I. The Background of Affirmative Action

Affirmative Action is usually, but incorrectly, traced to Executive Order 11246 signed into law by President Lyndon Johnson on September 24, 1965.1 As originally phrased, Executive Order 11246 forbade employment decisions on the basis of race, color, religion and national origin and empowered the Secretary of Labor to issues rules and regulations necessary and appropriate to achieve its purpose. The order also imposed penalties for noncompliance and established an enforcement agency in the Department of Labor, the Office of Federal Contract Compliance Programs. On October 13, 1967, Executive Order 11246 was amended to include gender by way of Executive Order 11375. In 1969, Executive Order 11246 was again amended and broadened, this time by President Nixon’s Executive Order 11478.2

However, prior to Executive Order 11246 there was Executive Order 10925, issued by President Kennedy in 1961. Among other statements, Executive Order 10925 included the following: SEC. 203. The policy

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2 Executive Order No. 11478 required federal contractors in the construction industry to hire minority workers. Secretary of Labor George Shultz later issued the first guidelines requiring businesses with federal contracts to create "action plans" for hiring and promoting women. The "set asides" for minority construction workers that grew out of the Philadelphia Plan were ruled unconstitutional by the Court in City of Richmond v. J.A. Croson 488 U.S. 469, 492 (1989). Justice Marshall’s dissent in City of Richmond, joined by Mr. Justice Brennan and Justice Blackmun, makes the following comment: “Other Reports indicating the dearth of minority-owned businesses include H. R. Rep. No. 92-1615, p. 3 (1972) (Report of the Subcommittee on Minority Small Business Enterprise, finding that the ‘long history of racial bias’ has created ‘major problems’ for minority businessmen); H.R. Doc. No. 92-194, p. 1 (1972) (text of message from President Nixon to Congress, describing federal efforts ‘to press open new doors of opportunity for millions of Americans to whom those doors had previously been barred, or only half-open’); H. R. Doc. No. 92-169, p. 1 (1971) (text of message from President Nixon to Congress, describing the paucity of minority business ownership and federal efforts to give ‘every man an equal chance at the starting line’).”
expressed in Executive Order No. 10590 of January 18, 1955 (20 F.R. 409) with respect to the exclusion and prohibition of discrimination against any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin is hereby reaffirmed. More importantly, and what may be the first reference to “affirmative action,” is found in the following:

SECTION 301. Except in contracts exempted in accordance with section 303 of this order, all government contracting agencies shall include in every government contract hereafter entered into the following provisions:

In connection with the performance of work under this contract, the contractor agrees as follows: (1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause. 

Executive Order 11246 even refers to the prior Executive Orders and states, “Sec. 403. (a) Executive Orders Nos. 10590 (January 19, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President’s Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee

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shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate."

The phrase “affirmative action,” as used in Executive Order No. 10925, is not used in the same sense as the current phrase and simply addresses the subject of discrimination. Even before President Kennedy, executive orders addressed the issue of discrimination. President Kennedy’s executive order was preceded by President Eisenhower’s Executive Order 10479, signed in 1953, and that created the Committee on Government Contracts. President Eisenhower’s executive order required businesses covered by its provisions to maintain documentation and provide such documentation upon request.

In July 1948, President Harry S. Truman ordered the desegregation of the Armed Forces by Executive Order 9981. The order required that there be “equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.” The power to truly effect change by executive fiat is questionable, and it is arguable that the U.S. military integrated only when the Korean War began in 1952. The enlistment rate for African-Americans tells the story. In April 1950, Negroes accounted for 10.2 percent of the total enlisted strength; by August this figure reached 11.4 percent. On 1 January 1951, Negroes comprised 11.7 percent of the Army, and in December 1952 the ratio was 13.2 percent. The percent of Negroes among those enlisting in the Army for the first time jumped from 8.2 in March 1950 to 25.2 in August, averaging 18 percent of all first-term

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4 Contractor’s Assn. of E. Pa., v. Secy. Of Labor, 442 F.2d 159, 163 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971) observing that the “Philadelphia Plan” was the Secretary of Labor’s implementation of Executive Order Numbers 11246 and 11375 as to the five-county Philadelphia area encompassing Bucks, Chester, Delaware, Montgomery and Philadelphia counties.

5 See, e.g., President Roosevelt’s first Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941) (Policy Preamble), wherein President Roosevelt stated: “I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin….”


8 The integration of the United States Army was not accomplished by executive fiat or at the demand of the electorate. Nor was it the result of any particular victory of the civil rights advocates over the racists. It came about primarily because the definition of military efficiency spelled out by the Fahy Committee and demonstrated by troops in the heat of battle was finally accepted by Army leaders.” MORRIS J. MACGREGOR, JR., INTEGRATION OF THE ARMED FORCES 1940-1965, CENTER OF MILITARY HISTORY, UNITED STATES ARMY, WASHINGTON, D.C. (1985).

enlistments during the first nine months of the war. Black reenlistment increased from 8.5 to 12.9 percent of the total reenlistment during the same period, and the percentage of black draftees in the total number of draftees supplied by Selective Service averaged 13 percent.

In June 1941, President Franklin D. Roosevelt signed Executive Order 8802 prohibiting government contractors from engaging in employment discrimination based on race, color or national origin. Although this order is the first presidential action ever taken to prevent employment discrimination by private employers holding government contracts, the primary impetus for governmental action on the subject of discrimination is arguably the need for as many individuals as possible for military service. Regrettably, although the Executive Order applied to all defense contractors, it contained no enforcement authority. President Roosevelt signed the Executive Order primarily to ensure that no strikes or demonstrations disrupted the manufacture of military supplies during preparation for war.

As with executive fiat, the power to effect change by judicial fiat is also questionable. While the Civil Rights Act of 1964, specifically Title VII, broadened the coverage of the prior Executive Orders, its actual effect on the subject matter is questionable, due at least in part, to interpretation.

The first use of “affirmative action” as is currently understood, did not occur until the Nixon Administration. As previously noted, Executive Order 11246 empowered the Secretary of Labor to issues rules and regulations necessary and appropriate to achieve its purpose. He, in turn,

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11 Brown v. Bd. of Edu. of Topeka, 347 U.S. 483 (1954). Brown was followed, almost twenty years later inter alia, by Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973) where the Court, in summarizing the case, noted:

This school desegregation case concerns the Denver, Colorado, school system. That system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education. Rather, the gravamen of this action, brought in June, 1969, in the District Court for the District of Colorado by parents of Denver schoolchildren, is that respondent School Board alone, by use of various techniques such as the manipulation of student attendance zones, school site selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district, entitling petitioners to a decree directing desegregation of the entire school district. (footnotes omitted).

12 President Nixon stated later: “A good job is as basic and important a civil right as a good education is necessary and right. We would not impose quotas, but would require federal contractors to show affirmative action to meet the goals of increasing minority employment.” Richard Nixon, RN: The Memoirs of Richard Nixon 437 (1978).
delegated most enforcement duties to the Office of Federal Contract Compliance. In 1971 the United States Department of Labor issued Order No. 4, which required federal contractors to analyze major job categories (i.e., officials and managers, professionals, technicians, sales workers, office and clerical workers, and skilled craft workers). Federal contractors were ordered to perform an underutilization analysis to determine if they hired women and minorities in the same proportion as the area labor force. If certain groups were underrepresented, companies were to set goals and timetables for hiring, retention and promotion to overcome any underutilization that was found to exist. Arguably, Order No. 4 was the first to impose affirmative action as the phrase is used today.

A. Early Attempts to Deal with Discrimination

In 1820 Congress passed what is generally referred to as the “Missouri Compromise” that prohibited slavery in the western territories “north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri.” The effect that the Compromise had on the status of a slave that entered “free” territory was addressed in the infamous case of Scott v. Sandford. A key issue was whether Dred Scott was entitled to the rights, privilege and immunities guaranteed to citizens by the Constitution, including the right to sue in federal court under certain circumstances. Chief Justice Roger B. Taney, writing for a majority of the Court, held that the

14 In 1969, President Richard M. Nixon established the “Philadelphia Plan” which instituted goals and timetables for minority hiring, allegedly because unions in Philadelphia were vehemently opposed to the hiring of minorities. Assistant Secretary Arthur Fletcher noted: “Equal employment opportunity in these [construction] trades in the Philadelphia area is still far from a reality. The unions in these trades still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few negroes being referred for employment. We find, therefore, that special measures are required to provide equal employment opportunity in these seven trades.” Department of Labor Memo from Arthur Fletcher to All Agency Heads discussing the revised Philadelphia Plan, June 27, 1969. At the time, the Philadelphia Plan arguably represented the most significant effort on the part of the government to address discrimination, and included in its coverage, women, veterans and the disabled. The late Assistant Secretary Arthur Fletcher, who played defensive end for the Los Angeles Rams and was the first black player for the Baltimore Colts, billed himself as the “father of affirmative action.” U.S. DEPT. LABOR, DOL New Brief (Feb. 21, 2013).
15 Scott v. Sandford, 60 U.S. 393, 432 (1856).
16 Id.
plaintiff was barred from filing the suit and observed that blacks, whether free or slave, were not, and could not, become citizens.17

However, the Court’s decision went even further, and declared the Missouri Compromise unconstitutional, which served to permit slavery where it was previously prohibited and held that Congress could not prohibit slavery.18 In opposing the decision in *Dred Scott*, Abraham Lincoln noted, “We do not propose that when Dred Scott has been decided to be a slave by the court, we . . . will decide him to be free . . . but we nevertheless do oppose that decision as a political rule . . . which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.”19

Nor did Lincoln’s opposition to the decision in *Dred Scott* stop him from stating, “I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races –that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people. . . .”20

In his first inaugural address, President Lincoln stated, “I have no purpose, directly or indirectly, to interfere with the institution of slavery in the states where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”21 President Lincoln’s statement reflected his view of the Constitution in that it was the states, not the national government, that had authority to regulate the laws on personal status, including marriage, divorce, child custody, inheritance, voting and, of course, slavery. By mid-1862 it appears that President Lincoln believed that he had the power to eliminate slavery, but only in those states that were currently in rebellion. On January 1, 1863, at the height of the Civil War, President Lincoln issued the Emancipation Proclamation freeing most, but not all slaves.22 The Emancipation Proclamation reflected President Lincoln’s view of the

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17 Id. at 404-06. Mr. Justice Taney went even further, holding that because the Missouri Compromise, in effect, sought to deprive slaveholders of their property it therefore, “could hardly be dignified with the name of due process of law.” Id. at 450.
18 Id. at 452.
21 Washington, D.C. (March 4, 1861). President Lincoln’s attempts to assuage the concerns of southern states failed with the start of the Civil War slightly more than one month later on April 12, 1861.
22 An Executive order based on his authority as “Commander in Chief of the Army and Navy” under Article II, section 2 of the Constitution and given permanence by the Thirteenth Amendment. Thus, those slaves that were not freed became so only after ratification of the Thirteenth Amendment.
23 60 U.S. 393 (1857).
Constitution, and was limited to those states of the Confederacy that had not yet been occupied by federal forces. Under the Constitution the president could arguably only free slaves in territory that was claimed to be outside the United States. The Emancipation Proclamation also appears to be carefully drafted on the assumption that it would be challenged in court. Were the case to make its way to the Supreme Court, it would face scrutiny by Chief Justice Roger B. Taney and four other justices who had been part of the majority decision in *Dred Scott v. Sandford.*

Following the Civil War, Congress passed three Constitutional Amendments that were intended to protect the rights of former slaves. In 1865, the Thirteenth Amendment was passed, stating in part, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

In 1868, the Fourteenth Amendment was enacted with the intention to prevent states from passing discriminatory laws. It required states to provide equal protection under the law to all persons, not just citizens. The Fourteenth Amendment would take on added significance almost a century later in *Brown v. Board of Education.* In 1870, the Fifteenth Amendment was passed, prohibiting the states or the federal government from using a citizen's race, color, or previous status as a slave as a voting qualification, with the intent to enfranchise newly-freed slaves. As with the Fourteenth Amendment, its significance would become apparent almost a century later with the Voting Rights Act of 1965 which, among other requirements, outlawed the use of literacy tests to qualify to register to vote.

These Constitutional Amendments were supplemented by other action, including civil rights acts. The Civil Rights Acts of 1866 and 1870 were passed immediately after the Civil War to ensure that newly freed slaves achieved full legal rights. These Acts are currently codified in Sections 1981, 1983 and 1985, Chapter 42 of the United States Code.

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23 Both the Fifth and the Fourteenth Amendments provide, in part, that no person shall be deprived of life, liberty, or property, without due process of law.”

24 14 Stat. 27 (1866), the Civil Rights Act of 1866 was the first in a series of laws that collectively constitute the Civil Rights Act, most recently amended in 1991 and now codified at 42 U.S.C. 1981 et seq. (2012). See also U.S. Const. Amends. XIII, XIV, XV.

25 Also known as the First Ku Klux Klan Act, 16 Stat. 140-146 (1870), passed by the 41st Congress (1869-1871) as H.R. 1293.

26 In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the U.S. Supreme Court held that Section 1981 applied only to racial discrimination in employment that related to the formation and enforcement of contracts and did not cover harassment based on race. The Civil Rights Act of 1991 amended Section 1981 and rendered Patterson moot by adding Section 1981(b), which states, “For the purposes of this section, the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.”
Section 1981 provides, in part, “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...as is enjoyed by white citizens. . . .” 27 The wording of Section 1981 (“as is enjoyed by white citizens”) demonstrates a concern with racial discrimination.

Title 42, section 1983 provides: “Every person who, under the color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, equity, or other proper proceeding for redress.” Unlike Section 1981, Section 1983 extends to claims based on the deprivation of rights granted under federal statutory law. However, a claim that is based on section 1983 is restricted to cases in which the alleged discrimination is by someone acting (or claiming to act) under government authority.

Title 42, section 1985(c) prohibits two or more persons from conspiring to deprive a person or class of persons “of the equal protection of the laws, or of equal privileges and immunities under the law.” This law was enacted to protect former slaves, who were overwhelmingly Republican because of President Lincoln, as well as white Republicans, from Ku Klux Klan violence.

The Civil Rights Act of 1991 amended Section 1981 and effectively overturned prior decisions of the Supreme Court 28 by adding Section 1981(b), which states, “For the purposes of this section, the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.”

In 1866 Congress passed a law to address employment discrimination and in 1875 a law to prevent discrimination in transportation and accommodations. 29 During this time a number of African Americans were elected to Congress as well as state legislatures.


29 The Civil Rights Act of 1875 guaranteed that everyone, regardless of race, color, or previous condition of servitude, was entitled to the same treatment in “public accommodations.” The United States Supreme Court held the act unconstitutional in 1883, on the basis that Congress had no power to regulate the conduct of individuals. The Civil Rights Cases, 109 U.S. 3 (1883).

30 Consider the following from the White House web site (available at whitehouse.gov) on former presidents: “Beneficiary of the most fiercely disputed election in American history,
B. The Presidential Election of 1876

Early attempts to address racial discrimination arguably ended in 1876, with the election of President Rutherford B. Hayes. At about that time, Union troops whose presence may have guaranteed the implementation of the noted Amendments and laws were withdrawn from the South as part of an agreement. From approximately 1877 to the 1950s various states enacted

Rutherford B. Hayes brought to the Executive mansion dignity, honesty, and moderate reform... "Although a galaxy of famous Republican speakers, and even Mark Twain, stumped for Hayes, he expected the Democrats to win. When the first returns seemed to confirm this, Hayes went to bed, believing he had lost. But in New York, republican National Chairman Zacharian Chandler, aware of a loophole, wired leaders to stand firm: 'Hayes has 185 votes and is elected.' The popular vote apparently was 4,300,000 for Tilden to 4,036,000 for Hayes. Hayes’s election depended upon contested electoral votes in Louisiana, South Carolina, and Florida. If all the disputed electoral votes went to Hayes, he would win; a single one would elect Tilden.” The irony of Florida proving to be pivotal in a presidential election cannot be overstated. “Months of uncertainty followed. In January 1877 Congress established an Electoral Commission to decide the dispute. The commission, made up of eight Republicans and seven Democrats, determined all the contests in favor of Hayes by eight to seven. The final electoral vote: 185 to 184. “Norther Republicans had been promising southern Democrats at least one Cabinet post, Federal patronage, subsidies for internal improvements, and withdrawal of troops from Louisiana and South Carolina...”Hayes pledged protection of the rights of Negroes in the South, but at the same time advocated the restoration of ‘wise, honest, and peaceful local self-government.’ This meant the withdrawal of troops. Hayes hoped such conciliatory policies would lead to the building of a ‘new Republican party’ in the South, to which white businessmen and conservatives would rally.”

31 See Ari Hoogenboom, Inaugurating a 'Most Successful Administration', RUTHERFORD B. HAYES PRESIDENTIAL CENTER, http://www.rbhayes.org/hayes/scholarworks/display.asp?id=499 (lasted visited Mar. 11, 2014). Anticipating that the Commission would give Hayes South Carolina, the Democrats delayed the count of electoral votes before the joint session by adjourning the House of Representatives, which they controlled. Some Democrats wanted to escalate the crisis into chaos by not having a duly elected president on March 4, 1877. Most Democrats, however, were bluffing. The threat of chaos was for them a bargaining chip to secure concessions from the incoming Hayes administration. All Democrats wanted federal troops to cease protecting Republican governments in Louisiana and South Carolina. (Florida was no longer an issue, since a post-election state Supreme Court decision gave it to the Democrats as of January 1, 1877). In addition to withdrawing troops, some Southern Democrats wanted federal support for internal improvements—specifically a land grant for the Texas & Pacific Railroad. Hayes was aware of negotiations between his supporters and Southern Democrats.

There were overtures prior to the Electoral Commission Act of January 29, 1877, then a lull, followed by a renewal in late February as Democrats filibustered and delayed the count. Some southern Democrats even hinted that in addition to acquiescence to Hayes's inauguration they might switch parties and help elect James A. Garfield Speaker of the House of Representatives in the next Congress. Although aware of talks, Hayes remained aloof. He wished to avoid charges of 'intrigue--bargain and sale' and saw the "true position to be 'hands off.'" His lieutenants did not disappoint him. They conceded nothing beyond what Hayes had already promised in his letter of acceptance of July 8, 1876: that if all parts of the Constitution—including the Reconstruction Amendments--were ‘sacredly observed’ and the rights of all--
Jim Crow 32 laws legalizing discrimination. 33 The schizophrenia had returned with a vengeance.

C. The Lawsuits Begin

The early conflict between the federal and state law arguably culminated in the Civil Rights Cases 34 that reached the U.S. Supreme Court in 1883. The Civil Rights Cases consolidated two cases alleging a refusal by inns in Kansas and Missouri to accommodate African Americans and a case alleging that a railroad in Tennessee refused to allow an African American woman to ride in the ladies’ car of a train.

In its opinion, the Court focused on the wording of the Fourteenth Amendment. The Amendment states that “no state” shall discriminate. Therefore, the Court held, the law did not prohibit a “private wrong,” and Congress lacked the authority to regulate private activities.

Regardless of the Civil Rights Act of 1875, and its wording, in 1890, Louisiana passed the Separate Car Act that required all Louisiana railroads to “…provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.” 35 Homer Plessy, who was seven-eighths white and one-eighth African, boarded a coach for white passengers. Upon his refusal to move to the other coach, Mr. Plessy was ejected from the train and put in jail. In his lawsuit, he claimed that the Separate Car Act denied him “equal with no exceptions—be recognized by all, he would promote ‘honest and capable local government.’” 36

32 The phrase “Jim Crow” seems to have been taken from a song, “Jumping Jim Crow” or “Jump Jim Crow” in a nineteenth century minstrel show by a white performer in black face.


34 109 U.S. 3 (1883). The consolidated cases were U.S. v. Stanley, U.S. v. Ryan, U.S. v. Nichols, U.S. v. Singleton and Robinson & Wife v. Memphis & Charleston Ry Co. Stanley and Nichols were indictments for denying to persons of color the accommodations and privileges of an inn or hotel. Those against Ryan and Singleton were, one on information and the other an indictment for denying to individuals the privileges and accommodations of a theatre. The case of Robinson & wife was an action brought to recover the penalty of five hundred dollars. The cases were from Kansas, California, Missouri, New York and Tennessee.

35 The law in Louisiana exempted “nurses attending children of the other race” from its application. Plessy v. Ferguson, 163 U.S. 540, 553 (1896) (Harlan, J. dissenting). Note also that Article 135 of Louisiana’s 1868 Constitution forbade segregation of the races in public schools. That prohibition was dropped by Louisiana’s 1879 Constitution by Article 231, which authorized the establishment of a university for negroes.
“protection” under the Fourteenth Amendment. In *Plessy v. Ferguson*, the Supreme Court, while paying lip service to *Yick Wo v. Hopkins*, disagreed. The Court specifically noted:

[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

The Court’s opinion makes clear that there was no longer a conflict between federal and state laws and Jim Crow laws were no longer limited to the former states of the Confederacy.

The next significant case arose as a result of World War II. Concerns about Japanese-Americans led to laws that affected thousands of individuals on the U.S. West Coast. Although the laws were directed primarily at a single racial group, the effect was far broader. In a mixed marriage, both spouses were affected by the law and placed in an internment camp. Several cases were filed challenging the laws. In *Hirabayashi v. U.S* the Court, ignoring the realities of Jim Crow laws and prior cases, again paid lip service to *Yick Wo v. Hopkins* and stated in part: “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. One may assume that

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36 163 U.S. 540 (1896). The “Ferguson” of *Plessy v. Ferguson* was John H. Ferguson, a judge who denied Plessy’s constitutional argument in a New Orleans Criminal Court.

37 118 U.S. 356 (1886). San Francisco passed an ordinance that required city licenses for all laundries, then denied licenses to those that were owned by Chinese. The U.S. Supreme Court struck down the ordinance as a violation of the equal protection clause of the Fourteenth Amendment. Had the Court been consistent, it would arguably have struck down the challenged Jim Crow Laws.

38 163 U.S. 540 (1896).

39 Indeed it is arguable that federal Jim Crow legislation is alive and well. At least one commentator has noted that the Davis-Bacon Act of 1931 was originally passed with the intent of favoring white workers who belonged to white-only unions over non-unionized black workers. The Act, requiring that federal construction contractors pay their workers “prevailing wages,” is still in effect and continues to discriminate against African-Americans. Bernstein, David, *The Davis-Bacon Act: Let's Bring Jim Crow to an End*, cato.org/pubs/brief/bp-017.html.

40 320 U.S. 81, at 85 (1943).

these considerations would prevail were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. "We must never forget, that it is a constitution we are expounding, a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant."42

A scant eleven years later in Brown v. Board of Education43 the Court would again confront the issue of racial discrimination. Surprisingly, Brown v. Board of Education was not the first case to confront the issue of “separate but equal.” The court wrote:

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In Cumming v. County Board of Education, 175 U.S. 528, and Gong Lum v. Rice, 275 U.S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter . . . the

42 McCulloch v. Maryland, Wheat. 316, 407, 415
Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.44

Also surprisingly, the Fourteenth Amendment, which appears to be so specific, was held by the Court to be less than clear. The Court noted that “[r]eargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States.’ Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.”45 The court continued:

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools supported by general taxation had not yet taken hold. Education of white children was largely in the hands of private groups. Education ofNegroes was almost nonexistent, and practically all members of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should

44 Id. at 487 (citations omitted).
45 Id. at 489 (citations omitted).
be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.\textsuperscript{46}

The Court’s comment that the Fourteenth Amendment was inconclusive is unsurprising and current laws also appear to present a challenge. Title VII prohibits discrimination in such contexts as education and employment on the basis of race, color, national origin, religion, and gender. The language of the law appears to be quite specific and intolerant of any discrimination, absent a bona fide occupational qualification (BFOQ) or business necessity. However, the United States Supreme Court has given the wording a flexibility that presents a challenge to all courts. Indeed, the Supreme Court has showed a glaring inconsistency (the Court’s opinions being described by one court as “schizophrenic”\textsuperscript{47}) in its approach to cases involving discrimination. This lack of consistency in interpretation poses a dilemma for deciding future cases at all levels. This issue is not only unsurprising, it was expected.\textsuperscript{48}

The Court’s use of different standards of review (strict scrutiny, intermediate scrutiny, rational basis) is well-documented and eminently justifiable. However, the appropriate standard of review in affirmative action cases has presented a challenge for the Court.

\textsuperscript{46}Id. (citations omitted).

\textsuperscript{47} Univ. & Comty. Coll. Sys. of Nev. v. Farmer, 113 Nev. 90 (1997), cert denied 523 U.S. 1004 (1998). In Farmer, the University of Nevada advertised for an impending vacancy in the sociology department. Yvette Farmer was one of the three finalists chosen for the position, but the University obtained a waiver to interview only one candidate, Johnson Makoba, a black African male emigrant. Because of a perceived shortage of black Ph.D. candidates, coupled with Makoba’s strong academic achievements, the search committee sought approval to make a job offer to Makoba at a salary of $35,000 (above the advertised salary of $28,000 to $34,000). Farmer was subsequently hired by the University for a position created under the “minority bonus policy.” Farmer sued and the trial court jury awarded her $40,000. The issue on appeal was the legality of the University’s affirmative action plan under both Title VII and the Constitution. The Supreme Court of Nevada noted, in part, “Tension exists between the goals of affirmative action and Title VII’s proscription against employment practices which are motivated by considerations of race, religion, sex, or national origin, because Congress failed to provide a statutory exception for affirmative action under Title VII. See 42 U.S.C. Section 2000 (e). Until recently, the Supreme Court’s failure to achieve a majority opinion in affirmative action cases has produced schizophrenic results.” Id. at 96. In overturning the verdict for Farmer, the Nevada Supreme Court noted that the “University’s affirmative action policies pass constitutional muster.” Id at 102.

\textsuperscript{48} “By going not merely beyond, but directly against Title VII’s language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind.” Dissent of Mr. Justice Rehnquist in United Steelworkers of America v. Weber, 443 U.S., 193, 255 (1979).
II. THE LONG AND WINDING ROAD

As the courts interpret the laws, and some courts interpret them differently from others, problems with compliance become even more pronounced. Although the Supreme Court’s muddled approach to racial discrimination is reflected in a variety of opinions, this problem did not always exist. In *McDonald v. Santa Fe Trail Transportation Co.*, 49 three employees were caught stealing from their employer. Two white employees were fired while the third, a black employee, was suspended. The white employees alleged discrimination. The employer attempted to justify the discriminatory treatment on the grounds that Title VII protected the black employee. The trial court agreed with the employer and dismissed the plaintiffs’ lawsuit. The District Court concluded that terminating the white employees was not a claim covered by Title VII. The Supreme Court disagreed and specifically stated that Title VII protects all employees, regardless of race, color, religion, gender or national origin. The employer violated Title VII by treating the white employees differently.

A dramatic change occurred only three years later in *United Steelworkers of America v. Weber*. 50 In *Weber*, the AAP, collectively bargained for by the employer and union, reserved for black employees fifty percent of the openings in an in-plant craft-training program until the percentage of black craft workers in the plant was commensurate with the racial composition of the local labor force. During 1974, the first year of operation for the AAP, thirteen craft trainees were selected for the program. Of those, seven were black and six white. The most senior black trainee selected for the program had less seniority than several white production workers whose bids for admission were rejected. One of those white production workers, Weber, sued.

The issue in *Weber* was the legality of a voluntary AAP adopted by an employer that had not been found guilty of prior illegal discrimination. The courts have almost uniformly held that “remedial” AAPs (i.e., those set up to remedy prior illegal discrimination) are permissible under Title VII, since such plans may be necessary to overcome the effects of the employer’s prior illegal discrimination. 51 Justice Brennan, writing for the majority in *Weber*,

51 The Court in *Grutter* addressed this issue. “We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since Bakke. It is true that some language in those opinions might be read to suggest that remedies for past discrimination is the only permissible justification for race-based governmental action. See, e.g., Richmond v. J. A. Croson Co., (plurality opinion) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility").
noted: “The only question before us is the narrow statutory question of whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan.”

Paying lip service to *McDonald*, the court noted, “Since, the argument runs, *McDonald v. Santa Fe Trail Transp. Co.*… settled that Title VII forbids discrimination against whites as well as blacks, and since the Kaiser-USWA affirmative action plan operates to discriminate against white employees solely because they are white, it follows that the Kaiser-USWA plan violates Title VII.” The Court dismissed this argument by noting:

[This argument] overlooks the significance of the fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. In this context respondent’s reliance upon a literal construction of Sections 703(a) and (d) and upon *McDonald* is misplaced. It is a ‘familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.’ The prohibition against racial discrimination in Sections 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the act arose. Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would ‘bring about an end completely at variance with the purpose of the statute’ and must be rejected.

The majority opinion drew a scathing critique by future Chief Justice William Rehnquist, who referred to the Court’s opinion as “…a tour de force reminiscent not of jurists such as Hale, Holmes, or Hughes, but of escape artists such as Houdini.” The various factors, such as the legislative history that the Court relies on in *Weber*, were surprisingly absent in *McDonald*. This case exemplifies the contradictions surrounding Title VII and AAPs in the employment context.

But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body. *Id.* (citation omitted).

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52 *Id.* at 200.
53 *Id.*
54 *Id.* (citations omitted).
III. THE PRESENT: BACK TO THE FUTURE?

In *Grutter v. Bollinger*\(^{55}\) the University of Michigan Law School allegedly sought through its admissions policy to “attain the purported educational benefits of having a diverse student body by enrolling a ‘critical mass’ of students who were members of underrepresented minority groups such as African-Americans, Hispanics, and Native Americans.”\(^{56}\) The policy (1) required admissions officials (a) to evaluate each applicant on the basis of all information available in the applicant's file, including a personal statement, letters of recommendation, an essay describing how the applicant would contribute to law-school life and diversity, the applicant's undergraduate grade-point average, and the applicant’s Law School Admissions Test score, and (b) to look beyond grades and scores to such “soft variables” as recommenders’ enthusiasm, the quality of the applicant’s undergraduate institution, the applicant’s essay, and the areas and difficulty of the applicant’s undergraduate course selection; and (2) did not (a) define diversity solely in terms of racial and ethnic status, or (b) restrict the types of diversity contributions eligible for “substantial weight.” A lawsuit was filed by a white female in-state applicant who had been denied admission to the law school, alleging that in rejecting her, the school had discriminated against her on the basis of race.

The District Court, among other relief, enjoined the law school from using race as a factor in the law school's admissions decisions. The U.S. Court of Appeals for the Sixth Circuit, after entering a stay of the injunction pending appeal, reversed the District Court's judgment and vacated the injunction, holding that the law school's race-conscious admissions policy did not violate the Fourteenth Amendment. The U.S. Supreme Court affirmed the appellate court’s decision.

Perhaps of greatest importance to this case, as noted by the dissent, is that the University of Michigan in *Grutter* admits to having practiced discrimination. In defending its admission policies, the University attempts to justify its discrimination by claiming that it was trying to achieve a “critical mass” of minority students. This aspect of the admission policy is described by the majority opinion in *Grutter* as follows:

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\(^{56}\) In a companion case to *Grutter*, *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court struck down the University of Michigan’s undergraduate admissions program which awarded points to African Americans, Hispanics, and Native Americans on an admission rating scale holding that such an approach was not narrowly tailored to achieve the university’s goal of diversity.
The policy aspires to ‘achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.’ The policy does not restrict the types of diversity contributions eligible for ‘substantial weight’ in the admissions process, but instead recognizes ‘many possible bases for diversity admissions.’ The policy does, however, reaffirm the Law School's longstanding commitment to ‘one particular type of diversity,’ that is, ‘racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.’ By enrolling a 'critical mass' of [underrepresented] minority students,’ the Law School seeks to ‘ensure their ability to make unique contributions to the character of the Law School.57

57 Id. (citations omitted). The University of Michigan’s professed goal of creating a “critical mass” faces a daunting task. The U.S. government compiled a list of minority groups. For instance, Exec. Order No. 11625, 36 Fed. Reg. 19967 (Oct. 13, 1971) unless otherwise noted, which superseded Exec. Order No. 11454, 36 Fed. Reg. 199 (designated “Blacks, Puerto-Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts as persons who are socially or economically disadvantaged…Other groups designated are listed below in paragraph (c)….” Paragraph (c) notes that, “In addition to those listed in E.O. 11625, members of the following groups have been designated as eligible to receive assistance: Hasidic Jews, Asian Pacific Americans, and Asian Indians.” The federal government’s Code of Federal Regulations (13 CFR 124.103) goes on to note, “Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. (b) Members of designated groups. (1) There is a rebuttable presumption that the following individuals are socially disadvantaged: black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section….” Note that nowhere do the requirements demand that the person be an American citizen. The Plaintiff and Petitioner in Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000) pointed this out to the Court, noting, “[E]very single legally admitted permanent resident or citizen of the United States who happens to be female or who can trace his origins to any of 42 specifically designated countries is automatically presumed to have attempted to enter the American highway construction business and to have experienced racial prejudice that somehow hindered that attempt.” (Petitioner’s Brief on the Merits, June 11, 2001, page 11). A member of one of the enumerated groups would be entitled to priority over a citizen of
The “critical mass” aspect of the University of Michigan’s two-pronged defense is not new and has been attempted in the employment context. In *Teal v. Connecticut*, five forty state employees applied for supervisory positions. To attain permanent status as supervisors, the applicants participated in a selection process that required, as the first step, a passing score on a written examination. The plaintiffs, including Teal, failed the written examination and were excluded from further consideration for permanent supervisory positions. The four employees then sued, claiming that the written examination excluded black applicants in disproportionate numbers and was not job-related. Approximately one month prior to trial, Connecticut promoted eleven of the forty-eight black employees who took the test and 35 of the 259 White employees that took the test. The Court noted that, “The overall result of the selection process was that, of the 48 identified black candidates who participated in the selection process, 22.9 percent were promoted and of the 259 identified white candidates, 13.5 percent were promoted. It is this ‘bottom-line’ result, more favorable to blacks than to whites, that petitioners urge should be adjudged to be a complete defense to respondents’ suit.” In essence, the defendant argued that it could not be liable for the alleged racial discrimination suffered by the four employees because the “bottom line” result of the promotional process “was an appropriate racial balance.”

The Court in *Teal* gave the defendant’s purported defense short shrift. “This Court has never read Section 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted.” Yet, this is what the Court has allowed in *Grutter*, where the University of Michigan has essentially argued a “bottom line” defense. The Court in *Teal* went on to note, “When an employer uses a nonjob-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity ‘because of…race, color, religion, sex, or national origin.’ In other words, Section 703(a)(2) prohibits discriminatory ‘artificial, arbitrary, and

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the United States that happens to be African-American or Hispanic-American, for instance. (Emphasis added). The University of Michigan’s selection of such a limited number of minority groups for special treatment goes unexplained by the majority opinion. In *Bakke*, Mr. Justice Powell noted, by way of a footnote, “…the University is unable to explain its selection of only the four favored groups – Negroes, Mexican-Americans, American Indians, and Asians – for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process.” 439 U.S. 265, 310, nt. 45 (1978).

59 Id.
60 Id. at 450 (emphasis added).
and unnecessary barriers to employment,’ that ‘limit...or classify...applicants for employment...in any way which would deprive or tend to deprive any individual of employment opportunities.”61

The Court in *Teal* went on to note, “It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees’ group. . . .”62 Again, this is precisely what the Court has allowed in *Grutter*. The Court in *Grutter* shows a surprising willingness to accept the ephemeral “critical mass” without any substantiation. The Court rejected such an approach by employers in *Teal* and should do so in the educational arena as well. The Court’s willingness to accept such an approach in education is of questionable wisdom.

The dissent to *Grutter*, with detailed analysis and reasoned justification, goes so far as to call the purported “critical mass” defense a “sham.” In examining the admission records of the law school, the dissent noted that the practice of admitting students among the various minority groups differed substantially. The dissent observed:

From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve ‘critical mass,’ thereby preventing African-American students from feeling ‘isolated or like spokesperson for their race,’ one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case, how can this possibly constitute a ‘critical mass’ of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of ‘critical mass,’ one would have to believe that the objectives of ‘critical mass’ offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving ‘critical mass,’

61 *Id.* at 447.
62 *Id.* at 455.
without any explanation of why that concept is applied differently among the three underrepresented minority groups.63

The point that disadvantaged minority groups may be further disadvantaged by other minority groups is critical to understanding the impact AAPs are having on current practices. The dissent in Grutter noted that in 2000 the University of Michigan Law School admitted only two of twelve Hispanics with LSAT scores between 159-160 and grade point averages of at least 3.0, while the school admitted all twelve African-American applicants with the same qualifications. Furthermore, no race-specific arguments were put forward in the case to explain why more individuals from one minority group are needed to achieve critical mass in comparison to other minority groups.

In addition to the discrepancies in the numbers needed to achieve critical mass, in Grutter a strong correlation existed between the percentage of applicants and those admitted by race; that is, the percentages of acceptance for African-Americans matched the percentage of applicants who were African-American, the percentage of Hispanics accepted matched the percentage of Hispanic applicants, etc. The dissent in Grutter commented:

The Law School cannot precisely control which of its admitted applicants decide to attend the university. But it can and, as the numbers demonstrate, clearly does employ racial preferences in extending offers of admission. Indeed, the ostensibly flexible nature of the Law School’s admissions program that the Court finds appealing…appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups.64

Such a program must necessarily involve racial discrimination among the various minority groups. And, when a member of one minority group is given a preference, it is a member of another minority group that may be a victim of discrimination. Even more surprising is that the majority opinion in Grutter purports to follow the dictates of the Bakke case65 while ignoring the

63 Id. As noted in the dissent, by way of a footnote, “Indeed, during this 5-year time period, enrollment of Native American students dropped to as low as three such students. Any assertion that such a small group constituted a ‘critical mass’ of Native Americans is simply absurd.” Id. at nt 5.
65 “We find that the Law School’s admissions program bears the hallmarks of a narrowly tailored plan. To be narrowly tailored, a race-conscious admissions program cannot ‘insulate each category of applicants with certain desired qualifications from competition with all other applicants.’ Bakke, 439 U.S. 265 at 315 (opinion of Powell, J.). Instead, it may consider race
clear command by the late Justice Powell that, “Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified as measured by standards applied without regard to race.”

There are two significant issues with the Court’s opinion in *Grutter*. In addition to the foregoing “critical mass” defense, the Court also addressed the University’s use of “soft variables.” This second prong of the University of Michigan’s defense in *Grutter* argues that subjective criteria should be used in assessing a candidate’s qualifications. The subject of informal evaluation criteria (the “soft variables” in *Grutter*) has also presented itself to the Court previously. In *Watson v. Fort Worth Bank and Trust* the United States Supreme Court was faced with a situation similar to *Grutter*. The Plaintiff was denied a number of promotions that instead went to Caucasian applicants. The trial court concluded that Watson had established a prima facie case of employment discrimination, but that her employer had met its rebuttal burden by presenting legitimate and nondiscriminatory reasons for each of the challenged promotion decisions. The trial court went on to note that the Plaintiff also failed to show that the employer’s reasons were pretexts for racial discrimination and dismissed the Plaintiff’s lawsuit. A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, concluding that the Plaintiff had failed to prove her claim of racial discrimination.

The case then went to the United States Supreme Court. The Court noted that the bank had not developed precise and formal criteria for evaluating candidates for the positions for which Watson unsuccessfully applied. It relied instead on the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled. In language that is critical to the *Grutter* case, the Court commented, “However one might distinguish ‘subjective’ from ‘objective’ criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature.” Continuing, the Court referred to a prior

or ethnicity only as a ‘plus’ in a particular applicant’s file; i.e., it must be ‘flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight,’ *id.*, at 317. It follows that universities cannot establish quotas for members of certain racial or ethnic groups or put them on separate admissions tracks. See *id.*, at The Law School’s admissions program, like the Harvard plan approved by Justice Powell, satisfies these requirements. (Emphasis added). Moreover, the program is flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application.” *Grutter*, 539 U.S. 306, 335.


68 *Id.* (emphasis added).
case and noted: “Thus, for example, if the employer in Griggs had consistently preferred applicants who had high school diplomas and who passed the company’s general aptitude test, its selection system could nonetheless have been considered ‘subjective’ if it also included brief interviews with the candidates. So long as an employer refrained from making standardized criteria absolutely determinative, it would remain free to give such tests almost as much weight as it chose without risking a disparate impact challenge. If we announced a rule that allowed employers so easily to insulate themselves from liability under Griggs, disparate impact analysis might effectively be abolished.” This rule, announced in Grutter, is what insulates educational institutions from liability and forecloses victims of discrimination from suing.

Continuing on, the Court in Watson notes:

If an employer’s undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply. In both circumstances, the employer’s practices may be said to ‘adversely affect [an individual’s] status as an employee, because of such individual’s race, color, religion, sex, or national origin. We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.

Surprisingly, the “subjective or discretionary” practice is precisely what the Court has allowed in Grutter, without explanation as to why it is acceptable in the area of education. Thus, if a more qualified Native American applicant is not admitted, in favor of a less qualified African-American or Hispanic-American candidate, there has been discrimination. While it may seem surprising that minorities victimized by such discrimination seem reticent to challenge such a practice, the reality is that the Court has erected virtually insurmountable hurdles to any such case. If and when such a lawsuit makes its way to the Supreme Court, the Court will be forced to confront its own language from Teal where, in rejecting the defense, the Court noted that the defendant, “…seek[s] simply to justify

69 Griggs v. Duke Power Co., 401 U.S. 424 (1971), where the Court held that the use of seemingly neutral job requirements that have a disparate impact on applicants or employees of a particular race, color, gender, religion or national origin is prohibited by Title VII unless those requirements are shown to be job-related.

70 Id.
discrimination against respondents, on the basis of their favorable treatment of other members of respondents’ racial group.”

It is the “soft variables” in *Grutter* that present the challenge. In *Watson*, the court noted that “[s]tandardized tests and criteria, like those at issue in our previous disparate impact cases, can often be justified through formal ‘validation studies,’ which seek to determine whether discrete selection criteria predict actual on-the-job performance. Respondent warns, however, that ‘validating’ subjective selection criteria in this way is impracticable. Some qualities – for example, common sense, good judgment, originality, ambition, loyalty, and tact – cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured. . . . Because of these difficulties, we are told, employers will find it impossible to eliminate subjective selection criteria and impossibly expensive to defend such practices in litigation. . . . ” The Court rejected such a defense in the business environment for a sound reason. It has approved such a defense in the educational environment, without justification.

Although the University of Michigan’s admission process appears to be based on positive intentions for diversity, the process recognizes ‘many possible bases for diversity admissions.’ Unsurprisingly, although *Watson* addressed this subject in the context of employment, *Watson* was not the first case to address this particular subject. However noble its intent, the University of Michigan’s motivation is irrelevant and the Court itself noted that in *Griggs v. Duke Power Co.*, (cited by the Court itself in *Watson*, supra.) where the Court observed, “The Company’s lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act (Title VII of the Civil Rights Act of 1964) to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.”

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71 *Id.* at 454.
72 *Id.*
74 “There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.” 110 Cong. Rec. 7213, cited in *Griggs*, 491 U.S. at 435.
75 *Id.*
76 There were several court decisions in *Hopwood*. See *Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994) referred to by the court as Hopwood I holding that diversity is not a compelling
What the Court has previously referred to as “informal standards” in the employment sector are now called “soft variables” in the educational sector. As with the “bottom line” defense, the Court long ago rejected “informal standards” in the employment arena noting in *Watson*, that informal standards allow a party to “easily... insulate themselves from liability.”

This is precisely what the Court has allowed in the educational environment. The problem that this presents has not gone unnoticed by the Court. One result is a reticence (perhaps more accurately described as a refusal) by some lower courts to accept the Supreme Court’s more recent decisions as controlling. In pointed criticism of the Supreme Court’s *Bakke* decision, and a ruling that is contrary to *Grutter*, the Court of Appeals for the Fifth Circuit in *Hopwood v. State of Texas* held that allowing school officials to take racial and other factors into consideration during the admission process violated the equal protection clause because it discriminates in favor of minority applicants. The court in *Hopwood* went so far as to directly

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76 As noted, the *Hopwood* case made several trips to the appellate court. In *Hopwood v. State of Texas*, 236 F.3d 256, 273 the Fifth Circuit noted: “The Hopwood II panel held that: the University of Texas School of Law may not use race as a factor in deciding which applicants to admit [1] in order to achieve a diverse student body, [2] to combat the perceived effects of a hostile environment at the law school, [3] to alleviate the law school's poor reputation in the minority community, or [4] to eliminate any present effects of past discrimination by actors other than the law school.” The court in Hopwood went on to take the United States Supreme Court to task and noted, “The Supreme Court has conclusively established that the government can, consistent with the Constitution, use racial preferences under particular circumstances to remedy the present effects of past discrimination. But it has also placed several limitations on the use of racial preferences for remedial purposes. In *Wygant*, the Court ruled that the government cannot use racial preferences to remedy general, societal discrimination. In *Croson*, the Court ruled that a municipality cannot use racial preferences in the awarding of construction contracts to remedy discrimination in the construction industry as a whole.” Despite having addressed the subject of remedial racial preferences in several opinions, though, the Supreme Court has yet to establish specific rules for determining precisely how "localized" past discrimination must be before a particular governmental entity (in this case, the Law School or even the University) can, consistent with the Constitution, use racial preferences to remedy the effects of prior discrimination. The Hopwood II panel nevertheless stepped into this "rules vacuum" and developed fairly specific guidelines for determining when remedial racial preferences are justified. The panel ruled that (1) the University cannot use racial preferences to remedy discrimination in other components of Texas's public education system, and (2) the record evidence did not support the University's use of racial preferences to remedy the effects of its own past discrimination.”

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challenge the Court’s reasoning in *Bakke* by noting that the use of race, even as a means of achieving diversity on college campuses “undercuts the Fourteenth Amendment.” The United States Supreme Court refused to issue a writ of certiorari and the lower court’s decision in *Hopwood* stands.

The Court has made clear, beyond any shadow of a doubt, that any private employer that relies on subjective evaluations (euphemistically referred to as a “soft variable” in *Grutter*) runs a serious risk of being sued. The same is not true in the area of education.

**IV. THE FUTURE**

The Court (as well as all lower courts) will continue to be inconsistent. The Court in *Grutter* acknowledged this issue, by specifying that such preferences must terminate in the future, noting:

> The requirement that all race-conscious admissions programs have a termination point ‘assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.’

> We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

In 1978, Justice Blackmun’s concurring opinion in *Bakke* contained the following passage, “I yield to no one in my earnest hope that the time will come when an ‘affirmative action’ program is unnecessary and is, in truth, only a relic of the past. *I would hope that we could reach this stage within a decade at the most.* But the story of *Brown v. Board of Education*, decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons

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will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.\textsuperscript{79} Justice Brennan’s prediction of a decade, noting a case from (at that time) a quarter of a century ago, and itself written a quarter of a century ago, should give pause (and guidance) to the Court.

V. CONCLUSION

The Court would do well to keep in mind the Equal Employment Opportunity Act of 1972. In its fourth attempt to improve Title VII’s effectiveness since its enactment in 1964, Congress amended Title VII by approving the Equal Employment Opportunity Act of 1972. The report that accompanied the bill stated: “The time has come for Congress to correct the defects in its own legislation. The promises of equal job opportunity made in 1964 must [now] be made realities.”\textsuperscript{80} The 1972 amendments were designed to give EEOC the authority to “back up” its administrative findings and to increase the jurisdiction and reach of the agency. In particular, the amendments included the following: Educational institutions are subject to Title VII. Congress found that discrimination against minorities and women in the field of education was just as pervasive as discrimination in any other area of employment.\textsuperscript{81}

The Court’s treatment of the educational and employment arenas as different is problematic. An applicant to the University of Michigan or any other educational institution without the qualifications necessary for admission is not facing the bleak prospect of no education. Other educational institutions are still available. An educational applicant from a minority

\textsuperscript{79} Bakke, 438 U.S. 265, 403 (emphasis added) (citations omitted). The dissent in Grutter also takes the majority to task on this subject, “These discussions of a time limit are the vaguest of assurances. In truth, they permit the Law School’s use of racial preferences on a seemingly permanent basis. Thus, an important component of strict scrutiny – that a program be limited in time – is casually subverted.

\textsuperscript{80} Id.

\textsuperscript{81} The effort to address discrimination against women seems to have been particularly successful. Nationwide, enrollment of female college students began to exceed male enrollments in 1978, although males continued to graduate in greater numbers for approximately a decade thereafter. That persistence in obtaining a degree has since evaporated. For approximately the past decade the gender gap favors females by a ratio of 60% to 40%. Not only is it less likely that male high school students will go to college, those that do go to college are less likely to obtain a bachelor’s degree. And, although the gender gap is true for all ethnic groups, it is smallest for students of Asian descent and most pronounced for African Americans, Hispanics and Native Americans. Brian A. Jacob, Where the Boys Aren’t: Non-cognitive Skills, Returns to School and the Gender Gap in Higher Education 21 ECONOMICS OF EDUCATION REVIEW 589-598 (2002) available at http://www.nber.org/papers/w8964.pdf?new_window=1.
group that loses out to a less-qualified minority applicant has a virtually insurmountable task in proving that such a decision was due to discrimination, in spite of the obviousness. The Court summarized this issue in *Bakke*:

Once the artificial line of a ‘two-class theory’ of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived ‘preferred’ status of a particular racial or ethnic minority are intractable. The concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments. As observed above, the white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only ‘majority’ left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence -- even if they otherwise were politically feasible and socially desirable.82

Whenever an organization, whether educational or not, engages in discrimination, it should face the very real possibility of a lawsuit.83 To minimize the likelihood of a lawsuit, it is best to keep in mind what one court said in the employment context: “We believe it is common business practice

82 *Bakke*, 438 U.S. at 295-96. (citations omitted). (emphasis added).
83 Consider the following from McCullough v. Real Foods, Inc., 140 F.3d 1123, 1129 (8th Cir. 1998): “While federal courts do not “sit as super-personnel departments reviewing the wisdom or fairness of the business judgment made by employers” (citation omitted), when the whole of the evidence raises a reasonable inference that “those business judgments involve intentional discrimination,” the law permits the person who claims to have been discriminated against to have her day in court. Such is the case here.
to pick the best qualified candidate for promotion. When that is not done, a reasonable inference arises that the employment decision was based on something other than the relative qualifications of the applicants.” 84 These observations should not be limited to promotion (or hiring) in employment. Ideally, employers and universities should hire those employees, and admit those students, that are best qualified. Such an approach would likely render Title VII, and related laws, moot.

84 Id. at 1123.