

# BACKGROUND

No. 2885 | FEBRUARY 27, 2014

## Discriminating Toward Equality: Affirmative Action and the Diversity Charade

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### Abstract

*Affirmative action was intended to ensure that all Americans are treated without regard to race. Today, public officials and educators justify using special treatment based on race to make up for past discrimination and to foster diversity. Stories of the victims of racial preferences, however, reveal the hidden consequences of these well-intentioned efforts to manufacture racial balance. Racial preferences are a form of discrimination, and they stigmatize those whose accomplishments are not due to such preferences. Race-based discrimination policies continue to undermine the American Dream, and the only way to end the vicious cycle of discrimination is to ensure that fair and equal treatment for everyone is a reality, not just a talking point.*

On October 15, 2013, the topic of affirmative action once again came before the United States Supreme Court. This time, the debate over race-based preferences came to the Court via *Schuette v. Coalition to Defend Affirmative Action*, a case that challenges Michigan's constitutional ban on government racial preference policies. Seven other states have passed similar measures ending race-based policies, and the Court's ruling in *Schuette* will have national implications for the future of affirmative action and the pursuit of equal treatment under the law for every individual.

### Origins of Affirmative Action

The term "affirmative action" was first used by President John F. Kennedy in 1961 when he issued Executive Order 10925, requiring government contractors to "take affirmative action to ensure

### KEY POINTS

- The United States Supreme Court is once again considering the constitutionality of race-based preferences, this time in *Schuette v. Coalition to Defend Affirmative Action*, a challenge to Michigan's ban on government racial preference policies.
- Seven other states have passed similar measures ending race-based policies, and the Court's ruling in *Schuette* will have national implications for the future of affirmative action and the pursuit of equal treatment under the law for every American.
- While the Supreme Court has heard several cases on this issue, it has shied away from striking down the use of race across the board, instead restricting the use of such race-based policies to "achieve diversity" while encouraging states to transition to race-neutral alternatives to meet that goal.
- The stories of the victims of racial preferences reveal the hidden consequences of efforts to equalize outcomes and manufacture an ever-changing ideal of racial balance.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2885>

Produced by the Edwin Meese III Center for Legal and Judicial Studies

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that applicants are employed, and that employees are treated during employment, *without regard* to their race, creed, color, or national origin.”<sup>1</sup> Today, America’s understanding of the term has changed dramatically.

After the passage of the 1964 Civil Rights Act, Kennedy’s “without regard” standard was transformed into policies that encouraged public officials, educators, and administrators to actively treat people *with* regard to race. Relying on allowances in Titles II and VII of the Civil Rights Act, federal, state, and local governments instituted special racial boosts and preferences with the goal of increasing minority representation in education and employment. Over the years, this special treatment based on race has been justified as remedying past discrimination, expanding opportunities for the underprivileged, and, more recently, fostering diversity. Thus, “affirmative action” today is an innocuous-sounding phrase for what are really racial preferences.

### Michigan’s Ban on Preferential Treatment

In 2006, Michigan voters passed Proposal 2, also known as the Michigan Civil Rights Initiative (MCRI), amending their state constitution to end preferential treatment based on race, ethnicity, or gender at public institutions. The law’s goal was equal treatment under the law, and the language of the amendment reflected that simple message: “The State shall not discriminate against or grant preferential treatment to any group or individual on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.”<sup>2</sup>

Immediately after Election Day, the initiative’s leading opponent, the radical Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), filed a lawsuit challenging the constitutionality of requiring equal treatment in public education. As a result of this requirement, BAMN argued, the MCRI violates the Fourteenth Amendment of the U.S. Constitution. BAMN contends that the legal impact and political restructuring of

banning preferences at the constitutional level fall wholly upon, and thus target, powerless minorities. Only the University of Michigan Board of Regents has the authority to decide whether or not a person’s skin color can be considered in making admissions decisions, according to BAMN, and the people of Michigan had no right to choose equal treatment as a matter of state law.

At the core of BAMN’s position is the belief not only that it is unconstitutional to treat people without regard to race, but also that the fundamental protections of the Fourteenth Amendment extend only to certain minorities. In fact, an attorney for BAMN, Shanta Driver, made that argument before the Supreme Court during the *Schuetz* oral arguments. When Justice Antonin Scalia asked Ms. Driver whether she could cite any case in support of her racial view of the Fourteenth Amendment, she responded, “No case of yours.”<sup>3</sup>

While the Supreme Court has heard several cases on this issue, it has shied away from striking down the use of race across the board. Instead the Court has restricted the use of such race-based policies to “achieve diversity” while encouraging states to transition to race-neutral alternatives to meet that goal. As a result, states have emerged as the frontier for pursuing equal treatment under the law.

Much progress has been made over the past 15 years. California, Washington, Florida, Michigan, Nebraska, Arizona, New Hampshire, and Oklahoma have ended the public use of racial preferences through various means: executive order, legislation, referendum, and constitutional amendment by citizen initiatives. The Court will soon decide whether or not states have the right to continue moving in this direction.

### Negative Consequences of Affirmative Action

The *Schuetz* case is important, and so is changing the law, but even if the Supreme Court decided today that racial preferences are unconstitutional, these policies would linger because public officials and school administrators continue to support them. In fact, they will continue to direct policy decisions

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1. Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961) (emphasis added).  
2. MICH. CONST. art. I, § 26, cl. 2.  
3. Transcript of Oral Argument at 42, *Schuetz v. Coalition to Defend Affirmative Action* (No. 12-682), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-682\\_1537.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-682_1537.pdf).

until individuals are confronted with the moral and practical costs of treating people differently based on skin color or their ethnic heritage. It is easy to engage this subject in the realm of laws, statistics, and court cases, but the real people who are adversely affected by these policies are often overlooked. The stories of the victims of racial preferences reveal the hidden consequences of efforts to equalize outcomes and manufacture an ever-changing ideal of racial balance.

When it comes to typical “reverse discrimination” cases, many people know high-profile stories like mine and that of Frank Ricci. For instance, my story made national headlines when I challenged the University of Michigan’s decision to use skin color as the primary basis for rejecting my application for admission.

At the time of my application, the university reviewed applications submitted by black, Native American, and Hispanic applicants under one standard and those submitted by everyone else under a much higher standard.<sup>4</sup> The school later claimed to simplify the admissions process by using a point system and automatically awarding an extra 20 points (out of 100) to select minorities. By comparison, a perfect SAT score earned an applicant only 12 points. Thus, even though I had good grades and a host of extracurricular activities, the university rejected my application because I had the wrong skin color. My case, *Gratz v. Bollinger*,<sup>5</sup> ultimately went before the Supreme Court, and in 2003, the Court ruled that racial discrimination had indeed taken place.

In another high-profile case, Frank Ricci, a firefighter for the city of New Haven, Connecticut, took and passed the exam for promotion to lieutenant. The results of this test, however, were discarded by the city because no black firefighters scored high enough to be considered for the open positions. Ricci and 17 others (including a Hispanic applicant) sued New Haven for reverse discrimination, and in the 2009 *Ricci v. DeStefano* decision,<sup>6</sup> the Supreme Court ruled in their favor.

Frank and I both worked hard and expected to be judged on our character and merit. Instead, despite our qualifications, we faced rejection because of an obsession with racial policies.

Proponents of reverse discrimination often argue that only privileged white individuals have any reason to oppose the use of racial preferences. These diversity engineers believe the benefits of expanding opportunities to certain minorities far outweigh the costs of using race to treat people differently. However, the personal stories of those who have been adversely affected by these policies—both the traditional victims and even the supposed beneficiaries—paint a very different picture. The following are just a few of them.<sup>7</sup>

### **The Stigma of Affirmative Action**

Ashley graduated from high school at 16 years of age with a 4.3 GPA and scored a 32 on the ACT.<sup>8</sup> She was active in numerous extracurricular activities and, not surprisingly, was accepted into every college to which she applied. Ashley did not want racial admissions boosts, and she did not need them. She knew, however, that she would get them anyway because she happened to be black. Despite her hard work and impressive accomplishments, she feared ever having a bad day or getting an answer wrong in class lest her peers think she got accepted only because of her skin color.

The use of race-conscious admissions policies at her university saddled Ashley with an unwanted stigma based on her skin color. It reinforced stereotypes of inequality and special treatment, forcing her constantly to feel the need to prove that she deserved to be in the classroom. Rather than helping Ashley, racial preferences obscured the legitimacy of her achievements. She wanted to be judged as an individual; instead, she worked twice as hard to overcome being judged for her skin color.

Patricia worked hard and made many sacrifices to achieve her dream of being a police officer. However, even after years on the job and having received many

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4. CENTER FOR INDIVIDUAL RIGHTS, CHARTING RACIAL DISCRIMINATION, [http://www.cir-usa.org/cases/michigan\\_1sa\\_charts.html](http://www.cir-usa.org/cases/michigan_1sa_charts.html) (last visited Feb. 7, 2014) (the guidelines used by the University of Michigan’s undergraduate admissions office).

5. 539 U.S. 244 (2003).

6. 557 U.S. 557 (2009).

7. Some names have been changed to protect privacy.

8. Videotape: Adam Abraham, An Act of Courage (American Civil Rights Coalition 2004) (on file with author). Ashley is featured in this video.

commendations, she still felt that she had to work twice as hard as her male colleagues to demonstrate that she deserved to be there. As a woman, Patricia struggled to overcome the stigma of gender preferences. Over and over again, she worked to prove that the promotions she received were the result of merit, not a diversity quota. The shadow of affirmative action diminished her accomplishments in the eyes of colleagues and robbed her of the honor and satisfaction she deserved. She did not need affirmative action, but she still suffered its consequences.

Recently, the University of Michigan's Black Student Union received national attention when its "Being Black at the University of Michigan" hashtag went viral on Twitter. Hundreds of students joined in to share the "unique experiences of being black at Michigan."<sup>9</sup> The vast majority of the comments were negative, and almost every single one of the students who commented expressed frustration with being treated differently because of his or her skin color. The students' demand that they be treated as unique individuals—instead of as token members of racial or ethnic groups—was striking, and it highlighted the fact that putting people in boxes and discriminating based on appearance is demeaning, harmful, and wrong. Is it any less so when it is done by public officials and administrators?

### The "Wrong" Kind of Minority

David, a student living in Los Angeles, wanted to attend the University of California, Los Angeles, but was rejected despite excellent grades and test scores.<sup>10</sup> David happened to be Vietnamese and was held to a much higher admission standard because of his ethnicity. Even being a minority applicant won him no favor in the system of discrimination for the sake of diversity. In the interest of maintaining a diverse campus, the university chose to limit the number of high-performing Asian enrollees. He was told he should accept discrimination for the "common good" and that he could always attend another elite school. For David, however, racial discrimina-

tion forced him to choose between taking care of his immobile grandmother and moving out-of-state to further his education.

Barbara Grutter, the mother of two sons, applied to the University of Michigan Law School in 1996.<sup>11</sup> Before applying, she had started a successful business, had graduated from Michigan State with a 3.8 GPA and high honors, and had scored 161 on the LSAT. She also happened to be white. The law school initially placed Barbara on their waiting list but later rejected her. Only 20 percent of white and Asian students with similar marks got into the school; however, "underrepresented" minorities with the same grades had a 100 percent acceptance rate.

Why the disparity? The law school gave preferences to certain applicants based on skin color. Grutter decided to sue, and in the course of the court hearings and testimony, it became clear that race accounted for well over a quarter of applicants' admission scores. Unfortunately, in 2003, the Supreme Court, in *Grutter v. Bollinger*, upheld the school's racially discriminatory policies as necessary for achieving the goals of a diverse campus.<sup>12</sup> The Court's holding was based on the flimsy rationale that because the preferences were not codified into a point system, they were permissible as part of a "holistic" admissions process.

Barbara entered the workforce in the 1970s along with many other women "empowered and emboldened by the belief that equal opportunity meant that it was illegal to judge anyone on the basis of race, gender, or anything else that has nothing to do with one's abilities."<sup>13</sup> She feared this newfound opportunity would prove illusory and that it could be "pulled back" at any moment, which is ultimately what happened—because of her race.

Experts insisted that racial preferences and the pursuit of diversity were good for Barbara and society as a whole. She could always attend another law school, they argued. Yet none of these experts discussed the fact that Barbara was only interested in attending a well-respected law school and, as a

9. Rhonesha Byng, *#BBUM Hashtag Sparks Dialogue About Diversity at the University of Michigan*, HUFFINGTON POST, Nov. 20, 2013, available at [http://www.huffingtonpost.com/2013/11/20/bbum-university-of-michigan-black-students\\_n\\_4310790.html?ncid=txtlnkushpmsg00000038](http://www.huffingtonpost.com/2013/11/20/bbum-university-of-michigan-black-students_n_4310790.html?ncid=txtlnkushpmsg00000038).

10. Interview with Jennifer Gratz.

11. News Conference, Center for Individual Rights, Supreme Court Affirmative Action Cases (Mar. 31, 2003), available at <http://www.c-spanvideo.org/program/CourtAf>.

12. 539 U.S. 306 (2003).

13. News Conference, *supra* note 11.

mother of two young children, was unable to move out-of-state to attend other schools. The University of Michigan was her only real option, but she was denied admission because of her race.

Katuria Smith grew up in poverty.<sup>14</sup> She was born when her mother was 17, had an alcoholic father and stepfather, dropped out of high school, and survived on any menial job she could find. By the time she turned 21 years old, Katuria was desperate to escape poverty, so she took night classes at a community college paralegal program while juggling jobs during the day. She graduated and enrolled in the University of Washington where she earned a degree.

With her 3.65 GPA and LSAT score of 165, Katuria applied to the University of Washington School of Law. Considering her background, she expected to be admitted. Instead, her application was rejected.

In order to bolster campus diversity, the university used race as a factor in determining whom to admit to its law school, maintaining separate admissions standards and procedures for minority applicants. The dean later admitted that with her story and qualifications, Katuria would have been accepted had she been a member of a “preferred” racial group.<sup>15</sup> The university claimed they employed a “holistic” approach in the admissions process, but even Katuria’s incredible life story of overcoming remarkable hurdles was not enough to make up for the fact that she was not the right color. In the end, a “holistic” admission proved to be mostly about race.

### “Equal Pay for Equal Work”

After concerns arose about unequal compensation among white male, female, and minority faculty, Northern Arizona University set out to implement a “pay equity” plan. The university used a computer program to calculate appropriate salary ranges for each professor and awarded one-time pay raises to 64 white female and 27 minority professors who were assessed as underpaid.

Interestingly, the study also ranked 192 white male professors as underpaid, but they were frozen out of any salary increases.<sup>16</sup> It turns out that equalizing pay was not about “equal pay for equal work”; rather, the school wanted to use skin color and gender to manufacture results. These professors were treated as pawns in an ugly game of racial and gender “balancing,” but after years of legal battles, a federal court called it what it was: discrimination.<sup>17</sup>

### An Honest Discussion About Race and Equality

Larry, the owner of a popular bar and restaurant in Detroit, used to own several hair salons around the time the *Gratz* and *Grutter* cases were being argued before the Supreme Court.<sup>18</sup> There was a full crowd in one of the salons on the day that a television in the salon carried a news report about my fight to be treated equally at the University of Michigan. Larry remembers his wife loudly remarking, “Well, why shouldn’t she be treated equally?” This sparked a discussion among the crowd. Larry, his wife, and much of their clientele happened to be black. Whether or not they agreed with racial preferences, they had serious conversations about the fairness of these policies.

Questioning the merits of treating people differently based on race is far more common than the supporters of racial preferences would like the public to believe. Friends, families, and colleagues are talking honestly about race and equality. Unfortunately, race-based politics and political correctness keep these honest discussions in the shadows.

### The Double Standard

Lee Bollinger is a prominent supporter of racial preferences and a self-proclaimed champion of diversity and equal opportunity. He was president of the University of Michigan when Barbara and I filed our lawsuits, and he publicly supported the university’s right to use race-based preferences throughout the legal proceedings. To him, a 20 percent boost

14. CENTER FOR INDIVIDUAL RIGHTS, SMITH V. UNIVERSITY OF WASHINGTON, <http://www.cir-usa.org/cases/smith.html> (last visited Feb. 7, 2014) (a compilation of documents related to Katuria’s lawsuit).

15. Nat Hentoff, *Katuria Smith Goes to Court*, VILLAGE VOICE, July 8, 1998, available at <http://www.cir-usa.org/articles/140.html>.

16. *White Males Fight the Freeze*, TIMES HIGHER EDUCATION, Dec. 4, 1995, available at <http://www.timeshighereducation.co.uk/news/white-males-fight-the-freeze/96258.article>.

17. Piper Fogg, *Northern Arizona U. Violated Rights of White Male Professors, Judge Rules*, CHRONICLE OF HIGHER EDUCATION, July 16, 2004, available at <http://chronicle.com/article/Northern-Arizona-U-Violated/5861>.

18. Interview with Jennifer Gratz in Detroit, Michigan (July 2013).

for race meant “one of many factors,” and selectively distributing special treatment based on race was consistent with equal protection under the law.

Now the president of Columbia University, Mr. Bollinger recently dealt with a new discrimination matter—a “whites only” scholarship fund established by a wealthy divorcee days before her death in 1920.<sup>19</sup> Bollinger is seeking a court order to lift the race restrictions because of the ugliness of discrimination, but he has remained silent on the long list of scholarships Columbia promotes only for “students of color.” In the eyes of Bollinger and those who agree with his position, preferential treatment counts as discrimination only when the race in question is not currently favored by the government or those in academia’s ivory towers.

### President Obama on Affirmative Action

When the Michigan Civil Rights Initiative appeared on the ballot in 2006, then-Senator Barack Obama recorded a radio ad urging viewers to vote against it.<sup>20</sup> He insisted that by not allowing policies that grant special treatment based on skin color, Michigan would undermine equal opportunity and reverse racial progress.

Just a year later, ABC News’ George Stephanopoulos asked Senator Obama whether his daughters should receive special treatment because of their race when applying to college.<sup>21</sup> Obama said his two daughters “should probably be treated by any admissions officer as folks who are pretty advantaged”—a subtle acknowledgement of the absurdity of using race to determine preferential treatment. While his daughters may share the same skin color as a child in inner-city Chicago, their backgrounds are worlds apart. In today’s increasingly pluralistic society, race usually does not—and certainly should not—determine what obstacles individuals have had to overcome or advantages they have received.

### A Legacy of Discrimination

There are four important lessons to draw from the stories recounted above.

**1. Racial preferences are a form of discrimination.** Any time an individual is granted preferential treatment based on race, opportunities are denied to others who may be just as qualified or needy but who simply have the “wrong” skin color or are the wrong gender. The government’s preference for one race (or gender or ethnicity) over another is the very definition of discrimination. Regardless of intentions, such policies create new injustices with new victims. No one—white, black, Asian, Latino, Native American, or any other color or ethnicity—should be turned away from education, scholarships, jobs, contracts, or promotions because they have the “wrong” skin color. This kind of discrimination was wrong 50 years ago, and it is still wrong today.

**2. Racial preferences rob recipients of the pride of ownership in their accomplishments.** When individuals of a certain race are selected to receive special treatment, those individuals must struggle against the idea that their skin color rather than merit is behind their success. Indeed, the achievements of people like Ashley, who did not need or want preferences, will forever be judged through the lens of racial preferences.

**3. The values of the diversity movement are only skin deep.** Proponents of these reverse discrimination policies refuse to treat people as individuals. Instead, they rely on discriminatory stereotypes and gross generalizations to label, judge, and group people based on race, gender, and ethnicity. Individuals are reduced to a skin color or gender type because diversity’s champions have little patience for the actual work needed to promote real diversity. Ask a university president how many black students are on campus, and he or she will be able to provide the number on the spot. But ask about the number of musicians, conservatives, liberals, libertarians, or students from single-parent homes, and he or she will be at a loss to provide any meaningful statistics. Real diversity is found

19. Sharyn Jackson, *Whites-only Scholarship at Columbia Challenged*, USA TODAY, May 15, 2013, available at <http://www.usatoday.com/story/news/nation/2013/05/15/whites-only-scholarship-challenged/2164815/>.

20. Stephen Hayes, *The Race Minefield*, WEEKLY STANDARD, Mar. 10, 2008, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/823xthib.asp?pg=1#>.

21. Eugene Robinson, *A Question of Race v. Class*, WASH. POST, May 15, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/14/AR2007051401233.html>.

in the wealth of experience, talents, perspectives, and interests of unique individuals. People of the same race do not all think alike.

**4. Race-based policies force people to make decisions and judgments that do not reflect how people live their lives.** The average person thinks very little about race on a daily basis, yet the diversity culture and racial preference policies insist that race is the centerpiece of almost every issue, work environment, and educational experience. People are constantly forced to describe themselves by checking a box or choosing a label from a list of predetermined and frequently artificial categories. From an early age, children are taught not to judge a person based on appearance, but when they grow older, they learn that this is exactly what is happening and being encouraged all around them.

America is ready to move beyond race. However, if the government and public institutions continue to divide the country by ethnicity and race, the goal of a color-blind society will remain beyond our reach. Policies that promote race-based discrimination continue to undermine the American Dream, and the only way to end the vicious cycle of discrimination is to ensure that fair and equal treatment for everyone is a reality, not just a talking point.

—*Jennifer Gratz is founder and Chief Executive Officer of the XIV Foundation, an organization dedicated to teaching the personal and societal advantages of fair and equal treatment, and lead plaintiff in the landmark Supreme Court case challenging the University of Michigan’s use of racial preferences in undergraduate admissions.*