is preserving affirmative action policies to remedy past discrimination and that minority students are in a better position than the university to present evidence of recent discrimination); *Grutter II*, 188 F.3d at 400 (concluding that the minority students' argument that the University would be less likely to present evidence of past and current discrimination was persuasive); Peter Schmidt, *Minority Students Win Right to Intervene in Lawsuit Attacking Affirmative Action*, Chronicle of Higher Education, September 3, 1999, at A68 (lawyer representing minority student intervenors states "black and other minority students will be able to bring into the courtroom the truth about continuing inequality and racism and bias in higher education.").

¹⁴ See generally, Benjamin Baez, *The Stories We Tell: Law, Race, and Affirmative Action* from Affirmative Action, Hate Speech, and Tenure (2002). Baez identifies a variety of stories that are told by both parties and courts in the course of affirmative action litigation. Baez argues that the stories told surrounding affirmative action demonstrate how the use of language perpetuates racial hierarchies and subordination in society. Baez identifies the story of the "impartial rule applier" in affirmative action cases in which "the neutral, objective, impartial judge [] mechanically applies the rules of the rational legislature acting in accordance with the will of the people." *Id.* at 107. Baez also identifies the story of the "intentional discriminator" in which judges struggle to construct a story about the role of a party's intention in the antidiscrimination law and affirmative action. See *id.* at 112-117. For the parties in affirmative action litigation Baez identifies stories of the "stigmatized minority," "innocent white victim," and of "individual merit." See *id.* at 116-125.

decisionmaking.¹⁵ In higher education affirmative action litigation the dominant narrative has become the narrative of the Caucasian plaintiff. This Article will demonstrate that the marginalization of the minority students' narrative is a direct outgrowth of the minority students' status as intervenors, in that intervenors are treated by the court as outsiders in the framework of litigation. Intervention, a procedure designed to transform bi-polar litigation into a context that affords protection to third parties with substantial interests at stake in the litigation, fails as a procedural device in these cases.

Part I of this Article will examine and recount the recent history of intervenors in higher education affirmative action cases from *Bakke* to the recent Michigan cases, *Grutter* and *Gratz*. In all of these cases, at varying levels courts have either refused to hear or have marginalized the minority students' narrative. These cases form three different categories based on the court's recognition or adoption of the minority students' narrative. The first category of cases are those in which the minority students' narrative was completely invisible, because intervention was denied. This category of cases includes *Bakke* and *Hopwood v. Texas*. The second category of cases are those in which the minority students' narrative is marginalized. These instances of marginalization occur when minority students become intervenors in the case, however their arguments, witnesses, and evidence are largely ignored by the courts in their decisionmaking process. This category includes *Johnson v. University of Georgia*, and the two University of Michigan affirmative action cases, *Gratz* and *Grutter*. The third category of cases are those in which the minority students' narrative is given the full recognition and adopted by the court. Up to this point, intervention has failed to produce any cases that would be included in this third category in which there is full recognition and incorporation of the minority student's narrative.

Part II of the Article will examine the failure of intervention as a procedural device in higher education affirmative action cases. The relative success or failure of intervention as a procedural device in these cases will be measured on two levels. First, intervention will be

¹⁵ See *id.*

measured as a procedural device based on the policy considerations underlying the intervention procedure. Commentators, most notably Abraham Chayes, have noted that intervention is one procedural device that is a marker of public law litigation. Public law litigation is litigation in which the plaintiff seeks to vindicate their constitutional or statutory policies in a way that effects more than the parties themselves. There are many policy reasons underlying intervention in public law litigation, such as affirmative action cases. These policy goals include the intervention as a means of assisting the court in information gathering, judicial economy, and preventing injury to nonparties. On most of these policy levels, intervention fails in higher education affirmative action cases.

In the specific context of higher education affirmative action cases many commentators have argued that intervention is necessary in order to insure that the courts hear the voices of minority students. These commentators assume that having the status of an intervenor is a good unto itself in that the intervenors have an opportunity to put forth their arguments before the court. However, if as in many of the higher education affirmative action cases, the intervenors arguments are ignored or not adopted by the court, intervention a less effective procedural mechanism.

Part III will argue that the central value of intervention sought to be fulfilled by the minority student intervenors is the opportunity to present a distinctive narrative to both courts and the public, which is not being presented by either the plaintiff or university defendants in affirmative action cases. However intervention efforts have failed to present a meaningful opportunity for minority students to become the central narrative in the continuing legal debate surrounding affirmative action.

Therefore, Part III proposes that in the affirmative action debate continuing following the Supreme Court's decisions *Grutter* and *Gratz* minority students should abandon their efforts at intervention, and instead become plaintiffs in lawsuits to challenge current "race neutral" admissions standards such as the Law School Admissions Test ("LSAT"). In the alternative, minority students may choose to take legislative action through ballot initiatives and other measure to replace traditional admissions criteria and expand the current justifications for race-conscious

admissions policies. Through the procedural positioning of themselves as plaintiffs or as the authors of legislative reform, minority students will be able to meet their goal of recognition of their unique narrative.

Part I: Intervention in Higher Education Affirmative Action Litigation

Intervention is a procedural device intended to enable a party or group with a substantial interest in the subject of litigation to become a party in the case to protect their rights.¹⁶ Intervention is often compared to other procedural devices in the federal rules that “recognize that a lawsuit is often not merely a private fight and will have implications on those not named as parties.”¹⁷ Although intervention does

¹⁶ See Wright & Miller, *supra* note 9 at § 1901 (stating that intervention is a procedure in which an outsider in a lawsuit becomes a party although not named as a party by the exiting litigants); James Wm. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 Yale L. J. 565 (1936) (describing intervention as a procedural device that allows a stranger to the litigation to present a claim or defense in a pending action, thus becoming a party in the proceeding); Jean M. Radler, *When is Intervention as a Matter of Right Appropriate Under Rule 24(a)(2) of the Federal Rules of Civil Procedure in Civil Rights Actions*, 132 A.L.R. Fed 147 (1996) (same).

Federal Rule of Civil Procedure 24 was adopted in 1938 in an attempt to codify existing practice in federal courts at law and in equity. WRIGHT & MILLER, *supra* note __ at § 1903. Originally the rule allowed for intervention as a matter of right under FED. R. CIV. P. 24(a)(2) when a party had an interest in the litigation that was not adequately represented by the parties. The rule provided a separate category for intervention as a matter of right under FED. R. CIV. P. 24(a)(3) when a party had an interest that may adversely affected by the distribution of property in the court’s custody. *Id.* A substantial amendment to fed. R. Civ. P. 24 occurred in 1966, when these two categories were collapsed into a single provision under 24(a)(2) to allow intervention as a matter of right when the existing parties fail to adequately represent the intervenor’s property interest or other substantial interest. *Id.* The 1966 amendment also altered the language of the rule to no longer require that intervenors be third parties that would be bound by the court’s judgment under the principles of *res judicata*, instead under the current rule the intervenor applicant need only establish that the disposition of the action may “as a practical matter impair or impede” the applicant’s ability to protect their interests. *Id.*

¹⁷ WRIGHT & MILLER, *supra* note 9 at § 1901. The other procedural devices that attempt to protect the interests of third parties not initially named in the lawsuit include FED. R. CIV. P. 19 (compulsory joinder), and FED. R. CIV. P. 23 (class actions). *Id.*; Moore & Levi, *supra* note __ at 565-67 (comparing intervention to joinder in its use as a procedural

not create a cause of action, intervenors have rights similar to those of parties in the litigation.¹⁸ Intervenors may file motions, participate in discovery, introduce direct testimony, conduct cross-examination and appeal adverse rulings.¹⁹ An intervenor's ability to add witnesses and present separate and sometime conflicting positions on existing issues in the litigation often leads to the litigation becoming more complex.²⁰ Due to the increased burden on the court and the existing parties as a result of intervention, the rule itself and courts interpreting the rule have standards to determine when a party should be allowed to intervene in a pending action. Federal Rule of Civil Procedure 24 provides for two types of intervention: intervention as a matter of right and permissive intervention.²¹

Intervention as a matter of right, under FED. R. CIV. P. 24(a) is allowed when a federal statute confers a right of intervention to the applicant for intervention, or when the applicant can demonstrate that they have an interest in the subject matter of the transaction, and that their ability to protect that interest may be substantially impaired by the

mechanism for the protection of third party interests).

¹⁸See Radler, *supra* note 16 at 147 ; Carl Tobias, *Intervention After Webster*, 38 U. KAN. L. REV. 731, 738-39 (1990).

¹⁹Tobias, *Intervention after Webster*, *supra* note 18 at 738-39.

²⁰Gene R. Shreve, *Questioning Intervention as a Matter of Right- Toward a New Methodology of Decisionmaking*, 74 Nw. U. L. Rev. 894, 903 (1980).

²¹Fed. R. Civ. P. 24 states:

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of rights of the original parties.

court's disposition of the case.²² The majority of circuits use a four part standard to determine whether a party's motion to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) should be granted: (1) timeliness of the filing of the motion, (2) whether the proposed intervenor claims an interest relating to the property or transaction which is the subject of the litigation, (3) whether the disposition of the litigation may impair or impede the proposed intervenor's right to protect that interest, and (4) whether the proposed intervenor's interest is adequately represented by the existing parties.²³ In recent higher education affirmative action litigation the applicants for intervention have sought to intervene as a matter of right, by demonstrating that they had a substantial interest in the university being allowed to continue to consider race as a factor in admissions, and that their interest were not adequately represented by the university defendants.

From *Bakke* to the most recent Michigan cases, at varying levels courts have either refused to hear or have marginalized the minority students' narrative. These cases form three different categories or groups based on the court's recognition or adoption of the minority students' narrative. The first category of cases are those in which the minority students' narrative was completely invisible, because intervention was denied. This category of cases would include *Bakke* and *Hopwood v. Texas*. The second category of cases are those in which the minority students' narrative is marginalized. These instances of marginalization occur

²² *See id.*

²³ *See* *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972) (describing the standard for a federal court to intervention as a matter of right under FED. R. CIV. P. 24(a)(2)); *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (same); *Reid v. Illinois State Board of Education*, 289 F.3d 1009, 1017 (7th Cir. 2002) (same); *Butler, Fitzgerald & Potter v. Sequa*, 250 F.3d 171, 181 (2d Cir. 2001) (same); *Loyd v. Alabama Dept. of Corrections*, 176 F.3d 1336 (11th Cir. 1999); *Public Service Co. of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998) (same); *Standard Heating & Air Conditioning v. Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998) (same); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (same); *Coalition of Arizona/New Mexico Counties v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996); *Mountain Top Condominium Ass'n v. Stabbert*, 72 F.3d 361, 365 (3d Cir. 1995) (same); *Sierra Club v. Espy*, 18 F.3d 1202, 1205-07 (5th Cir. 1994); *Teague v. Baker*, 931 F.2d 259, 261 (4th Cir. 1991) (same); *C. WRIGHT & A. MILLER, supra* note __, § 1907; *Brunet, supra* note __, § 24.03.

when minority students become intervenors in the case, however their arguments, witnesses and evidence are largely ignored by the courts in their decisionmaking process. This category includes *Johnson v. University of Georgia*, and the two University of Michigan affirmative action cases, *Gratz v. Bollinger* and *Grutter v. Bollinger*. The third category of cases are those in which the minority students' narrative is given the full recognition and adopted by the court. Up to this point, intervention has failed to produce any cases that would be included in this third category in which there is full recognition and incorporation of the minority student's narrative.

Part II.A: Invisible Intervenors— *Bakke* and *Hopwood*

In *Regents of the University of California v. Bakke*, a Caucasian applicant, Allen Bakke was denied admission to the University of California at Davis Medical School.²⁴ Bakke filed suit against the medical school claiming that the medical school's race-conscious admissions policy violated the federal constitution, California's state constitution, and Title VI of the 1964 Civil Rights Act.²⁵ Unlike recent higher education affirmative action cases, Bakke filed his lawsuit in state court, therefore Fed. R. Civ. P. 24 was not available for minority students or public interest groups to seek intervention.²⁶ At the trial court level no intervention was sought, however, when the case reached the California Supreme Court the NAACP Legal Defense Fund requested that the case be remanded to the trial court "for a new trial with directions to the trial court to permit the real parties in interest [minority students] to present evidence on the full

²⁴ *Bakke*, 483 U.S. at 276. The facts of *Bakke* have received significant treatment. See Liu, *supra* note __ at 1050-1054 (describing the medical school's admissions policy and Bakke's qualifications).

²⁵ *Bakke*, 483 U.S. at 278-79.

²⁶ See *id.* at 277 (suit filed in the Superior Court of California). At the time *Bakke* was filed California did allow intervention entirely at the discretion of the trial court, however intervention was not sought at the initial trial proceedings in *Bakke*. See James, *infra* note __ at 34, n.11 (citing Cal. Civ. Proc. Code § 387 (West 1973)). After *Bakke*, the California legislature amended the state's intervention rule to conform with Fed. R. Civ. P. 24(a). *Id.*

range of issues.²⁷ The California Supreme Court failed to address this request for a remand, and thus neither minority students nor public interest groups became intervenors in *Bakke*.²⁸

*Hopwood v. Texas*²⁹ presents another example of the complete invisibility of the minority students' narrative in affirmative action litigation that flows from the denial of a motion to intervene. In *Hopwood*, a Caucasian applicant to the University of Texas law school filed suit against the State of Texas, the Board of regents of the Texas State University System, and the University of Texas Law school claiming that the law school's admissions procedures that considered race as a factor were unconstitutional.³⁰ Two groups representing minority students, the Thurgood Marshall Legal Society and the Black Pre-Law Association sought to intervene in the lawsuit.³¹

²⁷ Jones, *supra* note __ at 33, n.11 (citing Petition of NAACP for Leave to File as Amicus Curiae on petition for Rehearing).

²⁸ The California Supreme Court's lack of response to the NAACP's petition was likely due to the procedural posture of the case at the time the NAACP sought the equivalent of intervention. At the trial court level the court found in favor of Bakke, holding that the medical school's admissions policy violated the federal constitution, state constitution, and Title VI because the admissions policy operated as a racial quota. *Bakke*, 483 U.S. at 279. The trial court refused to grant the injunctive relief sought by Bakke on the basis that the Bakke failed to carry his burden that he would have been admitted to the medical school but for the existence of the affirmative action program. *Id.* The California Supreme Court affirmed the trial court's holding regarding violation of the federal constitution, and initially ordered remand for a new trial on the issue of whether Bakke would have been admitted to the medical school. *See id.* at 280. The medical school filed a petition for rehearing that included a stipulation that the medical school could not demonstrate that Bakke would have been denied admission absent the affirmative action program. *See id.* After this stipulation was entered the California Supreme Court amended its opinion to provide for an entrance of judgment, instead of a remand for a trial. *Id.* The NAACP's request for a remand for a new trial in which intervenors could be heard was filed after the medical school's stipulation, thus when the California Supreme Court reconsidered its remand due to the stipulation there would no longer be a trial in which intervenors could participate as parties. *See James, supra* note __ at 33, n.9 (explaining that the NAACP's request for a remand to allow intervention came after the medical school's stipulation, but before the Court's decision on the petition for rehearing).

²⁹ *Hopwood I*, 21 F.3d 603 (5th Cir. 1994).

³⁰ *Id.* at 604.

³¹ The proposed intervenors sought both intervention as a matter of right under Fed. R. Civ. P. 24(a), and in the alternative, permissive intervention. The Fifth Circuit utilizes the majority standard for

The district court denied the motion to intervene and the Fifth Circuit affirmed the denial of the motion finding that the intervenors failed to establish that the Law School would not adequately represent the intervenors' interests.³² The Fifth Circuit concluded that the proposed intervenors failed to demonstrate that the law school would not strongly defend its affirmative action policy, or that the intervenors had a separate defense for the program based on a past discrimination argument.³³

Despite the common goals of UT Law School and the minority applicants for intervention—to maintain the race-conscious admissions policy—the minority students presented a narrative that was far from identical to that of the university. The proposed intervenors argued that they had an interest in both maintaining the UT Law School's then existing admissions policy, and also in eliminating vestiges of past discrimination.³⁴ The proposed intervenors also proffered that race-conscious remedies were necessary as a response to the state and university's past discriminatory practices.³⁵ The proposed intervenors further claimed that their unique narrative would provide better

intervention as of right: (1) interest in the subject matter of the litigation, (2) that disposition of the action may practically impair or impede the movant's ability to protect that interest, and (3) that the interest is not adequately represented by the existing parties. *Id.* at 605 (citing *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir.), *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed. 2d 115 (1970)).

³² *Id.* The Fifth Circuit stated that while the burden for a party to demonstrate inadequate representation is generally "minimal," in cases where the party whose representation is at issue is a government agency the burden to demonstrate inadequate representation is higher. *Id.* (citing 7C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1909 (1986)). This higher burden is due to the presumption that the State represents the interests of all the state citizens. *Id.* This presumption of adequate representation when the government is a party has been criticized by many courts and commentators. See Katherine Goepp, *Presumed Represented: Analyzing Intervention as of Right When the Government is a Party*, 24 W. NEW ENG. L. REV. 131 (2002) (proposing that there should be no presumption of adequate representation when the government is a party).

³³ See Hopwood I, 21 F.3d at 605; *supra* note 26.

³⁴ *Id.*

³⁵ *Id.* at 605 ("The BPLA and TMLS argue that they have met their burden of showing that their interests are different from the State's . . . Moreover, they argue that because of its competing goals, the State is not in as good a position to bring in the evidence of present effects of past discrimination and current discrimination.")

evidence of the past discrimination.³⁶

Part II.B: Marginalized Intervenors: *Johnson, Grutter & Gratz*

In *Johnson v. Board of Regents of the University System of Georgia*, three Caucasian female plaintiffs filed suit against the University of Georgia (“UGA”) claiming that UGA’s 1999 admissions policy violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the 1964 Civil Rights Act, and Title IX by considering race and gender in the admissions process.³⁷ Shortly after the lawsuit was filed, a group of African-American UGA students and potential applicants represented by the NAACP Legal Defense Fund were allowed to intervene in the lawsuit.³⁸ The district court granted summary judgment to the plaintiffs, holding that UGA’s admissions policy violated the Equal Protection Clause, Title VI and Title IX, and specifically finding that creating diversity was not a compelling interest to justify the consideration of race or gender in the admissions process.³⁹ On appeal, the Eleventh

³⁶ *Id.*

³⁷ *Johnson v. Board of Regents University System of Georgia*, 263 F.3d 1234, 1238 (11th Cir. 2001) (“*Johnson II*”); *Johnson v. Board of Regents University System of Georgia*, 106 F.Supp. 2d 1362, 1365 (S.D. Ga. 2000) (“*Johnson I*”). UGA’s 1999 admissions policy used a three tiered evaluation system. First, the university compiled an academic index based on a applicant’s standardized test scores and high school GPA. All students with AI scores over a certain designation were admitted. These students with an AI score under the automatic admission score, but above a minimum AI were reclassified and given a Total Student Index (“TSI”) ranking. Non-Caucasian applicants, including Asian Americans, African-Americans, Native Americans, Hispanics, and “multi-racial” students were awarded .5 additional TSI points. Male applicants were awarded .25 points. The university also offered bonus admissions points for students with both parents with no college education, and all Georgia residents. All applicants with a TSI score of 4.93 or higher were admitted. Applicants with a TSI score between 4.66 and 4.93 were then evaluated by “readers” who admitted students based qualities not evaluated at the other stages of the admissions process. See *Johnson II*, 263 F.3d at 1240-1242; *Johnson I*, 106 F.Supp. 2d at 1365.

³⁸ See *Johnson II*, 263 F.3d at 1238.

³⁹ See *Johnson I*, 106 F.Supp.2d at 1367-1372 (arguing that Justice Powell’s opinion in *Bakke* regarding diversity as a compelling interest is not binding precedent, and that post-*Bakke* affirmative action cases by the Supreme Court do not support the view that diversity is a compelling

Circuit affirmed the district court's grant of summary judgment to the plaintiffs, but refused to affirm the district court's holding that diversity was not a compelling interest that would justify the UGA's consideration of race as a factor in its admissions policy.⁴⁰ Instead, the Eleventh Circuit found that even if creating diversity was a compelling interest UGA's admissions policy was not narrowly tailored to meet this goal.⁴¹

Both the district court and appellate court in *Johnson* largely ignored the arguments of the intervenors. The intervenors agreed with the university defendants that diversity was a compelling interest that would allow the university to consider race in the admissions process, however, the intervenors also contended that the consideration of race was necessary to eliminate vestiges of past discrimination. The intervenors argued at summary judgment that UGA's history of de jure and de facto racial discrimination was extensive. For UGA's first 160 years no African-American students were admitted.⁴² After African-American students were admitted in 1961, the Office of Civil Rights ("OCR") ordered UGA to submit a desegregation plan and adopt affirmative action programs to alleviate vestiges of the university's past discrimination.⁴³

The district court only addressed the university's argument that the admissions policy was justified by the university's desire to create student body diversity. The district court never acknowledged in the factual background or legal analysis the university's history of overt discrimination towards African-Americans, and the role of affirmative action in alleviating vestiges of past

interest).

⁴⁰ See *Johnson II*, 263 F.3d at 1237 (affirming the district court's determination that UGA's 1999 admission policy was unconstitutional, but not adopting the district court's conclusion that student body diversity is not a compelling interest sufficient to satisfy the strict scrutiny analysis applied to government policies that utilize race as a criteria).

⁴¹ See *Johnson II*, 263 F.3d at 1244-1258 (finding that the court need not resolve the issue of whether student body diversity is a compelling interest because UGA's system of "mechanically" awarding bonus points to all applicants of certain racial and ethnic groups was narrowly tailored to meet the diversity goal because applicants were not considered on an individualized basis).

⁴² *Id.* at 1239.

⁴³ *Id.*

discrimination.⁴⁴

In contrast, the Eleventh Circuit addressed the intervenors' past discrimination argument directly. However, the appellate court acknowledged the intervenors' argument that UGA's race-conscious admissions policy was necessary to ameliorate the vestiges of intentional past discrimination, however, the court claimed that the intervenors' sufficiently raise this issue before the district court.⁴⁵ The court acknowledged UGA's past de jure segregation policies, but claimed that the summary judgment evidence on this point was insufficient.⁴⁶ The appellate court also claimed that OCR's 1989 lifting of the desegregation order demonstrated that affirmative action was no longer necessary to ameliorate vestiges of past discrimination.⁴⁷ Also, the appellate court noted that UGA itself disavowed past discrimination as a justification for its consideration of race in the admissions process.⁴⁸

In 1997, Caucasian plaintiffs filed two separate lawsuits challenging admissions procedures at the University of Michigan College of Literature, Arts and Science ("LSA") and Law School respectively.⁴⁹ In the law school suit, *Grutter v. Bollinger*, the plaintiff, Barbara Grutter, claimed that the law school's admissions process violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 by considering an applicant's race or ethnicity in the admissions process.⁵⁰

A group of forty-one individual minority students, and three pro-affirmative action coalitions applied for

⁴⁴ See *Johnson I*, 106 F.Supp. 2d at 1367-70 (analyzing the UGA admissions policy only under *Bakke* and post-*Bakke* case law regarding diversity as a compelling government interest).

⁴⁵ See *Johnson II*, 263 F.3d at 1264 ("Intervenors did not advance [the past discrimination argument] in any meaningful way at the time of summary judgment.")

⁴⁶ See *id.* at 1264 (stating that there was little persuasive evidence in the summary judgment record to support the intervenors' argument that "preferential treatment of all non-white applicants" was necessary to remedy present effects of past discrimination.)

⁴⁷ *Id.* at 1264-65.

⁴⁸ *Id.*

⁴⁹ See *Grutter V*, 123 S. Ct. at 2332; *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 813 (E.D. Mich. 2000).

⁵⁰ See *Grutter V*, 123 S.Ct. at 2332 (describing the plaintiff's claims); *Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002) (same).

intervention in the *Grutter*.⁵¹ The forty-one individual student applicants were divided into three groups. First, the applicants for intervention included twenty-one African-American, Latino, Caucasian and Asian undergraduates from various institutions who asserted that they intended to apply to the University of Michigan law school.⁵² The individual applicants also included five African-American high school students who intended to apply for admission to LSA and the Law School.⁵³ The last group of individual applicants included fifteen African-American, Caucasian, Latino/a, and Asian graduate students, including twelve Law School students.⁵⁴ Joining the individual intervenor applicants were three organizations: United for Equality and Affirmative Action, a coalition of the individual intervenors, the parents of the minor applicants for intervention and other affirmative action supporters; the Coalition to Defend Affirmative Action By Any Means Necessary (“BAMN”), a political action coalition with chapters in California and Michigan; and Law Students for Affirmative Action a pro-affirmative action organization which organized campus demonstrations in support of affirmative action.⁵⁵

The intervenor applicants sought intervention in March 1998.⁵⁶ The intervenor applicants claimed that they should be allowed to intervene as a matter of right under FED. R. CIV. P. 24(a)(2) because the Law School could not adequately represent their interests in the lawsuit.⁵⁷ Specifically, the applicants argued that the Law School would fail to raise several defenses, including the Law School’s past discriminatory practices, the continuing use of

⁵¹ See *Grutter v. Bollinger*, 188 F.3d 394, 397 (6th Cir. 1999) (“*Grutter II*”); Memorandum of Law in Support of Motion for Intervention at 2, *Grutter v. Bollinger* (E.D. Mich. 1998) (No. 97-75928) (“*Grutter I*”).

⁵² See Motion to Intervene, *supra* note 51, at 2 -3. The undergraduate student intervenors included undergraduates from the University of Michigan, University of California at Berkeley, Wayne State University, and Diablo Valley Community College.

⁵³ *Grutter II*, 188 F.3d at 397

⁵⁴ *Id.*

⁵⁵ Motion to Intervene, *supra* note 51, at 5

⁵⁶ *Id.* at 3.

⁵⁷ See Memorandum in Support of Motion to Intervene, *supra* note 51, at 3. In the alternative, the proposed intervenors also sought permissive intervention as allowed under FED. R. CIV. P. 24(b). *Id.* at 11.

racially discriminatory admissions criteria such as the LSAT, and that the Law School would not be able to produce sufficient evidence related to segregation and resegregation of educational institutions.⁵⁸

The district court initially denied the applicants' motion to intervene as a matter of right.⁵⁹ The district court found, similar to the Fifth Circuit in *Hopwood*, that the applicants for intervention failed to establish that they had a different interest from the Law School defendants, and that the Law School defendants would not adequately represent the applicants' interest.⁶⁰ The district court concluded that the applicants for intervention had the same "ultimate objective" as the Law School defendants, to preserve the current admissions policy that takes race and ethnicity into consideration.⁶¹

Similarly, the district court in *Gratz* also denied the intervenor applicants' motion to intervene.⁶² The intervenor applicants in *Gratz* included seventeen African-American and Latino/a high school students who intended to or already applied to LSA, and one organization, the Citizens for Affirmative Action's Preservation ("CAAP").⁶³ The district court found that the intervenor applicants failed two of the requirements for intervention.⁶⁴ The district court concluded that the intervenor applicants lacked a substantial interest in the outcome of the litigation, and that the applicants failed to demonstrate that the University defendants inadequately represented their interests.⁶⁵

The Sixth Circuit hearing a consolidated appeal on the intervenor applicants' motions to intervene in both *Gratz* and *Grutter* reversed the district courts' decisions and held

⁵⁸ See Motion to Intervene, *supra* note 51, at 6.

⁵⁹ See *Grutter I*, *supra* note 50, at 6 (opinion and order denying motion to intervene)

⁶⁰ *Id.*

⁶¹ *Id.* The district court assumed, without deciding, that the intervenor applicants had a "significant legal interest" in the case and that their ability to protect that interest could be impaired by an adverse finding in the case. The district court relied on the Fifth Circuit's denial of intervention in *Hopwood* finding that the circumstances of the two cases were "virtually identical." *Id.*

⁶² See *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) ("Gratz I").

⁶³ See *Grutter II*, 188 F.3d at 397.

⁶⁴ See *Gratz I*, 183 F.R.D. at 210.

⁶⁵ See *Grutter II*, 188 F.3d at 397.

that the intervenor applicants in both cases met the requirements for intervention under Fed. R. Civ. P. 24.⁶⁶ The Sixth Circuit examined the intervenor applicants legal interest in the litigation. The court noted that in the Sixth Circuit there is “a rather expansive notion of the interest sufficient to invoke intervention of right.”⁶⁷ Based on this broad definition of a substantial legal interest the Sixth Circuit panel found that the intervenor applicants’ interest in maintaining race and ethnicity as a factor in the admissions process was sufficient to meet the intervention requirements.⁶⁸ The court described the intervenor applicants’ interest as an interest in preserving the numbers of minorities enrolled at LSA and the Law School, and in preserving educational opportunity.⁶⁹ The court rejected the *Gratz* district court’s conclusion that a “substantial legal interest” must be a legally enforceable right to have the admissions policy construed.⁷⁰ Instead the court noted that the intervenor applicants “specific interest in the subject matter of this case, namely their interest in gaining admission to the University” was a direct interest more than sufficient to constitute a “substantial legal interest” under FED. R. CIV. P. 24(a).⁷¹

The intervenors in *Gratz* and *Grutter* presented a unique narrative characterized by three aspects: past discrimination, the institutional racism undergirding the use of LSAT scores and GPA as admissions criteria, and the state’s unitary education system. The first focus of the intervenors’ narrative was their emphasis on the link between race-conscious admissions programs and the University’s history of overt racial discrimination.⁷² The intervenors claimed that a central justification for the current University admissions policies were that the policies

⁶⁶ *See id.*

⁶⁷ *Id.* at 398 (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)).

⁶⁸ *See id.* (explaining that the *Gratz* court erred in finding that in order for the proposed intervenors to have a “significant legal interest” as required under FED. R. CIV. P. 24(a)(2) the intervenors must have legally enforceable right to have the court determine the constitutionality of the current admissions policy).

⁶⁹ *Id.*

⁷⁰ *Id.* at 399.

⁷¹ *Id.*

⁷² *See infra* notes 68-75 and accompanying text.

serves as a remedy for the past discrimination.⁷³ The intervenors argued that the University was unlikely to raise this defense because the defense would require the university to highlight its discriminatory practice, possibly subjecting the University to liability.⁷⁴

The intervenors argued that the University of Michigan's affirmative action policy was in direct response to civil rights protests to end racial discrimination by the university.⁷⁵ According to the intervenors, African-American students at the University of Michigan organized the Black Action Movement ("BAM") in March 1970 to encourage the university to increase African-American enrollment.⁷⁶ As a result of a strike organized by BAM the University announced that it would attempt to meet the student's demands for increased enrollment through an affirmative action program.⁷⁷ The intervenors also asserted that as a result of protests by black students in 1975 and 1987 the then president of the University issued a mandate which became the framework for the current University admissions policies, including the Law School's 1992 policy.⁷⁸

At trial, the intervenors also clarified the past discrimination aspect of their narrative through offering trial testimony.⁷⁹ The intervenors presented two witnesses to testify regarding the history of racial inequality in the United States. Historian John Hope Franklin ("Professor Franklin"), professor emeritus of history at Duke University

⁷³ Memorandum of Law in Support of Motion for Intervention, *supra* note ___ at 9.

⁷⁴ *See id.* at 9

⁷⁵ *See id.* at 2.

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ *Id.*

⁷⁹ In *Grutter*, the district court conducted a fifteen day bench trial in January and February 2001. The district court asked the parties to focus on three issues: "(1) the extent to which race is a factor in the law school's admissions decision; (2) whether the law school's consideration of race in making admissions decision constitutes a double standard in which minority and non-minority students are treated differently; and (3) whether the law school may take race into account to 'level the playing field' between minority and non-minority applicants." *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich. Mar. 27, 2001) ("Grutter III"), available at <http://www.bamn.comce/2001/010327-friedman-ruling.pdf>. The plaintiffs, defendants, and intervenors were allotted thirty hours to present their evidence. The intervenors utilized all of their time and presented fifteen witnesses.

testified about the history of race relations in the United States.⁸⁰ Professor Franklin's testimony included a wide-ranging account of racial hostilities and inequality, including race riots and Jim Crow segregation.⁸¹ Eric Foner, a leading history professor also testified about the general history of racial oppression and inequality in the United States.⁸²

The second aspect of the *Grutter* intervenors' narrative was the emphasis on what the intervenors argued is an inherent racial bias in the use of standardized testing and GPA as admissions criteria.⁸³ The intervenors argued that the use of LSAT alone, without the consideration of race as a factor in admissions would lead to the resegregation of most elite institutions of higher education.⁸⁴ This resegregation would occur as a result of the "LSAT gap" that exists between the LSAT scores of minority students and white students.⁸⁵ The intervenors' expert suggested that this gap existed based on cultural bias in the test itself, and the experiences of the test takers that influence their test taking methods.⁸⁶ The intervenors concluded that in order to fairly evaluate the LSAT scores of an applicant as a criteria for admissions the law school must take race into account in order to account for the "LSAT gap" which is caused by

⁸⁰ United for Equality and Affirmative Action Legal Defense Fund, *Grutter v. Bollinger*, No. 97-75928, Trial Outline, at <http://www.ueaa.net/case.htm#trial>.

⁸¹ See Tr. Transr. Vol. 7, 17:23-18:4, 18:8-13, 19:19-20:4 (Jan. 24, 2001), *Grutter v. Bollinger*, 137 F.Supp.2d 821 (E.D. Mich. 2001) (No. 97-CV-75928), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003).

⁸² See Tr. Transr. Vol. 10 226:2-22, 244:4-9, 250:21-251:9, 252:21-253:8 (Feb. 8, 2001), *Grutter v. Bollinger*, 137 F.Supp.2d 821 (E.D. Mich. 2001) (No. 97-CV-75928), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003).

⁸³ See Memorandum of Law in Support of Defendants' Motion for Summary Judgment and In Opposition to the Plaintiff's Motion for Summary Judgment, *Grutter IV*, at 27-36.

⁸⁴ *Id.* at 29, 31.

⁸⁵ See Tr. Transr. Vol. 11, 140:17-24, 141:8-20, 144:20-24, 145:10-13, 147:14-17 (Feb. 9, 2001), *Grutter v. Bollinger*, 137 F.Supp.2d 821 (E.D. Mich. 2001) (No. 97-CV-75928), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003). David White, Director of Testing for the Public, testified regarding the "LSAT gap" that "[w]hen we looked at the minority students' LSAT scores and compared that to all their comparable whites from the same school, we found that African Americans had 10 points lower LSAT scores on average than the white students from the same college with the same grades." *Id.* at Vol. 11, 144:20 24.

⁸⁶ *Id.* at Vol. 11, 155:10 13.

racially related factors.⁸⁷

The final aspect of the *Grutter* intervenors' narrative was their focus on the unitary nature of the state educational system.⁸⁸ One of the continuous themes in the intervenors' arguments and the testimony offered by them at trial was the notion that a state's higher education system must be viewed as a continuation of the elementary and secondary school education offered by the state of Michigan.⁸⁹ The intervenors argued that segregation and inequality in elementary and secondary education is increasing, which is another cause of the continuing gap between minorities and whites standardized tests.⁹⁰ Also, a witness the intervenors claimed that the elimination of affirmative action in higher education also has a trickle down negative impact on elementary and secondary schools, increasing inequality and eroding the overall quality of public education in the state.⁹¹

The district court in *Grutter*, is the only court during the course of the litigation addressed the intervenors' presentation of facts and legal arguments directly. The

⁸⁷ *Id.* at Vol. 11, 159:23-160:3 (“[Race] should be taken into account in evaluating the LSAT scores of the applicant. An aspect of evaluating the information is knowing the LSAT score, and knowing the race of the people who took the LSAT is part and parcel of evaluating that part of the applicant’s file.”) The intervenors also argued that the grade point average of minority students is negatively affected due to a racially hostile atmosphere on most elite college campuses. Professor Walter Allen testified that African-American students at predominantly black universities do better than their peers at predominantly white institutions, and this difference is attributed to the racial hostility encountered by African-American students at white institutions. *See id.* at Tr. Transr. Vol. 9, 88:3-17, 93:10-19, 103:12-17 (Feb. 7, 2001), *Grutter v. Bollinger*, 137 F.Supp.2d 821 (E.D. Mich. 2001) (No. 97-CV-75928), *rev’d*, 288 F.3d 732 (6th Cir. 2002), *aff’d*, 123 S. Ct. 2325 (2003).

⁸⁸ *See* Memorandum of Law in Support of Defendants’ Motion for Summary Judgment, *supra* note 77, at 30-31.

⁸⁹ *Id.* at 31.

⁹⁰ *Id.* at 30. *See* Defendant-Intervenors’ Final Brief at 8-16, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1516) (arguing that the nation’s primary and secondary schools remain largely segregated and these schools “systematically disadvantage black, Latino/a, and Native American students of all social and economic backgrounds.”)

⁹¹ *Id.* at 31. Eugene Garcia, Dean of the Graduate School of Education at the University of California at Berkeley testified that in jurisdictions such as California where affirmative action was eliminated at the university level, the overall quality of education at the primary and secondary school level declined. *Id.*

Grutter district court held that under *Bakke* creating racial diversity was not a compelling interest such that would allow the Law School to consider race as a factor in admissions in a constitutionally permissible manner.⁹² After a detailed treatment of the plaintiffs' and defendants' evidence and legal arguments, the district court provided a separate analysis of the intervenors' witnesses and exhibits, and their legal arguments.⁹³

The district court summarized the testimony of each of the intervenors' witnesses and presented findings of fact and conclusions of law specifically addressing the intervenors' arguments.⁹⁴ The district court pointed to the GPA and LSAT gap between Caucasians and the minority groups specified in the Law School's admissions policy and acknowledged that the reasons for the gap were "complex."⁹⁵ The court acknowledged that "while one must be cautious in making generalization, the evidence at trial clearly indicates that much of the GPA gap is due to the fact that

⁹² *Id.* at 49. The district court also held, in the alternative, that even if diversity were a compelling interest the Law School's admissions policy was not narrowly tailored to serve this interest. *See id.* at 49-54. After concluding that the Law School's admissions policy was not narrowly tailored, the district court found that the individual defendants were entitled to qualified immunity from monetary damages. *See id.* at 54. Also, the court held that the Law School's policy violated Title VI of the 1964 Civil Rights Act, and that the individual defendants could be held liable for monetary damages under Title VI. *See id.* at 57-58. The district court pointed to the policy's use of the term "critical mass" as a goal for the number of minority students that should be enrolled at the Law School, and determined that "critical mass" was insufficiently defined to meet the requirements for narrow tailoring. *See id.* The court also determined the law school policy insured the enrollment of a minimum percentage of minority students, making the policy indistinguishable from a quota. *See id.* at 49-50. The district court also concluded that the narrow tailoring criteria was not met due to the policy's lack of a time limit on the use of race. *See id.* at 50. Finally, the district court also found that the law School's admissions policy failed the narrow tailoring requirement by failing to provide a sufficient reason for considering race only for African-Americans, native Americans, and Hispanics, and that the Law School failed to investigate race neutral methods for creating diversity in enrollment. *See id.* at 51-54. The court argued that other groups beyond the three identified in the admissions policy had been subjected to discrimination, "such as Arabs and southern and eastern Europeans," but the law school made no commitment to enroll these students in "meaningful numbers." *Id.* at 52.

⁹³ *See id.* 59-89.

⁹⁴ *See id.* at 71-80.

⁹⁵ *Id.* at 75.

disproportionate numbers of Native Americans, African Americans, and Hispanics live and go to school in impoverished areas of the country.”⁹⁶ The court reasoned that even if you accept the intervenors’ factual assertions, the intervenors’ arguments fail as a basis for the Law School’s admissions policy because the Supreme Court has rejected general societal discrimination as a justification for “race-conscious decision making.”⁹⁷

In contrast to the district court’s detailed, although disparate, treatment of the intervenors’ evidence and legal arguments, the Sixth Circuit largely ignored the intervenors. The Sixth Circuit found that diversity was a compelling interest in the creation of the Law School’s admissions policy.⁹⁸ The Sixth Circuit never addressed the intervenors’ contention that the Law School’s admissions policy was justified based on past discrimination.⁹⁹ The Court explained that as a result of their finding that diversity is a compelling interest they would not address the intervenors’ past discrimination argument.¹⁰⁰ Therefore,

⁹⁶ *Id.* at 75. The district court did not accept all of the intervenors’ evidence regarding the GPA gap. The district court harshly criticized the expert report of Professor Allen who testified regarding a study he conducted which showed that minority students at majority undergraduate institutions face racially hostile environments that inhibit their ability to succeed academically. *See id.* at 65. The district court concluded that the court was unable “to give any weight to Professor Allen’s study [of the GPA gap], due to the small number of students who participated in the focus groups and surveys and due to the manner in which the students were selected.” *Id.* at 76.

⁹⁷ *Id.* at 83 (citing *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 274). The district court draws this conclusion without considering the unique context of an educational setting. The recent Supreme Court cases dismissing general societal discrimination as a justification for affirmative action were in the government contracts and employment contexts, not education. Also, the district court failed to distinguish between race-conscious policies based on past discrimination, and policies based on continuing or present racial disparities. The intervenors also presented evidence of present discrimination specifically in the Michigan public education system, through the testimony regarding the ongoing racial segregation in secondary and elementary schools in Michigan.

⁹⁸ *Grutter IV*, *supra* note ___ at 739 (stating that because the court is bound by *Bakke* the Court finds that the Law School has a compelling interest in creating a diverse student body).

⁹⁹ *See id.*

¹⁰⁰ *Id.* (“Because we hold that the Law School has a compelling interest in achieving a diverse student body, we do not address whether the Intervenor’s proffered interest—an interest in remedying past discrimination—is sufficiently compelling for equal protection.”)

after an offer of substantial trial testimony related to past discrimination, this aspect of the intervenors' narrative was neither addressed nor adopted by the University defendants or the court.

The Supreme Court affirmed the Sixth Circuit's opinion that the Law School's use of race and ethnicity in its admissions policy did not violate either the Equal Protection Clause of the Fourteenth Amendment or Title VI of the 1964 Civil Rights Act.¹⁰¹ The Supreme Court found that while the use of race is subject to a strict scrutiny analysis to assure its compliance with the Fourteenth Amendment, creating diversity in the law school environment is a compelling government interest and the Law School's 1992 policy was narrowly tailored to meet this goal.¹⁰² The majority opinion completely ignores the intervenors and past discrimination as an additional alternative justification for the Law School's admission's policy.¹⁰³ In the factual and procedural history of the case, the majority fails to acknowledge that the intervenors applied for intervention and after being included in the case present thirty hours of testimony at trial.¹⁰⁴ There is no mention in the majority opinion of past discrimination as an alternative justification for the admissions policy.

The likely reason that the majority opinion completely ignored the intervenors and their arguments was the Court's framing of the issue before it for consideration. The Court stated that certiorari was granted "to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."¹⁰⁵ Also, in the factual and procedural history of the case the Court notes the testimony of Professor Lempert that the

¹⁰¹ See *Grutter v. Bollinger*, 123 S.Ct. 2325, 2347 (2003) ("Grutter VI").

¹⁰² See *id.* at 2341-42.

¹⁰³ See *id.* at 2338-40 (stating that throughout the litigation the Law School asserted only one justification for the admissions policy, "obtaining the educational benefits that flow from a diverse student body.>").

¹⁰⁴ See *id.* at 2331-35. The intervenors were also denied the opportunity to participate in oral argument at the Supreme Court.

¹⁰⁵ *Id.* at 2335. Also, the majority opinion in *Gratz* specifically notes that the Court will not address a past discrimination justification for the admissions policy because the Law School itself never offered past discrimination as a reason for adopting the policy. [add citation]

Law School's 1992 admission policy was not intended as a remedy to past discrimination, but instead to bring "a perspective different from that of members of groups which have not been the victims of such discrimination."¹⁰⁶

Part II: The Failure of Intervention as A Procedural Device

Intervention has failed as a procedural device in the higher education affirmative action cases. In order to measure the success or failure of intervention in a particular litigation it is necessary to consider the general policy objectives underlying intervention.¹⁰⁷ Higher education affirmative action cases are a classic example of what has been called public law litigation. As initially described by Abraham Chayes, public law litigation is litigation in which the plaintiff's object is the vindication of constitutional or statutory policies.¹⁰⁸

The traditional conception of adjudication is private rights litigation in which private parties seek to settle a dispute regarding private rights.¹⁰⁹ The defining features of

¹⁰⁶ *Id.* at 2341. The majority opinion, while ignoring the intervenors does include the arguments and perspectives of other groups, namely the arguments of *amicus curiae* business and military leaders. The majority notes that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints . . . What is more, high-ranking retirees officers and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.'" *Id.* at 2340. (internal citations omitted) (citing Briefs of 3M Corporation, General Motors Corp., and Julius W. Becton, Jr. et al.) The majority does not cite the benefits of diversity for minority students that are outlined by the intervenors in their briefs before the Court.

¹⁰⁷ See generally,

¹⁰⁸ Abraham Chayes, *The Role of The Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976); see also Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415, 419 (1991) (stating that public law litigation is comprised of lawsuits that vindicate social values and affect large numbers of people); Cindy Vreeleand, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. Chi. L. Rev. 279, 279-80 (1990) (arguing that due to the adoption of the Fourteenth Amendment and the passage of legislation creating statutory rights and remedies has increased the situations in which courts are called upon to render judgment affecting a large number of persons).

¹⁰⁹ Chayes, *supra* note 108 at 1282.

private law litigation are a bi-polar structure, the dispute focuses on an identified set or prior events, the judgment is confined to the parties, and the lawsuit is initiated by a private party and controlled by the private parties.¹¹⁰ In contrast, in public law litigation the bi-polar structure of litigation has given way to suit involving multiple parties, most notably class action litigation.¹¹¹ The judges also engage in what is known as legislative fact finding, in which the judge will attempt to gather evidence about an entire system such as a state's prison system or school system, instead of gathering facts that pertain just to the named parties in the litigation.¹¹² Also, in public law litigation remedies are focused not just on the dispute between the parties, but on remedies that are forward looking and effect large numbers of people in society, such as desegregation orders.¹¹³

In public law litigation, public interest groups often seek to intervene to advocate and protect the rights of third parties that may be affected by the court's decision that will define the contours of a particular statutory or constitutional right.¹¹⁴ In a common public law litigation

¹¹⁰ *Id.* at 1282-83.

¹¹¹ *See id.* at 1291.

¹¹² *See id.* at 1297 ("In public law litigation, then, factfinding is principally concerned with 'legislative' rather than the 'adjudicative' fact); Tobias, *supra* note __ at 420 ("In institutional reform cases, for example, courts may undertake major responsibility for fact-gathering, even appointing adjuncts such as special masters, to fulfill what essentially are 'quasi-legislative' or 'quasi-administrative' decisional duties.").

¹¹³ *See id.* at 1294 ("The liability determination is not simply a pronouncement of the legal consequences of past events, but to some extent a prediction of what is likely to be in the future. And relief is not a terminal, compensatory transfer, but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved."); Tobias, *supra* note ____ at 419-20 (public law litigants seek remedies to vindicate rights and interests that are "abstract, ideological, collective or public in character").

¹¹⁴ *See* Ernest Shaver, *Intervention in the Public Interest under Rule 24(a)(2) of the Federal Rules of Civil Procedure*, 45 Wash. & Lee L. Rev. 1549, 1558-59 (1988) (public interest groups seek to intervene to defend policies or legislation consistent with the group's objectives); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270 (1989) (arguing that the concept of interest under Fed. R. Civ. P. 24(a)(2) is important to public interest organization because they represent large numbers of people who have interests that may seem individually insubstantial or intangible); Vreelend, *supra* note __ at 283 (public interest groups intervene to represent outsiders in litigation that

scenario, the government may seek to enforce administrative regulations against an industrial company and the Sierra Club or other environmental group will seek to intervene in order to protect the interest of citizens interested in protecting the environmental resources of the community affected by the alleged Clean Air Act violations.¹¹⁵ Due to the special role for intervenors in public

will have a broad impact beyond the parties to the case).

¹¹⁵ There are numerous examples of public interest groups intervening as a matter of right per Fed.R.Civ.P. 24(a). E.g., *U.S. v. City of L.A.*, 288 F.3d 391 (9th Cir. 2002)(affirming district courts denial of ACLU's motion to intervene in a consent decree between the United States and the city of Los Angeles, the Los Angeles Police Department, and the Los Angeles Board of Police Commissioners); *Clark v. Putnam County*, 168 F.3d 458 (11th Cir. 1999) (finding that the Georgia State Conference of NAACP Branches had rebutted the presumption that the named defendants, who had the same objectives in the litigation as the NAACP, would adequately represent the NAACP's interests, and remanding for consideration whether the NAACP had standing to intervene as defendants, which the 9th Circuit noted was suggestive but not dispositive in determining the intervenor's interest in the controversy); *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996)(allowing the North Star Chapter of the Sierra Club to intervene with other like-minded groups as defendants in an action seeking to keep various areas in the Voyageurs National Park open to snowmobiles); *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996)(holding that the Sierra Club and others forming the Oregon Natural Resources Council could not intervene in litigation between a timber industry trade group and the United States Department of Agriculture).

The courts of appeals have put forth various guideposts for public interest groups wishing to intervene as a matter of right. *See, e.g.*, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002)(saying that even if the federal government defendant discontinues its opposition to a plaintiffs position and does not appeal any court ruling in a plaintiffs favor, a private party may still seek intervenor status to take up appeals as intervenor-defendants); *U.S. v. City of L.A.*, 288 F.3d 391 (9th Cir. 2002)(noting that the circuit permits intervention in consent decrees, even where the consent decree is finalized prior to judicial approval of the intervention, with the understanding that intervention is not retroactive and intervenors will only be allowed to participate in post-decree activity); *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996)(stating in dictum that a public interest group has a better chance of successfully intervening if they were involved in the enactment of the law or administrative proceeding in question).

It is not only large, well-funded public interest organizations that seek intervention, often local community groups also seem intervenor status. *See, e.g.*, *Solid Waste Agency of N. Ill. v. U.S. Army Corps of Engars.*, 101 F.3d 503 (7th Cir. 1996)(denying a group of residents in Bartlett, Ill., permission to intervene as defendants in litigation relating to the Corps of Engineers denial of a permit to build a waste disposal facility); *Stupak-Thrall v. Glickman*, 226 F.3d 467 (6th Cir.

law litigation, the policy concerns underlying intervention in these suits are clear.

Four policy reasons are typically given for the presence of intervenors in public law litigation: (1) assisting the court in information gathering and providing expertise; (2) judicial economy; (3) preventing injury to nonparties; and (4) adding legitimacy to the court's decision. Many commentators in examining the role of intervention in public law litigation have identified, all or some of these four policy considerations.¹¹⁶ Courts have also recognized these four policy considerations when deciding whether to allow intervention in public law.¹¹⁷

First, many commentators and courts have insisted that intervenors provide valuable assistance to the courts in public law litigation by providing additional facts and expertise needed to make the complex choices and decisions inherent in public law litigation.¹¹⁸ Intervention under this theory operates as a procedural device for courts to gather additional information not provided to them by the parties, and receive expert testimony to assist the court in making and fair and accurate determination of the factual and legal issues. Under this policy consideration the intervenor is

2000)(affirming the district courts denial of motion to intervene by the Wilderness Association, a group comprising three local environmental groups and a local resident).

¹¹⁶ See *infra* notes 112, 115, and 117 and accompanying text.

¹¹⁷ See *supra* note 109.

¹¹⁸ See Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 Ga. L. Rev. 701 (1977-1978) ("The informational input of intervenors can help the court's factfinding and law determination and thus enrich the quality of litigation."); James, *supra* note ___ at 42 (stating that intervention expands the information available to a court attempting to decide the merits of the lawsuit); Gene R. Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 Nw. U. L. Rev. 894, 909 (1979-1980) (explaining that courts should consider the opportunity intervention provides for the court to gather additional data and evidence to make possible a more just or accurate decision); Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, *supra* note ___ at 443 (because the court's decision in public law litigation will have a broad impact judges will need "a broad range of expertise, information, and perspectives to render the most accurate determinations."); Vreeland, *supra* note ___ at 300 ("[Intervention] may promote better decisions by ensuring that critical information is available to the court. The original parties will not always produce the information necessary for just and accurate results; important information may be disadvantageous to both sides, of no concern to either, or too technical to be within their grasp.").

similar to an amicus curiae in that they are participating in the law suit to assist the court in its decisionmaking. The information gathering policy consideration also contemplated that there will be information that the intervenors have, which the parties themselves may be incapable or uninterested in providing to the court themselves.

Intervention as a procedural device to aid the court in information gathering failed in the recent affirmative action cases. In *Grutter*, the district court, Sixth Circuit and Supreme Court failed to utilize in any significant way the information given to the courts by the intervenors.¹¹⁹ The district court was the only court to address the intervenors' evidence directly.¹²⁰ The district court however, failed to incorporate the evidence in the decision making process.¹²¹ The district court approached the intervenors' legal arguments and evidence as a completely separate and distinct from the original parties' arguments.¹²²

The district court failed to use the evidence presented by the intervenors' to aid in its determination of what the court determined to be the central issues in the case, whether diversity is a compelling government interest and whether the Law School's admissions policy was narrowly tailored to meet this goal.¹²³ For example, the district court concluded that the Law School's policy was not narrowly tailored because the policy failed to explain why the Law School singled out African-Americans, Hispanics, and native Americans for the policy instead of groups such as Arabs and southern and eastern Europeans who had also suffered from discrimination.¹²⁴ The intervenors provided testimony that would explain the designation of these groups, by pointing out that all three groups disproportionately reside and attend schools in impoverished areas of the United States.¹²⁵ Instead of using the evidence presented by the intervenors to aid the court in its decisionmaking, the district court in *Grutter* elected to separate (segregate) the

¹¹⁹ See *supra* notes 86-98 and accompanying text.

¹²⁰ See *supra* note 87.

¹²¹ See *id.* and accompanying text.

¹²² See *id.*

¹²³ See *Grutter III*, *supra* note 10, at 36-54.

¹²⁴ See *id.* at 51-53.

¹²⁵ See *id.* at 75.

intervenor's arguments from its central decisionmaking in the case.¹²⁶ The district court's treatment of the intervenor's arguments signals the court's failure use the intervenor's information as an integrated part of its decisionmaking process.

The most prominent policy reason underlying intervention is the need to protect the interest of third parties that are not present in the lawsuit.¹²⁷ Since the inception of Fed. R. Civ. P. 24 both courts and commentators have heralded intervention as an important procedural device to ensure that third parties that may be affected by the outcome of litigation are allowed to be heard by the court.¹²⁸ In the realm of public law litigation, and specifically affirmative action litigation intervention was seen as necessary to allow minority students who would be affected by the outcome of the litigation an opportunity to be heard by the courts.¹²⁹ Despite this goal that intervention will give an outside party a procedural method to protect their interests in the litigation, intervenors remain outsiders in the litigation.

This is largely explained by the fact that the trial and appellate courts in higher education affirmative action cases, even after intervention, have treated the litigation as a private litigation bi-polar type enterprise.¹³⁰ In *Johnson*, *Gratz*, and *Grutter* the original parties to the lawsuit, the

¹²⁶ See *id.* at 59.

¹²⁷ See Kennedy, *supra* note __, at 334 (intervention as a matter of right permitted to protect interest of nonparties); Ernest Shaver, *Intervention in the Public Interest Under Rule 24(a)(2) of the Federal Rules of Civil Procedure*, 45 WASH & LEE L. REV. 1549, 1570 (1989); Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, *supra* note __, at 328-29 (intervention provides a valuable opportunity for third parties to participate in litigation that could adversely affect their interests); Vern R. Walker, Note, *The Timeliness Threat to Intervention as a Matter of Right*, 89 Yale L.J. 586, 587 (stating that intervention of right is intended to serve the policy goal of minimizing injustice to nonparties).

¹²⁸ See *supra* note 121.

¹²⁹ See *infra* notes 132-135 and accompanying text.

¹³⁰ See generally Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, *supra* note 50, at 327-29. Tobias argues that the courts' development of the four considerations for intervention as a matter of right have adversely affected public interest litigants that seek to intervene. *Id.* at 327. Tobias explains that the intervention of right standard reflects a "private law" brand of judicial thinking and courts continue to apply the intervention rule public law litigation as if it were private litigation. *Id.* at 328.

plaintiff and university defendant, constructed the framework of the litigation and the courts responded to this framework.¹³¹ The original parties asked the courts to address a single question, whether under the Fourteenth Amendment was the university is entitled to use race a factor in admissions in order to enhance the diversity of the student body at the university, and as a result courts have made the diversity justification the central issue in all of these cases.¹³²

The intervenors attempted to broaden the framework of the litigation by including additional justifications for the race conscious admissions program, namely past discrimination and the discriminatory effects of current admissions criteria.¹³³ The trial and appellate courts essentially rejected the intervenors attempts to add or contribute additional information outside of the framework set up by the plaintiff and defendant.¹³⁴ In this way, the court reacted to the intervenors' arguments in the same mode of a private rights litigation.

This attempt by the trial and appellate courts to limit the framework or scope of the litigation by ignoring the facts and legal arguments presented by the intervenors is a displacement of the balance of interests that should be considered upon a motion to intervene. The district court considering a motion to intervene should balance the interests of the original parties and the court in a

¹³¹ See *Johnson I*, 106 F. Supp. 2d at 1367-70 (analyzing UGA admissions policy only based on the diversity rationale); *Johnson II*, 263 F.3d at 1264 (providing minimal analysis of intervenors' past discrimination rationale); *Grutter IV*, 288 F.3d at 739 (stating that the court would only address the issue of whether diversity is a compelling government interest); *Grutter V*, 123 S.Ct. at 2334 (addressing only the diversity justification and stating that the university never offered past discrimination as a rationale for its admissions policy); *Gratz III*, 123 S.Ct. at 2420, n.9 (refusing to address past discrimination rationale because university denied that this was a justification for the admissions policy).

¹³² See *id.*

¹³³ See Defendant-Intervenors' Final Brief, *supra* note 87, at 40-43 (stating that racial integration of the schools is a compelling state interest, and affirmative action is the sole means of continuing racial integration at the University of Michigan Law School).

¹³⁴ See notes 94-101 and the accompanying text; Defendant-Intervenors' Final Brief, *supra* note 87, at 39 ("The district court never engaged with either side of the fundamentality of race—not with the students' arguments about racism and meritocracy and not with their arguments for integration, diversity, and progress.").

streamlined, less complex litigation with the interest of the intervenors in offering additional information and legal theories to the court to enhance the court's ability to make a more accurate determination of the legal and factual issues.¹³⁵ However, once the court has decided that the interests weigh in favor of allowing intervention, the court should seek to utilize intervention as a procedural device, and consider the evidence and legal arguments presented by the intervenors as a guide and an aid to the court.

The test for intervention as a matter of right under Fed. R. Civ. P. 24(a) requires that the intervenors be able to demonstrate that the part on whose side they wish to intervene will not adequately represent their interests.¹³⁶ The requirement that an intervenor must demonstrate inadequate representation is often said to be a minimal burden, but the proposed intervenor must demonstrate that its interest are not identical to that of the existing parties.¹³⁷ Thus, the Fed. R. Civ. P. 24(a) contemplates and demands that intervenors will bring a unique perspective to the litigation. Despite this requirement we see courts ignoring the unique interests that the intervenors were required to have to gain entry to the litigation. Essentially, the rule requires certain criteria for entry to the litigation but once inside the litigation the rules and our courts offer no answer to the intervenors' interests and concerns. This lack of symmetry between the entrance requirements and outcome may explain why courts have lowered the standard for

¹³⁵ See John E. Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 Ky. L. J. 329, 334 (1969) (stating that intervention as a matter of right is a recognition by the court that the interest of the intervenors and absence of any effective outside remedy outweighs the interests of the original parties to control their own litigation).

¹³⁶ See *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972) (requiring proposed intervenors to demonstrate that the plaintiff may inadequately represent the interests of the proposed intervenors); Katharine Goepf, Note, *Presumed Represented: Analyzing Intervention as of Right when the Government is a Party*, 24 W. New Eng. L. Rev. 131, 140 (discussing the special standard for adequate representation when the government is a party).

¹³⁷ See MOORE'S FEDERAL PRACTICE § 24.074[4], 24-71 (stating that in order to meet the inadequate representation requirement of Fed. R. Civ. P. 24(a) the proposed intervenors must show that their interests differ from the parties' interests); *Shaver*, *supra* note __ at 1555 (explaining that in order to meet the inadequate representation test proposed intervenors must show that their interests conflict with the parties' interest, the parties will not vigorously represent their interests).

intervenor's to demonstrate that their interest is not adequately represented. Perhaps the lower requirements are an acknowledgment by the courts that although intervenors are formally allowed into the litigation there will be little actual role for them as an influence in the Court's decisionmaking.

A court's lower requirements for intervention and subsequent marginalization of the intervenor perspective is apparent in *Grutter*. The Sixth Circuit in overturning the district court's denial of the intervenor applicant's motion to intervene points to the relatively low requirements for the intervenors to demonstrate that they have a substantial interest in the litigation, and that their interest in the litigation would not be adequately represented by the University defendants. The court stated: "The proposed intervenors must show that they have a substantial interest in the subject matter of this litigation. However, in this circuit we subscribe to a 'rather expansive notion of the interest sufficient to invoke intervention of right. For example, an intervenor need not have the same standing necessary to initiate a lawsuit."¹³⁸ The court clearly separates the status and role of the intervenor from those of the plaintiff and defendant.

The Court's clear recognition that intervenors need not have the same standing or interests as an actual party to the litigation leads to the intervenors being largely ignored during the actual decisionmaking. In *Grutter*, one member of the Sixth Circuit points directly to the intervenors' status as a reason to ignore their interests.

The Law School's disavowal is why I do not discuss whether the remediation of past discrimination is a compelling state interest that could justify the Law School's actions. Not only must a state interest be compelling to satisfy strict scrutiny, but it also must be the interest that motivated the classification in the first instance.¹³⁹

The Supreme Court's position amounts to a demand that in the context of Equal Protection analysis, and

¹³⁸ *Grutter II*, 188 F.3d at 398.

¹³⁹ *Grutter IV*, 288 F.3d at 795, fn. 17 (J. Boggs, dissenting).

defendant-intervenor's arguments related to the compelling state interest must be endorsed by the defendant. This conflicts with Fed. R. Civ. P. 24(a) demand that the intervenors' arguments not be adequately represented by the party on whose side they seek to intervene.

Another policy goal for intervention is to encourage judicial economy by consolidating related issues.¹⁴⁰ Similar to arguments that favor other joinder devices such as Fed. R. Civ. P. 19, and the class action rules of Fed. R. Civ. P. 23, intervention should allow a court to address all of the facts and legal arguments surrounding an issue to prevent later litigation of related issues. In the affirmative action cases intervention has failed to provide a resolution of the issue presented by the intervenors, thus leaving open the possibility of further litigation regarding past discrimination as a justification for race conscious admissions policy, and the alleged discriminatory effects of current admissions criteria.

In *Grutter* and *Gratz* the intervenors and district courts expended considerable resources in the presentation of the intervenors' unique factual and legal issues. However, due to the failure of the appellate court to fully address the intervenors arguments those resources were wasted.

Finally, intervention has also arguably been said to lend legitimacy the decisions of courts by allowing third parties input in the process of the litigation.¹⁴¹ In *Grutter* and *Gratz*, at varying levels the decisions of the trial and appellate courts were questioned by the intervenors who argued that the courts ignored their input.¹⁴² In *Grutter*, the

¹⁴⁰ See James, *supra* note __, at 42 (stating that intervention allows courts to consolidate related issues); Shaver, *supra* note __, at 1570 (explaining that commentators note that intervention assists courts in adjudicating disputes more efficiently by combining two or more claims into a single action).

¹⁴¹ See Tobias, *Standing to Intervene*, *supra* note __ at 444 ("In institutional reform, and much additional public law litigation, citizen participation in the form of intervention might promote governmental accountability for its decisionmaking and could make both the governmental decision and the judicial determination more palatable to those who must live with them"); Vreeland, *supra* note __ at 300 (stating that judicial decisions that affect widespread interests may be more likely to be viewed as illegitimate if courts fail to give the public a right to be heard through intervention).

¹⁴² See *supra* note 87 and accompanying text; Jeremy Berkowitz, Mich.

intervenor questioned the district court's willingness to involve the intervenors in its decisionmaking process stating: "The district court never engaged with either side of the fundamentality of race—not with the students' arguments about racism and meritocracy and not with their arguments for integration, diversity, and progress."¹⁴³ The presence of the intervenors in the recent affirmative action cases has failed to lend legitimacy to the courts' decisions due to the courts' failure to sufficiently address the intervenors' evidence and legal arguments in the decisionmaking in the case.

In the specific context of affirmative action higher education litigation the predominant argument regarding intervention has been that minority students have a significant vested interest in preserving affirmative action admissions programs, and intervention provides the best procedural device for minority students to protect their interest in affirmative action litigation.¹⁴⁴ In an article published almost twenty-five years ago, Emma Coleman Jones argued that in affirmative action litigation such as *Bakke*¹⁴⁵ no party in the lawsuit directly represented the interests of minority students and applicants.¹⁴⁶ Jones argued that intervention is the best procedural device for correcting the absence of minority representation in higher

Daily, March 11, 2003 (attorney for *Grutter* intervenors criticizes Supreme Court's denial of time for intervenors to participate in oral argument stating that the Court would be unable to hear crucial evidence regarding racial bias and inequality in the admission process).

¹⁴³ See Defendant-Intervenors' Final Brief, *supra* note 87, at 39.

¹⁴⁴ See Jones, *supra* note ___ at 34 (arguing that minority interest groups should be granted intervention of right in affirmative action litigation, and that intervention has great potential to "safeguard" minority interests in defending affirmative action programs); Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 Mich. J. Race & L. 263, 268-69 (1999) (intervention by affirmative action beneficiaries is appropriate in most affirmative action cases and minority students have the only unencumbered interest in defending affirmative action policies); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 Colum. L. Rev. 928, 967-68 (2001) (asserting that the intervenors in the Michigan affirmative action cases are an important voice for "transformative politics," the notion that the goal of affirmative action should ultimately be ending the subordination of people of color.)

¹⁴⁵ *Bakke*, 98 S.Ct. at 2757.

¹⁴⁶ Jones, *supra* note 8, at 31.

education affirmative action cases.¹⁴⁷ Jones suggests that courts are more likely to uphold affirmative action policies if intervenors participate in the litigation as a voice for “minority-group interests.”¹⁴⁸

More recently, other commentators have identified the goals of intervention in higher education affirmative action litigation. In a recent article Charles Lawrence states that intervenors provide a valuable critique of the “liberal defense of affirmative action,” commonly known as the “diversity defense.”¹⁴⁹ Lawrence argues that diversity has become the dominant rationale for affirmative action programs offered by universities and others attempting to preserve affirmative action.¹⁵⁰ Lawrence argues that the intervenors are attempting to engage in the promotion of “transformative politics,” the notion that in the debate over affirmative action beyond the winning and losing of a particular case is the need to change political consciousness and highlight the need for the end of racial inequality.¹⁵¹ He says “the intervenors have taken a first step in that the *true victims’ voices be heard* and in subverting the legal fiction that only recognizes injury to the white plaintiffs and makes the University a defender, never a violator, of minority rights.”

The intervenors themselves have also identified the roles they seek to play in these cases. The intervenors view the procedural process of intervention in higher education affirmative action cases as a mechanism for promoting the end of racial inequality in society and expanding

¹⁴⁷ *See id.* at 32 (arguing that intervention is one of the procedural devices available to correct the absence of minority representation in higher education affirmative action cases).

¹⁴⁸ *Id.* at 33.

¹⁴⁹ Lawrence, *supra* note 141, at 931.

¹⁵⁰ *Id.* (“I argue that as diversity has emerged as the dominant defense of affirmative action in the university setting, it has pushed other more radical substantive defenses to the background.”).

¹⁵¹ *See id.* at 965-66 (“Transformative politics requires looking beyond winning or losing the particular legal dispute or political battle and asking how one’s actions serve to reinforce people’s awareness of our interdependence and mutual responsibility as members of the human family. . . The task is to help the privileged comprehend the profound costs associated with inequality—the public costs of prisons, crime, illiteracy, disease, and the violence of an alienated underclass—as well as the personal costs of loneliness and anomie in a world where no one is responsible for the pain of any other person.”)

opportunities for minorities in higher education.¹⁵² In their view, the protection of their interests begins with voicing their unique perspective or story regarding race-conscious admissions policies during the course of the litigation.¹⁵³

As identified by Jones, Lawrence, and the intervenors themselves, the goals of minority students and public interest groups that seek intervention in these cases are two-fold: interest goals and narrative goals. The intervenors seek to protect their interests, namely successfully defending race-conscious admissions policies.¹⁵⁴ The intervenors also have a narrative goal to have their voices be heard, and in doing so to steer the affirmative action admissions debate in courts and in public discourse away from diversity and instead to remedying past discrimination and racial stratification.¹⁵⁵

The recent higher education affirmative action cases indicate that intervention is largely failing as a procedural device for providing intervenors a method to meet these two goals of protecting their interests, and meaningfully convey their unique narrative. First, in some recent higher

¹⁵² Miranda Massie, DET. FREE PRESS, January 17, 2001, (attorney for *Grutter* intervenors stating that “[S]tudent intervenors will give questions of racist inequality, bias and unfairness their proper emphasis. The pernicious and stultifying myth of race-neutral meritocracy will finally be dispelled.”); Katie Plona, MICH. DAILY, Feb. 6, 1998, at 1 (attorney for Citizens for Affirmative Actions Preservation explaining that the intervenors “have a direct and significant interest in preserving an admissions policy that broadens access to the University, including the University’s authority to consider how a student’s racial background has affected his or her experiences.”); Peter Schmidt, *Minority Students Win Right to Intervene in Lawsuit Attacking Affirmative Action*, CHRON. OF HIGHER EDUC., Sept. 3, 1999, at A68 (lawyer for *Gratz* and *Grutter* intervenors stating that intervention is necessary because “[i]t has been activism by students—always—that has been responsible for the expansion of opportunity at the University of Michigan . . . it has never been the university acting on its own.”).

¹⁵³ Massie, *supra* note __ (“ . . . the participation of student intervenors in the case gives us a chance for something more. The trail in the U-M Law School case will change the terms of the [affirmative action] debate and will correct serious flaws in the approach of recent decisions.” Schmidt, *supra* note __ at A68 (attorney for intervenors stating that intervention “means that black and other minority students will be able to bring into the courtroom the truth about continuing inequality and racism and bias in higher education.”);

¹⁵⁴ See, e.g., Defendant-Intervenors’ Brief in Support of Defendants’ Motion for Summary Judgment, *supra* note 80, at 1-3 (urging court to uphold the Law School’s admissions policy).

¹⁵⁵ See *infra* note and accompanying text.

education affirmative action cases intervention has failed to provide intervenors with a method of protecting their interest goal of preserving race-conscious admissions programs for the purpose of remedying racial inequalities.

In *Hopwood* where the Fifth Circuit struck down the race-conscious admissions policy, the intervenors were denied intervenor status.¹⁵⁶ In applying the standard for intervention as a matter of right, the district and appellate courts wrongly equated the university's narrative with the minority students' narrative, thus finding that the university would adequately represent the proposed intervenors' interests.¹⁵⁷ The court viewed the University's narrative simply as a story about the defense of a race-conscious admissions program, assuming that the University will work vigorously not to be found to have established and promoted an unconstitutional policy.¹⁵⁸ The Fifth Circuit's initial decision to deny intervention in the case, was later noted by one judge on the Fifth Circuit as a key error in the court's attempt to render a thoughtful decision on the merits of the case itself: "As to the request to intervene, what class of persons is more qualified to adduce the evidence of the present effects of past discrimination than current and prospective black law students?"¹⁵⁹

In *Johnson* and *Gratz*, although the intervenors are present in the case, the courts failed to uphold the race-conscious admissions policy.¹⁶⁰ In both of these cases the Eleventh Circuit and Supreme Court respectively found, the admissions policies unconstitutional without a full consideration of the intervenors' primary contention that the race-conscious policies were justified as remedies for past discrimination UGA and the University of Michigan.¹⁶¹

¹⁵⁶ See notes 25-32 and accompanying text.

¹⁵⁷ *Hopwood I*, 21 F.3d at 606 ("The proposed intervenors have not demonstrated that the State will not strongly defend its affirmative action program.")

¹⁵⁸ *Id.*

¹⁵⁹ *Hopwood v. State of Texas*, 84 F.3d 720, 725 (5th Cir. 1996) ("Hopwood III") (Stewart, dissenting).

¹⁶⁰ See *Johnson II*, 263 F.3d at 1244 (affirming district court's finding that UGA's race conscious admissions policy was unconstitutional); *Gratz III*, 123 S.Ct. at 2417 (holding that LSA's admissions policy violated both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act).

¹⁶¹ See *Johnson II*, 263 F.3d at 1264 (dismissing in one paragraph the

Intervention has also largely failed to allow the intervenors' meaningful opportunity to meet their narrative goal to have their voices heard by the courts. This is evident primarily from the fact that in *Johnson*, *Grutter*, and *Gratz* the courts failed to engage the intervenors' narrative without an endorsement of that narrative by the university defendant.¹⁶² In this way, the courts essentially demand that the intervenors' narrative be the same as the university defendant in order for the court to recognize the narrative as one of central relevance or importance.

In *Grutter* and *Gratz* the intervention fails to provide the intervenors with a meaningful opportunity to be heard, because the courts insist that the intervenors' narrative mirror the narrative of the university defendant. In *Grutter*, the University refused to put forth past discrimination as a justification for its admissions policy.¹⁶³ Instead, the Law School offered a drastically different vision of the advent of its admissions policy. While the intervenors claimed that the framework for the policy arose from campus protests by African-American students to encourage "educational equality," the Law School claimed that the admissions policy arose solely from the Law School's commitment to enroll students with different perspectives.¹⁶⁴

Also, in contrast to the intervenors' evidence regarding past discrimination, the Law School offered no testimony

intervenors' past discrimination contention); *Gratz III*, 123 S.Ct. at 2420, n. 9 (rejecting in a single footnote the intervenors' argument that LSA's programs had a remedial justification).

¹⁶² See *Johnson II*, 263 F.3d at 1264 (stating that there was little persuasive evidence in the record to support a remedial justification, in part because UGA rejected the position that its policy was motivated by a need to remediate past discrimination); *Gratz III*, 123 S.Ct. at 2420, n. 9 ("The District Court considered and rejected respondent-intervenors' [past discrimination] argument . . . We agree, and to the extent respondent-intervenors reassert this justification, a justification the University has *never* asserted throughout the course of this litigation, we affirm the District Court's disposition of the issue.")

¹⁶³ See *Grutter IV*, 288 F.3d at 735 ("The Law School contends that its interest in achieving a diverse student body is compelling . . . [t]he Intervenor offer an additional justification for the Law School's consideration of race and ethnicity—remedying past discrimination.")

¹⁶⁴ See *Grutter IV*, 288 F.3d at 737 ("Professor Richard Lempert, the chair of the faculty committee that drafted the admissions policy, explained that the Law School's commitment to such diversity was not intended as a remedy for past discrimination, but as a means of including students who may bring a different perspective to the Law School.")

regarding past racial or ethnic discrimination by the Law School or the University of Michigan.¹⁶⁵ The Law School instead presented evidence focused solely on diversity as a justification for affirmative action.¹⁶⁶ The Law School presented the testimony of current and former University of Michigan professors and administrators to testify about the pedagogical value of diversity, and the focus of the admissions policy to admit a diverse class without the use of quotas.¹⁶⁷ The Law School also presented detailed testimony regarding the 1992 admissions policy at issue in the lawsuit.¹⁶⁸ The law school also presented an expert witness to statistically substantiate the Law School's claim that no quota or numerical goal was used in the admissions policy.¹⁶⁹

The Law School's refusal to adopt the intervenors' past discrimination analysis may be explained by several factors. First, the Law School claimed that the faculty committee which conceived of the policy, and later the full faculty that adopted the admissions policy never considered past discrimination as a justification for the admissions policy. Instead, as stated in the policy itself the Law School claimed that the policy was solely justified by the Law School's goal "to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year Collectively, we seek a mix of students with varying backgrounds and experiences who will respect and learn from each other."¹⁷⁰ The Law School policy also specifically indicates an emphasis on racial and ethnic diversity:

¹⁶⁵See *Grutter III*, *supra* note 76, at 4-36 (giving detail recount of witnesses presented by the Law School, all of whom testified regarding admissions procedure or the development of admissions policy to foster a diverse student body).

¹⁶⁶ *See id.*

¹⁶⁷ *See*, Trial Outline *infra* note ___ at 6. Lee Bollinger, president of the University of Michigan in 2001, Professor Richard Lempert of the Law School, and then dean of the Law School, Jeffrey Lehman, all testified on behalf of the University as to the diversity justification for the Law School's admissions policy.

¹⁶⁸ *See id.*

¹⁶⁹ *See Id.* at

¹⁷⁰ *Grutter III*, *supra* note 76, at 5 (citing Michigan Law School's 1992 Admissions Policy at 1).

There is, however, a commitment to one particular type of diversity that the school has long had and which should continue. This is a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers. These students are particularly likely to have experiences and perspectives of special importance to our mission.¹⁷¹

Based on the text of the 1992 admissions policy itself, and the testimony of the Law School administrators and faculty that developed the policy there can be little doubt that the goal of maintaining racial and ethnic diversity was a motivating factor in the development of the 1992 admissions policy. However, it is also just as likely that the Law School began considering race and ethnicity as a factors in its admissions policy as a direct response to both societal discrimination and discrimination by the University of Michigan itself. As mentioned in the Law School policy, by the time the 1992 admissions policy was developed the Law School “over the past two decades” preceding the 1992 policy was already making efforts to increase the numbers of certain minority groups at the Law School. The Law School’s use of race and ethnicity as a consideration in admissions traces back to 1966.¹⁷² In 1975, the Law School adopted a formal admissions policy stating that the Law School should seek to enroll African-Americans, Hispanic students, and Native Americans as 10-12% of the entering class. The reason for this numerical goal was stated as “the Law School recognizes the racial imbalance now existing in the legal profession and the public interest in increasing the number of lawyers from ethnic and cultural minorities

¹⁷¹ *Id.* at 9 (citing Michigan Law School’s 1992 Admissions Policy at 9).

¹⁷² *See id.* at 13, fn. 8. The district court referenced a trial exhibit entitled “The History of Special Admissions at the University of Michigan Law School, 1966-81.” This document recounts the history of the Law School’s efforts to enroll minority students. In 1966, the law school faculty began to give preference to African-American students and students from “disadvantaged backgrounds” for admissions off the waiting list due to the faculty’s concern about the small numbers of African-American students enrolling at the Law School.

significantly underrepresented in the profession.”¹⁷³

The Law School’s initial focus on the need to address “racial imbalance” in the legal profession is much more closely akin to the argument that race conscious admissions policies are needed to cure societal discrimination. Curing racial imbalance is not an attempt to improve the classroom environment or capitalize on different perspectives that may be offered by students of certain racial and ethnic minority groups. Instead, the Law School was attempting to correct numerical differences in the number of minorities attending the Law School, and joining the legal profession. This original statement of purpose by the Law School resembles the intervenors claims that the current consideration of race by the Law School is necessary to insure that the law School does not become “resegregated.” In the intervenors’ current narrative and the previous incarnations of the Law School’s admissions policies, preventing resegregation and ending racial imbalance is a goal unto itself, separate from creating a racially diverse law school environment.

Therefore, looking at the Law School’s admissions policy from a broader perspective demonstrates that diversity was not the only justification for the Law School’s use of race in its admissions program. The Law School’s abandonment of the past discrimination rationale may be explained a number of considerations. The Law School in its litigation strategy may have concluded that a past discrimination rationale was unlikely to provide a sufficient basis for the courts to find the use of race to meet the requirements of the Equal Protection Clause. In affirmative action cases over the last quarter century the Supreme Court has consistently rejected remedying general societal discrimination as a justification for the use of race in admissions, hiring, and government contracting.

The courts in *Johnson*, *Grutter*, and *Gratz* failed to acknowledge the reason that the university defendant would avoid adopting the intervenors’ past discrimination narrative, namely because this story implicates the university in past and ongoing racial discrimination.¹⁷⁴

¹⁷³ *Id.* at 13 (citing University of Michigan Law School’s 1988-89 Law School Announcement at 85-86).

¹⁷⁴ See Lawrence, *supra* note 107, at 956 (“Perhaps the University’s rejection of the remedial defense can be explained by its concern that by admitting its own discriminatory practices it would expose itself to

The argument can be made that while the intervenors' narrative was never adopted by any of the courts deciding *Grutter* or *Gratz*, aspects of the intervenors' narrative were heard, because elements of the narrative are interwoven in the Court's decisions. Although not attributed to the intervenors, Justice Ginsburg's concurrence in *Grutter* adopts a similar perspective to that of the intervenors' narrative regarding the unitary nature of a state's educational system by highlighting the place of affirmative action in society' attempt to equalize educational opportunity for students of all races in ethnicity.¹⁷⁵

Justice Ginsburg argued that the majority's observation that "race-conscious programs" must have a "logical end point" will be more of a consideration over the next generation as society makes progress towards nondiscrimination and "genuinely equal opportunity."¹⁷⁶ Similar to arguments made by the intervenors regarding the need for race conscious solutions to remedy continuing racial discrimination, Justice Ginsburg notes that currently "conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals."¹⁷⁷

Justice Ginsburg also cited statistics that are reflective of the unitary education aspect of the intervenors' narrative. Justice Ginsburg recognizes that as of 2000-2001 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body, and that "many minority students encounter markedly inadequate and unequal educational opportunities."¹⁷⁸ Justice Ginsburg only connects her evidence regarding segregation and inequality in elementary and secondary schools with her argument that the time has not yet arrived to sunset affirmative action programs. Thus, while Justice Ginsburg does not acknowledge the intervenors narrative related to current discrimination and the inequality of educational opportunities as a basis for the Law School's affirmative action, these elements are present in her concurrence thus providing some recognition of the

liability vis-vis minority applicants and students."

¹⁷⁵ See *Grutter V*, *supra* note __ at 2347-48 (J. Ginsburg, concurring).

¹⁷⁶ *Id.* (J. Ginsburg, concurring).

¹⁷⁷ *Id.* at 2347.

¹⁷⁸ *Id.*

intervenors' perspective.

The intervenors' narrative theme of the inherent unfairness of the use of LSAT scores as a dominant admissions criteria also found recognition in the unlikely quarter of the dissent of Justice Thomas.¹⁷⁹ Justice Thomas rejects the majority opinion's conclusion that the Law School's use of race in admissions leads to educational benefits for all students.¹⁸⁰ Justice Thomas critiques the concept of selective admissions, stating that "there is nothing ancient, honorable, or constitutionally protected about 'selective' admissions."¹⁸¹ He argues that law schools have known that African-American students perform relatively worse on the LSAT than Caucasian students, yet the law schools continue to use the test as an admissions criteria, and then consider race to "correct for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body."¹⁸²

This argument is similar to the one made by the intervenors regarding the use of the LSAT and GPA.¹⁸³ The intervenors argued that the use of the LSAT without adding the explicit consideration of race, amounts to a racially biased admissions system.¹⁸⁴ The intervenors also presented testimony that attempted to demonstrate that the LSAT is racially biased.¹⁸⁵ At bottom, much of the intervenors questioning of the use of LSAT and GPA is an attack on the

¹⁷⁹ See *id.* at 2360-61 ("The Law School's continued adherence to [the LSAT] it knows produces racially skewed results is not entitled to deference by this Court.")

¹⁸⁰ *Id.* at 2357. Ironically, although Justice Thomas's critique of admissions criteria mirrors the intervenors' arguments, he fails to acknowledge the arguments of the intervenors in the portion of his opinion in which he argues that affirmative action programs "stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." *Id.* at 2361. The intervenors include a minority students who, as current students at LSA and the Law School, were "beneficiaries" of affirmative action. None of these students corroborate Justice Thomas's assertion that beneficiaries feel either entitled or inferior due to affirmative action programs. Justice Thomas fails to acknowledge the testimony by minority students in *Grutter*, which dispute his claims of stigma related to affirmative action.

¹⁸¹ *Id.* at 2360.

¹⁸² *Id.*

¹⁸³ See *infra* notes 77-81 and accompanying text.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

current system of selective admissions. The intervenors are essentially stating that the current “neutral” selective admissions criteria are unable to stand alone without the consideration of race.¹⁸⁶ Although the intervenors would obviously disagree with Justice Thomas’s conclusion that it is constitutionally impermissible to consider race in admissions, Justice Thomas’s dissent one of the intervenors’ narrative strands which questions other aspects of current admissions systems beyond the use of race.

Part III: Claiming Narrative Highground : Addressing the Failure of Intervention as Procedural Device

Intervention has failed as a procedural device in the recent affirmative action higher education affirmative action cases.¹⁸⁷ The general policy goals underlying intervention have not been met in these cases, and the benefits of intervention said to attach in affirmative action cases have failed to materialize.¹⁸⁸ Therefore, minority students and public interest organizations that have served as intervenors in these cases should abandon intervention as a procedural device in the continuing legal and public debate surrounding higher education admissions policies.

Several important issues in the area of higher education admissions policies remain unresolved by the Supreme Court’s holdings in *Grutter* and *Gratz*.¹⁸⁹ *Grutter* and *Gratz* did not answer the issue of whether public university’s may employ race-conscious remedies in order to

¹⁸⁶ See Memorandum of Law in Support of Defendants, Motion for Summary Judgment, *supra* note __ at 29 (“Because tests such as the SAT and the LSAT measure only a very narrow skill set and correlate poorly with even narrow measures of future performance, to propose any rigid use of them as tools for distributing opportunity, rather than as tools for diagnosing educational needs and designing pedagogical strategies is illegitimate. Since these tests downgrade the performance of black and other minority students, the suggestion that they should be used in a rigid manner is outrageous—it is a knowing proposal for a racist double standard.”)

¹⁸⁷ See *supra* text accompanying notes 99-117.

¹⁸⁸ See *supra* text accompanying notes 115-118.

¹⁸⁹ See Margaret Graham Tebo, *New Frontier for Affirmative Action*, 2 No. 25 A.B.A.J. E-Report 3 (2003) (stating that while *Grutter* resolved the issue of whether diversity is a compelling government interest many of the questions in the affirmative action area remain unresolved).

remedy past segregation.¹⁹⁰ Also, the Supreme Court failed to address the *Grutter* and *Gratz* intervenors' argument that a public university has an affirmative duty under the Equal Protection Clause to prevent resegregation that would result if the university relies primarily on standardized test scores and GPA as admissions criteria.¹⁹¹ The recent cases also did not address whether a race conscious admission policy may be justified to remedy ongoing de facto segregation in a state's elementary and secondary school system.¹⁹² Because all of these issues remain to be resolved in the area of higher education admissions policy, minority students and public interest groups committed to the resolution of these lingering questions must consider alternatives to intervention.

Minority students and public interest groups advocating race-conscious admissions policies as one method of reversing systemic racial inequality should consider becoming plaintiffs in lawsuits against public universities to challenge current admissions policies.¹⁹³ While these cases may ultimately prove unsuccessful on their merits the position as plaintiffs will afford a better opportunity to be heard than through the procedure of intervention.¹⁹⁴ Similar to the litigation strategy adopted by Caucasian plaintiffs in the affirmative action cases, a minority student after being rejected from a state university would file suit against the university challenging its admissions policy.¹⁹⁵

¹⁹⁰ See *Gratz II*, *supra* note ___ at 12, n. 9 (stating that the Court affirmed the district court's rejection of the intervenors' argument that LSA's race conscious admission program was justified by past discrimination, because the University failed to offer past discrimination as a justification for the program); [Bakke on past segregation]

¹⁹¹ See *id.*

¹⁹² See *id.*; Lawrence, *supra* note 107, at 946 (arguing that "subordinated minority children" becoming plaintiffs in a recent lawsuit places "the victims of racism at the center" of the admission debate).

¹⁹³ See *Rios v. Regents of the Univer. Of Cal.*, (N.D. Cal. Feb. 2, 1999) (lawsuit in which minority plaintiffs filed suit against the University of California at Berkeley's admissions policies which relied on GPA and standardized test scores); Lawrence, *supra* note 107, at 943-46 (citing *Rios* as an example of litigants challenging "race-neutral" admissions policies such as complete reliance on standardized test scores and GPA as the criteria for admissions).

¹⁹⁴ See *supra* discussion in Part II regarding the failure of intervention to provide a meaningful opportunity for the minority student's narrative to be heard.

¹⁹⁵ See *supra* note 188.

There is a growing movement among legal scholars and educators which questions the validity of standardized tests as a legitimate admissions criteria.¹⁹⁶ Presumably the university's admissions program would be primarily based on the use of standardized tests and GPAs to admit students.¹⁹⁷ The rejected minority applicant would argue that the use of standardized testing and GPA as the predominant factor in admissions violates the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁸ The argument regarding the inappropriate use of the LSAT and GPA as admissions standards has already begun to be litigated. Justice Thomas noted in his dissent in *Grutter* that:

The Law School's continued adherence to measures its knows produce racially skewed results is not entitled to deference . . . The Law School itself admits that the test is imperfect . . . An infinite variety of admissions methods are

¹⁹⁶ Richard Delgado, *Official Elitism or Institutional Self-Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 594- 95 (2001) (arguing that standardized testing is primarily a lucrative business for testing corporations instead of a measure for academic success); Matthew L.M. Fletcher, *The Legal Fiction of Standardized Testing*, 21 LAW IN EQ. 397 (2003) (challenging the use of standardized tests through the narrative of minority students); Lani Guinier & Susan Sturm, *Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 965 (1996) ("In fact, the dominance of standardized tests in selection is a relatively recent development. The civil rights revolution, and the introduction of affirmative action programs, occurred at the same time that society was formalizing a 'meritocracy' based on education and standardized testing."); Lawrence, *supra* note 107, at 945 (arguing that the University of California at Berkeley's admissions procedure rely on standardized tests in a "determinative and exclusionary way"); Symposium Proceedings, *Building a Multiracial Social Justice Movement*, 27 N.Y.U. REV. L. & SOC. CHANGE 5, 23 (2001- 02) (citing Malcolm Gladwell, *The Examined Life: What Stanley H. Kaplan Taught Us About the S.A.T.*, New Yorker, Dec. 17, 2001, at 86) (professor Gerald Torres noting that researcher have found that students who would have been rejected for admission if considering only GPA or standardized tests are outperforming expectations when admitted under admissions policies that do not consider standardized test scores).

¹⁹⁷ See generally, *Gratz III*, 123 S.Ct. at 2418-20 (describing LSA's admissions procedure which used a student's GPA and standardized test score to initially classify all applicants); *Grutter V*, 123 S.Ct. at 2331-32 (recounting the Law School's admissions policy including the Law School's use of LSAT and GPA as predictors of academic success).

¹⁹⁸ See *supra* note 188.

available to the Law School. Considering all of the radical thinking that has occurred at this country's universities, the Law Schools' intractable approach toward admissions is striking.¹⁹⁹

Also, if the university has an admissions policy, like that of the University of Michigan Law School, in which race is a consideration in admissions, the student could also seek a declaratory judgment that the university's race conscious admissions program should be expanded. The minority student should argue that race conscious admissions programs must be expanded in order to serve not just as a method of creating diversity in the school's enrollment, but also as a method of remedying past discrimination and ongoing racial discrimination in the state education system.²⁰⁰

Some obvious barriers exist to the success of a lawsuit constructed under these legal theories. First, in regards to the use of the LSAT and GPA as admissions criteria, while there may be a gap in LSAT scores and GPAs that correlates with race, these criteria on their face are race neutral. Also, arguably the advent of the use of standardized tests and GPA as admissions criteria may not be able to be traced to a racially based motive. Therefore, an Equal Protection challenge to these admissions criteria will likely be subject to rational basis review.²⁰¹ Under rational basis review courts will ask only whether the university has a rational basis for employing standardized tests and GPA as

¹⁹⁹ *Grutter V*, 123 S.Ct. 2360-61.

²⁰⁰ See *supra* note 100 and accompanying text.

²⁰¹ Plaintiffs in recent affirmative action cases have also claimed a cause of action under Title VI of the 1964 civil rights act. See, e.g., *Gratz III*, 123 S.Ct. at 2417. The analysis of a Title VI violation is identical to analysis under the Equal Protection Clause. See *Grutter V*, 123 S.Ct. at 2347 (citing *Bakke*, 483 U.S. at 287). Prior to 2001, under regulations promulgated under Title VI of the 1964 Civil Rights Act, private plaintiffs could challenge governmental actions which had a disparate impact based on race, national origin, or ethnicity. In 2001, the Supreme Court in *Alexander v. Sandoval* held that these disparate impact regulations may not be enforced through a private right of action. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). Therefore, potential minority student plaintiffs will likely not have a separate Title VI disparate impact challenge to facially neutral admissions criteria. But see William C. Kidder & Jay Rosner, *How the SAT creates "Built-In Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 Santa Clara L. Rev. 121, 173 (2002) (describing a viable disparate impact challenge to the use of standardized tests).

admissions criteria.²⁰² The university's obvious justification will be that standardized tests and GPA are the best predictors for academic success, although not the only useful predictors.²⁰³ Rational basis review is generally easy to satisfy, therefore it is unlikely that a constitutional challenge to a university's use of LSATs and GPA and admissions criteria would be successful.²⁰⁴ Also, the Supreme Court's opinion in *Grutter* makes it clear that university's should be given deference to determine the admissions criteria that best allow the university to meet its institutional goals.²⁰⁵

A student seeking a declaratory judgment that a public university's race-conscious admissions program is justified based on past discrimination will also face difficulties. First, both the district courts in *Grutter* and *Gratz*, the Sixth Circuit in *Grutter*, and the Supreme Court in *Gratz* emphasized the reason for the race-conscious admissions policy given at the time the policy was adopted.²⁰⁶ Therefore, even if the minority plaintiff came forward with an alternative factual background for the adoption of the race-conscious admissions policy, it is unclear whether a court would require the university to publicly adopt a specific justification for the program.

²⁰² See *Lawrence v. Texas*, 123 S.Ct. 2472, 2495 (2003) (citing *Washington v. Davis*, 426 U.S. 229, 241-42) (stating that a facially race neutral policy with no discriminatory intent is subject to "rational basis" review); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L. J. 1943, n.65 (2003) (citing *Katzenbach v. McClung*, 379 U.S. 294, 303-304 (1964) (describing rational basis review); James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 *Nor. Car. L. rev.* 1659, 1694 (2003) (stating that a policy which is facially neutral, with no finding of discriminatory intent will be subject to rational basis review, which is typically simple to satisfy).

²⁰³ See *Grutter V.*, 123 S.Ct. at 2332 (stating that Law School admissions officials must consider LSAT scores as admissions criteria, because they are "important (if imperfect) predictors of academic success in law school.").

²⁰⁴ See *supra* note 197; see *Kidder & Rosner, supra* note 197, at 173 (2002) (stating that an Equal Protection Clause challenge to the use of standardized tests is likely a dead end, but describing a viable disparate impact challenge to the use of standardized tests).

²⁰⁵ See *Grutter V.*, 123 S.Ct. at 2339 (stating that the Court's holding is in keeping with the Court's deference to a university's academic decisions).

²⁰⁶ See *supra* notes 158-163.

Therefore, the minority plaintiff would likely need to seek a declaratory judgment that the university should adopt a *more* expansive race-conscious policy than the policy already in place, in order to remedy the university's past discrimination. A model for this would be desegregation cases in which states were required by court order or administrative order to adopt affirmative measures to desegregate a school system.

The advantage to minority students and public interest organizations in abandoning intervention in favor of becoming plaintiffs is that as plaintiffs there are expansive rhetorical, narrative advantages.²⁰⁷ Despite the claim that in public law litigation, intervention provides a method for the protection of third party interests, the treatment by the courts of the intervenors in the recent affirmative action education cases demonstrates that many courts confronted with public law litigation continue to treat the litigation as a bi-polar enterprise. The court allows the plaintiff and defendant the powerful narrative tool of shaping the framework of the litigation, both in evidence and legal arguments. By becoming plaintiffs in litigation in lawsuits against university defendants, minority students would be able to assume this narrative highground. The courts making decisions in these cases would be forced to confront and engage with the arguments put forth by minority students. Even if ultimately unsuccessful in the litigation, arguably the minority students and public interest groups advocating further change in admissions programs would be practically no worse off than they are today, in the sense that although the university's would still use LSAT and GPA as predominant admissions criteria, race conscious remedies would also remain in place.

Due to the obvious barriers to successful litigation regarding admissions criteria, and the use of race-conscious remedies to remedy past discrimination, other alternatives should be explored by minority students seeking to gain narrative highground. One method that has proven to be successful for advocates interested in transforming

²⁰⁷ See Lawrence, *supra* note 107, at 946-47 (arguing that minorities serving as plaintiffs in lawsuits against universities regarding admissions policies has strong rhetorical value by giving voice to a different view of what constitutes equality and justice); Kidder & Rosner, *supra* note 197, at 143 (suggesting a litigation strategy for minority students to challenge the use of standardized testing).

admissions policies is the use of legislative alternatives. In Texas, after the *Hopwood* decision that ended the use of traditional race-conscious admissions policies, minority legislators developed an alternative admissions program called the Texas Ten Percent Plan.²⁰⁸ The Texas Ten Percent Plan allows for students graduating in the top ten percent from a Texas high school would be automatically admitted to any college or university in the state.²⁰⁹ The minority legislators also succeeded in revolutionizing the debate surrounding admissions criteria in general, by shifting the focus of the admissions policy away from standardized testing.²¹⁰ Also, the adoption of the Texas Ten Percent Plan allowed the legislature to examine the state's higher education system as a continuation of the state's efforts to create equal quality education at the elementary and secondary school levels.²¹¹ These goals are similar to

²⁰⁸ See Lani Guinier & Gerald Torres, *THE MINER'S CANARY* 72 (2002) (recalling the coalition of minority legislators and their purposes in proposing the Texas Ten percent Plan); Danielle Holley & Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 Harv. C.R.-C.L. 245, 252-60 (describing the legislative process of adopting the Texas Ten Percent Plan). California and Florida also have percentage plans that use GPA, instead of standardized test scores as the primary criteria for college admissions. See generally William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and Native American Admissions: 1950-2000*, 19 Harvard BlackLetter Law Journal 1, 29-30 (2003) (detailing the California and Florida percentage plans); Douglass C. Lawrence, Note, *Challenging Affirmative Action: Does Diversity Justify Race-Conscious Admissions Programs?*, 36 Suffolk U. L. Rev. 83 (2002) (describing California and Florida percentage plans).

²⁰⁹ See William E. Forbath & Gerald Torres, *Merit and Diversity after Hopwood*, 10 STAN. L. & POL'Y REV. 185 (1999) (detailing criteria of Texas Ten Percent Plan); Holley & Spencer, *supra* note 204, at 245 (describing requirements of ten percent Plan).

²¹⁰ See Holley & Spencer, *supra* note 204, at 260 (arguing that through the adoption of the Texas Ten Percent Plan the Texas legislature sought to redefine "merit" as separate from standardized test scores).

²¹¹ See Lawrence, *supra* note 104, at 969 ("By treating the top students at each of the state's schools as "most qualified," the University takes responsibility for existing discriminatory conditions in a state where most schools are still racially segregated and unequally financed, training future leaders from oppressed and under-served communities, and challenging the state to make its separate and unequal schools equal."); Holley & Spencer, *supra* note 204, at 262 (stating that the Ten Percent Plan places emphasis on equalizing the quality of secondary school education because the state is further motivated by the need to prepare students for higher education); but see Michelle Adams, *Isn't it Ironic: The Central Paradox at the Heart of Percentage Plans*, 62 Ohio St. L. J.

the goals of the students and public interest groups that have become intervenors in the recent affirmative action education cases.

Furthermore, drafting and advocating legislation that would advocate less reliance on standardized testing as an admissions criteria, would serve as a direct narrative contrast to opponents of race-conscious remedies who have used ballot initiatives in California and Washington to end the use of race conscious remedies in those states.²¹² Also, legislative action specifically to acknowledge that the use race-conscious policies in admissions is justified by the state's commitment to remedying past discrimination and ending ongoing segregation in secondary and elementary education echoes other recent movements by civil rights organizations, such as the racial reconciliation and reparations movement.

Conclusion

Through intervention, minority students and public interest groups have sought to preserve race-conscious admissions policies on their merits, but also to gain recognition for their unique narrative. The minority students' narrative which presents race-conscious admissions policies as a method of ending continuing racial inequality and offsetting the negative impact of admissions criteria such as the LSAT has remained at the margins in higher education affirmative action litigation. In order for this narrative to gain narrative force, minority students must shift away from their procedural posture as intervenors towards becoming plaintiffs in litigation or proponents of legislation that revolutionizes higher education admissions criteria.

1729 (2001) (asserting that percentage plans diversify higher education through a continued reliance of segregated elementary and secondary schools).

²¹² See generally Lawrence, *supra* note 104, at 952-56 (recounting the California ballot initiative and organizing by minority students to repeal the anti-affirmative action amendment).