The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 9 | Number 1 Article 1

10-1-2006

Shifting from Race to Ethnicity in Higher Education.

Pratheep Sevanthinathan

ARTICLES

SHIFTING FROM RACE TO ETHNICITY IN HIGHER EDUCATION

PRATHEEP SEVANTHINATHAN*

* J.D. Case Western School of Law 2006.

The term "race" takes for granted what those who use it take it to mean, and what they take it to mean may mean anything, and what may mean anything, in fact, means nothing.

- Ashley Montagu[1] (1963)

I. Introduction

Since the 1970s, universities throughout the United States have consciously sought to admit greater numbers of racial minorities in order to achieve "racial" diversity in their student bodies. The universities have proclaimed that diversity is beneficial to both the educational process and to the students immersed in the diversity. Racial diversity teaches students how to interact with a variety of dissimilar people, overcome bias and stereotypes, and to think with different viewpoints.

To accomplish this diversity, universities ask applicants to identify their race from five to seven enumerated choices,[2] standard in government policy-making on their admissions application so that the university can determine if the applicant will diversify its school in the manner it is seeking. This attempt at creating diversity, however, is overly broad and

1. Ashley Montagu, Race, Science, and Humanity 61 (1963).

2. *See, e.g.*, U.S. Census Bureau, U.S. Dep't of Commerce, Racial and Ethnic Classifications Used in Census 2000 and Beyond (2000) (stating "other" is an optional race category). Applicants usually, but not always, have the option of choosing "other on university admission applications." *Id.*

severely flawed. The hypothetical below illustrates the problem with using these standard, overly broad racial classifications.

Let's say that you own an automobile museum that can display one hundred cars. People come to the museum to see an array of automobiles. To maximize the museum experience, you show as many different kinds of cars as possible. Therefore, you solicit cars from automobile dealerships across the country by assuring them that the museum will provide valuable publicity for the dealerships. To have a car displayed at the museum, you ask each dealership to submit an application including only their contact information, how much they are willing to sell the car to the museum for, and whether they are sending a "Ford," "GM," "Daimler-Chrysler," "Honda," "Toyota," or "BMW." Based on the applications received you choose to include forty GMs, twenty Fords, twenty Toyotas, ten Hondas, six Chryslers, and four BMWs. Will you achieve the diversity you were seeking through this method? Probably not. What if all twenty Fords you receive are Mustangs? You will never *actually know* if you are going to achieve a high level of diversity from just looking at the make of the cars. However, you could have easily attempted to acquire a variety of other Ford models by simply asking the dealers to identify the model of the car in the application. By not acquiring information on the models that will be sent, you passed on an opportunity to ensure a diverse body of automobiles at the museum.

The automobile museum's flawed submission policy is an example that mirrors the underlying problems with using race-based university admissions policies. The use of race-based programs, themselves, are not inherently problematic; but rather, choosing to use broad classifications over narrow classifications can lead to the exclusion of certain groups and will not ensure diversity. From the above example, racial categories such as Black, White, and Asian are analogous to the make of the automobile and are much too broad to ensure diversity. Ethnic categories such as Middle Eastern, Scandinavian, and Black-American are analogous to the automobile's model and a much more precise identifier. The use of ethnicity, like the use of car models, is likely to result in an increase in diversity.

This article, instead, argues that despite the Supreme Court's ruling to the contrary, the University of Michigan Law School's ("the University") race-based admissions policies are not narrowly tailored to the school's objective of diversifying its student body. The use of the broad and imprecise classifications of race rather than the more tailored classifications of nationality and ethnicity created an admissions program that should have been declared unconstitutional under strict scrutiny analysis. Unfortunately, the Court overlooked the obvious differences between the numerous sub-groups within each racial classification and allowed the overly-broad classifications to stand.

This article addresses the problems inherent in current racial classifications used in university admissions policies and how the *Grutter v. Bollinger*[3] decision placed the Court's imprimatur on the unanticipated but very real discrimination that the classifications cause. Section II of this article will provide a brief history on affirmative action, its goals, and its current state; Section III will discuss the *Grutter* decision and its implications; Section IV will address the historical foundation of racial classifications, the problems caused by current racial classifications, and the harm caused by imprecise self-identification; and, finally, Section V will present a solution to the problem and examine its potential shortcomings.

II. Affirmative Action

A. *What Is Affirmative Action?*

Affirmative action is a policy or a program that aimed at providing minorities access to education, employment, health care, or social welfare.[4] The goal of affirmative action is to increase the representation of underrepresented minorities in these areas of society.[5] One of the underlying assumptions upon which affirmative action relies is that minorities are not represented in proportionate or meaningful numbers in these realms of society because of past societal discriminations.[6] Thus, affirmative action sought to repair these societal harms by requiring schools, businesses, hospitals, and other institutions to take affirmative steps to guarantee that minorities receive the special attention required to put them on equal footing with their majority counterparts.[7]

President John F. Kennedy first used the term "affirmative action" in 1961, in an Executive Order that required federally funded projects to take affirmative action to ensure that employment decisions were not racially discriminatory.[8] President Kennedy acted in response to the failure

3. 539 U.S. 306 (2003) (holding that the law school had a compelling interest in attaining a diverse student body, and that admissions programs must be narrowly tailored to serve its compelling interest in obtaining the educational benefits that result from a diverse student body).

4. *See* Encyclopedia Britannica Online, http://eb.com (search "affirmative action").

5. *See id.*

6. *See Grutter*, 539 U.S. at 316, 328.

7. *See, e.g.,* Encyclopedia Britannica Online, *supra* note 4.

8. Victoria Choy, *Perpetuating the Exclusion of Asian Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in* Grutter v. Bollinger, 38 U.C. Davis L. Rev. 545, 549 (2005) (stating the government must take affirmative action to expand minorities' opportunities for employment).

of the Civil Rights movement to ameliorate existing structural inequities caused by past harms.[9]

Since its inception, the constitutionality of affirmative action programs has been repeatedly challenged on equal protection grounds.[10] Under the Equal Protection Clause of the Fourteenth Amendment, state governments cannot discriminate against any person within their jurisdiction.[11] Thus, many affirmative action opponents have argued that affirmative action programs, which are inherently discriminatory towards members of the majority, must violate the Fourteenth Amendment.[12] However, the Supreme Court has held otherwise.[13]

B. *Affirmative Action in Higher Education*

Universities and other high academic institutions began using affirmative action to diversify their student bodies in the late 1960s and early 1970s.[14] During these early years, universities used everything from points systems, which awarded minority candidates extra application "points" to set-aside programs, which gave minorities a set number of guaranteed spots in the university.[15] In 1978, White applicants challenged the constitutionality of set-aside programs in the landmark Supreme Court case *Regents of the University of California v. Bakke.*[16]

In *Bakke,* the majority concluded that numerical set-aside programs are *per se* unconstitutional unless they are necessary to remedy clearly

---

9. *Id.*

10. *See, e.g.,* Adarand Constr., Inc. v. Peña, 515 U.S. 200 (1995); Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

11. *See* U.S. CONST. amend. XIV § 1 ("No State shall . . . deny to any person . . . the equal protection of the laws.").

12. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) ("A classification which aids persons who are perceived as members of relatively victimized groups at the expense of other innocent individuals is permissible only when there are judicial, legislative, or administrative findings of constitutional or statutory violations.").

13. *See Adarand Constr., Inc.,* 515 U.S. 200 (holding that petitioner could claim injury owing to a discriminatory classification which prevented petitioner from competing on an equal footing); *Metro Broad., Inc.,* 497 U.S. 547 (holding that affirmative action is required to correct past discrimination); *J.A. Croson Co.,* 488 U.S. 469 (holding that because appellant city failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violated the Equal Protection Clause).

14. Lackland H. Bloom, Jr., Grutter *and* Gratz*: A Critical Analysis,* 41 HOUS. L. REV. 459, 460 (2004) (speculating the minority applicants did not otherwise have the academic criteria necessary to gain admission without a deliberate preference).

15. *Id.*

16. *Bakke,* 438 U.S. 265 (addressing the complaints of white students who challenged the method of admission arguing the school improperly considered race).

proven past institutional discrimination.[17] In arriving at this conclusion, the Court held that increasing the number of minority students in the medical school, providing more doctors to underserved minority communities, and providing a remedy for past *societal* discriminations are *not* necessary to accomplish the purpose of a student body diverse enough to justify the use of suspect classifications.[18] However, the most important aspects of the *Bakke* ruling were Justice Powell's holdings that the diversity of a university's student body is a compelling state interest and that race could be used as a factor in the admissions process in order to enhance diversity, as long as it was not the only factor.[19]

Bakke remained the law guiding affirmative action policies for the next two decades,[20] and many universities crafted their admissions programs to conform to the *Bakke* decision.[21] However, after nearly twenty years of stagnation, the issue of race-based admissions in higher education returned to courts in *Hopwood v. Texas*.[22] In *Hopwood*, the Fifth Circuit Court of Appeals invalidated the University of Texas Law School's race-based admissions policy after an underprivileged, highly- qualified, white student challenged the policy after being denied admission.[23] In doing so, the Court re-opened the affirmative action debate, holding that Justice Powell's diversity justification was not the law and never had been.[24] This holding, in turn, led to several new challenges in other circuits[25] and

---

17. *Id.* at 271–72, 279, 319 (holding that because the University of California-Davis Medical School's set-aside program was not narrowly tailored to remedy a past discrimination by the institution itself, it was held to be unconstitutional); *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 592, 594 (1997).

18. *See* Bakke, 438 U.S. at 305–12 (holding that one cannot speculate as to the purpose one will put their education towards, in the absence of empirical data).

19. *Id.* at 314–16.

20. *Compare id., with* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *and* Grutter v. Bollinger, 539 U.S. 306 (2003).

21. *See* Bloom, *supra* note 14, at 461.

22. *Hopwood,* 78 F.3d 932 (considering whether a law school may use race as a component in admissions evaluation).

23. *Id; see also The Long Arms of Cheryl Hopwood*, 25 J. BLACKS IN HIGHER EDUC. 25 (1999) (resulting in a reduction of the number of black students at the Law School from sixty-five to eleven).

24. *Hopwood,* 78 F.3d 932 ("Justice Powell's view in *Bakke* is not binding precedent on [the use of diversity in admissions criteria]. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale . . . . [D]iversity is mentioned nowhere except in Justice Powell's single-Justice opinion. In fact, the four-Justice opinion, which would have upheld the special admissions program under intermediate scrutiny, implicitly rejected Justice Powell's position.") (internal quotation omitted).

25. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 377 F.3d 949 (9th Cir. 2004); Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000); Smith v. Univ. of Wash. L. Sch., 233 F.3d 1188 (9th Cir. 2000).

eventually brought the issue of affirmative action in higher education back to the Supreme Court.[26]

III. *GRUTTER V. BOLLINGER*

With the affirmative action debate facing the Supreme Court in 1996, the majority opinion in *Grutter v. Bollinger*[27] settled several key issues about what universities can and cannot do when using race-based admissions programs.[28] In short, the Court held that diversity of a student body was a compelling state interest and that students contributed to diversity if they had either a distinguishable non-majority appearance[29] or held a distinct set of minority viewpoints that distinguished them from the majority.[30] This section of the article details how the Court came to this conclusion and why its rationale is illogical.

A. *Procedural History*

In the winter of 1996, Barbara Grutter, a forty-three year-old Caucasian resident of Michigan, claimed she was denied admission to the University of Michigan School of Law because accepted minority students were not held to the same academic standards as non-minority students.[31] Grutter filed suit against the Law School on Equal Protection grounds.[32] The Michigan district court sided with Grutter and invalidated the University's use of race in admissions because it was not narrowly tailored.[33] The Court of Appeals for the Sixth Circuit subsequently overturned this ruling, and in 2003, the United States Supreme Court granted certiorari.[34]

---

26. Grutter v. Bollinger, 539 U.S. 306 (2003) (challenging the perceived unfairness of white applicants' requirements to score higher on exams and have better grades than their minority counterparts, in order to gain admissions to selective universities); Bloom, *supra* note 14 (stating the Court's decisions clarify any confusion surrounding the use of race in admissions calculations when they repeatedly "placed a judicial stamp of approval on a relatively broad use of racial preferences by institutions of higher education").

27. *Grutter*, 539 U.S. 306.

28. *Id.* at 328–29 (permitting the use of race in order to enroll a "critical mass" of minority students towards the compelling state interest in creating a diverse student body).

29. *Id.* at 355 n.3 (Scalia, J., dissenting).

30. *Id.* at 308, 330.

31. *Id.* at 316 (stating Grutter had a 3.8 undergraduate grade point average and a LSAT score of 161 at the time of her application).

32. *Grutter*, 539 U.S. at 317 (arguing discriminatory use of race in violation of the Fourteenth Amendment, Civil Rights Act: Title VI, and 42 U.S.C. § 1981).

33. *Id.* at 306.

34. *Id.*

B. *Summary of Grutter*

By the time *Grutter* made its way to the Supreme Court, related issues had developed which the Supreme Court sought to address in *Grutter*.[35] Most importantly, the Court addressed the validity of Justice Powell's opinion in *Bakke*.[36] Also at issue was (1) which level of judicial scrutiny to apply to affirmative action programs in higher education,[37] (2) whether student body diversity is a compelling state interest,[38] and (3) whether the Law School's admissions policies were narrowly tailored to achieve a compelling interest of diversity.[39]

In summary, the majority opinion written by Justice O'Connor reaffirmed Justice Powell's opinion in *Bakke*, and the Court endorsed the use of race in the admissions process.[40] Further, the Court decided that: (1) strict scrutiny is required when examining the constitutionality of race-based admissions programs, though scrutiny should take into consideration a university's right to educational autonomy;[41] (2) diversity of a university's student body was a compelling state interest;[42] and, (3) the Law School's race-based admissions policies were narrowly tailored to its goal of creating diversity.[43]

C. *Why Is Diversity a Compelling Interest?*

The first major premise upon which the Court rested its decision in *Grutter* was that diversity, as an educational benefit, was a compelling state interest.[44] This means that the Court deems student body diversity

---

35. *Id.* at 325 (addressing whether Justice Powell's "diversity rationale" is precedent).

36. *Id.* (2003) ("In the wake of our fractured decision in *Bakke,* courts have struggled to discern whether Justice Powell's diversity rationale . . . is nonetheless binding precedent."). *Compare* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (declining to follow Justice Powell's opinion on diversity stating "Justice Powell's argument in *Bakke* garnered on his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case"), *with* Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1248 (2001) ("Simply put, Justice Powell's opinion does not establish student body diversity as a compelling interest for purposes of this case.").

37. *Grutter*, 539 U.S. at 325 (holding strict scrutiny is required to make classifications based on race).

38. *Id.* (holding the state has a compelling interest in obtaining diversity in higher education).

39. *Id.* at 334 ("We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan.").

40. *Id.* at 325.

41. *Id.* at 328.

42. *Grutter*, 539 U.S. at 328.

43. *Id.*

44. *Id.* at 325 (identifying benefits such as lively classroom discussions, a semblance of a workplace environment, and increasing the students likelihood of interactions with students from different backgrounds in an educational and social setting).

significant enough to justify the consideration of race in admissions policies to achieve that interest.[45] The Court's outlining of educational benefits supporting the state's compelling interest in diversity is sketchy at best.[46] In support of the need for diversity in higher education, the Court considered numerous amicus briefs,[47] which resulted in a convoluted definition of "diversity."[48]

Ultimately, the Court deferred to the University on the matter of whether or not diversity is a compelling interest.[49] Despite the strict scrutiny level of judicial review mandated by *Adarand Constr. v. Peña*,[50] Justice O'Connor decided that the Court was ill equipped to make "complex educational judgments."[51] Instead, the Court deferred to the University's own examinations and evaluations regarding the necessity of diversity of student body.[52] Not surprisingly, the University found that diversity was, indeed, a compelling interest for its mission.[53]

The obvious flaw in the procession of *Grutter* was that the Court did not strictly scrutinize the central issues of whether or not diversity is a

45. Adarand Constr., Inc. v. Peña, 515 U.S. 200 (1995) (overcoming even strict scrutiny to do so). The use of race in any governmental policy or program must be done pursuant to a compelling state interest. *Id.* at 227.

46. *Grutter*, 539 U.S. at 347 (Scalia, J., dissenting) ("I find particularly unanswerable his central point: that the allegedly 'compelling state interest' at issue here is not the incremental 'educational benefit' that emanates from the fabled 'critical mass' of minority students, but . . . Michigan's interest in maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude . . . minorities. If that is a compelling state interest, everything is.") (internal citations omitted); *id.* at 328 (deferring primarily to the institutes of higher learning for a determination of whether diversity is important to their organizations).

47. *Id.* at 330 (influencing the Court were amicus briefs from 3M, General Motors Company, the U.S. Army, and several higher educational institutions).

48. *Id.* at 330–32 (presenting numerous conflicting ideas in reliance upon the amicus briefs). *Compare id.* at 333 ("The Law School does not premise its need for a critical mass on any belief that minority students always express some characteristic minority viewpoint on any issue.") (internal quotations omitted), *with id.* at 333 ("Just as growing up in a particular region . . . is likely to affect an individual's views, so too is one's own unique experience of being a racial minority in society . . . ."), *and id.* at 300 ("[S]tudies show that student body diversity . . . better prepares students for an increasingly diverse workforce and society . . . .").

49. *Id.* at 308, 329.

50. Adarand Constr., Inc. v. Peña, 515 U.S. 200 (1995).

51. *Grutter*, 539 U.S. at 308, 328.

52. *Id.* ("Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.").

53. *Id.* at 308, 333 (finding a critical mass of minority students a requisite of diversity in higher education).

compelling interest,[54] and whether the University's policies were narrowly tailored to achieve diversity[55] — as was required by *Bakke* and *Adarand*.[56] Justice O'Connor recognized this flaw and justified the Court's decision to grant deference to the University by asserting the University's First Amendment right to "educational autonomy."[57] Grounded in the First Amendment, this right to educational autonomy grants universities the right to be free from governmental intrusion when making academic decisions.[58] The right was first mentioned in Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*[59] and was again brought to the forefront in *Bakke*.[60] Educational autonomy was used in *Bakke* to justify the right to choose the makeup of a student body.[61] In *Grutter*, educational autonomy served as a basis for deference to universities in all academic decisions.[62] Quoting Justice Powell, Justice O'Connor reasserted the holding in *Bakke* that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body,"[63] and "the right to select those students who will contribute the most to the robust exchange of ideas . . . seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission."[64]

Thus, the *Grutter* court weighed a university's First Amendment right to educational autonomy against the need to scrutinize academic decisions on equal protection grounds, concluding that the right to educa-

---

54. *Id.* at 354 (Thomas, J., dissenting) ("Unlike the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination.").

55. *Id.* at 334 (providing mere lip service to the "narrowly tailored" prong of the constitutionality analysis of the admissions policy).

56. Adarand Constr., Inc. v. Peña, 515 U.S. 200 (1995); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

57. *Grutter*, 539 U.S. at 329; *see also* Paul Horowitz, Grutter's *First Amendment,* 46 B.C. L. REV. 461, 464–65 (2005) (implying the First Amendment right to educational autonomy should not be left unwatched because this empowers universities to regulate speech, provide biased funding, and reinstitute publicly supported single-sex schools based on academic grounds).

58. Horowitz, *supra* note 57.

59. 354 U.S. 234, 262 (1952) (Frankfurter, J., concurring) (arguing Sweezy, a professor at the University of New Hampshire, should have escaped conviction for the content of his class lectures under the right to education autonomy).

60. *Bakke*, 438 U.S. at 312.

61. *Id.* ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment . . . includ[ing] the selection of its student body.").

62. *Grutter*, 539 U.S. at 328.

63. *Id.* (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).

64. *Id.* (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)) (internal quotations omitted) (alterations in original).

tional autonomy lowers the need for scrutiny[65] — although the Court maintains that strict scrutiny is still the standard.[66] Foreseeing the backlash of arguments claiming that the Court did not properly scrutinize and weigh the compelling need for diversity, the Court declared in its own reasons why diversity is a compelling state interest. Accordingly, the Court held that diversity is a compelling interest because it: (1) promotes "cross-racial understanding,"[67] (2) helps to "break down racial stereotypes,"[68] and (3) creates livelier classroom discussions.[69] These holdings somewhat undercut O'Connor's decision to grant the University deference on the issue of whether diversity is a compelling interest.[70] As one noted professor questioned, why does the Court, stating it lacks the competence to make "complex educational judgments," give deference to the University on the issue, but then later "actively endorse[s] the education benefits of diversity[?]"[71] Nonetheless, the Court ultimately holds that "the educational benefits that flow from a diverse student body" are a compelling state interest.[72]

D. Grutter's *Main Problem – What Type of Diversity?*

Unfortunately, the cheery picture of diversity painted by the Supreme Court in *Grutter* is a mirage. Though clearly acting with good intentions, the Court did not reach the result it sought to accomplish. Simply put, the Court wanted universities to enhance classroom diversity by allowing them to enroll as many different ethnicities as possible.[73] However, *Grutter* does not create such diversity.

---

65. Bloom, *supra* note 14, at 468 (questioning whether the Court has "effectively dropped the standard of review from strict scrutiny to rational basis review" in instances where an issue is of educational need).

66. *Grutter*, 539 U.S. at 326 (stating further that strict scrutiny will be applied to all racial classifications, as "strict scrutiny is not 'strict in theory, but fatal in fact'") (quoting Adarand Constr., Inc. v. Peña, 515 U.S. 200, 237 (1995)).

67. *Id.* at 330.

68. *Id.*

69. *Id.* (implying a diverse background is best created by the enrollment of racial minorities).

70. *See* Bloom, *supra* note 14, at 467 (explaining that a critical reading of *Grutter* shows "an inability or unwillingness [by the Court] to define the state's purported interest with precision").

71. *See* Horowitz, *supra* note 57, at 499.

72. *Compare* Grutter v. Bollinger, 539 U.S. 306, 326–30 (2003) (majority opinion) (stating diversity is itself a compelling interest), *with id.* at 347–349 (Thomas, J., dissenting) (clarifying his position that a diverse student body was not a compelling interest, but the educational benefits that flowed from diversity was).

73. *Grutter*, 539 U.S. 306 (majority opinion) (focusing on "race" as the primary factor for diversity). It is important to note that the *Grutter* opinion does not prominently mention "ethnicity," but rather focuses on "race" as the primary factor for diversity. The pre-

Despite the fact that the Court recognized many of the imperfections of using "race-based" admissions programs (especially how they could possibly harm those not classified as an underrepresented minority) and required that race-based admissions programs sunset in approximately twenty-five years,[74] the Court overlooked the fact that racial classifications themselves are far too broad to be narrowly tailored to achieve a diverse student body.[75] Most notably, the Court failed to consider the fact that, under the university's classifications of race, several underrepresented ethnicities, such as Arabs,[76] would be harmed by being captured as a subgroup of the sufficiently represented "Whites" and "Asians."[77] This notion is illustrative of the fact that the Court never questioned whether the policy at issue *actually* accomplished what the Court thinks it set out to accomplish. Instead, deference was granted to the university to determine whether its policy was narrowly tailored to achieve its goal of diversifying its student body.[78] In accepting these unadjudicated claims, the Supreme Court failed to scrutinize the racial classifications themselves and allowed an unconstitutional policy to avoid inspection. If race is used, as it is defined and used by the University of Michigan Law School,[79] it will not produce the diverse student bodies envisioned by the Court. Further, the Law School's policy cannot be nar-

---

mise of my argument is that the "racial diversity" that the Court was talking about is better understood as "ethnic diversity." Race-based classifications do not provide the high-level of diversity that ethnic-based classification do, because they are overly broad. The factors of diversity, which the Court emphasized in the opinion, cannot be captured through use of "race" as the University of Michigan has classified race. I believe the Court sought ethnic diversity. Section IV, *infra,* provides a more detailed discussion about the difference between race and ethnicity.

74. *Id.* at 342 (majority opinion) (stating its desire that race-based admissions would no longer be needed to ensure meaningful numbers of minorities in student bodies).

75. *See id.* at 328 (deciding affirmatively not to review the classifications instead granting deference to the University and leaving wide open the possibility of limiting its application to certain underrepresented minorities).

76. Arabs may or may not be an underrepresented minority. Currently, there is insignificant data available to evaluate this assumption — mostly because universities do not keep count of Arab students as a separate ethnic group. Thus, Arab-American students are usually grouped with either "White," "Black," or "Asian" depending on what country they are from and which race they can ethically choose. For instance, Egyptians will likely choose African-American, while Afghans may wish to choose Asian or White. The point is that there is no way of knowing if Arab ethnicity is sufficiently represented unless they are actually accounted for in a student body.

77. Sarah C. Zearfoss, *Admissions of a Director,* 30 HASTINGS CONST. L.Q. 429, 439 n.31 (2003) (explaining that the University of Michigan Law School classifies "Arabs" as "Whites" in the admissions process).

78. *Grutter*, 539 U.S. at 328.

79. *See* Zearfoss, *supra* note 77.

rowly tailored to achieve diversity if it intentionally discriminates against certain underrepresented minority groups.[80]

The Court, in accepting the university's justification for the need for diversity, focused on several interests that cannot be accomplished through the University of Michigan Law School's classifications of race. Specifically, it can be inferred from the opinion that the Court's definition of diversity incorporated both physical and mental components.[81] The Court envisioned a classroom filled with students that look and think differently, but also share common ideals.[82] The use of over-encompassing and broadly defined "racial" classifications by the Law School does not promote this diversity.

1. Visible Diversity

The Court stated that the aim of diversity was to breakdown racial stereotypes,[83] pointing to the fact that it was looking for something more than a "characteristic minority viewpoint"[84] indicates that the Court believes diversity is accomplished by creating a student body that includes minorities who are physically and visibly different, but share common views with majority students.[85] The goal is that cross-ethnic understanding will be accomplished when people of different ethnicities see that, despite their visible differences, they have similar viewpoints. Ultimately, this shows students that perceived physical, biological, or background differences are not indicative of a person's true self.

---

80. *Id.* (accordingly and unfortunately, statistics on Arabs and Southeast Asians are not compiled (or at least not published) by the University of Michigan). Therefore, we do not even know for certain if such ethnic groups are being actually underrepresented or not. What is known, however, is that these groups are highly disadvantaged in society either through discrimination (which is the case for Arabs) or because of economic conditions (which is the case of Southeast Asians), and thus, *it would be expected* for them to have lower representations in universities. Regardless of the lack of statistics, the point still applies that the University of Michigan cannot possibly narrowly tailor their admissions policies to achieve minimal discrimination if they do not even recognize the groups which potential targets of discrimination by their policies.

81. *Grutter,* 539 U.S. at 330 (explaining ideologies expressed by those who are part of the "critical mass" create livelier discussions, dissolve stereotypes, and remedy the effects of past race-based discrimination; preparing students for a marketplace of widely diverse people, culture, ideologies and viewpoints).

82. *See id.*

83. *Id.*

84. *Id.* at 333 (stating the law school did not premise its need for increased minority enrollment on a specific belief of stereotypical views held by minorities).

85. Bloom, *supra* note 14, at 472 ("As far as the reader can tell from the Court's opinion, the educational benefits that result in a compelling state interest flow all but exclusively from racial as opposed to viewpoint-oriented diversity.").

In accepting this rationale, the Court assumed that students of minority "races" are visibly different from the students of majority "races." However, the goal of breaking down racial stereotypes cannot be accomplished unless a majority student actually knows she is in the presence of a minority student. It is utterly incorrect to assume that because a person is classified as a different race by the archaic racial classifications, they are necessarily visibly different from majority students. This is not a documented notion, but rather just common knowledge that certain persons of each of the underrepresented races (Blacks, Latinos, and Native Americans) may be "white" in appearance.[86] Of course, this is not a reason to deny those students access to affirmative action but, rather, that these people do not fit into the framework of diversity envisioned by the Court. After all, as both Justice O'Connor and Justice Powell mentioned, the use of race-based admissions programs can only be justified through its benefits to the educational process as a whole, and not on the basis that it helps the minority student who benefits from affirmative action.[87]

Considering these facts, under the first component of *Grutter's* diversity definition, a person receiving a 'plus' in a race-based admissions program should be significantly different *in appearance* from the average majority student. Discussed in Section IV below, the University of Michigan's racial classifications lack the precision to separate those people who are and are not visibly different from the majority within each racial category. Thus, on the first component of diversity, the Law School's race-based admissions program is not narrowly tailored to achieve a student body that has visibly different students with similar viewpoints.

2. Viewpoint Diversity

Despite apparently relying on visible differences as the benchmark for achieving a diverse student body, the Court proceeded to imply that there is also a mental or *viewpoint* component to diversity.[88] Specifically, the opinion points to amicus briefs from several United States companies

86. The criterion for determining what constitutes "white appearance" is, obviously, subjective. A discussion on the topic is beyond the scope of this note. However, I *do not believe* that it would be an unreasonable stretch to state that Mariah Carey, Ricky Martin, and Val Kilmer who are, under the University of Michigan's definitions, Black, Hispanic, and Native American, respectively, are "white" in appearance.

87. *See generally* Grutter v. Bollinger, 539 U.S. 306, 316 (2003) ("[T]he policy seeks to guide admissions officers in 'producing classes both diverse and academically outstanding . . . .'"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 267 (1978) ("[T]he goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances . . . .").

88. *See Grutter,* 539 U.S. at 330–31 (developing the idea that marketability requires exposure to other's ideas and viewpoints).

which state that "the skills needed in today's increasingly global marketplace"[89] *can only* be attained by being part of a diverse student body.[90] In summarizing these briefs, Justice O'Connor opines that a diverse student body is important to education, in general, because it gives students "exposure to widely diverse people, cultures, ideas, and viewpoints."[91] Although, this position somewhat contradicts the opinion's later conclusion,[92] it shows that the Court's awareness of traditional viewpoints associated with certain minority groups are also an important aspect of creating a "diverse" student body.[93] Unfortunately, this position is problematic on two grounds. First, it assumes that stereotypical viewpoints exist amongst "racial" groups. Second, in order for the first assumption to be correct, it must also be assumed that the "racial" groups utilized by the Law School are so similar that the entire group likely shares in the stereotypical viewpoint. Because this assumption ignores the inherent diversity amongst sub-groups in each of the university's racial classifications,[94] the opinion contains a second major flaw and allows for the existence of University of Michigan's still-unconstitutional admissions program.

Viewed in the aggregate, the visible/physical and viewpoint/mental elements of the Court's "diversity" create an interesting and complex set of characteristics that dictate whether or not a person will diversify a university's student body. Based on *Grutter,* the most diversifying minority is one who (1) is very much different in appearance than majority stu-

---

89. *Id.*

90. *See* Brief for 65 Leading American Businesses as Amicus Curiae Supporting Respondents at 5–8, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399056 (listing four distinct characteristics possessed exclusively by those who are educated in a diverse environment); Brief for General Motors Corp. as Amicus Curiae Supporting Respondents at 3–5, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399096 (arguing academic institutions are charged with preparing future business leaders with essential skills in dealing cross-culturally; further, students acquire this competence when the academic environment is multicultural and multiracial).

91. *Grutter*, 539 U.S. at 330 (citing Brief for 65 Leading American Businesses as Amicus Curiae Supporting Respondents at 5–8, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399056).

92. *Id.* at 333 (discussing that a diverse student body does not require characteristic minority viewpoints).

93. *Id.* ("[A] 'critical mass' of underrepresented minorities is necessary to further [the Law School's] compelling interest in securing the education benefits of a diverse student body.").

94. *See id.* at 375 n.2 (2003) (Thomas, J., dissenting) ("A relative preference awarded to a black applicant over, for example, a similarly situated Native American applicant, does not lead to the enrollment of even one more underrepresented minority student, but only balances the races within the critical mass.") (internal quotations omitted) (arguing a system that only looks at majority versus minority, ignores the distinctions between the competing minorities).

dents,[95] (2) is similar to majority students,[96] and (3) also shares in some stereotypical minority viewpoint.[97] Further, the least diversifying minority is one who (1) has a "white" appearance and (2) does not share in any stereotypical minority viewpoints. A narrowly tailored race-based admissions program[98] must take into account this range of diversity if it is to be the least intrusive means to ensure diversity.[99] The Law School's program does not take into account these crucial diversity factors[100] and is not, therefore, the least intrusive means of accomplishing the diversity accepted by the Court.[101] Thus, if the Court would have scrutinized the University's racial classifications, it would have found that under Justice O'Connor's rationale in *Grutter*, the Law School's admissions program should have been rejected as not narrowly tailored to achieve the diversity envisioned by the Court.[102]

E. *The State of the Law*

Before detailing why the racial classifications used by the University of Michigan are, themselves, unconstitutional, it is necessary to summarize the current state of affirmative action in higher education since *Grutter*.[103] First, a university may consider the applicants' race as a "plus"

---

95. *Id.* at 381–83 (Rehnquist, C.J., dissenting) (distinguishing persons who are admitted solely because of designations such as Native American, African American, Caucasian, etc.).

96. Grutter v. Bollinger, 539 U.S. 306, 313 (2003) (majority opinion) (finding both minorities and non-minorities needed to be the most capable and academically qualified students).

97. *Id.* at 329 (majority opinion) (finding students from a minority background "will contribute the most to the robust exchange of ideas").

98. Adarand Constr., Inc. v. Peña, 515 U.S. 200, 227 (1995) ("[S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

99. *Grutter*, 539 U.S. at 313 (Rehnquist, C.J., dissenting) ("[R]espondents must demonstrate that their methods of using race 'fit' a compelling state interest with greater precision than any alternative means.") (internal quotations omitted) (arguing the procedures used by the University of Michigan Law School fail to meet the narrowly tailored requirement of strict scrutiny).

100. *Id.* at 306 (majority opinion) (recognizing the greater definition of diversity includes aspects other than race, but stating that race is a factor of special reference for enrollment).

101. *Id.* at 379 (Rehnquist, C.J., dissenting) ("Stripped of its "critical mass" veil, the Law School's program is revealed as a naked effort to achieve racial balancing.") (explaining an admissions program that is narrowly tailored would take into account factors enhancing one's diversity, other than race).

102. *Id.* (Rehnquist, C.J., dissenting) ("I do not believe, however, that the University of Michigan Law School's . . . means are narrowly tailored to the interest it asserts.").

103. *Grutter*, 539 U.S. 306 (majority opinion).

factor in determining whether a minority candidate should be admitted[104] because the educational benefits that flow from diversity are a compelling state interest.[105] Second, universities may attempt to achieve a "critical mass" of minority students to ensure that they do not experience isolation or feel as if they are a representative of their race.[106] Third, in order to accomplish these goals, however, a university must narrowly tailor its program to take into account all relevant diversifying factors, and make the application process *individualized to every applicant.*[107] Fourth, universities must consider race-neutral alternatives prior to implementing a race-conscious policy,[108] though the university need not sacrifice its academic reputation.[109] Finally, universities have been awarded a great deal of deference in forming their admissions policies, and, in the absence of bad faith on the part of the university, the Supreme Court vowed to refrain from interference in academic judgments.[110]

IV. RACE: AN IMPRESSION SELF-IDENTIFIER

A. *Good Faith Does Not Alleviate Impermissible Discrimination*

The Court's deference to the University of Michigan was based upon a key assumption in *Grutter*.[111] That is, the Court assumed the university was acting in good faith in determining whether diversity is compelling and whether it was created through the least discriminatory methods.[112] Further, the Court assumed that good faith would cure the improper discriminatory element of affirmative action policies.[113]

Unfortunately, the Court did not take into account the fact that the university could act in good faith in constructing its race-based admis-

104. *Id.* at 330–31, 341 (explaining that programs seeking to promote diversity of the student body must not use race as the exclusive factor in evaluations).

105. *Id.* at 328 (relying primarily upon the arguments made in the amicus briefs).

106. *Id.* at 319.

107. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317–18 (1978) (discussing that the applicant who loses his seat will not have a Fourteenth Amendment claim if the candidates were evaluated using qualities such as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion . . . or other qualifications deemed important").

108. *See Grutter*, 539 U.S. at 340 (considering whether the Law School attempted race-neutral policies prior to a race-based to establish a "critical mass" of minority students).

109. *Id.* (stating the Law School need not attempt a lottery system as a race-neutral program for acceptance because such a sacrifice of academic integrity would be too great).

110. *See id.* at 328.

111. *Grutter*, 539 U.S. 306.

112. *See id.* at 328–29 ("'[G]ood faith' is 'presumed' absent 'a showing to the contrary.'") (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978)).

113. *See id.* at 329.

sions program, but still not create a constitutionally permissible program.[114] Even policies that do not cause intentional racial discrimination can be unconstitutional under true strict scrutiny analysis.[115] The University of Michigan Law School's admissions policies fit this category.

In sum, the Law School's race-based admissions policies are intentionally and permissibly discriminatory towards whites and sufficiently represented minorities, but, more importantly, the policies have an *unanticipated* and *impermissibly* discriminatory effect on many underrepresented minorities, such as Arabs and Southeast Asians. Such minorities may never reach a critical mass if universities continue to use obsolete racial classifications. Thus, current racial classifications work against the goal of diversity because they provide admissions staffs with imprecise and incorrect data regarding the identity of applicants.

The next section of this articles will discuss the various harms caused by the use of poorly defined racial classifications in admissions, beginning first with an examination of what "race" is for legal and policy-related purposes.

B. *What Is Race?*

Posing and then trying to answer the question "what is race?" in a legal paper may seem somewhat absurd. Most people already have a general understanding of what race is, at least at a basic level. However, when it becomes necessary to define race for the purpose of classifying people in public policy, a general understanding does not suffice. Moreover, this article advocates a shift away from less-precise classifications of race in favor of more precise ethnic classifications. Since many (if not most) people use the two terms interchangeably, it is imperative to define and differentiate the two concepts before making judgments or arguments.

1. Race - Defined

Merriam-Webster's Dictionary defines "race" as "a family, tribe, people, or nation belonging to the same stock . . . a class or kind of people unified by shared interests, habits, or characteristics . . . category of humankind that shares certain distinctive physical traits."[116] The Encyclo-

---

114. *See id.* at 383 (Rehnquist, C.J., dissenting) ("[T]he percentage of the admitted applicants who are [minorities] [are] far too precise to be dismissed as merely the result of the school 'paying some attention to [the] numbers.'") (some alterations in original) (hinting at possible 'bad faith' because the University of Michigan Law School had suspiciously admitted approximately the same percentage of minorities that applied every year for the past twenty years, raising questions about an underlying quota for minorities).

115. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (striking down an unintentional policy as a violation of the Equal Protection Clause).

116. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1024 (11th ed. 2003).

pedia Britannica explains that race, today, is "primarily a sociological designation, identifying a class sharing some outward physical characteristics and some commonalities of culture and history."[117] These two sources are mere illustrations of the varying definitions one would encounter when asking the question "what is race?" Race was originally thought to be an immutable biological characteristic by Europeans[118]a set of behavioral and physical traits biologically and genetically associated with a group of people.[119] This theory has since been disproved through modern anthropological and genetic studies which demonstrate that race is actually not a biological feature,[120] but rather an artificial sociological designation used to identify a class or group sharing similar physical or cultural characteristics.[121] In other words, a "black" person's descendants may become "white" as it is defined today, through select breeding choices of the descendants — contrary to the early European view.[122] This artificiality is significant to affirmative action because, if the classifications are not absolute and can change to encompass more diversity, universities that strive to diversify their student body should move away from the old racial classifications. A historical examination of the development of the concept of race will illustrate how the racial classifications that the University of Michigan uses are not set in stone and should be disposed of in favor of more accurate ethnic descriptors.

2. The Historical Development of "Race"

The concept of "race" can be traced back to Ancient Greece and Aristotle's doctrine of "Predicables of Genus, Species, Difference, Property, and Accident."[123] Race, at that time, was a concept of convenience used to explain diversity among the human species.[124] For the next several centuries, the common belief was that the different races that existed in the world were entirely different species of man.[125] François Bernier is widely acknowledged as the first author to use "race" to classify human

117. ENCYCLOPEDIA BRITANNICA ONLINE, *supra* note 4 (search "race and ethnicity").

118. *Id.* (identifying one by race according to physical traits and behavior transmitted by generations of persons).

119. *Id.* (specifically identifying one by "skin color, head shape, and hair texture").

120. *Id.* (accepting the view that rather than race being biological, it is likely influenced by differences in geographic location).

121. *Id.*

122. ENCYCLOPEDIA BRITANNICA ONLINE, *supra* note 4 (search "race and ethnicity") (explaining studies have determined all groups of persons are "thoroughly mixed" genetically, and thus race does not exist on a biological level).

123. MONTAGU, *supra* note 1, at 3.

124. *Id.*

125. *Id.* (discussing that during the mid-1700s, race was used to distinguish between the "six groups of man").

variety according to physiognomy and skin color.[126] Without ever distinguishing race from species, in his 1684 essay *A New Division of the Earth*, Bernier divided humans into four groups: Europeans (including South Asians and Native Americans), Far Easterners, Sub-Saharan Africans, and Lapps (the indigenous people of Scandinavia).[127] The first *direct* reference to race can be traced back to 1735, when Carolus Linnaeus, the father of scientific classification, took the Class, Species, and Genus concepts from theologians and used them as systematic tools.[128] Yet it was not until 1749 when the first literary definition of race was written by heralded French scientist Georges-Louis Leclerc Comte de Buffon.[129]

Finally in 1775, the human species was first scientifically divided into races by Johann Blumenbach.[130] Blumenbach separated humans into Caucasians/whites, Mongolians/yellows, Malayans/browns, Negros/blacks, and Americans/reds, based on the size of their skulls.[131] The Blumenbach classifications eventually evolved into Caucasoid, Mongoloid, and Negroid[132] in the nineteenth century, after scientists found little difference between Blumenbach's Malays, Mongolians, and Americans (which became Mongoloids, collectively).[133] Thus, the prevalent view heading into the twentieth century was that the human species was comprised of three main biologically determined races — Caucasoids, Negroids, and Mongoloids — with a few varieties of smaller sub-races.[134]

3. Modern View of Race

The views stated above have since been discredited scientifically. As early as 1784, many scientists had already rejected the notion that distinct races exist in a biological sense.[135] Unfortunately, modern racial classifications seem to be based upon these erroneous, and often racist, views of the eighteenth and nineteenth century scientists. The idea that race was

126. François Bernier, *A New Division of the Earth*, J. DES SCAVANS (1684) (translated by T. Bendyshe, Memoirs Read Before the Anthropological Society of London) (separating man into four or five species based primarily upon skin color).

127. *Id.*

128. MONTAGU, *supra* note 1, at 123.

129. *Id.*

130. *Id.* at 2 (recognizing the potential for problems with the use of race, he recommended its use for convenience only).

131. *Id.*

132. *Id.* at 174.

133. MONTAGU, *supra* note 1, at 174.

134. *Id.* U.S. anthropologist Carleton Coon added two additional races Australoid and Capoid to the three existing races to create the prevalent view of the early 20th century. *Id.* However, Coon has been widely discredited as being a racist. *Id.*

135. *Id.* at 2.

biologically determined remained popular for decades after and is still a common misconception in modern society.

Today, it is generally accepted by most biologists that race does not exist from a biological standpoint,[136] and it has no biological status.[137] There is simply not enough genetic diversity between any two people in the world to distinguish them biologically the way you could for other species.[138] The distinctions between the five "classic races" occurred as a result of *Homo sapien* mutation, selection, adaptation, migration, and isolation of humans as they spread out across the globe.[139] Descendants of the Early Man "developed different skin colours and other traits which, over a long period of time, became the racial characteristics we see today."[140] In other words, the diversity we see today, and often call race, is not the result of Africans, Asians, or Caucasians descending from different species.[141] Rather, most biologists now are in agreement that all humans came from one common Homo sapien ancestor, and that the diversity that we see amongst humans is the result of adaptation to environmental stimulus by certain groups of people migrating away from the central population and inbreeding.[142] In fact, Dr. Alan Templeton, a biology professor at Washington University in St. Louis, discovered that, genetically, people are much more similar based on their geographic location than based on their physical appearance.[143] Nearly every trait associated with a race can be linked to an environmental stimulus.[144] For

136. *See* David L. Wheeler, *A Growing Number of Scientists Reject the Concept of Race*, 1995 CHRON. HIGHER EDUC. 1 ("[R]ace is a myth [and] scientifically outmoded way of classifying people.").

137. MADAN SARUP, IDENTITY, CULTURE, AND POSTMODERN WORLD 171 (1998).

138. ENCYCLOPEDIA BRITANNICA ONLINE, *supra* note 4 (explaining genes are "thoroughly mixed" and are not distinguishable by race).

139. UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG., WHAT IS RACE? EVIDENCE FROM SCIENTISTS 10 (1952) (speculating that all *homo sapiens* evolved from one cell, named from the places they are found).

140. *Id.* at 13.

141. *Id.* at 11 ("[A]ll men living today belong to one single species, *Homo sapien*, and are derived from a common stock.").

142. *Id.* at 12 (basing this view upon the bone structure, internal organs, and nervous system which are all similarly shared by all human beings).

143. Tony Fitzpatrick, *Evolutionary Biologist: Race in Humans a Social, Not Biological, Concept*, WASH. UNIVERSITY IN ST. LOUIS NEWS & INFO. 1 (May 30, 2003) [hereinafter *Evolutionary Biologist*], http://news-info.wustl.edu/tips/page/normal/184.html (statement of Dr. Templeton) ("[L]et's say you have a person from Micronesia who needs a transplant. These are people who have dark skin and resemble western Africans. Yet genetically the Micronesian is closer to a European than he is to an African .... [S]kin color here is not a reliable indicator .... It's actually more important to find out a geographical ancestry than a donor's skin color.").

144. *See* Lecture Notes: What is Anthropology, http://www.unm.edu/~oberling/modhumbi.htm (last visited Oct. 6, 2006).

example, dark skin is attributed not to being African, Indian, or Australian, but because proximity to the equator and hot climates causes skin to darken, and over time dark skin will become a dominant trait in that group's gene pool.[145]

Fortunately, the world has made significant progress in recognizing that people do not exist in three to five simple and discrete races.[146] Yet for some reason, most Americans continue to acquiesce to being classified by an archaic five-race standard. The standard has been engrained in people's minds so strongly that it is nearly impossible to do away with it without completely re-educating the entire world on the recent race-related scientific findings that prove that three to five distinct races do not exist.[147] This relates to the Court's analysis in *Grutter*[148] because it does not seem as though the Supreme Court took into consideration the meaning of race and racial diversity when the case was decided. The fact that race and ethnicity has been used in tandem or interchangeably by the University in its briefs, court filings, and, most importantly, its documented admissions policy[149] indicates that the University equates the two as a unitary concept, and, while they may be striving for quantifiable ethnic diversity, they are accomplishing some sort of arbitrary "racial" diversity.[150]

The subsequent section of this article will discuss the legal concept and basis behind the racial classifications used by the University of Michigan.

C. *The Legal Concept of Race*

Race, as discussed in previous sections of this article, is not only an important anthropological and social concept;[151] it is also an extremely important legal concept.[152] Race was mentioned or alluded to in some of

---

145. *See* UNITED NATIONS EDUC., *supra* note 139, at 13 (indicating the geographical migration has affected the skin color variations created after the *homo sapiens* origin from Early Man); Lecture Notes, *supra* note 144.

146. *See, e.g.*, MONTAGU, *supra* note 1, at 62 (standing for the proposition that the term race is obsolete).

147. *See id.* at 60–70 (1963) (discussing the problem with the misuse of the term race, when the word ethnic group is correct, since there is no such thing as race).

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

149. DON HERZOG ET AL., REPORT AND RECOMMENDATIONS OF THE UNIVERSITY OF MICHIGAN ADMISSIONS COMMITTEE (1992), *available at* http://www.umich.edu/newsandinfo/lawsuit/admissionspolicy.pdf.

150. *Id.* (outlining a commitment to "racial" and "ethnic" diversity in the student body, specifically of three "races" who would not otherwise be represented adequately in the student body, and who likely have special experiences and perspectives).

151. MONTAGU, *supra* note 1, at 60–65.

152. HERZOG ET AL., *supra* note 149 (showing when the Court is not accurate in its use of "race" the result is misuse of "race" to create diversity in admissions programs).

the United States' first legal documents, including the Constitution,[153] and has been used in policy decisions throughout the nation's existence. The first races recognized by the federal government were "[w]hites," "American Indians," and "[s]laves," as categorized by the 1790 United States Census Bureau.[154] The mass influx of immigrants throughout the nineteenth and twentieth centuries caused subsequent censuses to include new classifications that took into account nationalities, ethnicities, and religion.[155] In fact, throughout this time, the United States changed its racial categories in nearly every census. Since 1900, twenty-six different racial categories have been used in various censuses, including Hindus (religions), South, East, and Central Europeans (ethnicities), and Italians and Irish (nationalities).[156] It is difficult to understand that, despite exponential increases in immigration and interracial marriages, agencies and institutions actually use *fewer* racial designations in classifying people than they did the 1950s and 60s.

Until the 1960s, exact or uniform racial distinctions and categories were not all that important to the federal government. Racial classifications were used initially as a means to discriminate and divide populations in the United States.[157] When racial classifications are used to arbitrarily discriminate, clear definitions are not required. However, after the civil rights movement of the 1960s and the development of federal affirmative action programs, the need for standard racial classifications became essential to the success of race-based government programs.[158] Thus, in 1975, after several years of confusion over who qualified for race-based government assistance, the Federal Interagency Commission on Education ("FICE") formed an Ad Hoc Committee on Racial and Ethnic Defi-

153. *See* U.S. CONST. art. I § 2 cl. 3 (stating that slaves count as three-fifths of a person for purposes of apportioning votes).

154. JUANITA TAMAYO LOTT, ASIAN AMERICANS: FROM RACIAL CATEGORY TO MULTIPLE IDENTITIES 17 (1997) (analyzing the origins of group classification in the United States).

155. *Id.* at 18.

156. *See* Campbell Gibson & Kay Jung, Historical Census Statistics On Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For Large Cities And Other Urban Places In The United States (U.S. Census Bureau, Working Paper No. 76, 2005).

157. *See* TAMAYO, *supra* note 154 (using race to exclude persons from full citizenship).

158. *Id.* at 32. For instance, the Voting Rights Act of 1965 required racial identification of persons within specific geographic locations to determine whether voting discrimination was occurring. *Id.* Further, several of the government agencies that utilized race-based programs to combat past discriminations did not even have policies, standards, or methods to collect racial data. *Id.* Among these agencies were the Department of Transportation and the Veterans Administration. *Id.*

nitions ("Committee").[159] The Committee's purpose was to develop "an integrated scheme of terms and definitions, conceptually sound, which can be applied to cover major categories of race and ethnicity and can be used by all agencies to help meet their particular data requirements."[160] The five original categories proposed by the FICE were "American Indian or Alaskan Native, Asian or Pacific Islander, Black/Negro, Caucasian/White, and Hispanic."[161] The Committee considered other categories but passed upon the chance to expand, in favor of brevity and simplicity.[162] For example, having an "Other" category was contemplated but ultimately rejected because most committee members believed that it would complicate surveys.[163] Also, the committee decided a category for Asian Indians was unnecessary because they were close enough to Caucasians that they could (and would have to) choose "white" as their race.[164] And so, after thorough discussion and debate through the Ad Hoc Committee, FICE developed America's first standards for classifying races, and recommended that the Office of Management and Budget ("OMB") promulgate these categories as the standard for all federal agencies.[165] These FICE standards ended up becoming the ancestor to all other governmental racial classifications that have followed.[166]

1. Directive 15

In 1978, the OMB released Statistical Directive 15, "Race and Ethnic Standards for Federal Statistics and Administrative Reporting" ("Directive 15").[167] The purpose of Directive 15 was to collect and use "compati-

159. *See id.* at 38.

160. *Id.* 38–39 (citing Fed'l Interagency Comm. on Educ. 20 (1975)).

161. *Compare id.* at 38, *with* HERZOG ET AL., *supra* note 149; Law School Admissions Council, http://www.lsac.org (comparing the "races" created by the Federal Interagency Committee on Education and the University of Michigan Law School and the Law School Admissions Council).

162. TAMAYO LOTT, *supra* note 154, at 39.

163. *Id.* (citing Federal Fed'l Interagency Comm. on Educ. 11–12 (1975)).

164. *Id.* at 39–40 (citing Fed'l Interagency Comm. on Educ. 20 (1975)) (deciding the regionalized discrimination against Asian Americans dispelled the need to protect them through categorization).

165. *Id.* at 39 (announcing the creation of an "integrated scheme of terms and definitions, conceptually sound which [could] be applied to cover major categories of race and ethnicity and can be used by all agencies to help meet their particular date requirements" (quoting Fed'l Interagency Comm. on Educ. 20 (1975))).

166. *Id.* at 45 (stating the OMB continued using the four categories of race, with few minor alterations, including the addition of the "other" category).

167. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, RACE AND ETHNIC STANDARDS FOR FEDERAL ADMINISTRATIVE REPORTING, Stat. Dir. No. 15, 43 Fed. Reg. 19, 87 (May 4, 1978) [hereinafter STANDARDS FOR FEDERAL ADMINISTRATIVE REPORTING], http://www.whitehouse.gov/omb/fedreg/directive_15.html; *See, e.g.,* 66

ble, non-duplicated, exchangeable racial and ethnic data by Federal agencies."[168] What was essentially created to dictate the use of race in federal agencies has been used to provide standards in affirmative action programs.[169] Thus, Directive 15 is critical to the analysis of *Grutter*,[170] because the Law School's racial classifications descended from Directive 15.[171]

In establishing Directive 15, the OMB adopted the FICE recommended classifications with the following changes: (1) the terms "Caucasian" and "Negro" were dropped and (2) Asian Indians were moved from the "Whites" category to the "Asians" category after persuasive lobbying from Association of Indians in America.[172] This initial version of Directive 15, however, was severely flawed because it lacked the complexity to encompass the new demographics of 1980s America. First, Directive 15 lacked clear definitions for each of its racial groups and so several of the newer ethnic populations in the United States simply did not know to which race they belonged.[173] Second, it did not take into account the large multi-racial populations that emerged in the 1980s; there was no multi-racial or bi-racial category.[174] Third, as one analyst noted, the Directive 15 racial classifications contained "significant problems in their construction and meaning" because of their lack of uniformity.[175] Specifically, White and Asian classifications are defined by location of ancestors, Native Americans are defined by "affiliation or community recognition,"[176] Hispanics are defined by culture, and Blacks are defined

---

Fed. Reg. 12923 (Mar. 1, 2001) (reciting the Office of Management and Budget is a body within the Executive Branch, with the primary task of coordinating federal agencies; and accordingly it is their duty to create standards for racial identification classifications).

168. TAMAYO LOTT, *supra* note 154, at 40 (explaining the OMB's intention that Directive 15 be the guidelines by which all governmental policies, programs, agencies, institutions, and organs followed when defining or using race).

169. Michael Omi, *Racial Identity and the State: The Dilemmas of Classification,* 15 LAW & INEQ. 7, 21 (1997).

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

171. *See* Omi, *supra* note 169 (arguing that although Directive 15 was originally conceived solely for the use of federal agencies, it has since become the *de facto* standard for racial classifications used for (1) both state and local agencies, (2) private and nonprofit use, (3) and researchers).

172. TAMAYO LOTT, *supra* note 154, at 45 (1997)

173. *Id.* (adding "other" to the racial categories to 1988 census seemed to be a quick, but ineffective way to fix the problem of not belonging to one of the listed categories).

174. Gibson & Jung, *supra* note 156 (suggesting the problem of not fitting neatly into one category of race continues today and has been remedied by the possibility of listing two races, instead of one on the recent censuses).

175. Omi, *supra* note 169, at 1 (explaining that one's race was based on non-uniform criteria including racial, cultural, and geographical affiliations).

176. STANDARDS FOR FEDERAL ADMINISTRATIVE REPORTING, *supra* note 167; *See* Omi, *supra* note 169.

through a circular definition that classifies them as people who have ancestors of "the black racial groups of Africa."[177]

In 1988, the OMB revised Directive 15 in an attempt to temper confusion and address the flaws of the previous version.[178] Unfortunately, the revision did not help much. "Other" was added as an additional racial category, but still no clear definitions were provided, and a mixed - race category was rejected because the OMB felt that it was necessary for people to choose one of the original categories in order to enforce civil rights programs.[179] Despite these flaws in the Directive 15 classifications, the standards were increasingly used throughout the 1980s and 1990s by "state and local government agencies, marketing firms, private industry, and the nonprofit sectors[,]" as well as by universities.[180]

2. Significance of Directive 15 to the *Grutter* Analysis

The United States government conceded in its 1997 revision of Directive 15 that "the [old] standards . . . do not reflect the increasing diversity of our Nation's population that has resulted primarily from growth in immigration and in interracial marriages."[181] In an attempt to cure the inadequacies, the OMB re-examined Directive 15 with new census data and came to the conclusion that the six racial categories being used were the "minimum set of categories" to be used when collecting data on race and ethnicity.[182] Further, the OMB urged users of racial data to expand on the standard classifications to fit their particular geographic area or field of interest.[183] Finally, in 2003, the OMB once again called for a committee to reassess the categories, as the number of "write-in" races was becoming much too large and unmanageable.[184] The group with the most "write-ins" was Arabs/Middle Easterners.[185] Although Arabs/Middle

177. *Id.*; see Omi, *supra* note 169 at 11.

178. *See* OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, RACE AND ETHNIC STANDARDS FOR FEDERAL ADMINISTRATIVE REPORTING, Stat. Dir. No. 15, 51 Fed. Reg. 12 (Jan. 20, 1988); TAMAYO LOTT, *supra* note 154, at 44.

179. TAMAYO LOTT, *supra* note 154, at 45–46.

180. *See, e.g., id.* at 47.

181. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, RACE AND ETHNIC STANDARDS FOR FEDERAL ADMINISTRATIVE REPORTING, Stat. Dir. No. 15, 59 Fed. Reg. 29831–29835 (June 9, 1994).

182. *Id.*

183. *Id.* (suggesting that these institutions make comments to the OMB staff and suggest possible changes).

184. *Id.; see* Gibson & Jung, *supra* note 156.

185. G. PATRICIA DE LA CRUZ & ANGELA BRITTINGHAM, U.S. DEP'T OF COMMERCE, CENSUS 2000 BRIEF: THE ARAB POPULATION: 2000 (2003), *available at* http//www.census.gov/prod/2003pubs/c2kbr-23.pdf (stating prior to the 2000 Census, 600,000 people chose to write in "Arab" as their race).

Easterners were already considered to be separate from Whites, Blacks, and Asians by most citizens, the government failed to recognize the distinction.[186]

And so, the University of Michigan, which has adopted racial classifications for its race-based admissions program in conformity with Directive 15, employs flawed standards that have been criticized by the agency in charge of its promulgation.[187] As the OMB stated in its 2001 revision to Directive 15, the old classifications are bare minimums and should be utilized only in view of the demographics to which they apply.[188] Universities receive applications from all over the country and from all types of people. There is no government actor that the OMB's recommendation for expanded classifications applies to more than to universities. Since this is the case, and since the OMB has recommended that institutions using Directive 15 classifications expand upon them (essentially stating that current classifications are not narrowly tailored to defining current United States demographics), universities must take positive steps to move away from the old standards and towards more narrow and precise classifications. A change to ethnic data will cure the imprecision and narrowly tailor the admissions program to avoid discrimination of unaccounted minorities.

D. *Ethnicity*

Ethnicity is also a concept that is difficult to define. Webster's Dictionary defines "ethnic" as "a member of a minority or nationality . . . as distinguished by customs, characteristics, language, etc."[189] Encyclopedia Britannica defines an "ethnic group" as "a social group or category of the population that, in a larger society, is set apart and bound together by common ties, including language, nationality, culture, perceived 'racial' characteristics, and a shared history."[190] Some claim ethnicity is "the shared, cultural, historical features of a group[,]" and is based upon "identification with a group conscious of its language, religion, history,

---

186. *Id.; see* Zearfoss, *supra* note 77 (stating Arabs were commonly not listed as a separate category of race in admissions policies).

187. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, RECOMMENDATIONS FROM THE INTERAGENCY COMMITTEE FOR THE REVIEW OF THE RACIAL AND ETHNIC STANDARDS TO THE OFFICE OF MANAGEMENT AND BUDGET CONCERNING CHANGES TO THE STANDARDS FOR THE CLASSIFICATION OF FEDERAL DATA ON RACE AND ETHNICITY (1997), *available at* http://www.whitehouse.gov/omb/fedreg/directive_15.html.

188. *Id.* (encouraging the use of more detailed categories of racial and ethnic classifications than set forth in Directive 15).

189. NOAH WEBSTER, WEBSTER'S DELUXE UNABRIDGED DICTIONARY 628 (2d ed. 2003).

190. ENCYCLOPEDIA BRITANNICA ONLINE, *supra* note 4 (search "race and ethnicity").

tradition and ways of life."[191] Finally, an ethnic group has been defined as "one of a number of populations, . . . which . . . maintain their differences, physical[ly] and cultural[ly] by means of isolating mechanisms such as geographic and social barriers."[192] Common amongst most of these definitions are culture and association — as opposed to predisposition.[193]

So how is ethnicity different than race? As famed demographer Juanita Tamayo Lott noted, the interaction of race and ethnicity is so intertwined and conflated that "[w]ithin the United States, the terms *nationality*, *race*, and *ethnicity* may be overlapping . . . ."[194] Participants in an international conference on ethnic or racial classifications revealed that some counties view "race as a dimension of ethnicity[,] while others mentioned ethnicity within the context of race."[195] Thus, the line between ethnicity and race is probably very fine in the eyes of most Americans.[196] Yet, there is a very important difference between race and ethnicity.[197]

In the United States, ethnicity is a more "voluntary" concept than race.[198] Ethnicity is determined more through first person identification, whereas race is often determined by third person identification.[199] As Professor Lott explains,

> [r]ace has been used to distinguish a White majority from a minority composed primarily of people of color. It has been imposed by the majority group. Ethnicity has been used mainly to describe White ethnics and is a form of self-definition not necessarily related to or based on a majority group.[200]

With ethnicity, the focus is less on biological features and more on cultural aspects that often take into account biological and physical fea-

---

191. SARUP, *supra* note 137, at 178.

192. MONTAGU, *supra* note 1, at 66–67.

193. *Id.* at 69.

194. TAMAYO LOTT, *supra* note 154, at 26.

195. *Id.* at 25–26.

196. *Id.*

197. MONTAGU, *supra* note 1, at 68–70 ("The advantages of the phrase 'ethnic group' are: first, while emphasizing the fact that one is dealing with a distinguishing group, this noncommittal phrase leaves the whole question of the precise status of the group on physical and other grounds open for further discussion and research; second, it recognizes the fact that it is a group which has been subject to the action of cultural influences; and third, it eliminates all obfuscating emotional implications.").

198. *Id.* at 67.

199. *Id.* at 66 (allowing those who are defined by ethnic group, rather than race, to explain themselves instead of the questioner applying their predetermined racial stereotype).

200. TAMAYO LOTT, *supra* note 154, at 26.

tures.[201] Further, ethnic groups can be formed on varying grounds depending on geographic location.[202] For instance, "in Canada, the focus is on ancestry, reflecting the immigrant origins of most Canadians. In Malaysia, as well as in India, and Indonesia, religion, language, and caste are definitive features . . . . Hispanic America and the Caribbean focus on language and culture."[203] Thus, ethnicity is a less rigid classification than race that employs an amalgamation of culture, language, religion, nationality, and physical features in determining how groups of people are different from each other.[204]

1. Why Is ethnicity a Better Indicator of Diversity?

Ethnicity is a better indicator of diversity than race for several reasons. First, the concept of race has negative connotations attached to it.[205] Historically, race was used or was a motive to commit some of the most heinous atrocities the world has ever seen.[206] The modern view on ethnicity is that "[c]ompared to the term 'race,' 'ethnicity' is often used as a more neutral or even positive term."[207] Noted anthropologist Dr. Ashley Montagu argued for the disposal of racial classifications in favor of ethnic classifications as early as 1963.[208] Montagu warned that racial classifications tend to incite emotional responses because of the way they were originally introduced.[209] Montagu also argues that race is inherently confusing — no one knows what it means.[210] Ethnicity, on the other hand, is non-committal and does not have the general negative connotations associated with race.[211] In other words, ethnicity does not have the same disturbing undertones as race and is more flexible in its usage.[212]

However, more important to affirmative action issues, strict scrutiny analysis, and the *Grutter* case, is the fact that ethnicity is much more precise concept than race. As discussed above, classical racial classifications

---

201. MONTAGU, *supra* note 1, at 67.

202. *Id.*

203. TAMAYO LOTT, *supra* note 154, at 25.

204. *See id.* at 25–26; MONTAGU, *supra* note 1, at 70.

205. BARBARA D. MILLER, CULTURAL ANTHROPOLOGY 22 (1999) (reminding those who use hear the term "race" of the actions performed of historical suppression or elimination of certain "races").

206. *Id.*

207. *Id.*

208. MONTAGU, *supra* note 1, at 61–70.

209. *Id.* at 64.

210. *Id.* at 61–62.

211. *Id.* at 66 (suggesting the term ethnicity leaves an open definition, whereas race results in the application one's own schemas or stereotypes towards that race).

212. *Id.* at 69–70 (arguing that ethnicity can be applied to any group that has distinct physical and cultural traits).

do not accommodate vast *intra*racial diversity. British anthropologist Madan Sarup expressed it best when he wrote "the term 'black' is reductionist, it reduces people with many different cultures to one flat category."[213] Using these "reductionist" categories, the Law School's admissions policies cannot be narrowly tailored to achieving diversity, especially when it groups several underrepresented ethnic groups within larger racial groups.[214]

2. Race or Ethnicity – Does it Matter?

As it has been stated for decades now, racial issues are no longer black and white.[215] The number of interracial children born in the United States increases each year.[216] Approximately seven million Americans claim more than one race.[217] Further, "the majority of [W]hite Americans have African Blood," and the majority of Blacks have White blood, and a substantial number have Indian blood."[218] Finally, the newest groups of immigrants coming to the United States no longer fit into the pre-conceived American classifications of race.[219] Consider that in the current decade, approximately 25,000 Cubans, 10,000 Iranians, 9,000 Jamacians, 50,000 Filipinos, and 44,000 Asian Indians immigrate to the United States each year.[220] Arguably, only Filipinos can sufficiently identify themselves on a university application.

Consider also, amongst the United States' Black population, several sub-groups exist that identify themselves as entirely separate from their

---

213. SARUP, *supra* note 137, at 180.

214. HERZOG ET AL., *supra* note 149 (listing the groups that the school has committed to including in the student body).

215. STEVE SAILER, RACE NOW 1 (United Press Int'l 2002).

216. *See id.* (revealing that the United States Census in 2000 indicated the number of offspring to mixed race couples doubled in the past twelve years).

217. *See* NICHOLAS A. JONES & AMY SYMENS SMITH, U.S. DEP'T OF COMMERCE, CENSUS 2000 BRIEF: THE TWO OR MORE RACES POPULATION: 2000 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-6.pdf.

218. John A. Powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 U.S.F. L. REV. 789, 797 (1997); *see* Steve Sailer, *Race Now* 1 (United Press Int'l 2002) (interpreting the Census 2000 data to show "a large fraction of African-Americans possess some white ancestors").

219. NANCY F. RYTINA, U.S. DEP'T OF HOMELAND SEC., REFUGEE APPLICANTS AND ADMISSIONS TO THE UNITED STATES: 2004 2 tbl. 2 (2005) (revealing, for example, in 2004, 14,035 Laotian refugees and 1,561 Iranian refugees were granted asylum in the United States from 2002 to 2004). Neither of these nationalities fit neatly into a racial group on most university applications. *See id.*

220. U.S. IMMIGRATION COMM'N, IMMIGRATION INFORMATION STATISTICS, http://www.uscis.gov/graphics/shared/aboutus/statistics/299.htm (last visited Oct. 15, 2006).

Black counterparts.[221] Similarly, Asians can be a variety of distinct nationalities from Vietnamese, to Sri Lankan, to Indonesian, while Hispanics include Mexicans, Cubans, Puerto Ricans, and a host of Central and South American nationalities.

The above examples indicate that the lines separating America's notions of 'race' are slowly but surely fading into grey.[222] As Professor Victor Romero wisely observed, "using broad categories such as 'Asians' and 'Latinas' to divide candidates between those who are and who are not presumptively diverse fails to accurately capture significant segments of America's population . . . . hose backgrounds traverse and transgress group boundaries."[223] Subsequently, a substantial percentage of the United States population is simply unable to identify themselves accurately.

Consider the following facts. The United States Census Bureau reports that ethnic groups of Southeast Asia (Indonesians, Laotians, Cambodians, and Hmong) have a socioeconomic status ranking near the bottom in America.[224] Southeast Asians are markedly lagging in all aspects of society when compared to the rest of the United States, but especially when compared to their "Asian" counterparts from South and East Asia.[225] Second, according to research conducted by the American-Arab Anti-Discrimination Committee Research Institute, Arabs have been increasingly discriminated against as an ethnic group within the United States.[226] Third, ethnicities with low socioeconomic statuses and ethnicities that have been historically discriminated against in the United States tend to have lower representation in higher education.[227] A logical conclusion

---

221. *See* NICHOLAS A. JONES & AMY SYMENS SMITH, U.S. DEP'T OF COMMERCE, CENSUS 2000 BRIEF: THE TWO OR MORE RACES POPULATION: 2000 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-6.pdf. Sailer, *supra* note 215 (Indicating that in Massachusetts, many Blacks actually classify themselves as part Cape Verdeans).

222. Sailer, *supra* note 215 (showing the increase in the number of persons born to two race parents has doubled in the last twelve years).

223. Victor C. Romero, *Are Filipinas Asians or Latinas?: Reclaiming the Anti-Subordination Objective of Equal Protection after* Grutter *and* Gratz, 7 U. PA. J. CONST. L. 765, 770 (2005).

224. TERRANCE J. REEVES & CLAUDETTE E. BENNETT, U.S. DEP'T OF COMMERCE, CENSUS 2000: SPECIAL REPORTS: WE THE PEOPLE: ASIANS IN THE UNITED STATES 17 (2004), *available at* http://www.census.gov/prod/2004pubs/censr-17.pdf (stating the numbers for Laotians, Cambodians, and Hmong nearly mirror those for Blacks and Hispanics).

225. *Id.*

226. Hussein Ibish, American-Arab Anti-Discrimination Comm. Research Inst., *Report on Hate Crimes and Discrimination Against Arabs: The Post 9-11 Backlash* 20 (2002), http://server.traffic.northwestern.edu/events/rps/shora.pdf (last visited Oct. 16, 2006).

227. ANTHONY P. CARNEVALE & STEPHEN J. ROSE, SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 10–11 (2003).

based on these facts is that Southeast Asians and Arabs are probably not represented well in universities.[228]

Although this may be true, there is no way to easily verify the conclusion. Because Southeast Asians are grouped together with other more successful groups such as South Asians (Indian-Americans in the United States are very successful) and East Asians (Chinese-Americans, Japanese-Americans, and Korean-Americans are also very successful in the United States) in university racial identification data, we cannot tell Southeast Asians truly are as poorly represented as it would seem. Likewise, Arabs, usually grouped with Whites (but sometimes Blacks and Asians), are not accounted for as a separate group in racial data.

By excluding such groups from affirmative action admissions programs, universities are committing *per se* equal protection violations.[229] This effect, where disadvantaged ethnicities are grouped with, and overshadowed by, successful groups, is the principal problem of using overbroad and imprecise racial classifications.

Unfortunately, unconstitutional discrimination and a lack of data are not the only problems created by currently used racial categories. The inability to accurately identify creates several other crucial problems in university admissions: (1) the dilution of applicant identity; (2) in-fighting amongst minority sub-groups for limited positions of the "critical mass;" (3) racial gerrymandering; and (4) the failure to produce a diverse crop of minority leaders. Each of these problems will be discussed, in turn, below.

E. *Dilution of Identity*

The first major policy problem that imprecise racial classifications cause is the dilution of applicant identity. When a prospective student is asked to choose a "race" on an application with which they do not identify, the entire ethnic group they belong to begins to lose recognition.[230] This dilution is readily apparent amongst "Asians."[231]

1. "Asians"

Dilution of applicant identity occurs when ethnic groups that are different from one another get lumped together as one group for identification purposes.[232] The over-encompassing "Asian" race classification is an ex-

228. *See id.* at 11.

229. Romero, *supra* note 223, at 772.

230. Omi, *supra* note 169, at 17.

231. Romero, *supra* note 223, at 769 (suggesting when Filipinas, for example, must chose between "Latina" and "Asian," they must compromise their identity).

232. Omi, *supra* note 169, at 17.

ample; grouping the very different South Asians (e.g., Indians), East Asians (e.g., Chinese), and Southeast Asians (e.g., Indonesians) into one supposedly homogenous group. The result of this grouping, as ethnic studies Professor Michael Omi points out, is that "[t]he panethnic organization of Asian Americans involved the muting of profound cultural and linguistic differences and significant historical antagonisms, which existed among the distinct nationalities and ethnic groups of Asian origin . . . . Panethnic formations such as this are not stable."[233]

Based on a 2003 survey by the United States Census Bureau, there "appears to be a growing desire among many individuals for a more country-based, as opposed to race-based, self-identification process"[234] when applicable. This "growing desire" seems to be a natural response to the federal government's erosion of nationalities and cultures in order to conform all citizens to preset racial definitions.[235] For example, on the Law School's application and the Law School Admissions Council's ("LSAC") identification forms, Korean-Americans and Pakistani-Americans are both limited to define themselves under the broad umbrella of "Asian." Koreans and Pakistanis clearly have different and distinct cultures, physical attributes, languages, religions, customs, and, most importantly, are perceived as two separate groups in society. Yet for admissions purposes at the Law School and most other higher educational institutions, the two are treated as one race.

The above example illustrates many of the inherent problems with classifying so many different nationalities, ethnicities, and cultures into a few broadly defined races.[236] Namely, that people from different ethnic groups within a race, or in the case of Asia, from different regions of the continent, are just plain different.[237] Though people from various regions of Asia[238] may share some similar characteristics, the only relevant feature common amongst *all* people from the continent of Asia is geographic location. As Professor Romero opines, the desire amongst various Asian-American ethnic groups to collect census data based on ethnicity

---

233. *Id.*

234. Romero, *supra* note 223, at 772. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, SUPER EXECUTIVE SUMMARY, PRELIMINARY RESULTS OF THE DEVELOPMENT ASSOCIATES CENSUS 2003 PRETEST: SIX ALTERNATIVE FORMS (2003), *available at* http://www.census.gov/cac/www/20032004TestHispanicOrginQues.html.

235. Romero, *supra* note 223, at 772.

236. *Id.* at 772–73 (suggesting a trend in university applications to mirror the census in that "ethnic specificity and away from larger group affiliation underlies an implicit realization that group affiliation dilutes individualism and masks the diversity apparent among subgroup members").

237. *See id.*

238. For example, South Asia (e.g., India, Pakistan, and Sri Lanka) East Asia (e.g., China, Japan, and Korea) Southeast Asian (e.g., Cambodia, Laos, and Burma).

"and away from larger group affiliation underlies an implicit realization that [large] group affiliation dilutes individualism and masks the diversity apparent among subgroup members."[239] In truth, there is no sound basis other than geographic proximity for treating the wide assortment of cultures in Asia as one homogenous group.

Additionally, the over-broad racial classifications are unable to take into account the economic, social, and political disparities of each subgroup of the "Asian race."[240] Specifically, the Southeast Asians (Cambodians, Laotians, and Hmong) are markedly lagging in all realms of American society in comparison to their Asian counterparts.[241]

Large portions of the Southeast Asian population in the United States are recent immigrants who came into the country as refugees fleeing civil wars.[242] Most of these refugees came to the United States with no money or transferable skills and thus were forced into a low-income lifestyle. Contrastingly, Chinese, Japanese, Indian, and Filipino-Americans are now well beyond third generations, have established communities, educated their children, gained political power, and progressed through society at a rapid speed.[243] So why is it that Laotians (Southeast Asian) and Japanese (East Asian) are considered on equal footing in the university admissions process? Surely, universities do not suggest that the two nationalities are equivalent from a diversity standpoint. Or is it that Laotians are represented in meaningful numbers because there are plenty of other "Asians" in the student body? It is true that Laotians compose only a 1.6% of the "Asian" population in America and only a fraction of the total population.[244] However, the four dominant Asian sub-groups (Chinese, Japanese, Indian, and Filipino) compose only sixty-six percent of the total Asian population in the United States.[245] Should the other thirty-four have to suffer a lack of representation because their distinctly different Asian counterparts are more successful? Why are courts more interested in having meaningful representation of Blacks and Latinos, but

239. Romero, *supra* note 223, at 772.

240. REEVES & BENNETT, *supra* note 224.

241. *Id.* at 20. For instance, sixty percent of Indians are employed in "management, professional, and related occupations," whereas only thirteen percent of fellow "Asians" from Laos were employed in such positions. *Id.* Further, the median salary and average household income for South and East Asian-Americans is approximately double that for Southeast Asian-Americans. *Id.* Finally, the poverty rates for Hmong, Cambodians, and Laotians are well above the national rate, and approximately double that of fellow Asians from Japan, India, and the Philippines. *Id.*

242. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE. RACIAL AND ETHNIC CLASSIFICATIONS USED IN CENSUS 2000 AND BEYOND (2000).

243. REEVES & BENNETT, *supra* note 224.

244. *Id.* at 4.

245. *Id.*

not of Sri Lankans or Cambodians? It cannot be because of the history of discrimination against Blacks and Latinos in the United States; remedying past societal discrimination was dismissed as a justification for race-based admissions programs.[246] Current racial classifications in the university admissions process not only fail to recognize struggling and underrepresented Asian sub-groups, but by classifying these subgroups as "sufficiently represented" or "overrepresented" Asians, universities aid in the oppression of these nationalities. As one author expressed, "[f]ailure to acknowledge the 'underrepresented' Asian Americans will also perpetuate their invisibility and prevent others from recognizing their existence. If the Court allows schools to treat them accordingly, it hinders non-Asian students and society from understanding the myriad cultures and experiences within the Asian race."[247]

2. "Arabs"

Maybe the most troubling aspect of the Directive 15 and University of Michigan's racial classifications is the exclusion of Arabs.[248] Several Arab American groups have lobbied the federal government, including the OMB and public universities, to include a Middle Eastern or Arab category for identification purposes.[249] Yet, most public institutions and programs still do not accommodate Arab ethnic identity.[250]

In recent years, Arab-Americans have, statistically, been one of the most discriminated and misunderstood minority groups in the United States.[251] The American-Arab Anti-Discrimination Committee Research Institute reported that, just in 2002 alone, there were over 700 violent attacks on people who were perceived to be Arab, eighty cases of airplane passenger removals due to "Arab appearance," over 800 cases of employment discrimination against Arab-Americans, and several instances of housing discrimination.[252] More relevant to *Grutter,* there have also been several instances of on-campus hate crimes targeting

246. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271–72 (1978).

247. Victoria Choy, *Perpetuating the Exclusion of Asian Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in* Grutter v. Bollinger, 38 U.C. DAVIS L. REV. 545, 570 (2005).

248. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, SUBMISSION FOR OFFICE OF MANAGEMENT AND BUDGET REVIEW: COMMENT REQUEST, 66 Fed. Reg. 12923 (Mar. 1, 2001); HERZOG ET AL., *supra* note 149.

249. *See* U.S. CENSUS BUREAU, *supra* note 242.

250. *Id.*

251. Ibish, *supra* note 226.

252. *Id.* (indicating the numbers of hate crimes have since declined recently but still remain strong).

Arabs on various university campuses.[253] If cross-racial understanding and the breaking down of racial stereotypes is truly the aim of the University of Michigan's affirmative action program, then admissions policies should be tailored to achieve a "critical mass" of the very misunderstood and discriminated against Arab ethnicity.

The lack of understanding of Middle Eastern ethnicities results in numerous incidents and stories that show that most Westerners cannot distinguish between a person who is Sikh and a person who is Arab.[254] Although the Sikh are from northern India, speak languages altogether different than Arabic, and are not Islamic, most people who look at a Sikh will associate that person with an Arab country because Sikh's wear turbans, and turbans are commonly associated with Muslims. This is precisely the racial stereotyping that the Court sought to alleviate with more diverse classrooms. However, without giving Sikh-Americans or Arab-Americans a chance to properly identify themselves, they will be precluded from receiving the extra "plus" they may need to achieve meaningful representation. The exclusion leaves Arabs with the choice of identifying themselves as White, Asian, or African (which leads to the problem of inter-ethnic fights for affirmative action spots that is addressed below).[255]

F. *In-fighting*

The second unfortunate effect of current racial classifications is that "minorities might be tempted to forego constructive, anti-subordination coalition building in favor of in-fighting over limited affirmative action programs . . . ."[256] In other words, if people who are of different ethnicities, such as Mexicans and Haitians, both identify themselves as Hispanics, the groups will end up fighting each other for limited portions of the Hispanic "critical mass."[257] Black-Americans will be harmed when North African Arabs (e.g., Egyptians and Algerians) identify themselves as African-American because North Africans can be used to satisfy the "criti-

253. Muslim Public Affairs Council, *Pig's Blood Splattered on Muslim Prayer Rugs at UCLA Medical Center* (Apr. 23, 2003), http://www.mpac.org.article.php?id=211 (reporting an instance when Islamic prayer rugs were splattered with pig's blood at the University of California at Los Angeles).

254. *See* Nabanita Sircar, *UK Sikhs Fear Racist Attacks,* HINDUSTAN TIMES (London) (July 10, 2005), *available at* http://www.hindustantimes.com/news/181_1426549,00050003.htm.

255. Zearfoss, *supra* note 77 (writing that the University of Michigan Law School's Director of Admissions states that Arabs are classified as White by the University).

256. Romero, *supra* note 223, at 768.

257. *Id.* at 769.

cal mass" of the "Black/African-American" race.[258] This result will cause in-fighting amongst Black-Americans and African-Arabs (and any other ethnicities who choose to classify themselves as African-American) for limited spots of the critical mass, when, instead, the two groups could best further their collective interests by joining together to form minority coalitions.[259]

Some may argue that this scenario cannot happen because, technically, the "critical mass" formula is not supposed to be a quota. However, as Justice Rehnquist pointed out in his dissent, the critical mass, of underrepresented minorities at the University of Michigan Law School has remained constant for several years, and it can thus be inferred that after the critical mass has been achieved for a certain underrepresented race, lower scoring applicants of that race will no longer be considered.[260] In truth, there is only a certain amount of "pluses" to go around, and the University will grant just enough pluses to achieve the critical mass it is looking for.[261] Handing out more pluses than necessary to achieve diversity would be a *per se* violation of the Equal Protection Clause.[262] The ultimate effect is that Black-Americans and North Africans Arab-Americans will have to compete for these pluses as they will fall under the same race in the University of Michigan Law School's application.[263] The obvious flaw in this system is that both North African Arab-Americans and Black-Americans diversify student bodies in different ways and should not be pitted against each other for limited affirmative action assistance.[264] Instead, universities should aim to achieve critical masses of both of these distinct ethnicities.[265] Forcing minorities to fight for spots and pluses will eventually lead to segregation of minority interests and hinder cross-racial coalition building.[266]

G. *Racial Gerrymandering*

A third major problem caused by imprecise racial designations is a phenomenon described here as "racial gerrymandering." There is great potential for abuse by applicants if universities publicly acknowledge their desire to reach a "critical mass" of certain races. Current policies inad-

---

258. *Id.*
259. *Id.*
260. *See Grutter,* 539 U.S. at 379 (Scalia, J., dissenting).
261. *See generally* Adarand Constr., Inc. v. Peña, 515 U.S. 200 (1995).
262. *See generally id.;* Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
263. Romero, *supra* note 223, at 769.
264. *Id.*
265. *Id.* at 775.
266. *Id.* at 769.

vertently induce applicants who do not neatly fall into listed racial categories (or none at all) to identify themselves with a race favored by the university, over their own premonitions of who they really are. It has been documented that "some Filipinas have attempted to distance themselves from other Asians in order to emphasize their unique cultural background and to acquire affirmative action benefits."[267] Further, the Native American population in a ten-year period increased 110% from 1990 to 2000, a number that is almost demographically impossible considering that there is virtually no immigration of Native Americans.[268] Much of this increase can be attributed to the fact that Native Americans were given preferential treatment through affirmative action programs after 1960.[269] Therefore, presumably, there was a greater incentive to identify oneself as a Native American after 1960.[270]

Because university admissions are a competitive game, opportunism is inherent. A self-interested applicant who can find a link between her identity and an underrepresented race has every reason to categorize herself as that underrepresented race, even if another listed race is more fitting.[271] This effect of current racial classifications hampers the goals stated in *Grutter.* Namely, people who do not diversify the student body in the way the *Grutter* court envisioned (i.e., those people who are so similar to the majority that they do not promote cross-racial understanding or breaking down of stereotypes) can "gerrymander" their identity to fit an underrepresented race.

Inherent in the goal of attaining "cross-racial understanding" and the breaking down of stereotypes is the fact that a student must be able to recognize that he/she is dealing with someone of a different "race." Allowing minorities who are not visibly different from the majority to gerrymander their way into a student body does not promote the cross-racial understanding and interaction with other ethnicities, which is what the *Grutter* court envisioned. According to *Grutter,* the fact that people may carry a unique viewpoint because of their incongruence with a specific race does not matter in the analysis because "[a]s far as the reader can tell from the Court's opinion, the educational benefits that result in a

267. *Id.* at 775 (pointing out that Filipinos often opt to choose 'Latino' as their race because most Filipinos have Spanish descendants).

268. *See* Charles Hirschman, *The Origins and Demise of the Concept of Race*, 30 POPULATION & DEV. REV. 385, 406 (2004) (citing JEFFREY PASSEL, THE GROWING AMERICAN INDIAN POPULATION, 1960–1990: BEYOND DEMOGRAPHY (1996)).

269. *Id.* at 406 (citing JEFFREY PASSEL, THE GROWING AMERICAN INDIAN POPULATION, 1960–1990 BEYOND DEMOGRAPHY (1996)).

270. *Id.*

271. *See* Romero, *supra* note 223, at 771 (stating Justice Scalia named the increasing likelihood one will chose to amplify their minority background as a "race to the bottom").

compelling state interest flow all but exclusively from racial as opposed to viewpoint-oriented diversity."[272] Therefore, unless overbroad classifications are broken down and replaced with ethnic groups, applicants will continue to force their way into affirmative action programs.[273]

H. *Current Racial Classifications Do Not Assure the Production of Minority Leaders*

Finally, the current racial classifications do not even work with Justice O'Connor's fallback justification for diversity — the production of minority leaders.[274] As stated previously, the Court held that diversity is vital to the production of "a set of leaders with legitimacy in the eyes of citizenry[.]"[275] As one author summarized, "the Court seemed to be saying that racial preferences in admission are a compelling interest because they help assure the continued production of minority leaders as well as the perception that minorities have a fair chance to receive leadership training."[276] If this truly is another interest justifying the use of race-based admissions programs, then shouldn't we attempt to achieve a critical mass of Arab or Asian Indian students? There are very few Arabs, South Asians, or Southeast Asians in the United States government. If the Court was seeking to ensure the production of minority leaders through a diverse student body, it would be logical to extend a plus to Arabs and Southeast Asians so that they have a better chance at entering leadership positions. The famed "3M brief,"[277] which Justice O'Connor relied so heavily upon in her opinion, specifically focused on internationally oriented diversity and the challenges of a global marketplace.[278] This flies in the face of excluding Southeast Asians, Arabs, and South Asians from affirmative action programs.

---

272. Bloom, *supra* note 14, at 472.

273. Romero, *supra* note 223, at 773. Of course, even when using ethnic categories there will still be some applicants who choose to identify outside of their most closely matched ethnicity. *See id.* However, applicants will feel less capable, ethnically, to do so when a certain ethnicity is right on point. *See id.* For instance, Egyptian-Americans, presumably, will choose Arab instead of Black-American because they cannot ethically disavow their Middle Eastern heritage as easily as they could their "White" heritage. *See id.* Further, there should be no desire to identify outside of the Arab ethnicity because schools should be attempting to achieve a critical mass of Arabs comparable to that of other ethnicities. *See id.*

274. Grutter v. Bollinger, 539 U.S. 306, 308, 332 (2003) (majority opinion).

275. *Id.* at 308, 328.

276. Bloom, *supra* note 14, at 476.

277. Brief for 65 Leading American Businesses as Amicus Curiae Supporting Respondents at 5, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399056.

278. *Id.*

I. *Did the Court Have an Ulterior Motive?*

Before examining possible solutions to curing the imprecision of racial identification on university applications, it is worth mentioning that many critics have asserted that the Supreme Court's diversity rationale was simply a ploy to validate the University of Michigan's affirmative action program.[279] The theory is that the Court actually believed that the race-based admissions program was necessary, not for diversity (or not for diversity alone), but instead to cure past societal harms caused by oppression, bias, and bigotry. However, because the Court felt bound by its precedent in *Bakke,* the diversity rationale was put forth as an alternative. Even if this were true and the Court is concerned more with helping disadvantaged applicants rather than encouraging diversity, the University of Michigan's racial categories are still unconstitutional because those categories discriminate without achieving a compelling government interest. Recall that with imprecise racial categories, applicants can ethnically identify themselves with any category that receives a "plus" if they have a legitimate justification for doing so. This leads to less representation of the historically discriminated against minority groups such as Mexican-Americans and Black-Americans in favor of, for instance, Whites with Spanish surnames and North African Arab-Americans.[280] Thus, regardless of the Court's true justification for upholding the university's admissions program, the current racial categories should not be used because they do not promote either diversity or redress.

V. The Solution

A. *Require Precision*

Fortunately, the problem of imprecise racial classifications is solvable: either define races more precisely or shift away from racial classifications and use nationality and ethnicity as identifiers. In the age of online admissions applications[281] and large admissions staffs, the ability to conduct thorough and individualized reviews of every applicant is more possible than ever. When race is a factor in admissions, the level of care and diligence in reviewing each application should be at its absolute maximum, and individualized review should be all but guaranteed. So why do uni-

279. Grutter v. Bollinger, 539 U.S. 306, 308, 383–85 (2003) (Scalia, J., dissenting).

280. Romero, *supra* note 223, at 773.

281. Every law school in the U.S. News' top 50 list had an online application. It is safe to assume that most all universities have online applications to stay competitive. Regardless, nearly all law schools accept personal information vital to admissions from the Law School Admissions Council ("LSAC").

versities continue to group applicants in large archaic racial groups and remove the individuality out of application review?[282]

1. Redefining Race

One way to increase the precision of self-identification on applications is to reclassify the current racial groups listed on application forms. For instance divide "Asian" into East Asian/Oriental, South Asian/Indian, and Southeast Asian/Indochinese;[283] include an Arab race; sub-divide "Latinos" into Central Americans, South Americans, Islanders and include a black/white component to each of these designations;[284] and finally, distinguish between White-Africans, Indian-Africans, and Black-Africans to avoid gerrymandering.

2. Moving Away from Race

A better approach would eliminate race altogether and, instead, use nationality and ethnicity as the factors in admissions that contribute most to diversity. Nationality and ethnicity are better indicators of diversity than race, and substituting those factors for race will alleviate many of the identification problems associated with the university application process. If nationality and ethnicity were used in place of race, applicants could be evaluated individually on a sliding scale, with the most represented ethnicities receiving the least amount of "pluses" and the least represented ethnicities receiving the most number of "pluses." Under this approach, each ethnicity and each sub-group within each ethnicity (e.g., Nationality – Algerian, Ethnicity – Arab) can each have their own "critical mass" if the school wishes. Further, this approach will give admissions staffs leeway to admit as many different kinds of people as they deems necessary to diversify their student body, without having to take blind guesses as to whether the applicant is truly "diverse." This method ensures that Black-Americans and Mexican-Americans achieve meaningful

282. *America's Best Graduate Schools 2007: Top Law Schools*, U.S. NEWS & WORLD REP., http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php. A possible argument is that smaller schools will simply not have the resources and personnel to collect and evaluate the added "ethnic." *Id.* However, smaller and less prominent schools, statistically, receive considerably less applications than larger and more prominent schools; therefore, a small state school would not be overwhelmed by extra review. *See id.*

283. REEVES & BENNETT, *supra* note 224 (acknowledging the differences between the three major sub-groups of 'Asians' and defining 'Asian' as "people having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent").

284. This would be more acceptable than just having white and black as separate races. E.g., South American/Black and South American/White would be two separate groups, each diversifying a student body in a different manner.

representation in student bodies, but also ensures meaningful representation for ethnicities that were not recognized under the old scheme.

B. *Potential Shortcomings*

Admissions staffs will make two main arguments as to why this proposed multi-factored test is unworkable: (1) collecting that data is much too hard and cannot be easily gathered through application forms; and (2) admissions staffs do not have the personnel to analyze the increased number of factors in that sort of a policy.

1. Collecting Data

With the move of applications from paper to the internet, a new world of possibilities has been opened as to how to input data, collect it, and even how it can be analyzed. In terms of identification data, a simple drop-down menu can be implemented to acquire an applicant's nationality and/or her ethnicity. Applications should also include a means to input multiple nationality/ethnicity selections for applicants who are multi-ethnic (or "multi-racial," as it is commonly called).

2. Analyzing the Data

It is true that sifting through the added identification information creates an added nuisance for admissions staffs. However, once this proposed system is implemented, it should not create a significant additional burden for admissions staffs. Admissions offices will continue to receive the same type of information regarding the diversity of the applicant, but, under this proposal, they will have more accurate information. Although it may be more difficult for admissions staffs to keep track of how many of a certain type of race/ethnicity have been admitted, this should not result in an insurmountable obstacle. Universities are not allowed to keep racial quotas, so the only use in tracking the number of a certain race/ethnicity is to achieve a critical mass of students. If it is apparent, via a post-application review scan of the proposed student body, that a desired critical mass has not been achieved through initial applicant reviews, admissions staffs can always go back to the applicant pool and pull the applicants needed to achieve the critical mass.

Still, many will argue that this process is much too cumbersome and onerous for admissions staffs. As has been mentioned time and time again in judicial opinions, legal treatises, law reviews, *Grutter,* and this article in the instances that the use of race can be justified as a factor in government policy, the policy must be narrowly tailored to avoid discrimination as best as possible. If a university wants to use race as a factor in its admissions, it should have a duty to keep a large and capable admissions staff at hand.

VI. Conclusion

The University of Michigan Law School's race-based admissions policy should have been rejected as unconstitutional in *Grutter* because of its unanticipated discrimination against several minority groups that do not conform to traditional Americanized racial classifications. By allowing the policy to stand, the Supreme Court did a disservice to the advancement of minorities and countered its goal of achieving diverse classrooms. Diversity simply cannot be achieved by admitting a certain number of applicants who fall into the archaic classifications adopted thirty years ago. The demographics of the United States have changed profoundly since Directive 15 was first adopted. It no longer makes sense to follow Directive 15 standards when more precise designations exist. Accordingly, the Supreme Court has stunted the growth of diverse student bodies at universities and set the scene for a plethora of new equal protection lawsuits from new minority groups that are being discriminated against.