

Discrimination and Affirmative Action

David Simon
University of Michigan

The word discrimination is used loosely to encapsulate negative ideas surrounding the practice. In the case of affirmative action admissions policies at the University of Michigan, discrimination is used to justify an unjust practice. Generally, when affirmative action is debated, it is considered from a singular perspective (i.e., it is wrong or it is right). Most ignore that admissions policies are discriminatory; they are *designed* to discriminate. In this case, a one-dimensional view is inadequate and leaves the argument with too many confounding variables and holes. Thus, an examination of affirmative action must look at discrimination from all sides, in the third dimension. The following pages will take a multifaceted approach to the affirmative action debate. The first goal will be to establish a working definition of discrimination. Next, different types of discrimination (particularly those based on truth and those based on erroneous beliefs) will be distinguished. Third, issues surrounding positive and negative discrimination will be explored. Once this definition is delineated and the different types of discrimination are outlined, it becomes possible to examine what types of policies are consistent with appropriate discrimination. We will see that affirmative action is not consistent with, though it may purport to be, acceptable forms of discrimination. Affirmative action does not comport with the claims it makes. Finally, affirmative action will be shown to be fundamentally flawed, both in principle and practice.

What is Discrimination?

Quite simply, discrimination can be taken to mean acting, either consciously or unconsciously, on the basis on knowledge (be it factual or chimerical) in a way that either adversely or positively affects the individual acted upon. Thus, several different types of discrimination can be differentiated.

1. *Conscious* discrimination indicates that the discriminatory actor¹ is cognizant of his discrimination. That is, the actor is aware of all of the beliefs he holds about that *actee*² and the actor understands that he uses such beliefs (real or imagined) to make a decision regarding the actee. For example, a woman who applies for a job involving heavy lifting is denied the position on the basis of a proved debility.
2. *Unconscious* discrimination can be taken as the aforementioned actions executed unconsciously; i.e., though the actor may be discriminating he is not aware of such discrimination.

For example, the woman who is interviewed for the construction job is turned down based on beliefs held by the employer concerning women's ability to lift heavy loads. But he *thinks* that his decision is made on the belief that she is not qualified (whether she is or isn't doesn't matter in this case), but really this belief is used to justify his *unconscious* belief that women cannot work on construction. The woman is passed over on the construction job not because the employer knows she is unable to do the job, but because he unconsciously groups the woman into a category he finds applicable then justifies such beliefs with rationalization. That is, without thinking, he has assumed characteristics about her that may or may not be true but result in discrimination. The distinction between *conscious* and *unconscious* is merely the fact that the actor does not knowingly act on his real beliefs.

It is also necessary to distinguish between *positive* and *negative* discrimination:

3. *Positive* discrimination is to be understood as discrimination that benefits the actee.
4. *Negative* discrimination can be taken to be any discrimination that harms the actee.

For example, a CEO who hires a close friend on the basis of the qualities he believes he has as his friend would be *positive* discrimination. An example of *negative* discrimination would be a man being denied a job on the basis of race. It is important to recognize that in any case of discrimination both positive and negative discrimination occur. In the case of the CEO, while his friend was the recipient of the *positive*

¹ Note also, that an actor is multiform; it can be an institution, a person, a committee, or other entity.

² *Actee* is tantamount to the individual being acted upon or the recipient of the discrimination

discrimination, those who were denied the job on the basis on not being a friend of the CEO suffered from *negative* discrimination.

Finally, it is possible to differentiate between *substantive-conscious-positive-discrimination (SCPD)*, *substantive-unconscious-positive discrimination (SUPD)*, *substantive-unconscious-negative-discrimination (SUND)*, *inane-conscious-positive-discrimination (ICPD)*, *inane-unconscious-positive-discrimination (IUPD)*, and *inane-unconscious-negative-discrimination (IUND)*.

5. *SCPD* can be seen as positive, conscious, discrimination that is based on fact. That is, the beliefs that are used as a benchmark by the actor for making a conscious, positive, discriminatory decision are based on *truth*.
6. *SUPD* can be taken to mean positive, *unconscious*, discrimination that is based on fact.

Therefore, in both *SCPD* and *SUPD* the beliefs that are used as a benchmark by the actor for making a discriminatory decision are based on *truth*.

On the other hand,

7. *ICPD* is positive, conscious, discrimination that is based on *apocryphal* beliefs.
8. Finally, *IUPD* is positive, unconscious, discrimination that is based on *apocryphal* beliefs.

In both *ICPD* and *IUPD* the beliefs that are used as a benchmark by the actor for making a discriminatory decision are based on *apocryphal* beliefs.³

In viewing the case of affirmative action the concern is not with unconscious discrimination because the discrimination that occurs in the admissions process is conscious. All admissions staff members are cognizant of the factors they use, and beliefs they are required to hold, about each applicant. What are of concern are the *SCPD* and *SCND* as well as *ICPD* and *ICND*. That most of the criteria used for discrimination are based on truth is prima facie correct. However, that *all* of the criteria used for admissions are true is fallacious. Therefore, there must be a distinction between discrimination that is based on *truth*, and discrimination that is based on *apocryphal* beliefs. Next, it is critical to understand the positive and negative effects of such discrimination in relation to the constitution as well as to become aware of what ideas and values are at stake.

Distinguishing Truth from Untruth

The University of Michigan has been forced to change their admissions policy. However, even with efforts to dismember a "point system" the University will still be able to take race into account in the admissions process.⁴ We must take issue with the use of the concept of race in determining admission to a school. Michigan purports to use a *SCPD* approach to matriculation. However, such a rationale is lacking because it lacks substance and is hardly positive. In assigning a value, any value, to race Michigan has determined that a certain worth is married to skin color. As a natural consequence of this assigned value, one race may be held more valuable than another.

In order for such a concept to be true, one must assume first that the concept of *race* is an actuality. Although it may seem that race is widely accepted by the layperson, academics have been hotly repudiating the idea of race for many years. The most common argument engaged in the debate against race is that it is socially constructed. Elizabeth Anderson, Professor of Philosophy at the University of Michigan, has gone so far as to say "race is an ideological concept which purports to be scientific, . . . is

³ Note that is also possible to distinguish the positive and negative forms of each for *SCPD*, *SUPD*, *ICPD*, and *IUPD*. By now, such a distinction should be self-evident.

⁴ University of Michigan undergraduate admissions program was previously based on a system of points. Each applicant was awarded a certain number of points for different categories such as curriculum, school quality, and extracurricular activities. The threshold number of points for admission into LS & A was 120 points. Minority students were automatically awarded 20 points on account of their race. On a separate note, a perfect SAT score was only awarded 12 points.

false, contradictory . . . in ways that legitimate the imposition of disadvantage, and . . . sustain it.”⁵ Numerous other scholars have continually buttressed the view that race is a social construction and does not really exist as a scientific concept.⁶

Many people recognize the relevance of race due to the role it plays in their everyday lives. Still, the issue needs digging. Even if race is recognized, we must ask if the University of Michigan is merely acknowledging such relevance or if the University is doing more. It seems that their policy does more than simply recognize “race” as a concept, but it goes one step further and assigns values and categorically ascribes traits and behaviors to a particular race. In fact, this was the principal rationale used by the Supreme Court in ruling the point system invalid in the Gratz case (in their ruling that U of M’s policy was not *narrowly tailored*). The University used to assign 20 points, or a numerical value, to all underrepresented minority applicants.⁷ Moreover, a point not cited in the Supreme Court’s decision was the blatant flaunting of the Constitution under the Michigan Mandate.⁸ Here the University made no effort to hide their intentions to change the *racial* composition of the student body. It seems that unless the University had been purposefully discriminating against minorities before such a Mandate, which it had not been, the only way to achieve this goal would be through a means of *SCPD*.

What the University failed to see in their Mandate, and consequential “point system” admissions policy, was that what may have appeared to be *substantive* and *positive*, was actually *inane* and *overridingly negative*. Firstly, it was *inane* in the sense that the idea that certain races are somehow more valuable and that they should be assigned additional points is illogical (yet, the Michigan Mandate did just this). Unless one is willing to subscribe to the notion that peoples of all races, however race may be defined, think and know exactly the same things the argument loses all substance. Secondly, the *overridingly negative* discrimination of race-based affirmative action stems not only from unconstitutional, adverse effects it has on whites and Asians, but also the stigmatizing effect it has on underrepresented minorities.⁹ Such a stigmatizing effect should not be overlooked as it undermines one of the basic values race-based affirmative action posits: racial cooperation and understanding.¹⁰ Moreover, one might do well to revisit footnote 11, in *Brown v. Board of Education*, to see the negative effects of racial stigmatization.¹¹ Justice Rehnquist, writing for the majority, cited an example given by Harvard in which two applicants were being considered for a final spot in the incoming class. In this example, student A is an affluent black and student B is a destitute black; Chief Justice Rehnquist illuminates the problems that arise with the former policy:

Thus, the result of the automatic distribution of 20 points is that the University would never consider student A’s individual background, experiences, and characteristics to

⁵ Anderson, Elizabeth. “Lecture on Race”. Given Fall 2003. Available only thru the University of Michigan. This distinction is also drawn deeply in the discipline of Anthropology.

⁶ Its social origins are recognized by Marshal, [Marshall, G. A. (1993). *The racial economy of science*. Indiana University Press: Bloomington and Indianapolis]; its importance is widely viewed as significant by numerous scholars [Nieman, D. G. (1991). *Promises to keep: African-Americans and the constitutional order, 1776 to the present*. Oxford University Press: New York; Flakowski, J. E. (1992). *Indian law/race Law: A five-hundred-year history*. Praeger Publishers: New York].

⁷ These are the classes of underrepresented minorities: Native Americans, Blacks, Hispanics, and women.

⁸ When James J. Duderstadt became President of the University of Michigan in 1988, he committed himself, his administration, and the University to the Michigan Mandate, a blueprint for fundamental change in the ethnic composition of the University community. (http://www.umich.edu/~urecord/9495/Apr17_95/faculty.htm)

⁹ In allowing preferential treatment to one group, enmity and animosity build in the group that does not receive special treatment. In this case, such enmity is brought to bear in the form of racism. Feelings of resentment develop in the minds of whites and Asians as a result a policy that gives others a better chance of admission without the same standard of qualification. Personal experience on my part at the University has been proof for me that such feelings develop as a result of affirmative action.

¹⁰ If not these concepts as ends in themselves, then at least some educational benefit derived from these principles

¹¹ Footnote 11 in *Brown* mentioned the famous doll experiment in which black children were show two dolls, a white one and a black one, and asked to choose the “better” doll. Most of the black children chose the white doll. Then, when asked to identify the doll that best represented themselves, they chose the black doll. Children began to cry and the psychological effects of segregation were assumed from this experiment.

assess his individual “potential contribution to diversity,” *Bakke, supra*, at 317. Instead, every applicant like student A would simply be admitted.¹²

What Rehnquist points out is that the old system flagged, and singled out, persons of color for special consideration: a violation of the constitution. But what is not clear is why using race as a “plus,” as Justice Brown specified in *Bakke*, is permissible. Even though students are not denied “individual consideration”¹³ per se, some students are given *greater* consideration on the basis of race.

Even more troubling is the question of why race should be used at all in determining an individual’s worth or value. As noted above, it seems perverse to even consider race as a factor in determining a persons’ “contribution” to a student body. The equal protection clause of the 14th Amendment lucidly states equal protection for *all*, not for *some* people. Justice Thomas voices strong egalitarian sentiment when he declares:

The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.¹⁴

Clearly, it is true that race-based affirmative action assigns value to a person’s race. The sole purpose of the point system, and the resulting new system (where race is used as a “plus”), is to epitomize how emphatically race is singled out and ascribed certain characteristics. The new system is just as deplorable as the old in terms of how it assesses and matriculates individuals. Regardless of how much “weight” a person is given for a variety of talents, a person of color will most definitely receive *more* weight on account of nothing more than their skin tone. Here we see how SCPD fails in the case of the University of Michigan. Instead of making a decision based on fact, the University has made discriminatory decisions based on generalizations (or stereotypes) that do not exist. In accounting for race, one presupposes a general aspect of race that is somehow *better* or *valuable* above other virtuous qualities. Moreover, it transgresses a fundamental (perhaps the most important) principle of the Constitution and undermines democracy, turning equality on its head as it connotes race with value. Undermining the basic principle of egalitarianism, affirmative action shakes the understructure of the Constitution with great force, rousing the foundational questioning of the equality and value of persons.

One might argue that the University discriminates, but rightly so (i.e., positively). One would argue here, as the University did, that race is merely a part of the panoply of factors considered in the admissions process including essays, geographic location, and GPA. This objection is wrong. In all other categories (save geographic location¹⁵) the quality that is assigned a value is *contingent* upon the actions of the individual himself. That is, the individual has achieved or demonstrated certain capabilities or qualities that have made him a more attractive candidate for matriculation. Such qualities may include leadership roles, social service, and others. Race, on the other hand, has no such prerequisites. Instead, accounting for race in assessing the individual fails to realize important concepts dependent upon the *demonstrated* qualities of the individual.

For example, a boy may have extraordinary latent talent as a leader but if he chooses not to exercise such ability, then such talent is never to be realized nor considered in the admissions process. Race, on the other hand, requires no such action. Race is taken at face value as “ability,” or at least an augmentative factor to education without qualification. That is, the person is not being considered for anything he has done to demonstrate his potential contribution to the University. Rather, just the opposite

¹² Gratz et al v. Bollinger. 539 U. S. 02-516 (2003) p. 29

¹³ Ibid. p. 30. Footnote 20.

¹⁴ Gratz et al v. Bollinger. 539 U. S. 02-516 (2003) p. 50

¹⁵ The firmest claim that is made in critique of this aforementioned argument is that geography is just as haphazard a design as race. In one respect this is true. However, in geography there seems to be a somewhat reasonable correlation between ideological distribution and geographic spread. People who live in Vermont might have different ideas and viewpoints regarding the environment than those in Detroit. It is not unreasonable to assume that such ideological differences are manifested geographically.

is true; the individual is given an advantage on the basis of assumed attitudes, beliefs, experiences that he may or may not have had. In this case, no quality is demonstrated per se, but a “bonus” is still given to a person simply on account of skin color.

In college admissions, the *sine qua non* should be demonstrated qualities, not presupposed fallacious stereotypes. Jacques Maritain, French Philosopher, stated: “man must become what he is.”¹⁶ Man does not achieve his goals by remaining static, he must work to achieve what he wants to become. Race, however, assumes such a “becoming” from birth, disregarding the principles of achievement and hard work. The College Board, in an *amicus curiae* filed on behalf of Michigan, defending the use of race, asserts that the educator “should be accorded deference” in the admissions process.¹⁷ One is inclined to agree. It is necessary that admissions directors are given deference in making matriculation decisions, however this assumption is not one that precludes the extrication of race from such deference. One can consider the many factors involved in admissions without implicating race as one of those factors. Even if one were to concede that potential impact is a viable factor to weigh into admissions, one still cannot justify considering a race as such as a value because of the generalization it makes about minorities.

Still, others object to the idea of “value” as married to skin color; or at least they reject the idea of a *greater value*. They claim that it is the benefit that these students provide to all other students, not the student by virtue of his race. They claim that a prerequisite to “educational benefits” for all is not a value of race as such, but rather what is derived from the tidy package of diversity. There are two problems with this line of reasoning: (a) attempting to divorce the relationship race-based affirmative action designates to race is implausible, and (b) the educational benefit afforded to all students is at best marginal.

Firstly, affirmative action must be described in terms of race; that is, what it means to be black or white in the admissions process. From this standpoint, we see that blacks are afforded preferential treatment in virtue of their skin color. One may not argue that they are given partisan treatment as only a partial consideration, because *any* additional consideration or bonus still ascribes value to race as such.

Secondly, in defending their law school admissions policy the University of Michigan refused to lower entrance standards universally for fear of losing its elite status. As Justice Thomas points out, such a defense offers to undermine the diversity/critical mass rationale:

The Law School believes both that the educational benefits of a racially engineered student body are large and that adjusting its overall admissions standards to achieve the same racial mix would require it to sacrifice its elite status. If the Law School is correct that the educational benefits of “diversity” are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law School’s reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all.¹⁸

Surely it is absurd to claim a significant educational benefit in terms of “diversity” yet refuse to acquiesce to a more sensible and less divisive approach to achieving such diversity. In refusing to lower standards uniformly for all applicants in fear of losing a certain quality of education, the University essentially acknowledges the limited educational impact of “diversity”. Moreover, the argument literally contradicts itself rendering itself fallacious and obsolete.

Implicit in the University of Michigan’s policy is the idea that minorities and whites have fundamentally different experiences and that such experiences are valuable to all students.¹⁹ Such reasoning leads us down a “slippery-slope” debilitating the concept of equality and enabling us to view the policy in its true form: as an ICND initiative. If not explicitly stated, Michigan bases much of the import of racial diversity on the fact that minorities in the world have considerably different experiences than whites and that such experiences are valuable to other students. Such reasoning leads again to an erroneous idea: the value of one’s experience on account of skin color is somehow superior to that of another race.

¹⁶ Maritain, J. (1966). *The person and the common good*. Southbend, IN: Notre Dame Press:

¹⁷ Lane, N., Bakersville, L., & Holt, J. (2003).. College Board. *Amicus Curiae*

¹⁸ Justice Thomas: Grutter v. Bollinger 539 U.S. 02-241 (2003), footnote 4, pp.53

¹⁹ These experiences are valuable in so far as they alert student’s unknown experiences.

The majority opinion in Gratz states, “by virtue of race or ethnicity alone, [a person] is more valued than other applicants because [the applicant is] likely to provide [a] distinct perspective, . . . based on a presumption that persons think in a manner associated with their race.”²⁰ Experience and race are not coextensive, and one does not necessarily imply a direct correlation with the other. And while certainly different people have different experiences, one is not justified in denoting one person’s experiences as more valuable than another’s simply on the basis of race.

One other problem with the experience argument is that it suggests that all experience had by underrepresented minorities will be consistent. One would do well to consider the different reactions of persons of the same race to a similar experience. It is obvious that such responses will not be identical.

Michigan continually argues, specifically in the “respondents brief” that “College is a coming of age, and college students, most of whom are between eighteen and twenty-two years old, learn as much from one another as through classroom study.”²¹ There is no doubt that people learn from one another; yet, it seems absurd to claim that such learning necessarily translates into anything meaningful. For example, I can learn values from a lethargic person, but is it necessarily a good idea for me to do so? More practically, simply because someone is of a different race does not mean they will have more to teach me (or the rest of the student body) than someone with red hair or of a different religion or sexual orientation. Deciding which students have more to teach the others is a process that will never yield a definite result. Undoubtedly, we all have numerous ideas to share with each other, no matter how well we have done in school.

What is more confusing with the University’s reasoning is the manner in which it undermines its own logic when it states:

Living, working, and learning with a racially diverse group of peers provides opportunities for a richer exchange of ideas—whether or not explicitly touching on race—that reflects a wider range of life experiences.²²

Why does race have to provide for a richer exchange of ideas? And if race is a factor in admission criteria, then should it not stand to reason that race would play a role in the discussion and exchange of ideas? Apparently the University sees it otherwise as the enrichment of idea exchange can be achieved without explicitly touching on race. If such enrichment is possible without implicating race, then the role of race plays a small, if at all measurable role in such a robust exchange of ideas. And, if the role is so minute as to be infinitesimal, it seems logical that such consideration would also be given to the admissions criterion; i.e., it would not be considered as a significant factor in weighing an individual’s potential contribution to the school. Moreover, if such a robust exchange can take place without touching on race, it most certainly can take place by touching on other characteristics not necessarily bound by race, such as geographic location, social background, religion, and leadership experience. It follows then that such an exchange being possible with a variety of other factors that race need not even be of concern.

Positive and Negative Effects of Discrimination: Is Discrimination Ever Justifiable?

The answer to the question, *supra*, is yes. Certainly if discrimination occurs whenever choices are made, some discrimination must be justified. It stands to reason that if all volition is discriminatory, some discrimination is justifiable. The argument for race-based affirmative action may not be constitutionally expedient, but there is one argument for discrimination that is justifiable (albeit, not on racial grounds).

The argument is one of *racial integration*²³ (RI), which is not consistent with SCPD, but proposes an idea that may be useful elsewhere. *RI* consists in people of different racial groups living “together” as equals in

²⁰ Gratz et al v. Bollinger. 539 U. S. 02-516 (2003) p. 28

²¹ Respondents Brief. University of Michigan. Gratz v. Bollinger 539 U.S. 02-516 (2003). p. 11. Available online: <http://www.umich.edu/~urel/admissions/legal/gratz/UM-Gratz.pdf>

²² Respondents Brief. University of Michigan. Gratz v. Bollinger 539 U.S. 02-516 (2003). p. 11. Available online: <http://www.umich.edu/~urel/admissions/legal/gratz/UM-Gratz.pdf>

²³ This argument was introduced by Jim Stahair, J.D.

the sense of forming relationships with each other and interacting with each other as equals. *RI* does not consist merely in people of different racial groups living “among” each other. As a result of such *RI* certain *first order* values will be realized by, if not the initial generation exposed to implementation, then to the following generations.

One such first order value that will be derived from *RI* is that of *vivid awareness*: as a consequence of *RI*, people of different racial groups become vividly aware of each other’s problems, concerns, and values. A second value is that of *sympathetic identification*: as a consequence of *RI*, people of different racial groups sympathetically identify each other’s problems as their own. That is, people of one racial group perceive the problems of another racial group as their own problems and, hence, feel a strong obligation to address those problems. Another value of *RI* is that people will learn to *trust* one another. In trusting one another, people’s tensions will be mollified and greater cooperation will ensue. A fourth value of *RI* is that persons of different races will achieve *personal relationships* with people from the opposite race. Such relationships can make each consider the other as an equal. The final first order value of *RI* is *knowledge sharing*. By sharing knowledge, persons of different races will learn new ideas from one another.

As a result of the *first order values being realized*, the following *second order values* are likely to be realized as well. Firstly, greater *political cooperation* will be realized. Greater political participation consists in the general improvement of interest and activity in the political process. In being aware of the values of other races, each race will become more sympathetic to the others’ needs and thus the function of government will improve in addressing everyone’s needs with greater efficacy. A second value is *economic cooperation*: as a result of *RI*’s first order values people of different races will increase business with one another, encouraging greater minority business interests and equality. A third second order value of *RI* is *social cooperation*, which consists of greater communication and general friendliness towards another race. Such social cooperation will lead to efficacious tackling of social tasks and increase friendship. The final second order value of *RI* is living in *social harmony*. With a greater understanding of, and concern for, the other race people will be able to live cooperatively with one another as race will not be a divisive issue.

Although such a set of conditions may be desirable, it still rests on the basis of *ICND*. Regardless of the values a theory posits to achieve, one must consider the aforementioned issues, particularly the issue of the Equal Protection Clause and race. The fundamental argument is that it still assigns a certain value to race and in doing so violates the Equal Protection Clause. If one need be reminded of the dangers of allowing discrimination based on race or *ICND* we need look no farther than the case of *Korematsu v. The United States* 323 U.S. 214 (1944), in which Japanese were sent to internment camps on account of their race. What would be more useful is a plan of Economic Integration (*EI*). The same values would be realized but a violation of the Constitution and democracy would be avoided. *EI* would embody the idea of *RI* but would achieve it more effectively because it is not limited to achieving only racial goals. The dichotomy of *EI* consists in realizing the values of *RI* for both race *and* class. Two goals are achieved without the issue of race entering into the equation.

Fundamental Problems of Affirmative Action

Aside from the issues already discussed there are still two fundamental problems concerning affirmative action in higher education: first, the idea itself neglects a stronger and more reasonable approach of improving public school conditions across the country and second, it leaves the question of termination of affirmative action unanswered.

In questioning affirmative action as a policy choice we must ask why we must intervene most decisively at the collegiate level. In attempting to “level the playing field” it seems that we have distracted attention from the real issue: schooling quality in public schools. Simply admitting more minorities to college will not change the state of affairs in public schools. A continual effort to ameliorate conditions in public schools and increase their quality must be made. Some might argue that it is possible to pursue both better fundamental schooling and *EI*. Herein lies the second problem with affirmative action: when does the practice cease? How is one to know when we have achieved the “correct” number of minority or poor students? Is there a “critical mass” as the Michigan law school asserts?²⁴ Even if there is, does this not

²⁴ See *Grutter v. Bollinger* 539 U.S. 02-241 (2003)

amount to a quota? And if it is in fact a quota, when do we relinquish such a quota system and affirmative action policies?

Such questions were raised in the oral arguments in the *Grutter* Case; the Justices continually questioned the concept of “critical mass.” When pressing for a definitive answer as to what number exactly constituted a critical mass, the University continually sidestepped the issue, offering vague and opaque definitions such as “a sufficient number.”²⁵ The University of Michigan’s tergiversation obfuscates the issue by eschewing the substantive question of “how much is enough?” The fact of the matter is one is never sure when affirmative action will be discontinued, making it a dangerous process: it disregards work and creates disincentives from its beneficiaries. Justice Scalia voices his concern over this very issue, “today’s *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant ‘as an individual,’ *ante*, at 24, and sufficiently avoids ‘separate admissions tracks’ *ante*, at 22, to fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a ‘good faith effort’ and has so zealously pursued its ‘critical mass’ as to make it an unconstitutional *de facto* quota system, rather than merely ‘a permissible goal.’”²⁶

The majority of the court conjures an arbitrary number out of the sky of 25 years as to when affirmative action will no longer be needed, but never addresses how we will know when affirmative action is to be abolished. They set no guidelines or rules as to acceptable conditions for extinguishment. Moreover, in siding with the University of Michigan’s law school, they confuse the matter further by accepting the ambiguous notion of a “critical mass” or “meaningful numbers.”²⁷ Is one to postulate that once a “critical mass” (whatever that is meant to imply) is achieved in all universities affirmative action is to be terminated? The open-endedness of the court’s decision does nothing more than complicate the debate over affirmative action. It leaves room for new litigation, as Justice Scalia points out, and also effectively distributes ineffectual and enigmatic language concerning the diminishing need for affirmative action.²⁸

Affirmative action has numerous problems, both with the Constitution and the suppositions it makes as well as the question of termination. In any case, affirmative action seems to fail in its reasoning. It makes generalizations about applicants without demonstrated qualities and it imposes overridingly negative discrimination on both minorities and nonminorities. Such a program faces numerous unanswerable questions and seems doomed to reappear in court in the future.

²⁵ Oral arguments of *Grutter v. Bollinger* 539 U.S. 02-241 (2003). Available through the University of Michigan (www.umich.edu) and also through the Supreme Court (www.supremecourtus.gov).

²⁶ *Grutter v. Bollinger* Cite as: 539 U. S. 02-241 (2003). pp. 44

²⁷ Term used in Respondents Brief. University of Michigan. *Gratz*. 2003. p. 11. Available online: <http://www.umich.edu/~urel/admissions/legal/gratz/UM-Gratz.pdf>

²⁸ If one is to claim, as the Court does, that affirmative action will no longer be needed in 25 years this suggests a gradual regression of the policy itself. That the initiative is to be repealed at some point represents a diminishing need for the policy over a certain number of years until that need reaches zero, in which case the program would cease.