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THE MICHIGAN AFFIRMATIVE ACTION CASES: A CRITICAL ESSAY

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I. INTRODUCTION

In the two University of Michigan affirmative action cases in June of 2003, the Supreme Court closely examined the practices and methodologies used by the respective admissions offices. In finding diversity as an acceptable admissions goal, the Court approved a flexible assessment plan used by the law school but disapproved a point assignment plan used by the undergraduate school. The opinions failed to specify what kind of affirmative action is acceptable.¹ The cases will make affirmative action more difficult to achieve and will undermine the efforts to improve equality in university admissions processes.

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1. Previous invalidations of university affirmative action plans include *Johnson v. Bd. of Regents of Univ. Sys. of Ga.*, 263 F.3d 1234 (11th Cir. 2001); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). Previous validations of other kinds of affirmative action plans include *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000) (continuing student assignment plan); *Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999) (allowing affirmative admission policy in laboratory school); *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (upholding a prison employment affirmative action plan).

II. THE CASES

A. *Grutter*

In *Grutter v. Bollinger*,² the Court approved the Michigan Law School affirmative action plan by a 5-4 margin in an opinion by Justice O'Connor. The plaintiff, Barbara Grutter, was an applicant for the 1996 incoming class. After the school placed her on the waiting list, she was rejected.³ In 1997, Grutter filed suit in a Michigan federal court, naming the Dean and others as defendants.⁴ Claiming violations of the Fourteenth Amendment, Title VI of the 1964 Civil Rights Act, and 42 U.S.C. §1981, she sought compensatory and punitive damages as well as injunctions ordering the defendants to offer her admission and also barring the future use of race in admissions.

The district court certified a class comprised of applicants since 1995 who had been treated less favorably in the admission process because of race or ethnicity.⁵ On cross-motions for summary judgment, the court held a fifteen day hearing on the use of race in the admissions process.⁶ The law school admission plan was described by the district court as “a flexible assessment of applicants’ talents, experiences, and potential ‘to contribute to the learning of those around them.’”⁷ The plan considered “soft variables” as well as hard numbers. Applying strict scrutiny, the district court found the use of race in the admissions process unlawful and enjoined its use.⁸ The court of appeals, en banc, reversed, relying on *Regents of the University of California v. Bakke*.⁹

The O'Connor opinion invoked the Powell opinion in *Bakke*, which approved of the use of race for “the attainment of a diverse student body.”¹⁰ Diversity “encompasses a far broader array of qualifications and characteristics” than just race and ethnicity.¹¹ Yet any use of a race or ethnic classification must be strictly scrutinized lest differential

2. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

3. *Id.* at 316.

4. *Id.*

5. *Id.* at 317.

6. *Id.* at 318.

7. *Id.* at 315.

8. *Id.* at 321. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

9. *Id.* See *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc).

10. *Grutter*, 539 U.S. at 324.

11. *Id.* at 325.

treatment undermines the constitutional requirement of equality.¹² The Court then invoked the First Amendment “in keeping with [its] tradition of giving a degree of deference to a university’s academic decisions.”¹³ Those decisions dictated that a variety of student backgrounds, present in sufficient numbers so as to constitute a critical mass, lead to an improved educational experience.¹⁴ These conclusions were backed by business and military leaders.¹⁵ Law schools are the training grounds for the country’s leaders.¹⁶ The “holistic review” of each applicant, allowing for “nuanced judgment,” diffused the notion that there were victims of the program because each applicant received individualized treatment.¹⁷ The opinion ended with the cryptic assertion that in twenty-five years affirmative action will no longer be necessary.

Justice Rehnquist, with the support of three other Justices, dissented by characterizing the plan “as a naked effort to achieve racial balancing.”¹⁸ He suggested that use of the “critical mass” rationale is a sham because it generated very different numbers for each of the three favored groups, with native-Americans, for example, comprising as few as thirteen in a class of 1130.¹⁹ The opinion included five year statistical tables showing that the law school admitted members of each group in almost exact proportion to the size of the applicant pool. This evidence undercut the notion of flexible assessment and supported the conclusion that the plan was simply a numbers game; therefore, the plan failed to meet the requirement that the means be narrowly tailored.²⁰

Dissenting, Justice Kennedy examined the statistical finding that between 1995 and 1998 the percentage of minority enrollment for each class varied only by three tenths of one percent.²¹ Justice Scalia, in dissent, questioned an educational benefit in law school diversity. Justice Thomas, dissenting, stated that the compelling governmental interest standard could be met only in “pressing public necessity,”²² like

12. *Id.* at 326.

13. *Id.* at 328.

14. *Id.* at 329.

15. *Id.* at 330-31.

16. *Id.* at 332.

17. *Id.* at 337, 340.

18. *Id.* at 379.

19. *Id.* at 380-81.

20. *Id.* at 377-78.

21. *Id.* at 389.

22. *Id.* at 353.

averting violence or anarchy,²³ and that the interest in diversity, which was mainly “aesthetic,”²⁴ failed to meet that standard.

B. Gratz

Jennifer Gratz applied to the University of Michigan’s undergraduate program in 1995 and Patrick Hamacher applied in 1997.²⁵ Both failed to be admitted after being placed on the waiting list, although similarly situated minorities were admitted.²⁶ In 1997, they filed a class action suit in Michigan federal court seeking damages and declaratory and injunctive relief based on the Fourteenth Amendment, Title VI, and 42 U.S.C. §1981.²⁷ The district court reviewed the various University of Michigan undergraduate plans between 1995 and 2000.²⁸ The court approved the 1999-2000 plans, which, like the 1998 plan, awarded applicants a maximum of 150 points based on test scores, high school record, residency, alumni relationships, and other factors; twenty additional points were added for “membership in [a] racial or ethnic minority group.”²⁹ Citing *Bakke*, the district court approved these plans as serving diversity and determined that they were narrowly tailored.³⁰ However, the district court held that the fact that the plans of earlier years, which reserved “protected seats” for specific groups including athletes, ROTC, foreign students, and minorities violated the prohibition in *Bakke* of operating as the functional equivalent of a quota.³¹

The district court certified questions to the Sixth Circuit for interlocutory review, which, upon the University’s motion, was joined with *Grutter* before the Supreme Court.³² Justice Rehnquist, for the majority, agreed that the University did have a compelling interest in the diversity of the student body. He found, however, that the automatic addition of twenty points to minority applicants was not narrowly tailored to that purpose.³³ He emphasized the individuated consideration

23. *Id.*

24. *Id.* at 354 n.3.

25. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

26. *Id.*

27. *Id.* at 252.

28. *Id.* at 254.

29. *Id.* at 255.

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

31. *Gratz*, 539 U.S. at 256.

32. *Id.* at 259.

33. *Id.* at 269.

available under the Harvard College Plan, cited approvingly by Justice Powell in *Bakke*.³⁴

Dissenting in *Gratz*, Justice Ginsburg suggested that societal discrimination justified remedial measures including affirmative action.³⁵ In addition, Justice Souter dissented, suggesting that the undergraduate point allocation plan was a good solution to a complex problem.³⁶

III. THE VALUES INVOLVED

Affirmative action is a difficult constitutional question because it involves competing fundamental values that are guaranteed by the Fourteenth Amendment: equality and liberty. Equality affirms the equal worth of all and negates barriers to achievement based upon assumptions of inferiority. The country's Christian roots affirm the equal dignity of all human beings as children of God.³⁷ The system of precedent received from the English courts guarantees that like cases are decided in a like manner regardless of the identities of the parties.³⁸ Liberty, which implies the opportunity to develop one's talents through hard work and perseverance, springs from the pioneer experience that all can pursue happiness and a livelihood, unencumbered by social status, lack of wealth, or lineage.³⁹ The natural law tradition received from Hobbes and Locke affirms the sovereignty of the individual.⁴⁰

However, slavery, coupled with the persistence of racial discrimination, seems to corroborate the fallacy of these rosy generalities of the American experience. Slavery lasted for over 200 years until purged away in the bloody Civil War.⁴¹ Discrimination continued to mar the promises of the American dream until invalidated in *Brown v. Board*

34. *Id.*

35. *Id.* at 298-302.

36. *Id.* at 295.

37. Gerard J. Clark, *An Introduction to Constitutional Interpretation*, 34 SUFFOLK U. L. REV. 485 (2001) (stating ideas of natural law influenced the framers).

38. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 753 (1988) (proposing that the system of precedent adds legitimacy to constitutional law).

39. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 619 (Philips Bradley ed., Knopf 1988) (1945).

40. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 8 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) (discussing man in the state of nature).

41. See generally JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* (C. Van Woodward ed., 1988).

of Education⁴² and the 1964 Civil Rights Act.⁴³ As discrimination and its effects persist, the promises of opportunity and equality remain unfulfilled for many.⁴⁴

In the context of the Michigan cases, the issues of race and educational excellence made the resolution of the equality/liberty problem difficult. Traditionally, the scarcer resources like higher education and jobs are distributed in a meritocratic fashion. This competition is a good thing because quality is rewarded.⁴⁵ Knowledge, innovation, and expertise are keys to America's prodigious success.

Time may indeed cure the ills of the past, but waiting denies the promises of the American dream for another generation or more.⁴⁶ The policy question is whether to forego the benefits of the meritocracy in favor of ameliorating the effects of past discrimination, which arguably makes true competition impossible. Proponents of affirmative action advocate intervention because the results of non-intervention are unacceptable; equality of access is not enough—only mathematically demonstrable parity ensures equality.⁴⁷ Others view affirmative action as an attempt at restitution or reparation, returning to the victims what is rightfully theirs. Such a rationale generates substantial political opposition.⁴⁸ Opponents cite the unfairness of government intervention on behalf of minorities.⁴⁹

42. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

43. Civil Rights Act of 1964, 42 U.S.C.A. § 2000a (1964).

44. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1065 (1991) (proposing that blacks are worse off than whites in every statistical category).

45. See generally RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 66 (1992) (stating clashing views will undermine the efficiency of firms).

46. See generally GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002) (indicating that intervention is necessary).

47. See WILLIAM BOWEN ET AL., *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE ADMISSIONS* (1998); ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* (Basic Civitas Books 1998) (1997).

48. See THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC TO REALITY?* 118-19 (1984) (indicating that preferences cause resentments); Patricia Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 541 (1990) (stating that preferences stigmatize).

49. RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1989). *The Bell Curve* cites controversial statistics to the effect that African-Americans demonstrate a lower level of cognitive ability than Caucasians, although East Asians outscore Caucasians. *Id.* at 269-313.

The solution is imperfect because it substitutes anti-minority processes with pro-minority processes, and pro-minority processes must be anti-majority assuming some kind of zero-sum logic.⁵⁰ The solution also requires the process to investigate race and to utilize the results for differential treatment. Numerical parity ensures that impermissible discrimination has not affected the process.⁵¹ Use of race to classify and differentiate has a long sorry history in America and indeed the world. Allowing its use requires weighty justification because of history's lessons about its misuse.⁵² The expert testimony in *Grutter* made clear "that membership in [a] minority group [] is an extremely strong factor in the decision for acceptance."⁵³ The entry rate of minorities was 35% as compared to 10% for others.⁵⁴ The admission of minorities would drop to 4% without affirmative action as compared to the actual figure of 14.5%.⁵⁵ "[A] race-blind admissions system would have a 'very dramatic,' negative effect on underrepresented minority [applicants.]"⁵⁶

The issue becomes even more complex when other minority groups are thrown into the mix. For instance, the Michigan plans included Native Americans and Hispanic Americans. Each group's claim to preference must stand on its own merit and historical experience.⁵⁷ Other ethnic groups that could have been included are Asian-Americans,⁵⁸ Pacific Islanders, Aleuts, and Eskimos.

Although these authors oppose affirmative action, the statistics, even if valid, serve neither to support nor to oppose affirmative action. *Id.* at 447-77.

50. See LANI GUINEIR & GERALD TORRES, *THE MINER'S CANARY, ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 108-30 (2002) (stating affirmative action creates new value).

51. See CORNEL WEST, *RACE MATTERS* 65 (1993) (claiming affirmative action is worth preserving to alleviate the "persistence of discriminatory practices."); David Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 *GEO. L.J.* 1619 (1991) (indicating only numerical standards are effective in remediating the effects of discrimination).

52. Peter Schuck, *Affirmative Action: Past, Present and Future*, 20 *YALE L. & POL'Y REV.* 1 (2002) (proposing affirmative action should be abandoned). See generally PETER SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* (2003).

53. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

54. *Id.*

55. *Id.*

56. *Id.*

57. Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to Laterit Theory*, 85 *CAL. L. REV.* 1143 (1997) (stating the exclusion of Mexican-Americans from the dialogue on race arises from emphasis on the black/white paradigm).

58. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 *CAL. L. REV.* 1241 (1993) (showing

IV. THE PRECEDENT

After the Civil War and the emancipation of the slaves, the Republican Congress grew concerned that the southern states' enactment of a series of laws, known as the Black Codes, were undermining the effort to free the slaves.⁵⁹ These laws, which denied the freed slaves' civil rights, were reimposing conditions that closely resembled the pre-Thirteenth Amendment slave system. The goal of the Equal Protection Clause was to protect the freed slaves from hostile state legislation. The goal of the Due Process Clause was to protect them from hostile exercise of judicial power. By the time the Fourteenth Amendment was finally ratified in 1868, the three-year-old Freedman's Bureau was engaged in social welfare programs that could certainly be characterized as affirmative action.⁶⁰

In order to eradicate the Black Codes, courts interpreting the Equal Protection Clause of the Fourteenth Amendment relied on the Framers' intentions.⁶¹ However, the courts ignored the contemporaneous effort to improve the plight of the freed slaves through targeted social welfare programs.

For example, in *Strauder v. West Virginia*,⁶² the Court invalidated a West Virginia statute that excluded the "race recently emancipated" from juries.⁶³ The Court stated that the purpose of the Fourteenth Amendment as "assur[ing] to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons."⁶⁴

In *Brown v. Board of Education*,⁶⁵ the Court invalidated a Kansas statute that required all schools in the state to be segregated.⁶⁶ While the

Chinese and Japanese have a distinctive history of discrimination in the United States).

59. See generally WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

60. See ERIC FONER, *RECONSTRUCTION* 142-70 (Henry Steele Commager et al. eds., 1988). The Freedman's Bureau established hospitals and dispensed health care and drugs at nominal costs or free of charge. *Id.* at 151.

61. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

62. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

63. *Id.* at 306.

64. *Id.*

65. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

66. *Id.*

Court could have performed a factual investigation into whether the educational quality and the facilities of the white schools as compared to the black schools were equal, it instead found state imposed segregation to be per se unequal.⁶⁷ This required overruling *Plessy v. Ferguson*,⁶⁸ which had found no equal protection violation in a Louisiana statute requiring segregation on public conveyances.⁶⁹

In *Loving v. Virginia*,⁷⁰ the Court invalidated the Virginia anti-miscegenation statute, which prohibited marriage between a Caucasian and an African-American.⁷¹ In doing so, the Court suggested that the presence of a race classification in the statute placed a “very heavy burden of justification” on the State.⁷² The Court went on to characterize its posture as requiring “the ‘most rigid scrutiny.’”⁷³

Despite this apparent consistency, the Court refused to extend the Equal Protection Clause to cases claiming disparate impact. In *Washington v. Davis*,⁷⁴ the Court rejected the claim that the racially disparate results of a written exam, where African-Americans failed the test four times the rate of Caucasians, violates equal protection.⁷⁵ A central purpose of the Equal Protection Clause was to prevent official conduct from discriminating on account of race.⁷⁶ An official’s decision or a statute designed to serve neutral ends was not invalid because of disparate impact. A whole range of official actions and statutes placed differing benefits or burdens on one race over another.⁷⁷ The Court acknowledged and affirmed that Title VII of the 1964 Civil Rights Act, although inapplicable at the time to federal entities, would produce a different result.⁷⁸

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁷⁹ the Court likewise rejected a disparate impact

67. *Id.* at 495.

68. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

69. *Id.*

70. *Loving v. Virginia*, 388 U.S. 1 (1967).

71. *Id.*

72. *Id.* at 9.

73. *Id.* at 11.

74. *Washington v. Davis*, 426 U.S. 229 (1976).

75. *Id.* at 238.

76. *Id.* at 239.

77. *Id.* at 248.

78. *Id.* at 238 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

79. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

claim.⁸⁰ A Plan Commission's refusal to re-zone a parcel of land for the construction of a low income housing development was not racially discriminatory without proof of invidious intent.⁸¹ Although the village was mostly Caucasian, market studies indicated that a majority of the eligible applicants to the development in question would be minorities.⁸² The Court examined deliberations of the Plan Commission where fears about property values were voiced.⁸³ The Court recognized that administrative bodies rarely act out of a single motivation.⁸⁴ The inquiry requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."⁸⁵ The Court reviewed the evidence in the case and found no support for an inference of invidious purpose.⁸⁶

In *Bakke*, the Court invalidated an affirmative action plan at the University of California at Davis Medical School, which reserved sixteen of one hundred places in its class for minority groups defined as "Blacks,' 'Chicanos,' 'Asians,' and 'American Indians.'"⁸⁷ Four Justices concluded that Title VI of the 1964 Civil Rights Act forbade the use of any race classification in the admission process.⁸⁸ Four Justices agreed with Justice Brennan that the Equal Protection Clause allowed the use of benign race classifications in the admissions process.⁸⁹ Justice Powell, writing only for himself, voted to invalidate the plan but suggested that a more flexible approach to admissions which takes race into account with a variety of other factors would be justifiable.⁹⁰

The unified approach to race classifications was applied in *City of Richmond v. J.A. Croson Co.*⁹¹ The City of Richmond's affirmative action plan required prime contractors on city-funded construction to award 30% of their subcontracts to minority business enterprises.⁹² The Court invalidated the plan because of insufficient evidence of past

80. *Id.*

81. *Id.* at 258.

82. *Id.* at 259.

83. *Id.*

84. *Id.* at 265.

85. *Id.* at 266.

86. *Id.* at 270. Indeed, the Court consistently rejected the pleas from dissenting judges that it ought to do away with the intent requirement in school desegregation cases. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

87. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 274 (1978).

88. *Id.* at 271.

89. *Id.* at 324.

90. *Id.* at 269.

91. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

92. *Id.* at 478.

discrimination.⁹³ The Richmond City Council relied on the following evidence: statistics that minority businesses received less than 1% of prime contracts although they constituted 50% of the city's population, evidence of minimal participation by minorities in state contractor associations, and a 1977 determination by Congress that discrimination stifled participation by minorities in the construction industry nationwide.⁹⁴ The Court labeled these findings to be weak and insufficient to support a plan that made use of the race classification.⁹⁵ The Court found "absolutely no evidence" of discrimination against other ethnic groups included in the plan: "Oriental, Indian, Eskimo, or Aleut."⁹⁶ Richmond's finding of "past societal discrimination"⁹⁷ would open the door to claims for remediation for every disadvantaged group.

*Adarand Constructors, Inc. v. Pena*⁹⁸ followed *Croson*'s lead of applying strict scrutiny to government-sponsored set-asides for minority subcontractors.⁹⁹ Here, the U.S. Department of Transportation gave financial incentives on federal highway projects to general contractors who hired the "socially and economically disadvantaged individuals," with "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities" presumed to be socially and economically disadvantaged.¹⁰⁰ Again, the Court found that the plan was not narrowly tailored to satisfy strict scrutiny.¹⁰¹ The lower courts have adhered to this rule.¹⁰²

93. *Id.* at 498.

94. *Id.* at 499.

95. *Id.* at 500.

96. *Id.* at 506 (emphasis omitted).

97. *Id.* at 505.

98. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

99. *Id.*

100. *Id.* at 205.

101. *Id.* at 235. The minority business enterprise programs evidenced by the Richmond program in *Croson* and the DOT program in *Adarand* appear to be blunt instruments of social policy and have been frequently criticized as subject to abuse and fraud. See EPSTEIN, *supra* note 45. Minority work force goals, especially in the construction industry, have been more effective and successful. See, e.g., Gerald J. Clark, *The Creation of the Newark Plan*, 23 CATH. U. L. REV. 443 (1974) (describing a plan to integrate the construction trade unions).

102. In *Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13 (1st Cir. 1998), three white police officers challenged the promotion of a black candidate to a lieutenant, in accordance with a preference dictated by a consent decree, to white candidates who outscored him on a promotional exam. The First Circuit affirmed the district court in rejecting the challenge. Applying strict scrutiny, the court found the decree narrowly tailored to remedy a history of past discrimination. See, e.g. Cotter v.

The Court's skepticism of numerical goals was not applied to judicial decrees in class action suits under Title VII of the 1964 Civil Rights Act. For instance, in *United States v. Paradise*,¹⁰³ the Court approved a one-for-one promotional plan for officers in the Alabama State Police after the district court found that less extreme measures were ineffective to remedy the violations.¹⁰⁴ In *United Steelworkers of America AFL-CIO-CLC v. Weber*,¹⁰⁵ the Court found no violation of Title VII in an affirmative action plan that was voluntarily adopted by a union and management "to eliminate conspicuous racial imbalance in traditionally segregated job categories."¹⁰⁶

V. A CRITIQUE

A. *The Plaintiff's Injury*

Barbara Grutter's application to the law school boasted a 3.8 GPA and a 161 score on the Law School Admissions Test ("LSAT"). After her rejection from the University of Michigan, she was offered admission to Wayne State.¹⁰⁷ Jennifer Gratz, a 1995 applicant, attended the University of Michigan at Dearborn after her rejection from the Ann Arbor campus and graduated in 1999.¹⁰⁸ Patrick Hamacher enrolled in and graduated from Michigan State University after he was denied admission to the University of Michigan.¹⁰⁹ As applicants, they of course had no right to be admitted. In paying their respective application fees, their only interest was in having their applications reviewed and

City of Boston, 323 F.3d 160 (1st Cir. 2003); *Quinn v. City of Boston*, 325 F.3d 18 (1st Cir. 2003). This holding accorded with *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), which also approved similar preferences. See also *Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992).

103. *United States v. Paradise*, 480 U.S. 149 (1987).

104. *Id.* See also *Local Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421 (1986) (approving the use of an affirmative action plan as a remedy in a Title VII class action).

105. *United Steelworkers of Am. AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

106. *Id.* at 209. See also *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (portraying a gender conscious affirmative action plan to remedy manifest imbalance in traditionally segregated job categories), *aff'g* *United Steelworkers of Am. AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) (approving a narrow voluntary affirmative action plan).

107. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

108. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 815 (E.D. Mich. 2000).

109. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

considered.¹¹⁰ While the litigants probably have technical standing to challenge the use of illegal admission criteria, their injury is diminished by the fact that they have numerous education options. Their interest in the use of allegedly illegal criteria is amorphous because the elimination of the challenged criteria does not necessarily conclude that they would have been admitted.

The facts and backgrounds of these plaintiffs are examples of paucity of injury to the Caucasian race by affirmative action in general. More generally, limitations on Caucasians' ability to attend elite schools arise only out of their qualifications and their finances. Minorities, on the other hand, are often not so favorably situated.

B. Revisiting the Precedent

1. The Benign-Invidious Distinction

Justice Ginsburg, in her dissenting opinion in *Gratz*,¹¹¹ sought to reopen two assumptions deemed settled by the rest of the Court: first, that there is no difference in treatment of a race classification based upon whether it is benign or invidious; and second, that intent is an element of a race claim under the Equal Protection Clause.¹¹² In support of the first assumption, she stated that the ““system of racial caste only recently ended””¹¹³ has generated large disparities between Caucasians, African-Americans, and Hispanics in income, health care, housing, and education.¹¹⁴ Measures destined “to hasten the day”¹¹⁵ when these groups can fully participate in what the country has to offer are constitutional. The use of a racial classification is unconstitutional only when it furthers racial oppression.¹¹⁶ The Michigan plan achieved its goal of access for minorities in a straight-forward way; the harm to non-

110. In *Steinberg v. Chicago Med. Sch.*, 371 N.E.2d 634 (Ill. 1971), the plaintiff claimed breach of contract and various consumer law violations by the defendant school for using admissions criteria not recited in the school's catalogue.

111. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (Ginsburg, J., dissenting).

112. Justice Ginsburg cites Stephen Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 433-34 (1988) to the effect that many cared little about classifications but cared much about discrimination.

113. *Gratz*, 539 U.S. at 299.

114. *Id.*

115. *Id.* at 301.

116. *Id.*

minority applicants was minimal.¹¹⁷

Ginsberg was relying on Justice Brennan's concurring opinion in *Bakke*¹¹⁸ that suggested affirmative action involved a benign race classification and that such classifications, unlike invidious ones, ought not be presumptively invalid.¹¹⁹ He began with the proposition that race-conscious remedies have been required in school desegregation cases.¹²⁰ He continued that only "racial classifications that stigmatize [are invalid]- because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred [or] separatism."¹²¹ Whites as a class, on the other hand, have none of the traditional indicia of suspectness: as a class they are not saddled with disabilities, they have no history of unequal treatment, nor have they been relegated to a position of powerlessness.¹²² In the famous *United States v. Carolene Products Co.* footnote,¹²³ the Court provided a rationale for a higher level of judicial activism on behalf of "discrete and insular minorities."¹²⁴ The Court suggested that such minorities were less able to protect themselves through the normal majoritarian processes which can normally be relied upon to include the interests of all voters. The lack of mutuality entailed in limiting equal protection claims to minorities, however, would undermine acceptance of the principle by the public at large.¹²⁵

117. *Id.* at 303 n.10.

118. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 355 (1978) (Brennan, J., concurring).

119. *Id.*

120. *Id.* at 356 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)) (approving the use of numerical percentages in formulating a remedy).

121. *Id.* at 357-58.

122. *Id.* at 357.

123. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (approving a federal statute that prohibited the interstate commerce shipment of filled milk).

124. *Id.*

125. The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is being gored. . . . Yet a racial quota derogates the human dignity and individuality of all to whom it is applied. . . . Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant. ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975). The lack of mutuality probably causes the distinction between benign and invidious discrimination to flunk Professor Wechsler's famous test of neutrality. Herbert

2. The Intent Requirement

With respect to the second assumption, a combination of *Washington* and *Croson* rationales indicates that specific findings of identifiable intent are an element for finding discrimination. As such, these findings are a necessary predicate of a judicial remedy or an administratively imposed affirmative action plan. There are at least two problems with the imposition of this requirement. First, it is very difficult to prove. In *Arlington Heights*, for instance, the Plan Commission was composed of numerous individuals who were appointed by the town.¹²⁶ The individuals would normally be sophisticated enough to veil their objections to an influx of poor minority families behind legitimate non-racial objections like density or overloading municipal service delivery systems.¹²⁷ The *Croson* requirement again makes the implementation of an affirmative action plan more costly. After *Croson*, a city wishing to attack the problem of all white labor unions would have to announce its intention to investigate discrimination in the construction industry with the goal of making specific findings and then imposing some kind of remedial plan.¹²⁸ Surely, if a minority identified a particular employer or union as discriminatory then the labeled entity would demand to appear to rebut the allegations.¹²⁹ The remedial plan would be contested as well.

Second, it assumes a bright line distinction between anti-minority animus and disparate impact. However, this ignores the fact that the ideas, attitudes, and beliefs about race and nationality are part of our cultural heritage. Caucasians and minorities alike are influenced by negative assumptions that the larger society makes about minority groups. Indeed, Judge Skelly Wright has suggested "that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."¹³⁰

Thus, when the Plan Commission in Arlington Heights votes against low income housing, voicing fears about decreased property values, the existing case law assumes that reason excludes any anti-minority animus

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959).

126. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977).

127. *Id.* at 269.

128. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 509 (1989).

129. *Id.*

130. *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.C. 1967).

without specific testimony effectively confessing to discriminatory animus.¹³¹ This creates a very narrow definition of the type of intent necessary to make out an Equal Protection violation.¹³² *Croson* treated the generalized Richmond findings with similar disdain.¹³³

C. Compelling Interests

1. Remediation

Although classifications based on race are strictly scrutinized, its use as a tool to compensate for specifically found past discrimination would have been acceptable in *Croson*.¹³⁴ Clearly, the beneficiaries of affirmative action plans or Title VII class action decrees are different individuals from the individual victims of the past practices that serve as a predicate for the plans or decrees. Why is there a compelling interest in granting an undeserved preference to a new applicant who was never victimized by discrimination because in the past someone who happened to be of the same race was treated in a discriminatory manner? Further, why is this so different from the evidence of societal discrimination that Justice O'Connor labeled highly conclusory in *Croson*?¹³⁵

It is assumed that this compensation principle would apply across the board to any institution that can be found to have systematically engaged in discrimination. School admissions, financial aid, real estate practices, housing subsidies, the provision of medical care, work place hirings, promotions, and pay scales could all be subjected to affirmative action type relief if the findings of past discrimination were more specific than the Richmond findings and more like the judicial findings in the Title VII cases like *Paradise*.¹³⁶

2. Diversity

131. *J. A. Croson Co.*, 488 U.S. at 509.

132. Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987); see also Barbara Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 968 (1993).

133. *J. A. Croson Co.*, 488 U.S. at 501.

134. *Id.*

135. *Id.* at 500.

136. *United States v. Paradise*, 480 U.S. 149 (1987).

Six justices agreed that all race classifications, whether benign or invidious, are suspect and require strict scrutiny.¹³⁷ The Michigan cases broke new ground by accepting diversity as a compelling governmental interest. While that standard, like so many constitutional standards, is vague and ultimately subjective, it is difficult to understand why a pedagogical judgment about how to deliver the best education, which is debatable at best, is compelling.¹³⁸ Such deference was not paid to the military training decisions at VMI in *United States v. Virginia*.¹³⁹

Diversity is never really defined. We are told that it enriches the educational experience. Is this because members of the three chosen groups think differently than merit-based admittees? Is there a Hispanic perspective on policy issues? If diverse perspectives are truly sought, one might expect greater diversity from adherents of non-American religions like Islam, Buddhism, or Hinduism. Diversity of experience might also enrich classes as well. Victims of ethnic cleansing in Bosnia might have different perspectives as might Eskimos, Australian aborigines, Nicaraguan peasants, American pig farmers, vegans, gay people, world federalists, and naturopathist.

Investigation of the economic stature of applicants might achieve a better mix of students than the law school's categories. Other factors leading to a diverse class might be hobbies, interests, age, employment history, language, and population of home town.¹⁴⁰

There are certainly ancillary societal benefits to mainstreaming members of groups that have received a lesser share of American prosperity. They include broadening alumni bases, increasing applications, and guarding against subtle discrimination.¹⁴¹ Justice Scalia suggested in *Grutter* that "generic lessons in socialization and

137. Included are the Gratz majority and Justice Breyer, who concurred with Justice O'Connor.

138. *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003).

139. *Id.* at 366 (citing *United States v. Virginia*, 518 U.S. 515 (1996)).

140. Percentage plans are a race neutral alternative to race classification used in Texas, Florida, and California. See *Gratz*, 539 U.S. at 303 n.10 (Justice Ginsburg citing Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admission: A Comparative Analysis of Three States' Experiences* (2003)), at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php>. Indeed, California has banned affirmative action in Proposition 209.

141. Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986) (claiming affirmative action offers other positive externalities).

good citizenship” are more appropriate at a younger age.¹⁴² Justice Thomas, dissenting in *Grutter*, denied that minorities need “the meddling of university administrators” to achieve “every avenue of American life.”¹⁴³ The interest in diversity was mainly “aesthetic.”¹⁴⁴ He cited the historically black colleges to rebut the notion that a diverse law school classroom yields educational benefits.¹⁴⁵ Further, the preferences of affirmative action constantly place minorities in classes where they are overmatched, a fact stigmatizing them to their classmates as well as themselves.

Further, the conclusion of the Court with respect to diversity seems to be at odds with its conclusions in *Wygant v. Jackson Board of Education*.¹⁴⁶ *Wygant* invalidated a union negotiated layoff plan which operated on the basis of seniority “except that at no time would there be a greater percentage of minority personnel laid off than the current percentage . . .” employed.¹⁴⁷ The school’s justification was the need to provide positive role models for its minority student population. The Court found that the role model rationale failed to meet the compelling standard.¹⁴⁸

D. Narrowly-Tailored Classifications

The three chosen groups for preference by the University of Michigan clearly cannot be viewed as narrowly tailored, because group membership is insufficient to prove victimization. Further, the critical mass rationale, namely acceptance of a sufficient number of minorities from each minority group to undermine feelings of alienation and to satisfy the needs for companionship, seems to militate against a requirement that the classifications be precise. Hispanics are clearly the most diffuse group. One would assume that Mexicans, Puerto Ricans, Dominicans, Peruvians, Chileans, and immigrants from Spain are also included. What about an Argentinian of German extraction? Does Spain include the Canary Islands? Moreover, African-Americans are not all similarly situated. The group with the strongest claim on affirmative

142. *Grutter*, 539 U.S. at 348.

143. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part).

144. *Id.* at 354 n.3.

145. *Id.* at 355.

146. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

147. *Id.*

148. *Id.*

action is clearly the descendants of American slaves. Should the descendants of African-Americans who lived in the North and never experienced slavery be included? What about the descendants of more recently immigrating Nigerians, Rwandans, Egyptians, or South Africans? What about applicants of mixed ancestry? Should proof of ancestry be required? What kind of proof should be sufficient? How does the plight of the Native American fit into the mix?¹⁴⁹

E. The Opinions

The majority opinions in both cases are weak. Justice O'Connor in *Grutter* spoke the language of strict scrutiny, but her review of what the law school did was perfunctory when she paid deference to the admissions office at the law school to do individuated review.¹⁵⁰ Justice Rehnquist's opinion for the majority in *Gratz* simply stated as a conclusion that a grant of twenty percent of the points needed for admission is not narrowly tailored.¹⁵¹ The law school plan adhered strictly to admission of each of the favored minority groups in the exact percentages that each group made of the total applicant pool.¹⁵² The daily monitoring of the minority numbers appeared to make the law school plan the less flexible of the two.

The *Gratz* process was a fairer and more sensible process than the *Grutter* process. Justice Souter, dissenting in *Gratz*, asserted that the twenty point addition for socioeconomic disadvantage, athletic ability, or at the Provost's discretion appeared less dramatic when compared to some of the other bonuses, like Michigan residence (ten points), residence in an underrepresented county (six points), or leadership (five points).¹⁵³ After these point awards were added, all applicants then competed on equal footing. Thus, favoring unbridled discretion over predictability, the court disapproved of a plan which was clear and easily administered¹⁵⁴ and approved a plan which is resource intensive. Indeed,

149. Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986) (cataloguing injustices perpetrated on the Native Americans).

150. *Grutter*, 539 U.S. at 340.

151. *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003).

152. Justice Kennedy criticized the admissions office for its close daily monitoring of the racial composition of the entering class. *Grutter v. Bollinger*, 539 U.S. 306, 391-92 (2003).

153. *Gratz*, 539 U.S. at 295-96.

154. *Grutter*, 539 U.S. at 372.

only Justice O'Connor perceived a constitutional distinction between the two plans.

The Court in *Gratz* found that the undergraduate program violated not only the Fourteenth Amendment, but also Title VI of the 1964 Civil Rights Act and 42 U.S.C. §1981.¹⁵⁵ Title VI mandates affirmative action to the recipients of federal funds, and virtually all universities have students whose tuition payments are made with monies borrowed with loan guarantees from the federal government under the Stafford Loan Program, Pell Grants, or others, mostly administered by the Department of Education.¹⁵⁶ The scope of 42 U.S.C. §1981 is still broader, applying to all schools public or private, primary, secondary, university, or post-graduate.¹⁵⁷

The twenty-five year limit on affirmative action announced in the *Grutter* majority would lead to what Justice Thomas called the "bigot's prophecy."¹⁵⁸ The limitation apparently assumes that equality will then be achieved and that all minorities will compete on an equal footing with majorities, making remedial measures unnecessary. If this assumption is not born out do we assume that schools' interests in diversity can no longer support affirmative action? Further, the *Grutter* majority accepts affirmative action on behalf of recent immigrants, including Hispanics and Africans.¹⁵⁹ This immigration is likely to continue. By what principle can efforts to remediate discrimination and to produce diversity be justified for twenty-five years but not twenty-six?

VI. CONCLUSION

Thus, the law school gets it both ways even though the State of

155. *Gratz*, 539 U.S. at 275-76.

156. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) (holding Title VI of the 1964 Civil Rights Act as well as Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a), apply to a private college by virtue of federal financial aid to its students). The scope of a college's obligations under the cited statutes was expanded by the Civil Rights Restoration Act of 1987. See 42 U.S.C.A. §2000d-4(a) (West 2003). See also 34 C.F.R. 100.3(b)(6)(i) (2004).

157. *Runyon v. McCrary*, 427 U.S. 160 (1976) (extending the non-discrimination principle to a private, commercially operated non-sectarian school); *Brown v. Dade Christian Sch. Inc.*, 556 F.2d 310 (5th Cir. 1977) (en banc) (holding that § 1981 applies to a school operated by the New Testament Baptist Church); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987) (stating 42 U.S.C. § 1981 protects against discrimination based upon nationality).

158. *Grutter v. Bollinger*, 539 U.S. 306, 377 (2003).

159. *Id.* at 316.

Michigan reaps few benefits from an elite law school that serves mostly out-of-staters.¹⁶⁰ The school is permitted to maintain its highly selective admissions process to ensure its elite status, including the use of legacy preferences, but it also gets to depart from the meritocracy to add minorities to salve the conscience and affirm the principle of equal opportunity.¹⁶¹ It is not required to forgo the LSAT and focus its attention on local law and lower overall admission standards, although this would achieve the goal of diversity without the use of a race classification.¹⁶²

The result also frustrates *Brown*. *Brown* affirmed the importance of education in a democracy, namely that education at the primary and secondary level must be integrated and equal. Apparently, the pursuit of the *Brown* goals at the university level generates close skeptical inquiry and strict scrutiny.

The result has the ring of political correctness with the Court bowing to current leaders at universities, the business world, and the military. A bit of cosmetic affirmative action is acceptable, but not too much. There are no victims because all have been individually assessed. The paper-thin distinctions between the two plans leave the whole area uncertain enough to allow for arguments on both sides of the debate.¹⁶³ But with the policy questions so close, not to mention the legal questions, and the injuries to majority applicants so elusive, one wonders why the Court feels the need to continually monitor this issue so closely.

160. *Id.* at 359-60.

161. *Id.* at 355, 368.

162. *Id.* at 377.

163. As Justice Scalia said, the “Grutter-Gratz split double-header seemed perversely designed to prolong” the affirmative action controversy. *Id.* at 348. The results leave the state of the law as muddled as it was before the cases.