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## A legal and philosophical inquiry into affirmative action

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A LEGAL AND PHILOSOPHICAL INQUIRY INTO  
AFFIRMATIVE ACTION

by

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Bachelor of Arts  
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Master of Arts  
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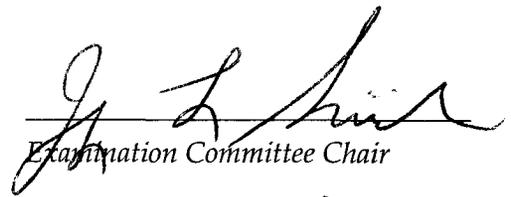
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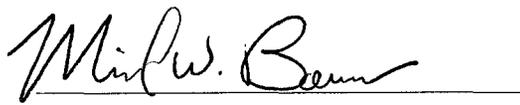
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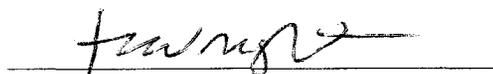
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ABSTRACT

**A Legal and Philosophical Inquiry Into Affirmative Action**

by

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This thesis explores the controversial question of affirmative action in higher education. The United States Supreme Court's recent ruling in *Grutter v. Bollinger*, 539 U.S.---(2003) and *Gratz v. Bollinger*, 529 U.S. ---(2003) is sparking a resurgence of debate over the issue. Both Grutter and Gratz filed lawsuits claiming that the University of Michigan affirmative action plan violated their right to equal protection of the laws because it served as a form of reverse discrimination by considering race in the admissions process. While the University of Michigan defended its use of affirmative action in higher education by citing the need for a diverse campus which originated in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The Supreme Court's recent decision in these two cases has changed the nature of affirmative action making it a policy that no longer focuses solely on race but instead, looks at a variety of factors when deciding which applicants to admit.

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## CHAPTER 1

### INTRODUCTION: THE ORIGINS OF THE AFFIRMATIVE ACTION DEBATE

Issues such as gun control, abortion and affirmative action are guaranteed to spark debate within society. However, unlike gun control and abortion, arguments over affirmative action force people to recognize differences in race and ethnicity, making the policy even more contentious. Although support or opposition for affirmative action is not necessarily based along racial and ethnic lines, the discussion has remained controversial since its implementation. Part of the reason behind this is that both proponents and opponents of affirmative action use the concepts of fairness and justice to defend their arguments, which makes it difficult to find a consensus. Another factor that contributes to affirmative action's divisive nature is its ability to affect those within society. From higher education admissions to employment practices, affirmative action has the potential to affect everyone. With the United States Supreme Court's recent decision regarding the policy in higher education, affirmative action has been brought to the forefront as a significant policy question.

This thesis will explore the critical issue of affirmative action by looking at several aspects of the policy. Chapter 1 will provide a brief history of the Civil Rights Movement and the evolution of affirmative action. It will also outline popular arguments expressed by proponents and opponents of the policy. Chapter 2 consists of summaries of Supreme Court decisions pertaining to affirmative action in higher education and the

workplace. Chapter 3 looks at the most recent Supreme Court rulings involving affirmative action in higher education. Chapter 4 considers the question of justice surrounding the general application of affirmative action. Originally through set-asides, and quotas, affirmative action represented a general policy that considered only race and ethnicity. John Rawls's *A Theory of Justice* and arguments made by Ronald Dworkin will be used to show how a general application can be considered just. By applying Rawls's hypothetical criterion, "justice as fairness" and his "difference principle" that redistributes social goods such as higher education, to the least advantaged, I will demonstrate how a general application of affirmative action can be viewed as just. To evaluate Rawls's arguments, I will apply Ronald Dworkin's critique of "justice as fairness." Even though Dworkin does not agree with all of the elements within "justice as fairness," he supports affirmative action because of its "forward-looking" ability, which centers on the future benefits of enrolling minority students.

The second and more current way affirmative action has been implemented is through an individualized process, which looks at various qualities of each applicant. Applying this approach Chapter 5, will examine Aristotle's concept of equity. Aristotle sees equity as correcting injustices, which more abstract and general policies had not intended to create. I will argue that equity can be used to cast a fresh light on how to justify affirmative action by applying it to particular individuals who have been or continue to be affected by racism (rather than simply applying one general policy to all minorities). Aristotle's notion of equity can be shown to be critical to the legal defense of affirmative action because it allows the policy to be "flexible" and "individualized." Aristotle understood equity to be the most important part of justice because it modifies

the general nature of law. This “flexible” and “individualized” approach is the foundation behind equity because it corrects laws or policies so as to make them applicable in specific situations, and thus more just.

### Civil Rights and Affirmative Action

Since its inception affirmative action has been a widely debated topic. Throughout society people have discussed the question of whether or not the policy fairly addresses inequalities that minorities may face. On one side are affirmative action supporters who argue that the policy should be maintained because it addresses discrimination in an equitable manner. On the other side, affirmative action opponents contend that it disproportionately considers minority interests over the majority. Nonetheless, affirmative action does not mark the first time racial inequality has been confronted. From Reconstruction to the Civil Rights Movement of the 1960s, American society has struggled with racial discrimination. The recent controversy over affirmative action embodies the on-going difficulty of addressing racial inequality. By looking at the history of the Civil Rights Movement and a few of the prevalent arguments on both sides of the affirmative action debate, one can understand why the policy continues to divide society into two groups – those who support it and those who do not.

Racial discrimination has beleaguered our nation since its founding. Many Americans continue to espouse racial prejudices and think nothing of such behavior, while others view racial prejudice as wrong and seek its end. Elected officials have attempted to legislate the issue by passing constitutional amendments and laws. Lawmakers took action on the problem of racial prejudice for the first time after the Civil

War. President Abraham Lincoln issued the Emancipation Proclamation, which freed slaves, and left open the question of how to incorporate newly freed slaves into society. Of course this proved difficult to answer because the United States was so divided on the issue that Americans fought a war over slavery. Moreover, slavery so greatly separated the nation that Radical Republicans attempted to impeach President Andrew Johnson because of his veto of the Civil Rights Act of 1866. The Act, which eventually became law, states:

All persons within the jurisdiction of the United States shall have the same rights in every state and territory, to make and enforce, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens (Leiter 2002, 24).

Leading the fight for civil rights were Radical Republicans who controlled Congress and ensured that a series of amendments to the Constitution were adopted. First, the Thirteenth Amendment was passed in 1865, which abolished slavery. Three years later, the Fourteenth Amendment declared all American born persons national and state citizens, and prohibited state violation of three general groupings of civil rights (privileges or immunities, equal protection, and due process) (Leiter 2002, 24). Finally in 1889, Congress passed the Fifteenth Amendment, which guaranteed to every male citizen over twenty-one years of age the right to vote, regardless of race, color, creed, national origin or previous condition of slavery (Krantz 2002, 6). Together the three constitutional amendments bestowed rights to black males that were once given only to white males.

Even though positive steps were being made, there were groups strongly opposed to the movement towards racial equality and who fought to prevent it at all costs. The Ku Klux Klan began a series of violent protests against racial equality by murdering blacks

and destroying their homes and churches. Jim Crow laws also barred blacks from equality by establishing separate facilities in education, employment and public accommodations. One author described the opposition to the Civil Rights Movement as:

To maintain and underscore its absolute supremacy, the white South systematically disenfranchised black men, imposed rigid patterns of racial segregation, manipulated the judicial system and sustained extraordinary levels of violence and brutality (Leiter 2002, 30).

Jim Crow laws created such a discriminatory society that the affects could be seen nearly a century later. For example, in 1964, the average state expenditure in Mississippi for education was just \$21.77 per black pupil as compared to \$81.86 for every white pupil (McAdam 1998, 25). “Even though the goal of Reconstruction was to give Negroes full citizenship, civil rights and the ballot, and get white men accustomed to treating Negroes as equals, at least politically and legally... in effect to revolutionize the relations of the two races it failed to be achieved” (Leiter 2002, 27). Simply by looking at the difference in per pupil spending in 1964, one can conclude that racial discrimination remained after Reconstruction. So what prohibited Radical Republicans from achieving their goal? White supremacy groups gained momentum and Jim Crow laws helped instill racial prejudice through local law enforcement. The political turning point for Radical Republicans and civil rights took place in the 1876 presidential election. With the Electoral College split, Rutherford Hayes, the Radical Republican candidate, promised to remove Union soldiers from the South if elected. The withdrawal of Union soldiers provided white supremacists the ability to impose their will through any means, which usually took the form of violence and intimidation. More importantly, although the deal gave Hayes the presidency, it also marked the demise of the Civil Rights Movement following the Civil War.

## Civil Rights Revisited

Since the end of Reconstruction, nearly a century earlier, Congress had failed to enact any but the most feeble legislation against racial discrimination (Grofman 2000, 9). The tide began to change in 1954 with the Supreme Court's decision in *Brown v. Board of Education* 347 U.S. 483 (1954). This decision overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896) that established the "separate but equal" doctrine. In *Brown*, the Court ruled that separate facilities [in education] are inherently unequal (Kranz 2002, 14). Advancing the civil rights movement further, President John F. Kennedy issued Executive Order 10925 on March 6, 1961, that mandated federal contractors take affirmative action to ensure minority applicants are employed, and employees are treated during employment without regard to race, creed, color or national origin (Schuck 2002, 64). The executive order coined the phrase 'affirmative action,' which meant that from this point forward any law or policy that sought racial equality in employment and higher education became analogous with the term. Numerous presidential executive orders and protests led by Reverend Martin Luther King, Jr. helped the Civil Rights Movement gain additional momentum. An important event took place in the spring of 1963 when King led protests that were retaliated against violently by the Birmingham, Alabama, police. Pictures of peaceful marchers, many of them schoolchildren, being met with fire hoses and attack dogs were spread across front pages throughout the country and showed each evening on national television (Grofman 2000, 12). This brought the brutal struggle for civil rights into the homes of those who may not have experienced it otherwise. Throughout the country awareness increased and so did pressure on Congress to end violence in the South. Less than a year after Kennedy's death, President Lyndon Johnson

signed the Civil Rights Act of 1964 into law. It implemented a set of laws banning discrimination in public accommodations involved in interstate commerce, federally funded programs, and in employment by federal and private employers (Kranz 2002, 15). The act declared a strong legislative policy against discrimination in public schools and colleges, seeking to end segregation. "Title VI of the Civil Rights Act prohibited discrimination in federally funded programs and Title VII barred employment discrimination on the grounds of race, color, religion, sex, or national origin" (Francis 1993, 13). The Civil Rights Act of 1964 provided a legislative mandate for the implementation of affirmative action plans nationwide and led to a society divided by support or opposition to the policy.

Because of the Supreme Court's recent decision involving affirmative action in higher education, much of the discussion currently centers on that issue. In *Grutter v. Bollinger*, 539 U.S. --- (2003), a white Michigan resident, Barbara Grutter, after being denied admission into the University of Michigan Law School, filed a lawsuit claiming that its affirmative action plan violated her right to equal protection of laws under the Fourteenth Amendment. She argued that she was rejected because the affirmative action plan used race as the "predominant factor," giving applicants belonging to certain minority groups an increased opportunity for admission. The Court ruled that the law school's affirmative action plan was constitutional on the grounds that its goal of diversity represented a compelling state interest. The majority opinion in *Grutter* applied Justice Lewis Powell's diversity opinion in *University of California v. Bakke*, 438 U.S. 265 (1978) as its precedent. Despite the Supreme Court's recent support of affirmative action in higher education, society remains deeply divided over the policy. Many

questions continue to surround the issue of affirmative action, such as: does the policy provide an unfair advantage for minorities? Is affirmative action an important policy that helps close the economic gap between whites and blacks? Does diversity represent a critical goal for college campuses? The answers to such vital questions likely depend on whether or not one supports affirmative action. In general, arguments from the left tend to defend the use of affirmative action in higher education while those from the right argue against the policy. By looking at arguments from the left and the right, one can see why affirmative action in higher education remains such a divisive policy.

#### Arguments Supporting Affirmative Action: Social and Economic Gap

For affirmative action advocates unequal social and economic conditions play an important role in defending the policy. Many refer to statistics that show differences in these conditions that tend to benefit other races or ethnicities over minorities. With regard to social conditions, social scientist Elijah Anderson has described the inner city problems that blacks face:

The inclination to violence springs from the circumstances of life among the ghetto poor – the lack of jobs that pay a living wage, limited basic services (police response in emergencies, building maintenance, trash pick up, lighting and other services that middle class neighborhoods take for granted), the stigma of race, the fallout from rampant drug use and drug trafficking, and the resulting alienation and absence of hope for the future (Anderson 1999, 32).

Anderson argues that blacks in the inner city are faced with a series of complex problems that must be addressed. Other social scientists have also related poverty conditions to those of racially divided communities. For example, Douglas S. Massey has written that poverty and racial concentration are mutually reinforcing and cumulative, leading

directly to the creation of underclass communities typified by high rates of family disruption, welfare dependence, crime, mortality and educational failure (Greenburg 2002, 20). The limited number of living wage positions created in these communities, which tend to be racially divided, perpetuates this kind of social condition. Those who support this defense of affirmative action ask one to imagine being forced to live in a community where violence and crime are regular occurrences and leaving is practically impossible because of the low paying job one is forced to accept. Essentially, this type of social condition creates a vicious cycle that makes it difficult to escape.

Research regarding economic inequalities also shows lines that tend to be drawn racially. For example, “in 1998 only 68% of black men were likely to be working, a proportion lower than that of any other racial group” (Greenburg 2002, 19). Those that were employed tended to be in lower paying jobs, which is reflected in the variance of annual household income. “In 1998, the annual median household income for blacks was the lowest (about \$25,100) compared with Asians (\$45,400) and whites (\$40,600)” (Greenburg 2002, 19). By 2000, the median household incomes reflected the same economic disparity; “blacks had the lowest (\$30,447) contrasted with Hispanics (\$33,447), whites (\$45,904) and Asians” (\$55,521) (Money Income in the United States 2000, 5). This translates into a reduced ability to purchase items such as a house or computer. Using median household income data from 1998, “72% of whites owned homes compared to approximately 40% of blacks and Hispanics” (Greenburg 2002, 19). Moreover, one-half of white households in 1999 owned a computer or were connected to the Internet compared to one-quarter of blacks (Greenburg 2002, 19). According to “Blacks in the Economy,”

The economic fortunes of blacks are strongly tied (more so than whites) to a strong economy and vigorously enforced policies against discrimination. Without these conditions, the black middle class may persist, but it is doubtful it can grow or thrive. And the position of lower status blacks cannot be expected to improve (Killian 1990, 7).

This type of disproportionate data provides evidence to affirmative action advocates that social and economic conditions are the equivalent to racial inequality because inconsistencies are divided by race. Supporters who use this argument propose that affirmative action in higher education is needed to increase educational opportunities so that minorities have the ability to improve their social and economic conditions.

### Compensation

A second argument supporting affirmative action involves compensatory justice. Those who advocate this viewpoint claim that because certain races continue to feel the affect of discrimination, compensation in the form of affirmative action is needed. Judith Jarvis Thompson maintains that:

Many [white males] have been direct beneficiaries of policies which have down-graded blacks and women...and even those who did not directly benefit...had, at any rate, the advantage in competition which comes of the confidence in one's full membership [in the community], and of one's right being recognized as a matter of course (Pojman 2003, 23).

Jarvis suggests that members of the majority have gained advantages over minorities simply because they have always been able to participate within the system. Accordingly, the inability of certain members to actively engage within society justifies the use of policies such as affirmative action. So who should be held accountable for discrimination? As Alison Jaggar puts it, "everyone who acquiesces in a racist and sexist system helps to cause discrimination"(Amdur 1979, 231). On the other hand, Robert Fullinwider posits that those who have voluntarily benefited from discrimination are

responsible for it (Amdur 1979, 231). Once responsibility is established compensatory supporters turn to the discussion of who will perform the compensation. Fullinwider argues that only those individuals who have practiced discrimination should be responsible for compensation. In contrast, Jaggar maintains everyone within society should compensate because everyone has participated in a variety of social and economic practices that tend to create inferior positions for minorities (Amdur 1979, 231). Overall, those who support compensatory justice assert that affirmative action is needed to serve as a means of compensation for the inequalities experienced by minorities.

### Diversity

Today, the most popular justification for affirmative action is the diversity rationale. Justice Powell noted the need for diversity in his *Bakke* opinion and since then, affirmative action plans have been revised to focus on diversity rather than quotas or goals for minority enrollment in higher education. Those who support diversity assert that it is an important component of education because it exposes students to different viewpoints and experiences. The diversity argument has gained momentum since the Supreme Court decision in *Grutter v. Bollinger* (2003) that upheld affirmative action at the University of Michigan because of its focus on diversity. However, interest in the diversity rationale increased after a 1998 study by William Bowen and Derek Bok, the former presidents of Princeton and Harvard, respectively, was published. Titled *A Shape of a River*, the study is based on the academic records of 80,000 students who entered 28 selective institutions.

Bowen and Bok found that large majorities, especially among blacks in the more recent cohorts, thought that it was important or very important in life, “to work effectively and get along well with people from different races and cultures,” and that their college educations helped to cultivate

this ability to a significant degree. They also found that the more blacks in an entering class, the more likely (56%) that white students in that class would know two or more black students well, and that percentage increased with the school's selectivity. These interactions occurred, moreover, even though black students represented fewer than 10% of the students in the schools studied (Shuck 2002, 31).

This proved to be groundbreaking research because it gave diversity advocates the empirical justification needed to defend affirmative action in higher education. The data show that the more diverse a campus is, the more likely it is that interactions with other racial or ethnic groups will occur. More importantly, the *Grutter* decision upholding affirmative action on account of diversity provides the legal backing necessary for the implementation of the policy in higher education. Michael Selmi explains:

Diversity has quite clearly become the most heralded of all justifications for affirmative action. In large part, this is because relying on diversity rather than discrimination places affirmative action programs on more solid legal and perhaps political grounds (Shuck 2002, 31).

This argument is popular because it encourages diversity rather than focusing on a specific race and making a decision to admit or reject a student solely based on skin color. Affirmative action plans have been deemed constitutional based on the diversity rationale, thus making it one of the leading justifications behind arguments supporting affirmative action in higher education.

#### Arguments Against Affirmative Action: Colorblind

The concept of a "colorblind" society originated in Justice John M. Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Justice Harlan wrote,

There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or

of his color when his civil rights as guaranteed by the supreme law of the land are involved (Berry 1996, 138).

In *Plessy*, the Court upheld a Louisiana statute, passed in 1890, which provided for separate railway carriages for white and colored races (Goring 2000, 4). Through *Plessy* and other Supreme Court decisions, the notion of a “colorblind” society has become an integral argument against affirmative action. Advocates of a “colorblind” society maintain:

Because race really is, and properly only would be, a matter of unchosen appearance concerning skin hue, hair texture, and the like, there is and would continue to be an awareness of those natural, superficial differences in appearance pertaining to features such as eye color or height. Given this understanding of racial identity, any person’s race is and properly should be irrelevant in and for virtually all social contexts for the same reasons that differences in eye color or height are also largely irrelevant (Wasserstrom 1995, 163).

According to those who support a “colorblind” society, it is important that distinctions based on race be proscribed. A colorblind society will achieve the equal protection of laws, which is guaranteed by the Fifth and Fourteenth Amendments. From a constitutional standpoint, these issues play out under the mandate – expressly applicable to the states via the Fourteenth Amendment Equal Protection Clause and made applicable to the federal government by the Supreme Court via the Fifth Amendment Due Process Clause, which requires that all governmental entities provide all citizens the equal protection of laws (Cokorinos 2003, 4). Recently, “colorblind” supporters received a slight set-back in California when Proposition 54, The Racial Privacy Initiative, failed to pass in fall of 2003. The proposition stated:

Effective January 1, 2005 prohibits state, and local governments from using race, ethnicity, color, or national origin to classify current or prospective students, contractors, or employees in public education, contracting or employment operations. Does not prohibit classification by

sex. Exemptions include: law enforcement descriptions, prisoner and undercover assignments, action taken to maintain federal funding (Proposition 209 2003).

The initiative represents the growing support to end racial distinctions so that a “colorblind” society is attained. Interestingly, additional defense of a “colorblind” society has also come from the left. For example, Bayard Rustin, a civil rights leader during the 1960s, claimed that we need a political and social reform program that will not only help blacks but one that will help all Americans (Skrenty 1996, 31). The “colorblind” argument from the left has broad appeal because it advocates solving inequalities for all Americans rather than concentrating on minorities. “Colorblind” advocates desire a society where race no longer plays a role. Hence, affirmative action would be prohibited because of its use of racial distinctions.

#### Merit

Opponents of affirmative action often claim that the policy devalues merit, which typically translates into high standardized test scores. Meritocracy is founded on the argument that students with the highest test scores deserve admission into college. Most advocates use the definition of merit found in dictionaries that recognize at least three senses of merit: (a) the state, fact or quality of deserving well; (b) something deserving reward, praise, gratitude; (c) worth, value, excellence (Davis 1983, 349). Meritocracy supporters assert that the second definition accurately applies to merit because only ability and achievement deserve reward, which means race, is irrelevant.

The notion of meritocracy dictates that:

Individuals will be motivated to develop their skills only if they are rewarded by differential status and differential income. IQ becomes the basis of qualification for entrance... and education becomes the certifying

agency, success reflects natural superiority developed through effort and measured by technical competence (Livingston 1979, 123).

For meritocracy advocates, affirmative action is wrong because it fails to focus on specific test scores for admission. A student who has worked hard to score high on SAT or LSAT exams should gain admission over another who may have not scored as well, but is admitted because of skin color. Meritocracy defenders point to the lowering of standards as a main reason why affirmative action is wrong. Christopher Jencks and Meredith Phillips have found that the typical American black student scored lower than 75% of his white counterparts on most standardized tests for admission into college, law school, medical school and business school (Greenburg 2002, 4). Statistics such as these are used to show that affirmative action decreases admission standards by accepting minorities who have lower test scores. Meritocracy advocates argue that test scores show how hard one is willing to work to get ahead, while race is something that one is born with. Accordingly, affirmative action does not consider the achievements of individuals because the policy is unfairly concerned with race. Meritocracy is closely tied to the American capitalist idea that encourages the possibility for everyone to be successful as long as they are willing to work hard. Giving one an advantage simply because of one's race is unfair and should not occur. For meritocracy supporters, the importance of working hard to get ahead cannot be placed behind a policy such as affirmative action, which looks at race above hard work. The land of opportunity was thus meritocratic: one deserved all that one could attain by talent and industry (Skrenty 1996, 27). Generally, those who use the meritocracy defense do not support affirmative action because of its failure to reward based strictly upon merit.

## Reverse Discrimination

The claim of reverse discrimination linked to affirmative action has become a leading argument against the policy. The charge of reverse discrimination rests on the implicit premise that whites are denied access to advantages to which they are entitled, and which they would have obtained had not preference been given to minorities (Livingston 1979, 40). Reverse discrimination was the basis for Barbara Grutter's lawsuit against the University of Michigan Law School.

When the Law School denied admission to Grutter, a white Michigan resident with a 3.8 GPA and 161 LSAT score, she filed suit, alleging that she had been discriminated against on the basis of race. She argued her rejection occurred because the Law School uses race as a predominant factor giving minority groups a significantly greater chance of admission than students with similar credentials from disfavored groups (539 U.S.--- 2003, 9).

Grutter maintained that because she had higher scores than the minorities that were accepted into the program, the law school discriminated against her on the basis of race. Reverse discrimination advocates argue that by favoring minorities, the affirmative action plan discriminates against the majority. In *Grutter*, a qualified member of the majority was denied admission while a less qualified minority was admitted which depicts the perfect illustration of how affirmative action is reverse discrimination. The Fifth and Fourteenth Amendment guarantees of equal protection of laws are cited as proof that race-centered policies violate the Constitution. Ward Connerly has led the fight against affirmative action as reverse discrimination by contending that ending race-based affirmative action is a conservative principle because preferences are unfair and against the spirit of the Constitution (Pincus 2003, 55). Those who defend the premise that affirmative action serves as reverse discrimination adduce that discrimination is

unconstitutional. If past discrimination is unjust, so is discrimination against whites (Livingston 1979, 29).

Put simply, the objection is that the current beneficiaries of reverse discrimination are not often the same persons as those who were harmed by the original discrimination, and those who now bear the burden of reverse discrimination are seldom the same persons as those who practiced the original discrimination (Sher 1979, 82).

Therefore, affirmative action in today's society does not necessarily help those who were harmed by discrimination prior to the 1960's Civil Rights Movement. Moreover, affirmative action is wrong because it discriminates against those who are not responsible for past discrimination. Overall, reverse discrimination arguments assert that affirmative action is unjust because it creates a situation where the majority is discriminated against simply because of skin color.

#### Where Does Affirmative Action Go From Here?

*Grutter v. Bollinger* (2003) represents a significant success for affirmative action in higher education. By upholding the affirmative action plan at the University of Michigan Law School, the Supreme Court provided unprecedented legal support that it had not shown since *Bakke*. The Court validated the affirmative action plan because of its flexible and subjective nature. The *Grutter* decision is a milestone for several different reasons. First, it represents the most recent Supreme Court decision regarding the constitutionality of affirmative action in higher education. Second, by upholding the law school plan, other universities are able to revise their affirmative action plans to mirror Michigan's. Finally, the decision enables affirmative action to remain in higher education, which is seen as a victory by those who continue to support the policy.

However, affirmative action opponents are not without victories of their own. In California, Texas and Washington affirmative action has been restricted in higher education. It seems that arguments for and against affirmative action play an important role in its success or failure. The Court may have been able to determine the constitutionality of affirmative action, but its 5-4 ruling epitomizes the same divisions that exist within society. Attitudes and opinions toward affirmative action are driven by how one wishes to perceive the facts. Those who support or oppose the policy cite statistics that reinforce their position. Just like any other highly debated policy, finding a middle ground for affirmative action is difficult. For instance, some affirmative action advocates claim that a “critical mass” is too vague and will not fully address the inequalities that exist among minorities. Meanwhile other supporters may see the decision as a victory because it found affirmative action plans constitutional. On the complete opposite end of the spectrum are those who oppose any consideration of race in higher education. The various opinions on the issue of affirmative action most likely stem from the diverse viewpoints within society. These viewpoints can lead a person to conclude that the future of affirmative action will likely be as controversial as its past.

## CHAPTER 2

### UNITED STATES SUPREME COURT DECISIONS REGARDING AFFIRMATIVE ACTION

Most of the revisions to affirmative action are due to Supreme Court decisions. Both support and opposition to the policy by the Court has changed the way affirmative action has been implemented. In fact, the numerous decisions for and against the policy have greatly contributed to the manner affirmative action is applied today. While not all of the following cases pertain to affirmative action in higher education, they represent landmark decisions involving the policy.

Decisions In Support of Affirmative Action: *Griggs v.*

*Duke Power Company*

The first time the United States Supreme Court made a decision regarding an affirmative action plan was in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). Before passage of the Civil Rights Act of 1964, Duke Power Company allowed black employees to work only in the Coal Department. The revised policy required a high school diploma or the passage of a standardized intelligence test for promotion to higher paying jobs outside of its Coal Department. The policy no longer limited blacks to a single department, but it did require a diploma or the passage of a test for any type of promotion. In response, the National Association for the Advancement of Colored

People (NAACP) filed a class action lawsuit on behalf of Duke Power Company's black workers, challenging the qualifications for promotion as a violation of Title VII of the Civil Rights Act. The question before the Court was whether Title VII prohibited this policy when it was not significantly related to job performance, as it disqualified blacks at a higher rate than whites and the jobs had previously been reserved for whites (Greene 1989, 64).

In an 8-0 decision, the Supreme Court determined Duke's promotion policy was unconstitutional and established the "disparate impact" theory. The theory acknowledged, "some employment practices adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination" (Pattison and Varca 1996, 3). The Court based its decision that Duke Power Company's test was discriminatory by reviewing North Carolina's census data. Research found that 34% of white males had completed high school and only 12% of blacks had done so (Raza and Anderson 1999, 20). The Court concluded that the overwhelming disparity between white and black high school graduates constituted an unfair requirement by Duke. In *Griggs*, the justices rejected Duke's argument that Title VII allowed employers "to give and act upon the results of any professionally developed ability test, as long as the test is not intended or used to discriminate because of race" (Raza and Anderson 1999, 20). The Court demonstrated its support for affirmative action by stating "...that the objective of Congress in the enactment of Title VII was to achieve equal employment opportunities and remove discriminatory barriers" (Hernandez 1986, 4). Its support of affirmative action was shown in the application of the "disparate impact" theory, which changed the nature of the policy. From this point forward, adverse

affect was identified by racial imbalances and affirmative action was implemented to help correct these imbalances.

*Griggs* established that a company's failure to hire a workforce similar to the racial composition of the local, qualified pool of candidates violated the Civil Rights Act of 1964. Evolving from the *Griggs* decision was the Equal Employment Opportunity Commission's creation of the Uniform Guidelines on Employment Selection Procedures. The newly enacted policy stated that any group, which is less than 4/5ths of the rate of the highest group, was considered adversely affected. Even though the EEOC's 4/5ths policy was termed by the agency as only a "rule of thumb" most employers feared the consequences of not following the guideline. The central aim of the guideline was to achieve racial equality in the workplace by employing those groups who do not have comparable representation in the workplace.

*Regents of the University of California v. Bakke*

As private and public agencies throughout the nation began to revise their affirmative action programs, many white males began to sue for reverse discrimination. *Regents of the University of California v. Bakke*, 138 U.S. 265 (1978), was the first time the issue of reverse discrimination was considered. The plaintiff, a white male named Allan Bakke, had been denied admission to the medical school at the University of California at Davis. The school had a special admissions program in which a specific number of positions were set-aside for minority students. Bakke claimed that he was more qualified than some of the minority candidates selected under the set-aside. Further, he maintained that the quota prevented his admission by restricting the number of positions available to white students. Bakke challenged the university's affirmative

action program as a violation of his Fourteenth Amendment right to equal protection of laws. In response, the university defended itself by citing that "...an applicant's race is reasonably good proxy for an assured characteristic, i.e., willingness to provide medical services for underserved areas"(Alt 1997, 89). The issue of affirmative action in higher education proved difficult for the Court to resolve. The Supreme Court's decision in *Bakke* was considered:

...a prime example of the divisiveness and fragmentation that has characterized the Supreme Court's handling of affirmative action cases. Not only did the Court in *Bakke* fail to produce a majority opinion, but also it did not even manage to muster a single majority in support of its decision (Rosenfeld 1991, 68).

In its 5-4 decision, the justices were divided into three groups: one group of four who refused to address the constitutionality of affirmative action, another group of four who believed that the constitutionality of affirmative action should be addressed, and Justice Powell who sided with both groups on two separate issues. The first group of justices concluded that the Davis program violated statutory law and therefore, they did not feel the need to rule on the constitutionality of the program. The second group determined that the university's program was constitutional and should be upheld. Finally, Justice Powell sided with the second group because he believed that not all racial classifications were unconstitutional. However, he also sided with the first group because he held that the university's quota violated both statutory law and the Constitution. Justice Powell "...could find no substantial interest that justified establishment of the University's specific quota system" (Witt and Gottron 1990, 604). He ruled that the university's goal to remedy past discrimination was not a valid justification because "...such a desire was based on an amorphous concept of injury that may be ageless in its

reach into the past” (Witt and Gottron 1990, 604.). This compelled Powell to side with the first group, giving the majority a narrow edge in its conclusion that the university’s plan was unconstitutional, leading to Bakke’s admission into medical school.

According to Powell, the university’s program violated Bakke’s equal protection rights because the affirmative action plan completely barred majority students from competing for any of the positions held specifically for minority students. Furthermore, Powell noted that the university did not have a history of prior discrimination, which meant it had no compelling state interest to implement an affirmative action plan. Powell’s opinion did not reject the use of race-based preference by a university without prior discrimination, but he did deny the use of quotas. More importantly, he explained that diversity within the university provides, “academic freedom and the promotion of robust exchange of ideas” (Alt 1997, 190). Justice Powell referred to Harvard’s plan as an example of a constitutional affirmative action plan. It gave full consideration to all individuals, with race counting as one of the many aspects in the admission process making it a “plus factor.” However Harvard deemed other factors were regarded important including clubs, sports and community activities. In *Bakke* the Court struck down the university’s minority preference policy structured around quotas while Powell’s diversity opinion provided support for affirmative action founded on the need for a diverse university campus.

*United Steelworkers of American, AFL-CIO v. Weber*

*United Steelworkers of America, AFL-CIO v. Weber* 443 U.S. 193 (1979), presented another reverse discrimination challenge to an affirmative action plan that permitted a private union, United Steelworkers of America, and a private employer,

Kaiser Aluminum and Chemical Corporation, to adopt a voluntary, race-conscious affirmative action plan. To address an imbalance of white craft workers to black craft workers at Kaiser, the company and the union entered a collective bargaining agreement that established an affirmative action program. The disparity occurred because, prior to 1974, blacks were not provided a training opportunity for promotion to skilled craft worker positions. As a result, only 5 of the 273 skilled craftspeople were blacks in 1974 (Greene 1989, 25). “The agreed upon plan reserved 50% of the openings in an in-plant craft-training program for blacks until the percentage of black craft workers in the plant approximated the percentage of blacks in the local labor force” (Greene 1989, 25). During its first year, the program had thirteen employees, seven were black, and six were white (Greene 1989, 25). Several of the black employees chosen had less seniority than Brian Weber and other white employees who were not admitted into the program. Weber sued claiming that the affirmative action plan was a violation of Title VII of the Civil Rights Act. The district court ruled in favor of Weber and the court of appeals affirmed its decision.

The AFL-CIO appealed the case to the Supreme Court. The decision was 5-2 with Justices Powell and John Paul Stevens not participating. According to Justice William Brennan’s majority opinion, the issue before the Court was “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” (Patterson 1999, 2). The majority of the Court concluded that Title VII did not forbid employers from agreeing on voluntary affirmative action plans. “The Court determined rather, that Congress enacted Title VII in response

to concerns throughout the country regarding historical racial inequity from one century to the next”(Patterson 1999, 2). It then considered whether the plan violated Title VII of the Civil Rights Act of 1964. First, the Court concluded that the plan had the same goal of the Civil Rights Act because both were established to eliminate racial discrimination and second, it measured if the plan “unnecessarily trammled the interests of white employees” (Patterson 1999, 3)

The majority concluded that the affirmative action plan did not inhibit the ability of white employees because there were no layoffs and whites had the same opportunity as blacks to be chosen for the training. It upheld Kaiser’s plan noting that “the plan and Title VII shared the common purposes of breaking down old patterns of racial segregation and hierarchy and opening employment opportunity for Negro’s in occupations which had traditionally been closed to them”(McGinely 1997, 3).

#### Decisions Against Affirmative Action: *City of Richmond v. J.A. Croson*

Several changes took place that altered the Court’s approach to affirmative action. The election of a conservative president in 1980 and the appointment of conservative Supreme Court justices resulted in a more narrow view of affirmative action from this point forward. In 1986, the Supreme Court’s conservative shift was reinforced when William Rehnquist became Chief Justice. This change was illustrated in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), which was one of the first cases that limited the scope of affirmative action. The Court’s decision was a turning point for affirmative action plans nationwide. In 1983, the Richmond City Council established an affirmative action plan to help the hiring of minority construction contractors. Titled the

“Minority Business Utilization Plan,” it mandated that businesses receiving contracts from the city were forced to subcontract at least 30% of their dollar amount [from the city] to minority businesses. However, minority businesses that won city contracts were not forced to subcontract 30% of their dollar amount to other minority businesses. Richmond argued that the implementation of its affirmative action plan would promote more participation by minority contractors. After the city rejected a bid from J.A. Croson, a white contractor, for “noncompliance with the set-aside, Croson brought suit claiming that the set-aside discriminated against him based on his race in violation of the Equal Protection Clause of the Fourteenth Amendment”( Rogers 1991, 3).

The court of appeals ruled the set-aside unconstitutional and the City of Richmond appealed to the Supreme Court, which affirmed the court of appeals judgment. Justice Sandra Day O’Connor, in the majority opinion wrote that the “City Council lacked the authority that Congress possessed under section five of the Fourteenth Amendment to enact a set-aside without specific findings of discrimination” (Rogers 1991, 3). O’Connor noted that the Fourteenth Amendment “places clear limits on the states’ use of race as a criterion for legislative action” (Rogers 1991, 3). She “concluded that strict scrutiny was necessary to smoke out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool”(Chang 1997, 69).

After strictly scrutinizing the set-aside program, the Supreme Court ruled that the City of Richmond had not shown a compelling government interest to end the present effect of past discrimination. It found no evidence that the city had discriminated against minorities nor was there evidence that past discrimination presently affected minorities.

Without a remedial justification for the plan, the majority of the Court determined the affirmative action plan was unconstitutional. It concluded that a 30% quota did not represent a specific goal, but instead a “completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population”(Green 2000, 315).

In *Croson*, the Supreme Court implemented a new guideline for the establishment of set-aside programs. It forced state and local governments to “establish the existence of prior discrimination and then narrowly tailor the program to meet the specific situation”(Urofsky 1997, 175). As a result, “*Croson* severely limited the scope of permissible affirmative action by applying strict scrutiny and strongly suggesting both that remedial purpose and substantial evidence would be required” (Chang 1997, 71). Even though this decision applied only to local and state affirmative action programs, the development of the strict scrutiny test restricted the use of affirmative action to those governmental agencies that had exhibited current or past discrimination.

*Adarand Constructors v. Pena*

Six years after *Croson*, the Supreme Court extended the use of strict scrutiny to the federal government in *Adarand Contractors Incorporated v. Pena, Secretary of Transportation, et al*, 515 U.S. 200 (1995). Since 1989, the United States Department of Transportation awarded the prime contract for construction of a Colorado highway to Mountain Gravel and Construction Company. The Department of Transportation affirmative action policy:

...established by the Small Business Act and the Surface Transportation Act, provided financial incentives for general contractors to hire subcontractors who were socially and economically disadvantaged, by giving general contractors a bonus equal to ten percent of the value of any

subcontracts that they awarded to disadvantaged subcontractors (Spann 2000, 53).

Mountain Gravel solicited bids from two subcontractors, Gonzales Construction Company and Adarand Constructors, Inc. Adarand submitted the lowest bid, but Gonzales, a minority subcontractor, was awarded the contract. Adarand filed a lawsuit alleging that the Department of Transportation affirmative action plan, which awarded a bonus for hiring minority subcontractors, was a violation of the Fourteenth Amendment Equal Protection Clause.

In a 5-4 decision the Court ruled in favor of Adarand, reinforcing its position that when considering the constitutionality of racial preferences that allegedly violate the Equal Protection Clause, strict scrutiny must be applied. “We hold today that all racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny” (Spann 2000, 53). Strict scrutiny mandated that all levels of government must formulate affirmative action plans that would meet its rigid standards. In its opinion, the Court listed three main obligations that must be reviewed when looking at racial classifications. The first was skepticism, meaning that racial classifications had to be subjected to strict scrutiny. Second, consistency, meaning that the equal protection guarantee of the Constitution extended to the white majority as well as to racial minorities (Spann 2000, 53). Third, the precedents established the principle of congruence, meaning that the requisite strict scrutiny standard applied equally to state classifications under the Fourteenth Amendment and federal classifications under the Fifth Amendment (Spann 2000, 53). Taken together, the preceding propositions essentially meant that every person has the right to equal

protection, but unequal protection would be reviewed under the strictest judicial scrutiny. By applying this test, the Court made it more difficult to enact affirmative action plans.

*Hopwood v. Texas*

Interestingly, it would be the Supreme Court's refusal to consider a case that would make an impact on affirmative action in higher education that it had not experienced since *Bakke*. *Hopwood v. State of Texas*, 518 U.S. 1033 (1996), involved the University of Texas Law School affirmative action plan, which maintained a goal of achieving a student body composed of 5% blacks and 10% Mexican Americans (Raza 1999, 52). Applications from minorities were considered by a minority admissions subcommittee and were not compared with non-minority applicants. In 1992, four white applicants, including Cheryl J. Hopwood, were denied admission into the law school. The students argued that their LSATs and GPAs were much higher than minorities accepted into the program. The four rejected applicants filed a suit in district court, contending that the law school's admissions policy violated their Fourteenth Amendment equal protection rights. The district court concluded that the school had not violated the plaintiff's Fourteenth Amendments rights (Cole and Raymond 1997, 776). The judge ruled "affirmative action programs are still needed in our society and therefore, universities may legitimately consider race and ethnicity as one factor in their admission policies" (Raza 1999, 53). The district court agreed with the university's defense of its affirmative action plan by citing that Texas still suffered from the affects of past discrimination.

On March 18,1996, the U.S. Court of Appeals for the Fifth Circuit reviewed the case and concluded that "the ultimate objective of the Equal Protection Clause of the

Fourteenth Amendment is to eliminate race-conscious decision making in the U.S. society and legal culture”(Cole and Raymond 1995, 267). The Fifth Circuit reversed the district court’s decision citing that the Supreme Court had required that strict scrutiny must apply to all government racial classifications in its *Adarand* decision. Using strict scrutiny, the circuit court considered two questions. Did the racial classification serve a compelling state interest and was the affirmative action plan established to achieve that goal? To answer the first question the circuit court referred to the Supreme Court’s decision in *Bakke*. “The Fifth Circuit found that promotion of diversity as a government interest had never gained enough adherents to the Supreme Court to become law” (Chang 1997, 73). The circuit court then considered if Justice Powell’s compelling state interest in diversity served as binding precedent. Because his argument garnered only one vote – his own, this opinion did not represent the viewpoint of the majority of the Supreme Court. Therefore, the circuit court concluded that the university did not have a compelling state interest to implement its affirmative action plan. The Court then considered if the University of Texas Law School’s affirmative action plan served the purpose of achieving the goal of addressing remedies. The Court found that “the purpose was not remedial because the law school had failed to show any present effects of past discrimination by the law school itself” (Cole and Raymond 1997, 776). The circuit court deemed the law school affirmative action plan unconstitutional and stated, “Race-based remedies must be narrowly tailored and thus limited to the specific state actor” (Alt 1997, 194). As the University Texas discovered, defending affirmative action under the strict scrutiny test was a very difficult task indeed.

In June 1996, the law school filed a petition to the Supreme Court for review of the decision. A single paragraph written by Justice Ruth Bader Ginsberg stated,

The Court had denied the review because of the absence of live controversy. We must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition”(Carter and Johnson 1997, 235).

The Court found no controversy because the law school had already acknowledged that its plan was unconstitutional and proscribed its use. This left standing the Fifth Circuit Court’s ruling invalidating affirmative action plans in its jurisdiction of Texas, Louisiana and Mississippi leaving a question mark on its future.

Following the Court’s refusal to hear *Hopwood*, many states outside the jurisdiction of the Fifth Circuit began to place initiatives on the ballot urging voters to prohibit affirmative action in their respective states. The first state to do so was California with its passage of the California Civil Rights Initiative (CCRI). It declared that “California government agencies may not discriminate or grant preferential treatment based on race, sex, color, ethnicity and national origin in public employment, education and contracting”(Volkh 1997, 2).

The CCRI could be applied only to state agencies, which were forced or pressured to make a race-based decision. The CCRI stated,

Discrimination in pursuit of a goal or timetable is similarly prohibited, regardless of whether the goal is rigid or flexible; so long as one applicant is treated differently from another based on race or sex, that’s discrimination (Volkh 1997, 4)

By banning preferential treatment, the CCRI set out to limit the scope of how Title VII would be applied and send a clear message that race-based decisions would no longer be tolerated.

The Supreme Court's decisions supporting affirmative action gave it the judicial authority needed. Many employers, government agencies and educational institutions implemented affirmative action plans following the Supreme Court decisions in *Griggs*, *Bakke* and *Webber*. However, the Court's rulings in *Croson* and *Adarand* resulted in a drastic weakening of the policy. Many of the same employers, government agencies and educational institutions that once established affirmative action plans dismantled them following the Court's decisions. The Court's rulings that limited the scope of affirmative action also reflected the public opinion with regard to the policy. Voters in Washington and Texas passed initiatives like the one in California. Support shifted away from affirmative action throughout the 1980s and 1990s as the public elected conservative presidents for three consecutive terms. The Supreme Court followed the public's lead; with the help of appointments from Republican presidents the composition of the Court changed to one that supported such ideologies. Public opinion and Supreme Court decisions against the policy left many questioning its future.

## CHAPTER 3

### THE UNIVERSITY OF MICHIGAN CASES

On June 23, 2003, the United States Supreme Court changed the way in which affirmative action plans could be implemented in higher education. The revision followed two decisions pertaining to the policy at the University of Michigan: *Gratz v. Bollinger*,<sup>1</sup> 529 U.S. --- (2003), which addressed the undergraduate admissions policy and *Grutter v. Bollinger*, 539 U.S. --- (2003), the Law School. Both plaintiffs alleged that the affirmative action plans violated the Fourteenth Amendment Equal Protection Clause and Title VI of the 1964 Civil Rights Act. The Court issued two different opinions - one that upheld the law school's affirmative action plan and the other that deemed the undergraduate plan unconstitutional. The contrasting opinions were based on a difference in the implementation of the two affirmative action plans. The undergraduate program used a point system while the law school applied "soft variables" to its goal of achieving a "critical mass." Justice O'Connor provided the swing vote that enabled affirmative action to remain in higher education only if it mirrored that of the University of Michigan Law School's policy.

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<sup>1</sup> When referring to the Supreme Court's opinion in *Gratz* and *Grutter*, I will use page numbers according to Findlaw because a bound copy of the Court's opinion is not yet available.

## The Undergraduate Case

In *Gratz v. Bollinger* (2003) the plaintiffs, Jennifer Gratz and Patrick Hamacher, applied for admission into the University of Michigan's College of Literature, Science and Arts (LSA) in 1995 and 1997, respectively. Both white Michigan residents were denied admission even though met the published standards. Gratz applied with an adjusted grade point average (GPA) of 3.8 and an ACT score of twenty-five, and Hamacher had an adjusted GPA of 3.0 and an ACT score of twenty-eight (Lauriat 2003, 4). The Office of Undergraduate Admissions (OUA), applied an affirmative action plan, which sought a diverse student body composed of different races, ethnicities, cultures and socioeconomic backgrounds led to their rejection (Lauriat 2003, 4). The OUA considered a number of factors when making its decision to admit a student, including “high school grades, standardized test scores, high school quality, curriculum strength, and geography”(529 U.S. --- 2003, 5). Besides these factors, the affirmative action plan also took race into account by targeting “underrepresented minorities” for admission. The university classified “African-Americans, Hispanics, and Native Americans to be underrepresented minorities” (529 U.S. --- 2003, 5). “Undergraduate applicants from 1995-1998 were sorted into cells using grids marked on the vertical axis with GPAs, and on the horizontal axis with test scores”(Cohen and Sterba 2003, 182). Under these guidelines, the university admitted all qualified “minority groups as soon as possible, without deferring or postponing their applications<sup>2</sup>” (Gratz Respondent Brief 2003, 7). This discrepancy led the undergraduate program to revise its affirmative action plan. The new plan implemented a point system where one could receive a total of 150 points, but only 100 were needed for acceptance. One hundred ten points were designated for

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<sup>2</sup> Page numbers refer to Respondent Brief in *Gratz* obtained from Findlaw.com.

academic factors and the other forty could be given based on other factors (Gratz Respondent Brief 2003, 7).

Examples of academic factors included eighty points for GPA, twelve for standardized tests and up to four for strength in high school (*Gratz Respondent Brief 2003, 7*). A few of the “other factors” considered were ten points for Michigan residency, four for alumnus, and twenty for one of the following: (a) socioeconomic disadvantage; (b) membership in an underrepresented minority group; (c) attendance at a predominantly minority or predominantly socioeconomically disadvantaged high school; (d) recruitment for athletics; and (e) provost discretion (*Gratz Respondent Brief 2003, 9*). Gratz and Hamacher sued the University of Michigan arguing that the designation of twenty points for the above factors violated the Fourteenth Amendment Equal Protection Clause and Title VI of the 1964 Civil Rights Act.

In 2000, the first district court *Gratz* decision examined whether diversity served a compelling interest. The required the court to consider if Justice Powell’s *Bakke* opinion represented a binding opinion. Powell maintained that a campus could use race in admissions if the policy sought a diverse campus. Demonstrating its support for Powell’s opinion, the district court declared that even though there were not five justices concluding that diversity served a compelling interest in *Bakke*, there were five who believed that race may be considered in the admissions process.

The court proposed that Justice Brennan’s silence as to the diversity issue is not necessarily a rejection of the idea. In the later *Metro Broadcasting* case, Justice Brennan explicitly recognizes Justice Powell’s diversity argument from *Bakke* (Raines 2002, 11).

The district court found diversity to serve a compelling interest and applied *Bakke* as precedent. The court reiterated its support of a diverse campus by upholding the University of Michigan affirmative action plan.

The second district court *Gratz* trial occurred one year later. It considered if the undergraduate plan was narrowly tailored. This obligation, founded on Supreme Court precedent, mandates that all racial considerations be strictly scrutinized. The first component of strict scrutiny was met when the district court ruled that the university had a compelling interest in a diverse campus. The second aspect addressed in this case, pertained to the structure of the plan to ensure that it was precisely tailored to serve that interest. The district court determined that the original grid method used by the university was unconstitutional because it automatically accepted all minority applicants. However, it concluded that the revised point system met the standard because the twenty points could be distributed for more than simply race. The district court also noted that applicants could be “flagged” if they possessed certain qualities or characteristics (Swink 2003, 14). Taking all this into account, the court upheld Michigan’s affirmative action plan, but this time on the grounds that it achieved a diverse campus by applying a narrowly tailored method.

The plaintiffs appealed the district court rulings to the U.S. Court of Appeals for the Sixth Circuit where the judges heard *Gratz* and *Grutter* at the same time. The Sixth Circuit issued a ruling in *Grutter*, but it failed to do so in *Gratz*. Without a circuit court decision, *Gratz* and Hamacher petitioned the United States Supreme Court to hear their case. The Court agreed and it was argued on April 1, 2003, and a decision was issued on

June 23, 2003. In a 6-3, ruling the Court reversed the two previous district court decisions that had upheld the undergraduate policy.

The six members of the majority included Justices Rehnquist, O'Connor, Antonin Scalia, Anthony Kennedy, David Breyer and Clarence Thomas. Rehnquist delivered the opinion of the Court and began by considering Stevens's claim that Hamacher did not have standing to sue because (1) he never attempted to apply as a transfer student; and (2) if he had done so it would not be applicable since *Gratz* involved the freshman undergraduate admissions policy, not the transfer (529 U.S. --- 2003, 8). On the first point, Rehnquist disagreed with Stevens arguing that:

After being denied admission, Hamacher demonstrated that he is able and ready to apply, as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions (529 U.S. --- 2003, 9).

Rehnquist determined that Hamacher had been denied equal consideration as a freshman because the point system gave "underrepresented minorities" an unequal advantage in the admissions process. Hamacher's initial rejection and subsequent assertion that he would transfer if race were no longer weighted provided him standing. Rehnquist addressed Stevens's second argument against standing by contending that:

In the present case, the University's use of race in undergraduate transfer admission does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions. Respondents' failure to allege any such differences is simply consistent with the fact that no such difference exists (529 U.S. --- 2003, 10).

For Rehnquist, the freshman undergraduate policy and transfer policy were one in the same because the respondents did not highlight the differences between the two.

Rehnquist then turned to the question of whether the University of Michigan plan could be viewed as being narrowly tailored. He concluded that the policy, “which automatically distributed twenty points or one fifth of those needed to guarantee admission, to every single underrepresented minority applicant solely because of race, is not narrowly tailored to achieve the interest of diversity” (529 U.S. --- 2003, 12). The Chief Justice referred to Powell’s opinion in *Bakke*, which focused on an individualized consideration of each applicant. The automatic designation of points did not reflect an individualized or case specific approach and, because of this, it violated the Fourteenth Amendment Equal Protection Clause.

Justice O’Connor, concurring with the majority opinion criticized the fixed distribution of points for “underrepresented minorities” because it overlooked other important qualities. She noted “that an outstanding leader could not receive more than five points for her accomplishments, which is only one fourth of the points assigned to someone underrepresented”(529 U.S. --- 2003, 6). O’Connor suggested that the university revise its affirmative action policy, which she labeled as “non individualized” and “mechanical.”

Thomas also concurred with the majority stating, “The LSA policy fails, however, because it does not sufficiently allow for the consideration of non-racial distinctions among underrepresented minority applicants” (529 U.S. --- 2003, 7). Justice Breyer concurred with the majority, yet did not join the Court in its opinion. Instead, he joined O’Connor’s opinion “except insofar as it joined that of the Court” (529 U.S. --- 2003, 7.). He cited his agreement with Justice Ginsburg’s dissent, which emphasized a societal obligation to true racial and ethnic equality.

Justice Souter joined Stevens's dissent over the issue of standing. Stevens argued that Hamacher did not have standing to sue and thus the Court should not consider the case. He noted that both petitioners were enrolled at other institutions when the lawsuit was filed. Moreover, neither one had attempted to transfer to the University of Michigan following initial rejection. Stevens wrote, "To seek forward-looking, injunctive relief, petitioners must show that they can face an imminent threat of future injury" (529 U.S. -- - 2003, 19). Hamacher contended he would have reapplied had the University removed its consideration of race. Stevens argued that because Hamacher had not attempted to transfer, he did not suffer a potential legal injury. Stevens also challenged the majority's conclusion that the transfer and the freshman process were the same. He mentioned that the transfer policy was not included in the documents provided to the Court. Without this information, the majority determined that the policies were one in the same, which he believed was not the case. Gratz and Hamacher argued that the freshman policy that used a point system was unconstitutional. However, Hamacher's claim of harm as a potential transfer student did not make sense because the transfer policy did not utilize a point system. Stevens concluded this discrepancy as one that failed to provide Hamacher with standing since the point system was the policy at issue.

Stevens also recognized that as a member of a class action suit, Hamacher still must show actual harm caused by the undergraduate affirmative action plan. He suggested that other members may have been harmed by the undergraduate policy, but Hamacher did not demonstrate harm. Without a personal stake, Hamacher did not have standing in *Gratz* and precedent left no alternative but to dismiss the case for lack of standing.

Justice Ginsburg joined Souter in a separate dissent to the majority ruling. Souter observed that non-minority applicants have the same chance at gaining the twenty points under the freshman policy because other factors such as athletic ability and socioeconomic disadvantage are included. By assigning a value to a variety of characteristics, the University of Michigan employed a narrowly-tailored plan that considered all applicants individually. Souter criticized the United States government brief that expressed support of percentage plans rather than a point system designed to achieve a diverse campus. Souter noted that:

The percentage plans are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness, equal protection cannot become an exercise in which the winners are the ones who hide the ball (529 U.S. --- 2003, 25).

Justice Ginsburg's dissent discussed the current disparity among racial and ethnic lines as the fundamental justification for affirmative action. Statistics citing the differences in income, education and employment represent obstructions to a truly equal society. She wrote,

Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice (529 U.S. --- 2003, 26).

Instead, Ginsburg preferred an open and up-front policy of affirmative action, like the one published by the university that explained the twenty point designation. She expressed concern that the only alternative to an open policy such as Michigan's would be a hidden one. She referred to other universities that required students to write an essay on their cultural background as a form of hidden affirmative action. Ginsburg maintained

that the obligation to fix inequalities experienced by minorities should not be overlooked and affirmative action should be in place to address this issue.

Even though it was a close decision, the outcome of *Gratz* forced many colleges and universities to revise their affirmative action plans. Rehnquist's majority opinion condemned the automatic twenty point designation for "underrepresented minorities." This rejection of the point system led the Court to find that such policies are not narrowly tailored; hence, they are unconstitutional. Conversely, Justice Ginsburg's dissent suggested "that decision makers in a system of sponsored mobility should use numbers as a source of accountability to individuals, underrepresented groups and the public mission of the institution"(Guiner 2003, 23). Regardless of the variance in opinion, the *Gratz* decision proscribed the legal use of affirmative action via point-assignment.

#### The Law School Case

*Grutter v. Bollinger*, 539 U.S. --- (2003), heard in conjunction with *Gratz*, involved a suit against the University of Michigan Law School affirmative action policy. Barbara Grutter, a white Michigan resident, applied for admission into the program in 1996. At first, she was placed on the waiting list, but in June 1997 she was denied admission (Swink 2003, 15). Grutter met the published standards by obtaining a 3.8 GPA and 161 LSAT score. In response to her rejection, she filed a suit alleging that the law school's consideration of race as the "predominant factor" in the admissions process, made it a violation of the Equal Protection Clause and Title VI of the Civil Rights Act (Swink 2003, 15).

Since 1992, the law school followed an admissions policy adhering closely to the Supreme Court recommendations in *Bakke*. Rather than using set-asides or quotas, the *Bakke* opinion supported the use of a flexible affirmative action plan that took into account various aspects of each applicant. Items such as undergraduate GPAs and essays inquiring how one would contribute to a diverse campus were all considered in the law school admissions process. In addition to academic qualities, the institution recognized “soft variables” for each applicant such as travel abroad and family hardships. The combination of academic qualities and “soft variables” helped admissions officials determine whom to accept. Nevertheless, the school openly advocated its use of affirmative action in order to achieve a diverse campus. The policy stated that “The law school seeks to admit students who show substantial promise for success in law school, in the practice of law, and who are likely to contribute in diverse ways to the well being of others”(Fata and Schumaker 2003, 2). The program defined diversity broadly, “it seeks a mix of students with varying backgrounds and experiences that will respect and learn from each other” (Fata and Schumaker 2003, 2).

To promote diversity, the law school sought to achieve a “critical mass” of underrepresented students. Law school admissions officials explained a “critical mass” as “meaningful representation that is understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated<sup>3</sup>”(Brief for the Respondents 2003, 6). The definition of “critical mass” represented a major part of the debate in *Grutter*. The law school defended its use of a “critical mass.”

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<sup>3</sup> Page numbers refer to Respondent Brief in *Grutter* obtained from Findlaw.com.

Professing an abhorrence of all target numbers and race quotas, the law school insisted that it sought no more than a critical mass of minority students. A critical mass is regularly found when the number of minority admissions reached ten to twelve percent (Sterba and Cohen 2003, 83).

While the law school maintained the range of percentages accepted under the “critical mass” as flexible and not constituting a quota, Grutter argued the contrary claiming that the range of percentages did indeed constitute a quota. Statisticians who testified noted,

...when cell by cell, and year by year, underrepresented minority applicants are admitted in significantly greater proportions than their non-minority competitors with similar UGPA and LSAT scores, it is clear that this accords the race of applicants a great deal of weight (Swink 2003, 16).

At issue in district court was whether racial diversity served a compelling state interest and, if so was the law school plan narrowly tailored? The court first determined that Justice Powell’s opinion in *Bakke* was his and his alone, which meant the court was not obligated to follow his opinion. “The Brennan group does not so much as mention the diversity rationale in their opinion, and they specifically declined to join in the portion of Justice Powell’s opinion that addressed that issue” (Swink 2003, 16). This position led the district court to conclude that according to Supreme Court precedent, diversity did not serve a compelling interest. Furthermore, it found that a “critical mass” was not a narrowly tailored policy because:

- (1) No one at the Law School could define a “critical mass;”
- (2) there is no time limit on the use of affirmative action;
- (3) underrepresented minorities received special attention in the admission process; [and]
- (4) the school does not consider other methods of increasing minority enrollment (Swink 2003, 16).

These factors provided the district court with several reasons why it deemed the plan unconstitutional.

The district court decision in *Grutter* was eventually appealed to the U.S. Court of Appeals for the Sixth Circuit and on May 14<sup>th</sup>, 2002, its decision was reversed.

The Sixth Circuit opined that Justice Brennan's first footnote gave qualified approval of a race-conscious admissions policy: "We also agree with Mr. Justice Powell that a plan like the Harvard plan is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination" (Swink 2003, 16).

The Sixth Circuit treated Powell's opinion as binding precedent, finding diversity served a compelling state interest. This left the question of whether the law school's plan was narrowly tailored to establish diversity. Here, it also overturned the district court by concluding that the law school policy met the narrowly tailored requirement. The circuit court determined that the plan was narrowly tailored because it considered a variety of factors for each applicant. The circuit court refuted every one of the reasons the district court listed as the school's failure to narrowly tailor its plan. For example, it noted that the district court's conclusion that "critical mass" was not defined "[is] at odds with its characterization of it as the functional equivalent to a quota" (Swink 2003, 17). While it agreed with the district court that a time limit for affirmative action might be needed, it left such a decision to the institution (Swink 2003, 17). It also gave deference to the institution's ability to choose an appropriate affirmative action plan and establish the definition of whom it must target for a diverse campus (Swink 2003, 17). The Sixth Circuit reversed the district court ruling by supporting the compelling need for diversity and its attainment through a narrowly tailored plan such as the law school's.

*Grutter v. Bollinger* (2003) was appealed to the United States Supreme Court and decided on June 23, 2003. Justice O'Connor provided the swing vote in *Grutter* by affirming the circuit court's decision. In a 5-4 opinion, Justices O'Connor, Stevens,

Souter, Ginsburg and Breyer formed the majority while Rehnquist, Scalia, Kennedy and Thomas dissented. O'Connor writing for the majority, "gave great deference to the University of Michigan Law School's contention that diversity is essential to its educational mission" (Lauriat 2003, 4). She conceded that diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals"(Bell 2003, 12). *Amici curiae* briefs, supporting the benefits of a diverse workforce were submitted by sixty-five different businesses including Boeing, Pepsi and Xerox. The businesses defended the use of affirmative action because:

The students of today are this country's corporate and community leaders of the next half century. For these students to realize their potential as leaders, it is essential that they be educated in an environment where they are exposed to diverse people, ideas, perspectives and interactions<sup>4</sup> (*Amicus curiae* for 65 Leading American Businesses 2003, 4).

Former military officers and leaders also expressed support for affirmative action: "The military has made substantial progress towards its goal of a fully integrated, highly qualified officer corps. It cannot maintain the diversity it has achieved or make further progress unless it retains its ability to recruit and educate a diverse officer corps"( *Amicus curiae* for Lt. General 2003, 5). The briefs written by businesses and military leaders highlight the advantages of diversity beyond the classroom. They espoused the notion that a diverse experience in higher education will help prepare students for entry into a similar situation following graduation. Justice O'Connor acknowledged that:

Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own,

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<sup>4</sup> Page numbers refer to *Amici* briefs in *Grutter* obtained from Findlaw.com. There were sixty-nine *amici curiae* briefs in support of the Law School in *Grutter* and forty-nine in support of the Undergraduate School in *Gratz*.

unique experience of being a racial minority in a society like our own, in which race unfortunately still matters (539 U.S. --- (2003), 16).

By accepting the importance of diversity, O'Connor embraced Powell's opinion that a diverse campus serves a compelling interest because it reflects the differences found within society. After graduation, students will enter a diverse workforce making a diverse campus critical so that students learn how to interact with a variety of people.

O'Connor continued by considering whether the law school policy was narrowly tailored for the advancement of a diverse campus. She reasoned that the use of a "critical mass" allowed it to be narrowly tailored because it did not set specific goals for admission. This idea was reinforced in the school's evaluation of each applicant based on factors such as GPA, LSAT scores, and letters of recommendation. In addition, it considered "soft variables" such as travel abroad, fluency in different languages, and whether one had to overcome personal adversity or family hardships (539 U.S. --- (2003), 16). These "soft variables" looked at qualities besides race, which established an individualized and flexible approach in the admissions process. O'Connor stated:

The Law School affords this individualized consideration to applicants of all races. Unlike the program at issue in *Gratz*, the Law School awards no predetermined diversity "bonuses" based on race or ethnicity (539 U.S. --- (2003), 15).

By using the term "critical mass" and not obligating the acceptance of a specific number of "underrepresented minorities," the policy was constitutional. Moreover, "soft variables" did not look solely at the race or ethnicity of applicants, rather they enabled other traits and qualities to be included in the admissions process. This aspect of the policy ensured a truly diverse campus because it helped students from a variety of different backgrounds, skin colors, religions, and geographic areas gain admission.

Despite her support of affirmative action, O'Connor indicated the need for a time limit on race-conscious admissions policies. Even though she suggested a possible twenty-five year time limit on affirmative action, O'Connor's majority opinion in *Grutter* upheld diversity as a compelling state interest and labeled the law school plan a constitutional model for universities nationwide.

Justice Ginsburg, with whom Breyer joined in a concurring opinion, also addressed the notion of placing a time frame on the implementation of race-conscious admission policies. Ginsburg wrote, "From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action" (539 U.S. --- (2003), 20). Nevertheless, Ginsburg's concurring opinion explained her divergence from O'Connor's twenty-five year limit; for her, affirmative action must remain in place as long as disparities exist along racial and ethnic lines.

Chief Justice Rehnquist, author of the dissenting opinion, maintained that the law school plan did not meet the standards mandated by strict scrutiny. "Stripped of its critical mass veil, the law school's program is revealed as a naked effort to achieve racial balancing" (539 U.S. --- (2003), 20). Rehnquist referred to admission statistics that showed underrepresented minorities were selected for admission more so than non-minorities with similar qualifications. For example,

In 2000, 12 Hispanics who scored between 159-160 on the LSAT and earned a GPA of 3.0 applied for admission and only 2 were admitted. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted (539 U.S. --- (2003), 22).

Rehnquist challenged the plan because, as the data suggested, certain minorities were being selected over other minorities. He asked why the law school never explained the

reason more individuals from specific underrepresented minority groups were needed in order to achieve a “critical mass” or further diversity? Rehnquist concluded that the goal of attaining a “critical mass” was simply a cover that provided the law school an opportunity to ensure that specific underrepresented minorities were accepted (539 U.S. - -- (2003), 22). He also noted that the lack of a time limit inhibited the admissions policy from meeting the standard of strict scrutiny. For Rehnquist, the majority incorrectly found that the law school plan met the standards prescribed in previous precedents regarding strict scrutiny.

Justice Kennedy, in his dissenting opinion, agreed with the Chief Justice’s assessment that the policy failed to meet strict scrutiny standards. He too pointed to statistics that reinforced this argument.

About 80-85 percent of the places in the entering class are given to applicants in the upper range of the Law School Admission test scores and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity. With respect to the remaining 15-20 percent of the seats, race is likely outcome determinative for many members of minority groups (539 U.S. --- (2003), 31).

The law school did not demonstrate the manner in which it reviewed each applicant individually especially when the seats become most competitive. Kennedy referred to the testimony of admission officers who disclosed they examined incoming admission statistics daily as a reference point. “The consultation of daily reports during the last stages in the admissions process suggests there is no further attempt at an individual review safe for race itself” (539 U.S. --- (2003), 33). This led Kennedy to assert that the law school plan was unconstitutional because it did not provide an individual assessment at every stage of the admissions process.

Justice Scalia's dissenting opinion denounced the split decision by the Court in *Gratz* and *Grutter*. He fulminated that it would spawn never-ending litigation because the Court did not produce a single solid opinion on the matter of affirmative action. For him, the majority erroneously supported the law school plan because "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception" (539 U.S. --- (2003), 36).

Justice Thomas's dissent was more critical towards the majority decision. Besides the law school's inability to meet the standards of strict scrutiny, Thomas flatly rejected the notion of diversity serving a benefit to anyone within society. As he put it "Diversity is merely a faddish slogan of cognoscenti that depends on deference to the judgment of know-it-all elites" (539 U.S. --- (2003), 20). Thomas contended that O'Connor's claim for the benefits of diversity lacked evidence. "The *amici* briefs from all corners of society do not prove that the 'beneficiaries' of this racial discrimination perform at (or even near) the same level as those who receive no preferences" (539 U.S. --- (2003), 57). Merit was important to Thomas and high test scores deserve reward – not diversity. Diversity has no value to Thomas because it degrades those classified as the "underrepresented minority." He thought that the law school plan was unconstitutional because he did not support the concept of diversity as serving a compelling state interest.

In *Grutter v. Bollinger*, (2003) the Supreme Court narrowly upheld affirmative action in higher education. O'Connor's majority opinion focused on the compelling interest in diversity because of the benefits to the future workforce. She supported the law school plan because of its individualized approach that included "soft variables" and the ambiguous goal of a "critical mass." In contrast, Chief Justice Rehnquist concluded

that the intention of a “critical mass” represented a latent method of ensuring that “underrepresented minorities” gain admission. Thomas took the stance that diversity was belittling to minorities because it assumed they could not garner acceptance into law school on their own merit. For him, all racial consideration should be avoided, following Justice Harlan’s concept of a colorblind constitution.

In summary, *Gratz* and *Grutter* were two key cases for affirmative action in higher education. While *Gratz* proscribed the use of affirmative action plans that designated points for specific factors in order to target minority students, *Grutter* upheld a policy that looked at numerous qualities of all applicants regardless of race. Many changes have occurred regarding the manner in which affirmative action has been implemented. At first, the policy was composed of set-asides and quotas to attain a specific number of minorities. In *Bakke* this method was deemed unconstitutional because race and ethnicity were the sole criterion for admission into U.C. Davis. Over thirty years later, in the two University of Michigan cases, the Supreme Court finally provided an example of how affirmative action plans should be implemented. The Court’s support of the law school policy that considered various factors beyond race and ethnicity provided a new approach to affirmative action. Terms such as “soft variables” and “critical mass” now represent the constitutional method of implementing an affirmative action plan. This new approach, narrowly agreed to by the Supreme Court, has enabled the policy to remain in higher education for the time being. However, it is difficult to predict how or if affirmative action will be applied in the future. In *Grutter*, Justice O’Connor suggested a twenty-five year time limit on the policy. The composition of the Court due to retirement will surely affect the policy. If conservative appointments

are made it is likely affirmative action will be reconsidered and found unconstitutional. Increasing this possibility is the continued controversy surrounding affirmative action nearly one year after *Grutter*. Court appointments and societal opposition may also encourage the Court to reconsider its decision upholding affirmative action in higher education. These factors make the attainment of the twenty-five year time limit on affirmative action seem like a very slim possibility.

## CHAPTER 4

### AFFIRMATIVE ACTION AND THE QUESTION OF JUSTICE

In general, executive orders and Supreme Court decisions on affirmative action involve the policy's ability to provide equality. For the most part in society, justice and equality go hand in hand. For example, Allan Bakke claimed that the U.C. Davis admission policy based on race was a violation of the Fourteenth Amendment Equal Protection Clause. The litigious nature of affirmative action centers on the question of whether it is just to treat people unequally in order to address an inequality. Opponents of affirmative action argue that it is unjust because it is a form of reverse discrimination. They contend that instead of race, gender or ethnic background the main consideration should be the most qualified candidate, which usually focuses on high test scores. On the other hand, proponents of affirmative action believe it is just because it helps provide an opportunity to those who may not have one otherwise, as a result of the history and consequences of racism and sexism.

It seems that the question of justice is a deciding factor for those formulating an opinion towards affirmative action. Justice is an important notion and one that many believe should never be compromised. By reviewing John Rawls's *A Theory of Justice*, it is possible to show how affirmative action plans that are generally applied to all minorities can be considered just by applying his hypothetical criterion, "justice as fairness." According to Rawls, a just society is one that is based on two principles

adopted in what he calls the “original position.” By detailing his second principle of justice referred to as the “difference principle,” an argument for affirmative action can be made. To evaluate Rawls’s theory, Ronald Dworkin’s critique of *A Theory of Justice* will be used. Dworkin posits that the hypothetical nature of the “original position” cannot make it a binding agreement for principles of justice. He also claims that the “difference principle” does not provide for a just society in all instances. Although Dworkin rejects the “original position” and the “difference principle,” his arguments concerning justice also provide an alternative viewpoint in support of affirmative action.

#### An Overview of Rawls’s Theory

In *A Theory of Justice*, John Rawls maintains that individuals free of their knowledge of advantages and disadvantages will make fair and equal principles of justice. He applies a contractarian view of justice in which “free, equal and rational” members of a society accept his hypothetical contract from the “original position.” By adopting the “original position,” citizens are agreeing to what Rawls calls “justice as fairness.” This consists of: (1) an interpretation of the initial situation and of the problem of choice posed there, and (2) a set of principles, which it is argued, would be agreed to (Sterba 1999, 14).

The first component of “justice as fairness” is a well-ordered society. According to Rawls, it is a society in which (1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic institutions generally satisfy and are generally known to satisfy these principles (Rawls 1999, 4). Hence, Rawls’s well-ordered society depends upon all members understanding the principles of justice they adopt and

the institutions they create help ensure the principles of justice are maintained. “Justice as fairness” involves social justice, thus it is mostly concerned with how institutions distribute fundamental rights and duties, and how they determine the division of advantages from social cooperation (Rawls 1999, 6). Consequently, for the most part, the focus of this chapter will be on how Rawls provides a situation in which institutions actively preserve the principles of justice.

In “justice as fairness”, “the original position of equality corresponds to the state of nature in the traditional theory of social contract” (Rawls 1999, 11). According to Rawls, the “original position” follows the basic structure of the contractarian view towards justice. Although the “original position” is a hypothetical situation, it serves as an important part of his theory toward the creation of a just society.<sup>5</sup> The hypothetical situation allows Rawls to consider what principles of justice would be adopted, in order to establish a just society, if all citizens were equal and did not know their own advantages or disadvantages in advance. This is critical to Rawls’s theory because it provides him the opportunity to create a “what if” situation where justice is the central objective.

The features of the “original position” are that “no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, age, gender and the like” (Rawls 1999, 11). This allows members of a society to accept principles of justice under what Rawls calls a “veil of ignorance.” The “veil of ignorance” helps ensure that “no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance

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<sup>5</sup> Tom Campbell argues that the original position fails to take into account an individual’s desire to be a member of a culture or community (Campbell 2001, 112).

or the contingency of social circumstance because no one knows where she will be in the resulting society” (Rawls 1999, 12). The “veil of ignorance” creates a situation where members of society do not adopt principles of justice that increase their advantages but instead, choose principles that will be fair and equal to everyone in society. In fact, the fair and equitable situation that the “veil of ignorance” creates is why Rawls calls his theory “justice as fairness”. Given this “original position,” the two principles, which members then adopt under the “veil of ignorance”, are:

(1) each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others; [and] (2) social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all (Rawls 1999, 53).

Liberties such as the right to vote and freedom of speech are equally protected to all under the first principle. While the second principle involves the distribution of income and wealth under it, both do not need to be equal but must be distributed to everyone’s advantage, unless an unequal distribution is to everyone’s advantage. Thus, if financial inequalities exist they must be addressed in favor of those who are worse off, unless it is to the advantage of everyone to maintain the inequality. The second principle also requires positions of authority and responsibility to be accessible to all members of society. Rawls ranks the principles in importance. The first is the most important and the second is consequent and inferior to the first. “This ranking means that infringements of the basic equal liberties protected by the first principle cannot be justified or compensated for, by greater social and economic advantages” (Rawls 1999, 54). Other kinds of liberties that are not addressed specifically by the first principle, such as the freedom to contract, are not basic, and thus will not be protected under the first principle.

Based on the ranking of the preceding two principles, Rawls's general conception of justice is that "all social values – liberty and opportunity, income and wealth, and the social bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all of these values is to everyone's advantage" (Rawls 1999, 54). Therefore, within "justice as fairness," this "difference principle" ensures that social and economic inequalities are arranged so that both benefit the least advantaged. In addition, under the two principles of justice, there are no restrictions on what inequalities are allowed as long as inequalities improve everyone's position within society. Rawls explicitly notes that inequalities such as slavery would not be allowed because it would not help everyone's situation if it were permitted.

#### The Difference Principle

To help define the phrases "everyone's advantage" and "equally open to all," Rawls uses institutions within society. Moreover, he applies the concept of democratic equality to institutions. This concept combines the principle of fair equality of opportunity with the "difference principle." "The intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate" (Rawls 1999, 65). Thus Rawls's second principle of justice relies mostly on the "difference principle." In the example of an entrepreneurial class on owning property, Rawls explains the "difference principle." He begins by assuming that members of the entrepreneurial class are more likely to be better off than unskilled laborers. According to the "difference principle," inequality is justified only if lowering the expectation of advantages for the least advantaged would make them less badly off. Rawls's example of the "difference principle" illustrates his belief that if

unskilled workers would be made even more disadvantaged by lowering the expectation of advantages, then it should not be lowered.

Rawls argues that two important considerations of the “difference principle” should take place within “justice as fairness.” “First, if the expectations of the least advantaged are already maximized, no changes in the expectations of those who are better off can help those who are worse off” (Rawls 1999, 68). The second consideration addresses the issue that, within the “difference principle,” inequalities are chain-connected meaning that if the expectations of the least advantaged are raised, all of the positions will experience an increase. However, the chain connection fails to identify the problem that occurs when the least advantaged do not experience an increase. Rawls is illustrating that the “difference principle” appears to react only from the bottom up and fails to increase advantages from the top down. He continues to defend the use of the “difference principle” because of its capability to spread benefits among all members of society. According to Rawls, “it seems probable that if the authority and power of legislators and judges say, improve the situation of the less favored, they improve that of citizens generally” (Rawls 1999, 71). He also claims that the lexical nature of the “difference principle,” in which the welfare of the least advantaged is the first to be maximized, also helps reduce the chain reaction dilemma. By applying the “difference principle” to the second principle of justice Rawls revises it to state:

Social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity (Rawls 1999, 72).

## Applying the Difference Principle to Institutions

In “justice as fairness” members adopt principles that provide for a fair and just society. Rawls maintains that within his theory of “justice as fairness,” justice is a pure procedural matter. This means that justice is “a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed” (Rawls 1999, 75). Individuals use “reflective equilibrium” to determine the moral standards and reasons why the institution is obligated to follow them. Procedural justice holds society accountable for making the rules that institutions follow to ensure justice.

Within “justice as fairness” social position also plays a key role. Rawls notes that the subject of justice revolves around the structure of society. This is critical because an individual's status within society determines the role she plays. He begins by assuming everyone has equal citizenship and that their places within society are defined by distributions of income and wealth. In turn, equal citizenship is defined by how successful institutions are at creating a situation where everyone will benefit. However, establishing a system to judge social and economic inequalities is much more difficult. Rawls leaves this imperative step up to the political authority or those with more responsibility within associations. To define the least advantaged Rawls describes:

...this group as including persons whose family and class origins are more disadvantaged than others, whose natural endowments (as realized) permit them to fare less well, and whose fortune and luck in the course of life turn out to be less happy, all within the normal ranges and with the relevant measures based on social primary goods (Rawls 1999, 83).

Moreover, Rawls addresses the arbitrary way by which the least advantaged are defined.

He posits that one method of identifying the least advantaged could be through a social

position, but mentions other ways such as wealth and income. The importance here is to create a method of identifying the least advantaged. Once this is done, the “difference principle” can be applied to provide the least advantaged with feelings of self-worth. Consequently, the least advantaged will be more willing to participate within society, which is central to Rawls’s notion of justice.

“Justice as fairness” applies mostly to a social system based on equal citizenship and proportional distribution of wealth. To address inequalities based on gender or race, Rawls again refers to the “difference principle”. Here, he claims that if an inequality based on race is to the advantage of the disadvantaged then it is justified. Nonetheless, Rawls asserts that inequalities such as those based on race usually do not serve to assist the disadvantaged in “justice as fairness.”

#### Why Apply The Difference Principle to Institutions?

For Rawls, the most important job institutions perform is providing a situation where the principles of justice are followed. The main aspect of his two principles of justice centers on the ability of institutions to redistribute advantages to ensure equality. The “principle of redress” is one such method of redistributing advantages. “The redress principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions” (Rawls 1999, 86). Rawls uses the example of directing more educational resources to the least advantaged. By doing so, the least advantaged gain an opportunity to participate within society, which increases feelings of self-worth. The additional resources distributed through the “principle of redress” are similar to that of the “difference principle.” Thus the principle of redress is

thought to represent one of the elements in our conception of justice (Rawls 1999, 86). The “principle of redress” and the “difference principle” would come to the same conclusion, but in a different manner. Instead, the “difference principle” would allow more resources for the less educated if it would improve the overall condition of the society.

Therefore, we are led to the difference principle if we wish to set up the social system so that no one gains or loses from this arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return (Rawls 1999, 87).

Even though the redress and difference principles are not the same, Rawls believes both have an identical intent. The difference principle represents, in effect, an agreement regarding the distribution of natural talents as in some respects a common asset and to share in the greater social and economic benefits made possible by the complementarities of this distribution (Rawls 1999, 87). Rawls argues that the “difference principle” has the same capability as the “principle of redress,” which is to ensure institutions equally redistribute advantages. However, under the “difference principle,” natural inequalities are compensated for only when it benefits the common good, whereas under the “principle of redress” they are compensated regardless of that benefit.

Another way the “difference principle” provides an equal society is through institutions and their capacity to create a mutual benefit. Rawls acknowledges that some may argue the “difference principle” does not ensure reciprocity because it serves only the least advantaged. Yet, he does not agree with the preceding assertion because the application of the “difference principle” requires:

...the more advantaged to recognize that the well being of each depends on the scheme of social cooperation without which no one could have a satisfactory life: they recognize also that they can expect the willing

cooperation of all only if the terms of the scheme are reasonable (Rawls 1999, 88).

No one has a prior claim to advantages and, under the “difference principle,” everyone gains because the most advantaged are compensated by distributing benefits to the least advantaged. This creates a mutual benefit [reciprocity] to both groups because the most advantaged gain by helping to provide a just society while the least gain when given additional benefits. In order to ensure that this occurs it is important that contributions to the less advantaged remain positive and do not exceed the maximum amount. If contributions surpass the maximum amount, reciprocity no longer exists. Rawls explains the importance of reciprocity by stating, “it is to realize the ideal of the harmony of interests on terms that nature has given us, and to meet the criterion of mutual benefit, that we should stay in the region of positive contributions” (Rawls 1999, 90). Through the proportional distribution of advantages, Rawls establishes a basis by which distributions should occur to ensure reciprocity. Everyone cooperates in “justice as fairness” because they want to maintain the just society that is established through the two principles of justice.

An additional reason why Rawls defends the use of the “difference principle” is its inherent principle of fraternity. “Fraternity is held to represent a certain equality of social esteem manifest in various public conventions and in the absence of manners of deference and servility” (Rawls 1999, 91). Rawls maintains that feelings of fraternity are achieved through the “difference principle” because everyone adheres to the concept of helping the least advantaged. Rawls believes that fraternity is vital to his theory because the concept is oftentimes excluded from democratic theory. Overall, he asserts that the “difference principle” includes fraternity by creating a society that collectively works to

help the least advantaged. He even states, “we might conjecture that in the long run, if there is an upper bound on ability, we would eventually reach a society with the greatest equal liberty the members of which enjoy the greatest equal talent” (Rawls 1999, 96). Rawls’s implication is that the continual use of the “difference principle” could lead to a just society in which everyone has the opportunity to experience his or her greatest talent.

### Principles for Individuals

The two principles adopted in “justice as fairness” help establish the structure of society as it relates to institutions. Principles for individuals must also be chosen in order to provide for a just society. While Rawls does not go into depth describing the exact method for establishing principles for individuals, he does maintain that there should be a sequence or specific numerical ordering for each principle. According to Rawls, one of the main principles that individuals should adhere to is the “principle of fairness.”

This principle holds that a person is required to do his part as defined by the rules of the institution when two conditions are met: first, the institution is just (or fair) if it satisfies the two principles of justice, and second, one has voluntarily accepted the benefit of the arrangement or taken advantage of the opportunities it offers to further one’s interests (Rawls 1999, 98).

The “principle of fairness” does not allow an individual to receive advantages from others without the individual first completing his or her obligations to society. A second obligation is formed by the institutions that determine what an individual is required to do. Finally, individuals must cooperate in order to ensure that the agreed-upon arrangement continues.

In addition to obligations under the ‘principle of fairness,’ individuals have natural duties. The following are examples of natural duties: “(1) the duty of helping another when he is in need or jeopardy, provided that one can do so without excessive

risk or loss to oneself; (2) the duty not to harm or injure another; and (3) the duty not to cause unnecessary suffering” (Rawls 1999, 98). Rawls refers to the first duty as a positive duty because an individual is performing a good deed for another. The last two duties are negative because they require an individual to not act in a bad manner. Regardless of whether positive or negative, everyone in society must adhere to his/her natural duties without creating a formal agreement or having an institution establish rules. “Natural duties apply to everyone in society therefore they obtain between all as equal moral persons” (Rawls 1999, 98). Here Rawls emphasizes that natural duties automatically apply to everyone on a moral basis, which is also part of the “original position.” Nevertheless, Rawls believes that those who are more advantaged may have more obligations to the “principle of fairness” because of their additional responsibilities. When discussing natural duties, Rawls mentions supererogatory actions such as heroism, but these actions do not fall under natural duties. Rawls explains, “For while we have a natural duty to bring about a great good, say, if we can do so relatively easily, we are released from this duty when the cost to ourselves is considerable”( Rawls 1999, 100). Rawls argues that supererogatory actions should not be considered natural duties because they go above and beyond natural duties. Natural duties, as described by the “principle of fairness,” ensure all individuals contribute to the creation of an equal society under the “original position.”

“Justice as fairness” relies on the “original position” as the foundation for Rawls’s two principles of justice. The “veil of ignorance” ensures principles that are adopted serve to the advantage of everyone rather than one’s self interest. However, once the veil is lifted, members of society continue to follow the two principles of justice adopted

within the “original position.” The first principle involves equality and rights and takes priority over the second, which focuses on economic advantages. In the second principle, the “difference principle” is used to help redistribute advantages to those who are less advantaged. Distributions that occur, under the “difference principle,” must benefit society in general and individuals have an obligation, according to the “principle of fairness,” that both principles of justice are followed.

### Rawls and Affirmative Action

The “difference principle” distributes goods on the basis of social and economic inequalities. Economic distributions include income and wealth while social goods pertain to liberty and opportunity, which, according to Rawls, outweigh economic distributions. Because social distributions take precedence under the “difference principle,” one may argue that a policy such as affirmative action could be used to ensure social inequalities are addressed. For example, the least advantaged group, which are those whom the “difference principle” is designed to help, could be composed of minorities and women, both of whom are the normal beneficiaries of affirmative action (Gray 2001, 145). Although Rawls does not specify the least advantaged group, he does state that “...the difference principle ...requires that the higher expectations of the more advantaged contribute to the prospects of the least advantaged [or that] social and economic inequalities must be in the best interests of the representative men in all social positions” (Rawls 1999, 95-96). For Rawls, economic equality is not the priority, but redistribution of social goods such as education is essential so that the least advantaged gain self-respect and equally participate within society.

Thus, for example, resources for education are not to be allotted solely or necessarily mainly according to their return as estimated in productive trained abilities, but also according to their worth in enriching the personal and social life of citizens, including here [justice is fairness] the less favored (Rawls 1999, 92).

Accordingly, affirmative action reflects the notion of the “difference principle” when minority representation [the least advantaged] is deemed important by a university because of the opportunity it provides to those who may not have been able to attend college otherwise. In turn, fraternity is achieved when the least advantaged acquire a new-found self-respect and knowledge that translates into an ability to participate in society. These ideas are critical to the defense of affirmative action. Affirmative action plans that implement different standards for minorities to increase their enrollment reflects the idea that no one has a prior claim to attend a university. Because of this, affirmative action can be used to include groups (minorities) that have traditionally been excluded from the opportunity to attend college. Furthermore, reciprocity ensures that the advantaged gain under policies such as affirmative action because they help advance the lives of the least advantaged, which benefits the advantaged because the policy contributes to the development of a more equal and just society.

#### Dworkin On Rawls’s *A Theory of Justice*

Ronald Dworkin offers an interesting critique of Rawls’s *A Theory of Justice* on several different grounds. He questions the “original position” as a basis for Rawls’s two principles of justice and discusses the possibility of citizens actually choosing the two principles without the “veil of ignorance.” In addition, Dworkin argues that even

granting Rawls's conditions, his use of the "difference principle" does not always provide equality.

One aspect of Rawls's theory that Dworkin critiques is the basis of the "original position". He believes that the "original position" cannot be binding because of its hypothetical nature. According to Dworkin,

His [Rawls] contract is hypothetical and hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms. A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all (Dworkin 1978, 151).

The contract under "justice as fairness" would be void because those who enter it are not aware of their standing in society. Rawls's requirement that people blindly enter the contract, is the reason Dworkin claims the contract should be null and void. Dworkin maintains that it is unfair to hold people to a contract for which they may have miscalculated their self-interest. One example he uses to show how hypothetical contracts are unfair involves the purchase of a painting. Dworkin explains that someone has agreed to purchase a painting on Monday for \$100, but on Tuesday it is found to be extremely valuable. He then asks whether it would be fair to have to sell the painting on Wednesday for \$100 after finding out it is worth more. In this situation, the person selling the painting gains an advantage over the purchaser when it is found the painting is worth more. For Dworkin, this illustrates the problem with entering hypothetical contracts before knowing all the factors involved. Overall, he claims that the "original position" is invalid because hypothetical contracts are not legally binding due to the fact that everyone must have the whole story before agreement.

To further analyze this point, he establishes a difference between an antecedent interest and an actual interest (Dworkin 1978, 153). An antecedent interest is one where

an individual will most likely be affected by an action. In contrast, an actual interest deals with the actual effect the action has on the individual. Dworkin argues that the “original position” is based on an antecedent interest because the actual situation does not yet exist due to the veil of ignorance (Dworkin 1978, 153). “It is not in the best interest of everyone to adopt the two principles, because when the veil of ignorance is lifted, some will discover they would have been better off if some other principle, like the principle of average utility, had been chosen” (Dworkin 1978, 153). He criticizes the veil of ignorance for forcing individuals to adopt, what he believes, are conservative principles and interprets it as necessary to ensure individuals do not better their position when principles of justice are being decided upon (Dworkin 1978, 154). Under this situation, Dworkin notes that the “original position” rightly serves its purpose, but speculates what would happen if an individual knew his or her place in society. If everyone knew his or her place and still chose to accept the same two principles that Rawls uses, Dworkin would be incorrect. Although if they chose different principles Dworkin’s antecedent interest argument would invalidate the way principles are adopted. Dworkin states, “But some actual men, aware of their own talents, might well prefer less conservative principles that would allow them to take advantage of the resources they know they have” (Dworkin 1978, 159). He argues that imposing the “veil of ignorance” requires that individuals choose conservative principles and this directly affects the antecedent interest of individuals, which makes the contract invalid.

#### Why Use the Original Position?

Dworkin also inquires as to why Rawls includes the “original position” when he applies “reflective equilibrium” in his theory of “justice as fairness.” “Reflective

equilibrium” is the technique by which Rawls assumes that readers have a sense, which we draw upon in our daily life, that certain particular political arrangements or decisions, like conventional trials, are just and others such as slavery are unjust (Dworkin 1978, 55). According to Rawls, individuals rank the arrangements in order of importance using “reflective equilibrium.” It also serves as a balance between the first and second principle of justice. Dworkin uses the example of executing an innocent individual and compares it to the killing of an innocent bystander in the time of war. He notes that it is generally accepted that innocent bystanders will be killed during wartime, but it is not accepted to execute an innocent person. Dworkin asserts that “reflective equilibrium” allows individuals to rank the two situations and one ends up being more just than the other. The concept is composed of two points: “(1) the order of the principles must illustrate the belief they reflect; and (2) help individuals in situations where beliefs are contradicted or weak” (Dworkin 1978, 152). “Reflective equilibrium” is important to Rawls because it applies to individuals in a moral sense. But Dworkin questions why the “original position” is needed if “reflective equilibrium” plays such a key role on moral issues. He maintains that “reflective equilibrium” should be enough justification for the adoption of Rawls’s principles, therefore the “original position” is not necessary. He rejects Rawls’s argument that “reflective equilibrium” helps reinforce the principles of justice in the “original position.” Moreover, Dworkin explains that the conditions of the “original position” are fundamental principles governing our moral powers or, more specifically, our sense of justice (Dworkin 1978, 158). Because of this, he asserts that the “original position” is not needed because the notion of justice is a fundamental aspect to all individuals. Individuals can use their “reflective equilibrium” to help them determine the

principles of justice without the “original position.” As a result, individuals themselves could adhere to the principles because of “reflective equilibrium,” without being forced into the “original position” to construct a concept of justice.

#### Dworkin On the Difference Principle and His Alternative

Another point of contention for Dworkin is Rawls’s use of the “difference principle.” Dworkin first mentions that the “difference principle’s” arbitrary nature poses a serious problem with regard to the creation of a theory of justice. He examines the issue because of the “difference principle’s” failure to define the worse off. For Rawls, the two methods of identifying the least advantaged include: (1) social position and (2) income and wealth. Dworkin claims that Rawls applies only vague definitions to the “difference principle,” which plays a critical role in justice as fairness (Dworkin 2000, 113). Dworkin also points out that the two definitions of the least advantaged leave out a segment of society that is physically handicapped. He suggests that the “difference principle’s” lack of redress is to blame. Because of the failure to include redress, he posits that individuals who are physically handicapped can be overlooked because the least advantaged category acknowledges only social or economic status.

Another problem Dworkin points out with regard to Rawls’s theory, is that the “difference principle” fails to consider various levels above the least advantaged. He gives a hypothetical situation to illustrate the limitation of the “difference principle:”

Suppose an existing economic system is in fact just. It meets the conditions of the difference principle because no further transfers of wealth to the worst off class would in fact improve its situation. Then some impending catastrophe presents officials with a choice. They can act so the position of the representative member of the small worst off class is worsened by a just noticeable amount or so that the position of everyone else is dramatically worsened and they become almost as poor as the worst off. Does justice really require the much greater loss to everyone but the

poorest in order to prevent a very small loss by them (Dworkin 2000, 114)?

Dworkin uses this example to illustrate what he considers a major downfall in applying the “difference principle”. He notes if the preceding situation occurred it would not be just to provide only the worst-off advantages because it may not benefit society as a whole. It is problematic to assume that always helping the least advantaged will create a chain reaction from the bottom up. Dworkin concludes that the “difference principle” incorrectly ties social class with justice. He contends that his theory, called “equality of resources,” would correctly apply in the above hypothetical situation because “it aims to provide a description of (or rather a set of devices for aiming at) equality of resources by person” (Dworkin 2000, 114). Dworkin does not divide society into two groups based on social or economic conditions, as does Rawls. Instead, equality is in principle a matter of individual right rather than one of group position (Dworkin 2000, 114). Applying “equality of resources,” a government would be able to determine if it is to the advantage of everyone to benefit the least advantaged in every circumstance.

Suppose for example, that the tax necessary to provide the right coverage for handicaps and the unemployed has the long-term effect of discouraging investment and in this way reducing the primary-goods prospects of the representative member of the worst-off class. Certain individual members of the worst-off groups who are handicapped or who are and will remain unemployed would be better off under the tax scheme (as would certain members of other classes as well), but the average or representative member of the worst-off class would be worse-off. The difference principle, which looks to the worst-off as a whole, would condemn the tax, but equality of resources would recommend it nevertheless (Dworkin 2000, 115).

“Equality of resources” also takes into account individual ambition, talent, and interest while Rawls fails to do so (Dworkin 2000, 115). Different people have different ambitions and goals and Rawls’s failure to recognize this makes it difficult to determine

those who should be categorized as the least advantaged. “Equality of resources will not take into account pure luck, including the distribution of natural endowments, but will allow for the effects of the uses individuals make of their talents and choices they make in pursuit of their chosen interests in a liberal economy” (Campbell 2001, 82). Moreover, Dworkin distinguishes between treatment as an equal and equality of treatment. Equality of treatment pertains to equal distributions for everyone within society. In contrast, treatment as an equal is a right all individuals possess. For him, “treatment as an equal provides everyone the right to equal consideration and respect” (Campbell 2001, 82). “Equality of resources” provides everyone the right to treatment as an equal because it takes into account the differences among individuals. By taking such factors into consideration, Dworkin further emphasizes the importance of permitting differences among those within society.<sup>6</sup>

Dworkin’s assessment of Rawls’s *A Theory of Justice* provides some interesting points. He focuses on the “original position” and reasons why it is not a binding contract. Dworkin notes that the hypothetical nature of the “original position” makes it a contract to which individuals are not bound. He maintains that the “veil of ignorance” also compromises the authority of the “original position” because individuals may not agree to the principles once the veil is lifted. Dworkin even suggests that the antecedent interest compromises the “veil of ignorance” because individuals should know all the facts before entering an agreement. He also argues that the “original position” should not exist because “reflective equilibrium” provides a moral basis by which individuals can create principles of justice. Finally, Dworkin attacks the “difference principle” as being a

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<sup>6</sup> Tom Campbell notes a problem with applying “equality of resources” is that it may create a discriminatory society because it does not make adjustments for resources that are “scarce or in high demand”(Campbell 2001, 89).

principle that fails to provide for a just society. He asserts that it lacks the principle of redress and divides society into two groups based on social and economic status, which fails to provide for a truly just society in all instances.

### Dworkin and Affirmative Action

Would Dworkin support the use of affirmative action in higher education? Since *Grutter*, affirmative action plans have been deemed constitutional if based on a flexible nature. Within his theory “equality of resources” differences in talent and ambition are acknowledged in society. Meanwhile, the goal is to benefit society overall instead of focusing only on the betterment of the least advantaged as Rawls does. Dworkin explains his support of affirmative action:

Nevertheless, colleges, universities, and professional schools use race-sensitive standards not in response to any central government mandate but through individual decisions by individual schools. They act, not to fix how many members of which races will occupy what roles in the overall economy and polity, which is in any case beyond their power, but only to increase the number of blacks and other minorities who are in the pool from which other citizens – employers, partners, patients, clients, voters and colleagues acting in their own interests and for their own purposes – will choose employees, doctors, lawyers, and public officials in a normal way (Dworkin 2000, 425).

For Dworkin, affirmative action benefits society as a whole because it increases the number of minorities in skilled positions. He claims that the decision to enact affirmative action should come from the university and, once implemented, applicants should be considered based on their individual attributes. Using a “forward-looking” defense, Dworkin supports affirmative action because of the future affect it will have on the entire society. Minorities would benefit from an increase in skill level and society benefits because it will have a larger group of skilled minorities to choose from.

In conclusion, both Rawls and Dworkin would determine that affirmative action is just, but in their own unique ways. Rawls contends that education is a social good and the redistribution to the least advantaged is critical for improvement of society overall. Self-respect and the opportunity to participate are keys to Rawls's notion of justice and support of affirmative action. Through the "difference principle," affirmative action can be used because of its focus on improving the lives of the least advantaged. For Rawls, affirmative action is just because it serves the benefit of the least advantaged (minorities). On the other hand, Dworkin supports affirmative action because of its future benefits to society. Rather than defending affirmative action simply because it benefits the least advantaged, Dworkin argues that the whole society benefits from the policy. According to Dworkin, the focus should be on the benefit of society as a whole and affirmative action does that by increasing the number of minorities in skilled positions. However, the one concept that both Rawls and Dworkin do agree upon regarding affirmative action is that it should be applied to all minorities because of its benefit to society as a whole.

## CHAPTER 5

### AN EQUITABLE FORM OF AFFIRMATIVE ACTION: BOOK V OF ARISTOTLE'S *NICOMACHEAN ETHICS*

In order to establish an association between affirmative action and justice one must first consider some theory of justice. In Chapter 4 we considered the theories of Rawls and Dworkin. Book V of Aristotle's *Nicomachean Ethics*<sup>7</sup> discusses many important elements of justice that can be utilized to defend affirmative action. He begins by distinguishing between just and unjust actions and explains the various types of justice within a community. By focusing on his views regarding equity, which corrects ambiguity or unforeseen consequences within laws and policies, an argument in support of affirmative action can be made. According to *Black's Law Dictionary*, equity is justice administered according to fairness, as contrasted with strictly formulated rules (Black 1979, 484). I will argue that equity can be used to justify affirmative action by applying the policy to particular individuals who have been or continue to be affected by racism, rather than applying a general policy to all minorities.

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<sup>7</sup> In Joe Sachs's translation of Aristotle's *Nicomachean Ethics*, Sachs uses the term "decency" to describe "equity" (*epieikeia*). He chooses to use decency because he believes that "equity" is misleading since Aristotle is describing something that goes beyond what is equitable (Sachs 2002, 203). Sachs, Hamburger and Sherman all use different terms to describe "equity." This may occur because of the varying dates of publication. In my analysis of Book V, I will use the term "equity" rather than decency because of the association between "equity" and a fair or just decision. In my references to Aristotle's works, all Bekker numbers are cited, unless otherwise specified.

The critical part of Aristotle's conception of justice involves the individual. Throughout Book V he refers to the role actions play when determining justice. For example, "the lawbreaker seems to be unjust, and so does someone who is greedy and inequitable, and so it is clear that someone who is law-abiding and someone who is equitable is just" (1129a 34-36). To distinguish between unjust and just actions, Aristotle suggests using the mean, "which is a position equally apart from either extreme" (1106a30- 30-31). Accordingly, if someone drives too aggressively or defensively she may not be exercising the mean which could result in harm to one's self or others.

In Book II, Aristotle discusses the mean and how it applies to an individual. He maintains that in order to apply the mean, "it is always necessary for those who are acting to look at the circumstance surrounding the occasion themselves"(1104a7-9). "The mean rests solely on the individual who at the time, considers the feelings and the reasons for the sake of which, and the manner one ought to act" (1106b 19-24). Reliance on the preceding factors pertains to things that are specific to a situation or individual with the intention of choosing the best action at that time. He illustrates the particular application of the mean to the art of steering a ship so that the mean helps guide individuals towards just actions. Aristotle says that "the mean involves pleasure, which serves as a base for actions, and pain that causes individuals to refrain from beautiful actions "(1104b8-10). "When one chooses to follow things that lead to just actions, one is demonstrating his ability to handle pleasure/pain well and an unjust action occurs when one handles pleasure/pain badly" (1105a 11-14). However, he notes that a just act involves more than simply performance. For Aristotle, a truly just action includes three things: "The first is to act knowingly, and the next, having chosen the act and chosen it for its own sake, and the

third, being in a stable condition and not able to be moved all the way out of it” (1105a 29-35). He describes the third condition to that of a toy which is able to bounce back after being knocked over. Nevertheless, Aristotle asserts that all three conditions and the mean must be exercised in order for an action to be truly just.

Aristotle then differentiates between complete and particular injustice. “When someone throws her shield away and refuses to fight because of cowardice the action is an illustration of complete injustice” (1130a 17). While the act may be unjust, it does not result in the deprivation of another’s goods. On the other hand, when an individual takes more than she deserves the action is a particular injustice. Aristotle explains that:

For both [particular and complete injustice] have their power in relation to another person, but the one [particular] is concerned with honor or money or safety, or some one thing if we had a name that includes all these, and is for the pleasure that comes from gain, while the other is concerned with everything that a serious person is serious about” (1130b 36-40).

Differentiating between particular and complete injustice allows him to establish criteria for injustice. “Thus what is unjust has been distinguished into the unlawful and the inequitable, and the just into the lawful and equitable” (1130b8-9). Corrective justice and civil penalties assign punishments based upon the act, while distributive justice uses proportional distributions that allocate according to what is deserved proportionally or equally (1131a 25-32). Applying Aristotle's theory, corrective justice involves numerical equality through civil penalties depending on the act and distributive justice uses proportional or equal distributions, which offer a more flexible type of justice because it considers what is deserved. To emphasize the main component of justice, Aristotle states that “there are no equal acts that are not at the same time lawful, so lawful is one of the main characteristics of justice.” Hence, “rightly enacted law commands all virtues and

forbids all vices” (1130b22-25) and it helps “educate its citizens, which results in the development of the other virtues” (1130b 25-29). Therefore, “complete justice fosters virtues through education and thus is not part of virtue but the whole of virtue, just as injustice is the whole of the vice” (1130a 9-11). This shows Aristotle's belief in the completeness that justice embodies.

Aristotle then turns to the discussion of the two types of particular justice. The first is distributive, which involves “distributions of honor, or money, or as many other things as are divisible, among those who share in the political community (for in these it is possible both to have an unequal amount or one amount equal to another)” (1130b 31-34). Under distributive justice, individuals may have both unequal and equal shares within the community. For example, in today's society Social Security payments are not exactly the same amounts for everyone and this is considered fair. Thus, an unequal share within society allows justice to occur because those who paid more into Social Security receive more money than others who have not. Additionally, individuals can have equal shares within the community such as when they vote. Citizen A's vote holds equal weight to Citizen B and it is perceived as just. In this situation, distributions are equal regardless of how citizens choose to allocate their votes.

The second type of particular justice is corrective justice, which includes private transactions such as selling, buying or leasing. While the above examples of corrective justice include willing exchanges, unwilling exchanges may occur such as robbery or fraud. Corrective justice seeks to resolve a transaction that occurs privately through a civil penalty imposed on those who perform an unjust deed. Aristotle concludes that the

use of numerical equality, with regard to corrective justice, ensures that civil penalties are just by assigning a punishment that considers the unjust act among other factors.

Distributive justice is an important part of the polis because it helps distribute goods among its citizens. The mean, addressed in Book II, plays an essential role in distributive justice because an unjust person is “inequitable and what is unjust is inequitable” (1131a 10-11). To determine what is inequitable, one must apply the mean, which represents a middle ground between two extremes. In order to establish the mean, goods must somehow be proportional to one another. “Justice, therefore, is a certain kind of proportion, for proportion is not merely something peculiar to numbers in arithmetic, but belongs to a number in general, for proportionality is equality of ratios...”(1131a 33-36). Ratios are important to proportionality because “the unjust person will have more benefit or less burden, than his/her share while the one to whom the injustice is done has less or more than his share” (1131b 19-20) and justice is achieved when the mean is used to distribute goods proportionally.

Aristotle explains that corrective justice is attained when a judge uses the mean to determine whether a penalty, fine or imprisonment is just or unjust. “The law is the deciding force behind corrective justice, therefore it is for the judge to hit the mean of justice” (1132a 20-23). The judge rectifies the situation and determines the mean by considering the "loss" and "gain" that occurs in an exchange. Regardless of whether or not the exchange is willing or unwilling, the judge will equalize the situation by adjusting "loss" and "gain" (1132b 14-16). This reflects the fact that "loss" and "gain" are judged through the examination of each case individually rather than by applying a universal rule to all circumstances.

A separate and independent aspect of particular justice is reciprocity. Reciprocity does not include distributive or corrective justice, however it plays a fundamental role in Aristotle's conception of justice because "it helps keep the polis together" (1131b 32-33). Reciprocity pays back individuals proportionally but not equally. For instance, a community needs a doctor and a farmer. While both are needed, their services may not always be considered as being equal in importance. If the doctor does not need food she will not look to the farmer, but when the doctor needs food the farmer plays an important role in the process. "Thus through an exchange of services between the two the polis is able to survive" (1133b 16-19). With regard to reciprocity, "justice occurs when individuals receive what is proportionally equal, [or in other words fair] and similarly with another person in comparison with someone else" (1134a 5-6).

Aristotle continues his discussion of justice by considering willing and unwilling acts of justice. "Whenever one chooses to act in an unjust manner she is committing an injustice"(1135b 20-26). He says that the capacity to judge an act of justice is a beautiful ability and distinguishes between willing and unwilling acts that are forgivable. "If one acts out of ignorance and shows remorse, that is forgivable" (1136a 7-9). Additionally, he posits, "one who takes less or gives more without consideration is demonstrating an act of beauty" (1136b 25). Aristotle reiterates that an act of justice involves more than simply obeying the law. For him, the central component to justice is "knowing how things are done and distributed" (1137a 14-16). Because the moral mean helps inform individuals about distributions within the polis, Aristotle separates it from that of a mathematical mean. The midpoint of zero and ten will always be five, yet the mean, as it applies to individuals, cannot be universally applied. "The mean in relation to us, is what

neither goes too far nor falls short, and this is not one thing nor the same thing for everyone” (1106a 29-33). For that reason, a mathematical mean pertains to the universal, while the moral mean involves a particular individual and guides one towards just acts.

Aristotle also asks the essential question: How does one implement laws that may not be just to all members of the polis? He answers this through the use of equity. Every law or policy applies to the universal, to all citizens equally. But it may not always be applied in the same manner throughout time. Therefore, equity decisions are needed to address any possible loopholes or injustices that may arise once the law or policy is implemented. According to Aristotle, “this is the nature of what is decent [equity], a setting straight of a law, in so far as it leaves something out as a result of being universal” (1137b 27-29). Equity creates something better than a law or policy because it has the ability to mend the law or policy once implemented. For example, Professor A is hired as an assistant professor at the current market price of \$40,000. Three years later, Professor B is hired as an assistant professor at the same university, but the market price has increased to \$45,000. During Professor A's three years at the university, she has published several articles and received let us say, one and one-half percent per year salary increase. Nonetheless, when Professor B is hired she is experiencing a "gain" over Professor A because she automatically makes more than the professor who has three years of experience at the same university. Professor A experiences a "loss" because she has worked for the university for three years and deserves to have a higher salary than Professor A who is just starting their career. In order to correct this inequity, the university includes a line item in its annual budget, which ensures that when this situation occurs Professor A's "loss" will be corrected through a salary increase over Professor B.

Lawmakers create laws or policies and equity exists to help address the problems, which arise due to their general nature. Through equity an improved, more just outcome can be implemented that has the capability to apply to a specific situation.

In summary, “An unjust act reflects upon one's self” (1138a 14). One's ability to find the mean helps determine where the fine line of justice is to be drawn. Distributive justice is associated with the distribution of goods, while corrective justice involves the use of civil penalties. Reciprocity exists to maintain the polis through proportional exchanges among its citizens. Nevertheless, the key to justice is equity because it fine-tunes laws and policies that are unable to be applied to some situation, which would otherwise create harmful unintended consequences. Before making an argument asserting that affirmative action represents an equitable policy, I will interpret additional views on Aristotle's concept.

#### Hamburger On the Origins of Equity

Max Hamburger has written several books on Aristotle and the foundations of legal thought. In *Morals and Law: The Growth of Aristotle's Legal Theory*,<sup>8</sup> he examines the concept of equity. Hamburger begins by noting that Aristotle can claim sole and first authority to defining the term *epieikeia* (equity or reasonableness) (Hamburger 1965, 93). He explains that “a legal dynamic entails the correction, completion, alteration, and adaptation of a law that does not automatically fit a practical case or is not compatible with economic and social development” (Hamburger 1965, 91). In contrast, a legal static refers to the inflexible nature of laws. He concludes that *epieikeia* is a legal dynamic

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<sup>8</sup> Hamburger uses the term “*epieikeia*” in his writings and I will use the same word when citing his work. The first citation within the parenthetical reference is Hamburger's and the preceding one is Aristotle's corresponding Bekker number.

rather than a legal static because it is able to adjust laws or policies as needed. Hamburger also cites early notions of *epieikeia*, which separate it from the law. He refers to “Plato's use of the word in the *Statesman* and in the *Laws*, both of which use *epieikeia* as something outside the sphere of positive law, a breaking away from right law” (Hamburger 1965, 93). By outlining the original use of the term *epieikeia*, Hamburger intends to show how Aristotle eventually redefines it to include something that is part of law.

#### Hamburger On Equity In *Magna Moralia*

When Aristotle first addresses *epieikeia*, it continued to be viewed as something separate from law. In *Magna Moralia* Aristotle discusses *epieikeia* in Book II Chapters 1 and 2 (Hamburger 1965, 93). Influenced by Platonic teachings that distinguish *epieikeia* from the law, Hamburger finds that Aristotle does not often refer to the term. Aristotle addresses the issue of *epieikeia* from two angles: “the external aspect of action in the sense of *epieikeia* and the inner aspect, the mental attitude of the one who acts equitably discussed under the head of reasonableness” (Hamburger 1965, 93). He argues that Aristotle believes that *epieikeia* is contrary to graspingness, which is taking more than the law allows. Hamburger claims that Aristotle is attempting to link the functional and material aspects of equity. In the words of Aristotle,

There are matters in which it is impossible for the lawgiver to enter into exact details in defining, and where he has to content himself with a general statement, then when a man gives way in these matters, and chooses those things which he would have wished indeed to determine in detail, but was not able to, such a man is equitable (Hamburger 1965, 96; *MM* 1198b 27-30).

An equitable man is one who is willing to help address areas within a law where the lawmaker fails to do so. However, Hamburger finds that Aristotle's first attempt to define

*epieikeia* can be misleading. While he agrees with Aristotle's claim that *epieikeia* exists to address inadequacies that arise out of the general application of laws, he argues that an equitable person is not grasping if she demands more than the law would allow. For Hamburger, "a problem occurs because Aristotle assumes that an inadequacy with the law has no other meaning than to entitle a claimant to less than the law would give" (Hamburger 1965, 94). He alleges "it is possible that the man who bases his claim on *epieikeia* will be entitled to more than the law would justify in its inadequate and hence inequitable formulation" (Hamburger 1965, 94). Therefore, he claims that one can take more than the inadequate law would allow and may not be grasping because the law itself does not provide enough for that individual. Agreeing with Aristotle's original assertion that *epieikeia* serves as a correction of law, Hamburger is reinforcing his belief that the term reflects its dynamic ability to adjust the law when needed. This is a fundamental part of *epieikeia* because it establishes something that goes beyond the general application of law.

Once Aristotle determines what comprises an equitable action, he then addresses the internal sense of *epieikeia* and how it relates to reasonableness. Hamburger claims that Aristotle's first attempt to discuss equity may demonstrate his desire to separate the external and internal aspects of the term. He notes that in *Nicomachean Ethics* and *Rhetoric*, Aristotle no longer tries to distinguish between the two senses, but combines external and internal aspects into the concept of *epieikeia*.

#### Hamburger On Equity In *Nicomachean Ethics*

Hamburger's analysis of *Nicomachean Ethics* begins by considering the Latin meanings of just and law. He observes "there is a predicament in defining the terms

because *jus* in Latin in this connection means *droit, deritto, recht*, i.e. law in the objective sense, whereas law comprises both ‘Law’ *-jus*, and ‘the law’ *-lex, loi, gesetz*” (Hamburger 1965, 96). “Justice, in its nontechnical meaning, includes comprising righteousness, lawfulness” (Hamburger 1965, 96). These definitions would create the equation “law = justice.” Hamburger argues that “law = justice” cannot be a valid equation because *epieikeia* corrects laws that are inadequate due to their general nature.” This idea helps establish the most important concept of the term, which lies in the fact that he [Aristotle] was the first to explain that *epieikeia* constitutes only the corrective function of law, and is not something different from law (Hamburger 1965, 96)! Because of this, Hamburger asserts that the importance of *epieikeia* cannot be overlooked and he cites several countries that apply it within their legal codes (such as the Switzerland).

The first topic regarding *epieikeia* Aristotle highlights in *Nicomachean Ethics* is the problem in separating it from the law, which can also be found in Plato's work. Aristotle refers to the dilemma of distinguishing the two by stating, “If the just and the equitable are different, they cannot both be good. If they are both good, they cannot at the same time be different” (Hamburger 1965, 96; *NE* 1137b 4-5, 97). “This allows Aristotle to combine them both and define *epieikeia* in its functional aspect as something not different from law, but as the corrective function of law, as the corrective of legal justice” (Hamburger 1965, 96). Law applies a general rule, which oftentimes prohibits it from being applicable in a specific sense and when this occurs, *epieikeia* exists to make the universal law apply to the particular situation. Hamburger maintains that equity, “as the corrective of law is needed to comply with the requirements of the particular case and with absolute law, or justice in its highest and true sense” (Hamburger 1965, 98).

While Hamburger does not say that equity is different than law, he does state that if law and equity are good, equity is the better part of law.

This is how Aristotle puts the same idea:

...the equitable, though it is better than one kind of justice, yet is just, and it is not as being a different class of thing that is better than the just [law]. The same thing, then, is just and equitable and while both are good the equitable is superior (Hamburger 1965, 98).

Hamburger claims that the equitable is just because it completes the law's purpose. Equity allows for possible errors or omissions to be corrected, thus it represents something better than law, which is associated with the universal and remains static. Hamburger states, "And this is the nature of equitable, a correction of law where it is defective owing to its universality" (Hamburger 1965, 98). In Book V of *Nicomachean Ethics*, Aristotle fully addresses the functional aspect of equity as being that which corrects laws.

#### Hamburger On Equity In *Rhetoric*

In *Rhetoric*, Aristotle considers the second component of *epieikeia*, which is the material aspect or ability to define an equitable person. Hamburger starts his analysis by citing that Aristotle divides law into two parts -municipal and universal. "Municipal law involves written laws and unwritten customs of a particular state and universal law is identical to natural justice" (Hamburger 1965, 99; *Rh.* 1373b 1- 7). Aristotle examines unwritten laws and distinguishes them into moral and legal spheres. "The moral sphere includes the showing of gratitude towards benefactors, the repayments of their benefaction, the helping of friends, and other acts of a similar nature" (Hamburger 1965, 100). Aristotle maintains that the moral sphere also reflects that of social opinion. In contrast, the legal sphere of unwritten laws is concerned with inadequacies in particular

or municipal law. “Thus equity is explained in its systematic origin and nature: It is part of the wider concept of unwritten law which also comprises the unwritten law of moral and social opinion” (Hamburger 1965, 100). By linking moral and social opinion to equity, Aristotle is creating a unique standard for the equitable person. Hamburger notes that while Aristotle does not specifically assert that equity and natural law are one in the same, he does mention them both together, which may illustrate Aristotle's belief that the two are closely related. After summarizing Aristotle's work in *Rhetoric* Hamburger distinguishes the two parts of *epieikeia* into:

- 1) The functional aspect: Equity constitutes legal dynamics as against the legal static and discharges the function of correction, completion or adaptation where there is a gap or defect in the formulation of the law.
- 2) The material aspect: Equity entails fairness, humaneness, reasonableness, and similar qualities (Hamburger 1965, 101).

Tracing the concept of *epieikeia* from its origins, and evaluating three works by Aristotle, Hamburger is able to provide the reader with an in-depth analysis of Aristotle's work on the concept.

#### Sherman On Equity

In *The Fabric of Character: Aristotle's Theory of Virtue*, Nancy Sherman analyzes Aristotle's concept of equity or fair-mindedness (*epieikeia*). She asserts that although Aristotle acknowledges the necessary and legitimate place of rules, he nonetheless steadily cautions against their intrinsic defects and dangers of over-rigorous applications.<sup>9</sup> Focusing on his discussion of equity, Sherman illustrates how the concept

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<sup>9</sup> Sherman uses the term “equity” in her writings and I will use the same word when citing her work. The first citation within the parenthetical reference is Sherman's and the preceding one is Aristotle's corresponding Bekker number.

allows for an ethical response to the problems that are created by the universal application of laws. She notes, "Aristotle qualifies law, arguing that law is not subordinate to a transcendent intelligence, but that law itself is intelligence; it has its own rationality or logos" (Sherman 1989, 15; *NE* 1134a 29-32). Because law is not fixed or rigid, it instead continuously evolves into something that represents a reasonable decision. She cites *Politics* where Aristotle writes: "What is final is not the deliverance of written law, but rather the best judgments of those who, guided by experience and the law can improve upon it" (Sherman 1989, 15; *Pol.* 1287a25- 37). Sherman claims that because of equity, law is flexible by nature and this addresses the limitation of law when it is unable to be applied to a particular circumstance. "What it says in a general and relatively unqualified way is always subject to further stipulation" (Sherman 1989, 15). In the words of Aristotle, "To speak legally is to speak of general types leaving aside for further consideration a more precise treatment of individual cases"(Sherman 1989, 15; *Pol.* 1341b30-2).

After acknowledging the problem created through the universal application of law, Sherman provides a more detailed discussion of equity. Its ability to apply to a particular situation allows for the correction of law, which, in turn, makes equity better than law. Aristotle elaborates this idea in *Rhetoric*:

The second kind of [unwritten law] makes up for the defects of a community's written code of law. This is what we call equity; people regard it as just, it is in fact the sort of justice, which goes beyond the written law. Its existence partly is and partly is not intended by legislators, not intended where they have noticed no defect in the law; intended, where they find themselves unable to define things exactly and or obliged to legislate as if that held good always which in fact only holds good usually; or where it is not easy to be complete owing to the endless

possible cases presented, such as the kinds and sizes of weapons that may be used to inflict wounds- a lifetime would be too short to enumerate all of these. If, then, the law is imprecise and yet legislation is necessary, then law must be expressed widely without restriction (Sherman 1989, 16; *Rh*: 1374a25-35, *NE* 1137b 20-8, *Pol.* 1269a8-12)

Sherman cites several reasons why Aristotle believes equity should be applied. First, law is essentially incomplete. Using Aristotle's example, a legislator is unable to list every kind of weapon that could be used to commit murder. The incompleteness of law lies in its inability to address every possible situation. Just as a lawmaker cannot list every weapon used to kill, situations also arise that are not specifically covered under the law. Second, one must consider the intent of the legislator when attempting to determine the manner in which to apply the law. "Equity considers what the legislator would have said himself, had he been present, and what he would have prescribed, had he known, in his legislation" (Sherman 1989, 17; *NE* 1137b23). Equity includes legislative intent because one must consider the goal of the legislator when interpreting the law. Third, equitably interpreting the law may require going beyond the legislative intent, correcting for a defect, which as Aristotle suggests above, the legislator did not anticipate (or perhaps could not have anticipated (Sherman 1989, 18; *Rh.* 1374a29). Sherman posits that equity also includes looking beyond the intentions of the lawmaker as a check on the lawmaker who may not consider every situation. Fourth, when there is no law that can be applied to a case, equity requires the issuing of a decree.

The decree is indefinite then, not in the sense that it imprecisely determines the requirements of the situation (for it does determine them precisely), but in the sense that it does not determine or define a role for other cases. A decree concerns actions about particulars (*NE* 1141 b28); unlike a statute of law it is not possible to be universal (Sherman 1989, 18; *Pol.* 1292a37, *NE.* 1134b24-25, 1094b11-27).

In terms of application, a decree is different from law because it refers to a particular instead of the universal. Accordingly, equity requires a decree to ensure that specific situations are addressed. By outlining the four reasons why equity should be applied, Sherman intends to show the important role it plays in Aristotle's work. Without equity, nothing would be capable of applying or fine-tuning a law when it overlooks something or accidentally causes harm once implemented.

#### Equity With Regard to Distribution of Punishments

Sherman then turns to the issue of equity as it relates to punishments. "It [equity] is associated with considerateness and a disposition to show forgiveness, leniency or pardon" (Sherman 1989, 18; *NE* 1143a19-24, 1135b16-1136a9, 1110a24, *Rh.1374b4-10*). "Thus equity requires one to consider all circumstances involved in the situation including the person and how she has been or is usually"(Sherman 1989, 19; *Rh* 1374b13-23). This concept can be seen today, as when an individual says that she is "out of character" or does not "feel like herself today." Daily interactions with other individuals create a perception of how one tends to act. But, when someone is not acting like herself this is noticed by others. Thus, if someone commits a crime while out of character, equity would acknowledge this and may allow for a more lenient punishment. Certain circumstances and motives may also limit the responsibility of one's actions under equity punishments. Aristotle explains,

A fuller consideration of circumstances and motives may reveal, for example, that an agent while making a voluntary choice with foreseen ill consequences, is none the less not fully culpable for the choice was made under duress, under conditions of a sort that over-strain human nature and no one would endure (Sherman 1989, 19; *NE* 1110b25).

Following Aristotle's argument, equity punishments would forgive or pardon individuals if an unjust act is performed under force or stress. Equity would also limit the responsibility of an individual if she commits a crime in order to protect one's family. Aristotle argues that equity should be applied when deciding such punishments because outside circumstances may play a role in the decision to commit a crime. More specifically, "he differentiates accidents from errors of judgment in so far as the latter may be cases of negligent ignorance, the former due to ill consequences, which the agent could not reasonably have expected to foresee" (Sherman 1989, 19; *Rh.1374b4-10, NE 1135b12-1136a9*). By considering what causes a person to act in an unjust manner, equity helps ensure the fairest punishment. If such factors were not evaluated, laws would impose punishments simply based on the crime, without taking into account circumstances that may lead one to act unjustly. Therefore, equity is applied to punishments because it enables every case to be treated individually.

Not only should equity consider all of the circumstances involved when deciding a punishment, but it should also evaluate the individual. "Civic law, Aristotle tells us, ultimately derives from the considerations of virtue as a whole, and has to do with living that is a productive part of it" (Sherman 1989, 18). For him, it is virtuous to be a productive citizen within the polis. "This suggests that even when rules and proceduralism have predominance, the notion of merely lawful actions that are right or juridical but not virtuous, does not hold a comparably important place" (Sherman 1989, 18; *NE 1136a9-25*). One cannot simply follow laws and be considered virtuous because it takes more than obeying a law to be virtuous. Determining whether someone is virtuous or their type of character may be challenging, and that is why Aristotle believes

equity should be a factor in such decisions and arbitration should be used to help evaluate character. "Rather than applying strict litigation, arbitration is used to give fuller weight to the considerations of equity" (Sherman 1989, 21; *Rh.* 1374b18-22). Litigation, which is used in corrective justice, usually centers on two parties with specific claims and is concerned with righting the wrongs that are performed (by considering the "loss" and "gain."). Accordingly, "restoration considers not the agent, but the action, and the cancellation of damages" (Sherman 1989, 21). Decisions under corrective justice do not represent equity decisions because motives, circumstances and the individual's ability to pay the penalty are not considered. Corrective justice assumes that the court treats the parties as equals.

For it makes no difference whether a good person has robbed a bad person or a bad person a good one, nor whether it is a good or bad man that has committed adultery; the law looks only at the different amounts of damage in the injury (Sherman 1989, 21; *NE* 1132a3-24).

The key to corrective justice is its ability to impose civil penalties, which occur when the judge seeks to hit the mean by considering "loss" and "gain." Aristotle notes that this may appear as a drawback because corrective justice considers questions such as ability to pay and the nature of an action when deciding punishments. Nonetheless, he defends this method because of the attention a judge pays to each case. He continues by stating that the main attribute of an equitable person is that the person will choose to take less than his share (Sherman 1989, 21; *NE* 1138a1-3).

Not a stickler for justice, one who is precise as to his rights is willing to compromise the damages and forego the full restitution demanded by strict corrective justice. The fair-minded person is willing to make allowances (Sherman 1989, 21).

An equitable person is flexible in nature, which means that she will not always demand exactly what the law allows. Corrective justice issues civil penalties consistently based upon the unjust act and quantity is the focal point of corrective justice. Litigation is used to ensure that similar civil penalties are applied to corresponding situations. However, Aristotle asserts that through arbitration equity decisions are rendered because character, motive and circumstances are considered instead of simply "loss" and "gain."

Sherman continues her examination of arbitration and litigation in order to reinforce the idea that arbitration reflects an equitable corrective decision. "The arbitration process involves settlement through reconciliation rather than opposition and open discussions instead of settled deed" (Sherman 1989, 21). In Book II of *Politics*, Aristotle tells us "that arbitration, unlike litigation, involves the conferral and dialogue of jurors, who deliberate with each other before voting. The result is a qualified verdict that renegotiates the plaintiff's original demands" (Sherman 1989, 22; *Pol.* 1268b7). Through discussion, arbitration achieves a more equitable decision because it provides a thorough consideration of character, motive and circumstances. Moreover, it treats each case individually and does not assume the same conditions for every situation. This allows for equitable decisions because the punishment reflects equity in the sense that it focuses on a particular case.

Sherman considers two aspects of equity: the first is as it applies to the process of implementing laws and the second involves equity punishments. With regard to equity within the law, Sherman emphasizes Aristotle's belief that the law is not final, because equity ensures that laws are improved so that they can apply to a particular situation. The general application of law serves as a limitation, which is why equity is used to enhance a

law and make it applicable to an individual circumstance. In relation to punishments, Sherman cites Aristotle's work in *Rhetoric* in which he explains that character, circumstances and motive should all be factors when determining a punishment. For him, the arbitration process mirrors that of an equitable decision because it evaluates the preceding factors. Sherman notes several reasons why Aristotle supports arbitration, but most important to him is that it allows each case to be considered individually instead of issuing a rubberstamp decision based on the unjust act.

### An Overview of Equity

Individuals play a critical role in Aristotle's concept of justice because they usually create specific situations that require the equitable adjustment of a law. For example, a handicapped person does not take the same driving test as one who is not handicapped. Instead, a handicapped individual receives a revised test that enables him/her to take a test in spite of the disability. This idea is reinforced through Max Hamburger's consideration of Aristotle's concept of equity, treating it as a legal dynamic because of its flexible nature. Hamburger notes that eventually, Aristotle determines that equity is the better part of law because it completes the law's purpose. Without equity, the law remains incomplete. Moreover, Nancy Sherman analyzes Aristotle's work on equity and his assertion of equity as a "more precise treatment of individual cases." Sherman goes one step further by providing four reasons why Aristotle defends the use of equity in his work. First, law is essentially incomplete. This idea is illustrated in Aristotle's example of a lawmaker's inability to list every single murder weapon possible. Second, equity considers the intention of the lawmaker when drafting the law.

It looks at the legislative intent because if the law establishes unintended consequences, an equitable adjustment must be made. Third, equitable decisions may sometimes require one to go beyond legislative intent due to the difficulty for lawmakers to anticipate every reaction a law creates. This also creates a check on lawmakers who may not consider every single possible outcome. Finally, if no law can address the specific case, equity requires the announcement and order addressing the particular finding. While a law is typically universal in nature, an announcement or directive concerns an exact situation so that without a law as a reference point, lawmakers have the option of issuing it under certain conditions. Overall, it appears as if the primary goal of equity is to correct laws that are general in nature so that they address particular situations citizens may face.

#### Conclusion: Equity and the Current Debate Over Affirmative Action

*Grutter v. Bollinger* 539 U.S. --- (2003) involved a white Michigan resident, Barbara Grutter who, after being denied admission into the University of Michigan Law School, filed a lawsuit claiming that its affirmative action plan violates her right to Equal Protection of Laws found in the Fourteenth Amendment. She argued that her rejection occurred because race was used as the “predominant factor,” giving applicants who belong to certain minority groups “a significantly greater chance of admission than a student with similar credentials from disfavored groups” (539 U.S. --- (2003), 5). The controversy between Grutter and the law school is founded on the school’s implementation of an affirmative action plan to increase diversity on campus. “The plan targets a critical mass which is understood to represent a number that encourages underrepresented minority students to participate in the classroom and not feel isolated”

(539 U.S. --- (2003), 5). While the law school does not use a specific number to determine whether or not it achieved a “critical mass,” it did consider race when it sought to attain a “critical mass.” According to the Dean of the Law School, “*in some cases an applicant’s race may play no role, while in others it may be a determinative factor*” (539 U.S. --- (2003), 5). In addition to race, the policy considered a number of other factors.

So called “soft variables” such as enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant’s essay, and the areas of difficulty of undergraduate course selection are all brought to bear in assessing an applicant’s likely contributions to the intellectual and social life of the institution (539 U.S. --- (2003), 5).

“Soft variables” allowed the law school to not exclusively use race in its decision to admit a student. This collegial decision by the law school is demonstrated in its goal of achieving a “critical mass” through the use of “soft variables,” which enables the admissions board to review each applicant as an individual. For those applying to the law school, the limited number of seats represents a social good that provides additional training, skills and education that help one get ahead in life. On one side of the debate is Grutter, who maintains that the affirmative action plan is wrong because it considers race when making a decision to accept a student. On the other, is the law school, which asserts that its goal of a diverse student body through the use of “critical mass” and “soft variables” enhances the educational experience of its students because other viewpoints and experiences are preserved.

Does the affirmative action plan at the University of Michigan Law School represent an equitable policy? When the Supreme Court upheld the affirmative action plan the majority opinion stated:

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants’ talents, experiences, and potential to

contribute to the learning of those around them. The policy requires admission officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School (539 U.S. --- (2003), 4).

This opinion reflects several important components of Aristotle's concept of equity. First, particular judgments are made under the law school affirmative action plan because each applicant is evaluated on an individual basis. Using factors besides strictly quantitative data such as test scores and grade point averages, the law school applies a case by case assessment of each applicant through the consideration of a variety of "soft variables" when determining admittance into its program. Second, the law school plan is flexible meaning it allows admissions officials to look at a variety of factors when making its decision. Grutter argued that her test scores exceeded many minority applicants who were admitted, but the law school considers qualities beyond strictly numbers, thereby making it an equitable policy. Aristotle maintains that the downfall with enacting laws is that the universal application creates an inability to adapt to specific situations. To address this problem, he posits that equity can be applied to fine-tune loopholes within the law, which helps to complete the intent or purpose of the law. The flexible nature of equity allows it be dynamic and change as needed just as the law school affirmative action plan considers a variety of "soft variables" for each applicant rather applying rigid standards. Overall, O'Connor applies Aristotle's notion of equity when upholding the law school affirmative action plan because of its individualized and flexible approach that has the ability to address particular situations

The idea of implementing an equitable affirmative action plan was first illustrated in Justice Powell's opinion in the *University of Regents v. Bakke* (1978). Before this

decision, universities applied strict quotas or “set-asides” to achieve minority representation on campus. These represented abstract, universal affirmative action plans that conveyed admission to whole classes of persons. But, in his concurring opinion, Powell wrote that the key to a fair or just affirmative action plan is flexibility.

A university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of race-conscious admissions programs is paramount (539 U.S. --- (2003), 15).

Twenty-five years later, in *Grutter*, the Court applied the same logic as Justice Powell in *Bakke* who cited the key aspects of equity when defending affirmative action in higher education. Both the *Bakke* and *Grutter* decisions supported affirmative action plans that apply an individualized and flexible approach. The affirmative action plans matched that of Aristotle’s concept of equity because he too criticizes laws and policies that are rigid and he advocates the use of equity to address this issue. The dynamic nature of equity is found in the law school’s willingness to look at a variety of factors for admission that go beyond race. The plan includes two critical aspects of Aristotle’s idea of equity. First, the flexible nature of the affirmative action plan is achieved through the use of a “critical mass” in place of strict quotas or set-asides. Second, individual examination of each application is attained with “soft variables” that consider various qualities possessed by each applicant. For Aristotle, these two aspects work together to produce an affirmative action plan that is equitable and just. The flexible and individualized approach in the law school plan considers numerous aspects of every applicant, which applies to the particular individual rather than the universal (a group within society). By focusing on

the individual, this equity adjustment allows affirmative action to become a more fair and just policy.

According to Aristotle's definition of particular justice, there are two ways to allocate goods. The first is equally, which mirrors the concept of one-person one vote. Grutter maintained that admission should be determined equally which mandates all those who have specific test scores or GPAs receive acceptance into the program. This notion dictates that equal allocations should correspond with the number of available seats into the program. For example, if Student A and Student B both have the same test scores and grade point averages, both should gain admission. Under this example, admission officials would look at the same factors for everyone and base acceptance on achievement of those factors. The second way to distribute justice is proportionally, which allows distributions to occur based on a variety of factors. Social Security represents a proportional distribution because those who have contributed more money receive more than others who have given less. Not every applicant comes from the same background, and proportional distribution makes equity adjustments to address this. In the admissions process, affirmative action allows for equitable adjustments by taking into account the differences individuals may possess in family, education, and community involvement. The policy follows Aristotle's idea of equity because it considers a variety of factors and recognizes that each applicant comes from a particular background. This individualized and flexible approach enables affirmative action to be regarded as an equitable and just policy. Future framings of affirmative action lawsuits and court decisions would benefit by a more widespread consideration of Aristotle's concept of

equity as the completing and finest level of adjudication for the sake, not only of procedural, but also of substantive justice.

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