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PROPOSAL 2 AND THE BAN ON AFFIRMATIVE ACTION: AN UNCERTAIN FUTURE FOR THE UNIVERSITY OF MICHIGAN IN ITS QUEST FOR DIVERSITY

I. INTRODUCTION

In *Grutter v. Bollinger* and *Gratz v. Bollinger*, white applicants sued two educational institutions that denied them admission: the University of Michigan (the “University”) and the University of Michigan Law School (the “Law School”).¹ The applicants claimed the institutions violated the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 by using race as a factor in their admissions processes.² The Supreme Court (“Court”) upheld the Law School’s use of race as a “plus factor” in its admissions program,³ but struck down the University’s use of race as too automated and not narrowly tailored under strict scrutiny review.⁴ Under strict scrutiny review, the government’s use of racial classifications is constitutional only if those classifications “are narrowly tailored to further compelling governmental interests.”⁵ After the Court’s ruling in *Gratz*, the University modified its admissions practices to mirror the Law School’s highly individualized review process.⁶ The University and the Law School relied on the Court’s ruling in *Grutter* to continue the use of race as one of many factors in their admissions practices.⁷

The University and Law School, however, suffered a surprising and disappointing setback to their diversity initiatives and use of race as an admission factor when Michigan voters approved a ban against affirmative action practices in higher education.⁸ On Michigan’s November 2006 ballot, affirmative action opponents proposed to ban affirmative action in public education and

¹ See *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

² See *id.*

³ *Grutter*, 539 U.S. at 336.

⁴ *Gratz*, 539 U.S. at 270.

⁵ *Grutter*, 539 U.S. at 326.

⁶ See University of Michigan News Service, *New U-M Undergraduate Admissions Process to Involve More Information, Individualized Review*, Aug. 28, 2003, <http://www.ns.umich.edu/htdocs/releases/print.php?Releases/2003/Aug03/admissions>.

⁷ See Mary Sue Coleman, President, University of Michigan, U.S. Supreme Court Rules on University of Michigan, Address to the University of Michigan Community (June 23, 2003), available at <http://www.umich.edu/pres/speeches/030623ruling.html>.

⁸ See generally Mary Sue Coleman, President, University of Michigan, Diversity Matters at Michigan, Address to the University of Michigan Community (November 6, 2006) available at <http://www.umich.edu/pres/speeches/061103div.html>.

public employment.⁹ Michigan voters approved the initiative, named Proposal 2, which subsequently amended Michigan's constitution to forbid public educators and employers from using race and gender as admission and hiring criteria.¹⁰ With Proposal 2's passage, the University and the Law School faced a new set of legal challenges to using race as an admission factor.¹¹

Shortly after Proposal 2 passed, opponents of the proposal sought and obtained a preliminary injunction in federal district court to prevent its implementation.¹² However, the Sixth Circuit granted a stay of the injunction and ordered that the proposal take immediate effect.¹³ Despite much speculation for weeks that the University would initiate a lawsuit against the State to prevent Proposal 2's implementation and amidst affirmative action supporters' appeal of the Sixth Circuit's ruling, the University made a surprising announcement that it would comply with the ban and change its current admissions practices to exclude the use of race and gender.¹⁴ Heralding itself as a "national leader in diversity," the University recognized that it had to face the formidable task of admitting a diverse student body for the 2007-2008 admission cycle—and without using race as an admissions factor.¹⁵

As a result of the ban against affirmative action practices, the University and the Law School must seek out effective race-neutral solutions to achieve diversity without compromising their academic excellence. Part II of this Note discusses *Grutter* and *Gratz* and describes the Court's analysis in approving the Law School's admissions process and in rejecting the University's admissions process. Part II further discusses the effects the *Gratz* ruling had on the University's admissions system. Part III addresses the main actors and forces behind Proposal 2, its approval, and the response to its approval. Part IV outlines the current legal challenges to Proposal 2. Finally, Part V analyzes the challenges that the University and the Law School face as a result of Proposal 2 and discusses several race-neutral options the institutions could employ to maintain their reputations as champions of diversity initiatives.

⁹ Brian DeBose, *Group Seeks Affirmative Action Vote: Few in Michigan Back Bid to Abolish Policy*, WASHINGTON TIMES, May 28, 2006, at A02.

¹⁰ See *Questions and Answers Regarding Proposal 2*, <http://www.diversity.umich.edu/legal/prop2faq.php> (last visited February 14, 2008).

¹¹ See *id.* President Mary Sue Coleman noted that while the University will not initiate separate lawsuits against the implementation of Proposal 2, the University will defend itself in those lawsuits where the University is named as a defendant.

¹² See *Coal. to Defend Affirmative Action v. Granholm*, No. 06-15024, 2006 WL 3953321 (E.D.Mich. Dec. 19, 2006) and *Cantrell v. Granholm*, No. 06-15637 (E.D. Mich. Dec. 19, 2006), available at http://www.diversity.umich.edu/legal/filings/show_case_doc-29.pdf.

¹³ See *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (Mich. 2006).

¹⁴ Mary Sue Coleman, President, University of Michigan, *Proposal 2 Next Steps* (January 10, 2007) available at <http://www.umich.edu/pres/speeches/070110prop2.html>.

¹⁵ *Id.*

II. GRUTTER, GRATZ, AND THEIR EFFECTS ON THE UNIVERSITY OF MICHIGAN'S ADMISSIONS PROCESS

A. University of Michigan's Admissions Practices before Grutter and Gratz

1. The Law School

Prior to *Grutter*, the Law School permitted admissions officers to consider an applicant's race among several other factors when determining whether or not to admit the applicant.¹⁶ In considering each applicant's qualifications, the admissions officer would focus on the applicant's academic achievements (such as his LSAT score and undergraduate GPA), combined with "soft variables," such as the applicant's talents, life experiences, and ability to contribute to the Law School's learning environment.¹⁷ In its efforts to achieve diversity in its classrooms, the Law School sought to enroll a "critical mass" of minority students, namely African Americans, Native Americans and Hispanics, to "ensur[e] their ability to make unique contributions to the character of the Law School."¹⁸ The Law School rejected the suggestion that the term "critical mass" translated to a hidden quota system.¹⁹ Instead, officials explained that obtaining a critical mass of minority students helped to achieve the Law School's goal of having "substantial and meaningful racial and ethnic diversity."²⁰ The Law School made clear that its admissions practices were "flexible" and acknowledged that diversity could be achieved in a number of ways that did not focus solely on racial and ethnic diversity.²¹ Law School officials later recognized, however, that under the Law School's admissions policy, "all that mattered was that without affirmative action . . . meaningful diversity could not be achieved."²²

2. The University

Prior to *Gratz*, the University's College of the Literature Science and Arts (the "LSA")?the specific college the plaintiffs applied to in *Gratz*?used an admissions procedure that included a formula that utilized an applicant's high school GPA and a number of other factors.²³ The admissions committee could award point values for factors such as "underrepresented minority status, socio-economic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to

¹⁶ *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

¹⁷ *Id.* at 315.

¹⁸ *Id.* at 316.

¹⁹ PATRICIA GURIN, ET AL., *DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN* 71 (2004).

²⁰ *Id.*

²¹ *Grutter*, 539 U.S. at 315-16.

²² Gurin, *supra* note 19, at 72.

²³ *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003).

which the student was applying.”²⁴

Following the *Gratz* ruling, the University changed its admissions guidelines in 1998 to a “selection index” process where an applicant could score up to 150 points.²⁵ The University would typically admit a student earning anywhere from 100-150 points under this system.²⁶ An admissions officer granted points based on a number of numerical factors, such as the applicant’s high school GPA and standardized test scores.²⁷ The admissions officer would then award points based on the quality of the high school the applicant attended, whether the applicant was an in-state resident, the quality of the applicant’s personal essay and any personal achievements or leadership positions the applicant held.²⁸ Under this revised system, the University created a “miscellaneous” category in which the admissions officer would award an automatic twenty points based solely upon the applicant’s race or membership in an ethnic minority group.²⁹ The University could also award extra points based on an applicant’s “extraordinary talents,” such as artistic abilities, but the applicant could only receive up to five points for this category.³⁰ In all applications from 1995 to 1998, the University set aside “protected seats” specifically for athletes, foreign students and minority applicants.³¹ If these designated spaces were not filled by the intended categories of applicants, including minorities, the University could then admit other candidates from its waitlist.³²

B. *Grutter and Gratz*

1. *Grutter*

In challenging the Law School’s admission process, the plaintiffs argued that the Law School’s use of race in its admissions program directly violated the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), and 42 U.S.C. § 1981.³³ Barbara Grutter, a white Michigan resident who the Law School initially waitlisted and then denied admission, represented the class of white plaintiffs.³⁴ Grutter claimed the Law School used race as a predominant factor in granting admissions to applicants in certain minority groups to the detriment of applicants with similar credentials who did not be-

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 273.

³¹ *Id.* at 256.

³² *Id.*

³³ *Grutter v. Bollinger*, 539 U.S. 306, 316-17 (2003).

³⁴ *Id.* at 316.

long to minority groups.³⁵ Grutter also argued the Law School could not provide a compelling reason to justify using race in its admissions process, thereby failing strict scrutiny review under the Fourteenth Amendment.³⁶ Although the district court ruled the Law School's use of race was unlawful and failed strict scrutiny review,³⁷ the Court nevertheless held that the Law School's use of race did not violate the Constitution.³⁸

Speaking on behalf of the 5-4 majority, Justice Sandra Day O'Connor held that the Equal Protection Clause of the Fourteenth Amendment allowed the Law School's "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."³⁹ O'Connor relied heavily on Justice Powell's opinion in the landmark case of *Regents of the University of California v. Bakke*, which held that the University of California could legitimately consider a person's race and ethnic origin in its admissions program to further the substantial state interest of diversity.⁴⁰ In *Bakke*, Powell stated that in higher education, "the attainment of a diverse student body" is a constitutionally permissible goal.⁴¹

Building upon Powell's argument in *Bakke*, O'Connor reasoned the Law School's use of race in its admissions process survived strict scrutiny review because the goal of achieving diversity in the classroom was a compelling state interest.⁴² O'Connor held that achieving diversity in the classroom was a compelling state interest because diversity "breaks down racial stereotypes" and allows students from different races to better understand each other.⁴³ She relied heavily on the large number of amicus briefs in support of the Law School's use of race, which demonstrated to the Court the immense educational benefits created by a diverse student body.⁴⁴ In addition, the Justice viewed diverse student classrooms as the ideal environment in preparing students for the increasing level of diversity in the workplace and in society.⁴⁵ Furthermore, O'Connor recognized universities as the "training ground" for our Nation's future leaders, and believed that it was necessary for universities to consider the use of race so that this "path to leadership" was open to individuals from varying racial and ethnic backgrounds.⁴⁶

In approving the Law School's use of race as narrowly tailored under strict

³⁵ *Id.* at 317.

³⁶ *Id.*

³⁷ *Id.* at 321.

³⁸ *Id.* at 343.

³⁹ *Id.*

⁴⁰ *Id.* at 322-23, citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

⁴¹ *Id.* at 311.

⁴² *Id.* at 329.

⁴³ *Id.* at 330.

⁴⁴ *Id.* at 330-31.

⁴⁵ *Id.* at 330.

⁴⁶ *Id.* at 332.

scrutiny review, O'Connor recognized the school utilized a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."⁴⁷ The Law School allegedly only used race as a "plus" factor in determining whether or not to admit an applicant, signaling to the Court that the Law School did not use race as a defining factor of an individual's application.⁴⁸

One of the most notable features of O'Connor's analysis was her conclusion that the Court defer to the Law School's educational "mission" to achieve diversity.⁴⁹ O'Connor reasoned that in deferring to the Law School's goals, the Court upheld the tradition of the courts in "giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."⁵⁰ Furthermore, O'Connor rejected Grutter's argument that the Court demand the Law School use race-neutral alternatives to obtain diversity in the classroom.⁵¹ She held that the Law School used good faith efforts to sufficiently consider race-neutral alternatives and noted that the alternatives to considering race would "require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."⁵² However, Justice O'Connor clearly stated that the use of race-conscious admissions should eventually cease and noted that the Court expected educational institutions to discontinue the use of race as a tool to achieve diversity within the next 25 years.⁵³

2. *Gratz*

While the Court approved the Law School's use of race as a "plus factor" in its admissions practices, the Court rejected the University's admissions practices because the University automatically awarded points to minority applicants based solely on their race.⁵⁴ In rejecting the University's admissions process, Justice Rehnquist held that the University's admission policy, unlike the Law School's policy, was not narrowly tailored to achieve diversity.⁵⁵ Under the selection index system, Rehnquist noted that a black student would automatically be awarded twenty points based solely upon his race, while a white applicant with artistic skills that "rivalled that of Monet or Picasso" would only receive five points for possessing "extraordinary talent."⁵⁶ Such a plan did not constitute individualized review of an application and instead, mirrored a pro-

⁴⁷ *Id.* at 337.

⁴⁸ *Id.* at 336-37.

⁴⁹ *Id.* at 328.

⁵⁰ *Id.*

⁵¹ *Id.* at 339.

⁵² *Id.* at 339-40.

⁵³ *Id.* at 343.

⁵⁴ *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

⁵⁵ *Id.*

⁵⁶ *Id.* at 273.

cess more like a quota system.⁵⁷

The Court rejected the University's argument that the admissions program could not conduct a highly individualized review of each application due to the high volume of applications sent to the University each year.⁵⁸ The Court held that a university may not avoid using an individualized system due to "administrative challenges," nor may the University use "whatever means it desires" to achieve diversity.⁵⁹ The Court's holding sent a clear message to the University that, unless the school changed its admissions policy, the University's admissions program would continue to directly violate the Equal Protection Clause of the Fourteenth Amendment.⁶⁰

C. *The University of Michigan's Admissions Programs after Grutter and Gratz*

After the Court's rulings in *Grutter* and *Gratz*, both the Law School and the University continued to use race as an admissions consideration.⁶¹ The Law School did not have to alter its admissions program because it complied with the Constitution.⁶² Before the enactment of Proposal 2, therefore, the Law School used the same "holistic" and highly individualized admissions process it had been using since 1992.⁶³

On the other hand, after the Court struck down the University's use of race as unconstitutional in *Gratz*, the University scrambled to create an admissions process that complied with the Court's ruling. In August 2003, the University announced that it changed its admissions process from the 150 point system to a process with "multiple levels of highly individualized review" that reviewed each applicant's file "holistically."⁶⁴ When the Office of Undergraduate Admissions (the "OUA") received an application, three different OUA admissions officers reviewed the application.⁶⁵ First, a "reader" reviewed an applicant's file and made an initial recommendation as to whether to admit the student.⁶⁶ The reader then sent the application to a "professional admissions counselor" who conducted a blind review of the file and made an admissions recommendation.⁶⁷ The counselor sent the file to a "senior-level manager" who reviewed

⁵⁷ *Id.* at 258.

⁵⁸ *Id.* at 275.

⁵⁹ *Id.*

⁶⁰ *Id.* at 275-76.

⁶¹ See generally *supra* note 7 (citing the University President's letter to the student body after the *Grutter* and *Gratz* decisions).

⁶² See *Updated Note on Admissions Policy for the 2006-2007 Year*, <http://www.law.umich.edu/NewsandInfo/prop2/Pages/default.aspx> (last visited Jan. 31, 2008).

⁶³ *Id.*

⁶⁴ See *New U-M Undergraduate Admissions Process supra* note 6.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

the previous two recommendations and decided whether to admit, defer, or deny the applicant.⁶⁸ The manager could send the file to an admissions review committee if there was “disagreement or inconsistency” in the review of the application.⁶⁹ In changing its admissions policy, the University no longer granted an applicant’s race and ethnicity a fixed or automatic weight, but rather considered these factors “flexibly,” among other factors in the student’s application.⁷⁰

III. CREATION, APPROVAL, AND RESPONSE TO PROPOSAL 2

A. *The Response to Grutter and Gratz*

Shortly after the decisions in *Grutter* and *Gratz*, affirmative action opponents devised a new plan to eradicate all forms of affirmative action in Michigan’s public sphere.⁷¹ These opponents joined the Center for Individual Rights (the “CIR”), a conservative nonprofit litigation firm, and the American Civil Rights Institute to form the Michigan Civil Rights Initiative (the “MCRI”), an organization designed to place an affirmative action ban on the November 2006 ballot.⁷² The MCRI sought to ban affirmative action based on race, gender and ethnicity in both public education and employment to achieve “a colorblind government that treats people equally based on their merits.”⁷³

Jennifer Gratz, the named plaintiff in *Gratz*, now serves as the executive director of the MCRI.⁷⁴ After her legal victory against the University, Gratz joined forces with Ward Connerly, a wealthy African American known for his staunch disapproval of affirmative action programs.⁷⁵ Connerly served as the chairman of the similarly named California Civil Rights Initiative (the “CCRI”), which created the affirmative action ban, Proposition 209, in California in 1996.⁷⁶ In joining the fight to get Proposal 2 on the Michigan ballot, Connerly used his previous knowledge and funds to maximize the MCRI’s suc-

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Andrew Grossman, *Which State is Next for Anti-Affirmative Action Activists: Anti-Affirmative Action Crusaders Look Ahead*, MICH. DAILY, Nov. 10, 2006, <http://www.michigandaily.com/media/storage/paper851/news/2006/11/10/CampusLife/Which.State.Is.Next.For.AntiAffirmative.Action.Activists-2452567.shtml?norewrite200611211637&sourcedomain=www.michigandaily.com> (last visited Jan. 31, 2008).

⁷² *Id.*

⁷³ Jerika Richardson & Mary Kate Burke, *Reaffirm Affirmative Action? Michigan Group Files Suit to Overturn Proposal 2*, ABC NEWS LAW & JUSTICE UNIT, Nov. 10, 2006, <http://abcnews.go.com/US/print?id=2644440> (last visited Jan. 31, 2008).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

cess.⁷⁷

Like the MCRI, the CIR also served as a key player in initiating Proposal 2, given the CIR's extensive experience in representing white plaintiffs in affirmative action cases and initiatives.⁷⁸ The CIR acted as legal counsel for both named plaintiffs in *Gratz and Grutter*,⁷⁹ represented the plaintiffs in *Hopwood v. Texas*, another decisive affirmative action case, and gained crucial support for California's Proposition 209.⁸⁰ In *Hopwood*, the Fifth Circuit held that the University of Texas School of Law improperly used racial quotas in admitting students.⁸¹ After the CIR's win in *Hopwood*, the organization gained momentum in instituting affirmative action bans in other states.⁸² The CIR subsequently filed lawsuits in 1997 against the University of Washington School of Law and the University of Michigan for using race in their admissions practices.⁸³ In 1998, the CIR achieved another round of success when Washington voters approved Initiative 200, a ban on affirmative action that mirrored California's Proposition 209.⁸⁴ Following its successes in California and Washington, the CIR and its coalition set their sights on instituting a similar ban against affirmative action on Michigan's November 2006 ballot.⁸⁵

B. *The Approval of Proposal 2*

The MCRI had to obtain the requisite number of voter signatures in order to get Proposal 2 on the November 2006 ballot.⁸⁶ Once the MCRI attained these signatures, controversy arose over the validity of the signatures.⁸⁷ The plaintiffs in *Operation King's Dream v. Connerly* claimed that the MCRI used deceptive practices to persuade voters to sign the petition by telling voters that Proposal 2 supported, rather than banned, affirmative action.⁸⁸ The plaintiffs

⁷⁷ Grossman, *supra* note 71. Connerly reportedly donated more than \$700,000 to the MCRI's campaign for Proposal 2.

⁷⁸ *Id.*

⁷⁹ *Michigan May See Many Affirmative Action Suits: Use of Affirmative Action in Government Hiring and College Admissions Banned*, DETROIT FREE PRESS, Nov. 10, 2006, A10.

⁸⁰ Terry Carter, *On a Roll (Back): After Its Big Win in the Hopwood Case, Setting Aside Affirmative Action at the University of Texas Law School, the Center for Individual Rights is on a Mission- To Do More of the Same at Other Public Universities*, 84 A.B.A. J. 54, 55 (1998).

⁸¹ *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

⁸² Carter, *supra* note 80.

⁸³ *Id.*

⁸⁴ Jodi Miller, "Democracy in Free Fall": *The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 2.

⁸⁵ *Id.*

⁸⁶ *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at *2 (E.D. Mich. Aug. 29, 2006).

⁸⁷ *Id.*

⁸⁸ *Id.*

also alleged that the MCRI targeted large minority populations and obtained over 125,000 minority signatures under “false pretenses.”⁸⁹ The MCRI denied the plaintiff’s allegations of fraud and stated that the plaintiff’s claims were an “insult” to the thousands of voters who signed the petition to get Proposal 2 on the ballot.⁹⁰

The district court ultimately held that although the MCRI engaged in voter fraud to obtain the required signatures, the plaintiffs failed to show that such voter fraud “deprived minorities of equal access to the political process.”⁹¹ The court frustratingly acknowledged that because the MCRI deceived *both* white and black voters, the MCRI did not specifically try to prevent minorities from voting in violation of the Voting Rights Act.⁹² Following the district court’s ruling, the Michigan State Board of Canvassers (the “Board”) reviewed the ballot initiative, but deadlocked regarding whether the MCRI obtained signatures by voter fraud and if the Board actually had the authority to investigate the charges of voter fraud.⁹³ Nevertheless, the Michigan Court of Appeals and the Michigan Supreme Court ordered the placement of Proposal 2 on the November 2006 ballot, irrespective of the charges of voter fraud.⁹⁴

After the courts approved Proposal 2’s placement on the November ballot in 2006, affirmative action supporters mobilized to fight the proposal.⁹⁵ One United Michigan, a diverse group of affirmative action supporters, created a coalition to try to convince Michigan voters to vote “No” on Proposal 2.⁹⁶ The organization teamed up with executives from various Michigan companies, such as General Motors Corp., the Michigan Catholic Conference, the NAACP, and several state universities.⁹⁷ The coalition set and exceeded a fundraising goal of between three and five million dollars in order to run advertisements across Michigan to warn voters of the consequences of banning affirmative action.⁹⁸ In these advertisements, opponents characterized Proposal 2 and the MCRI as a “tragedy on the scale of 9/11” and claimed that the ban on affirma-

⁸⁹ *Id.*

⁹⁰ Tim Martin, *Affirmative Action Vote Was Years In The Making: Issue Sprung Up In State During U-M Admissions Lawsuit*, GRAND RAPIDS PRESS, Oct. 29, 2006, at H1.

⁹¹ *Operation King’s Dream*, 2006 WL 2514115, at *19.

⁹² *Id.* at *17.

⁹³ *Mich. Civ. Rights Initiative v. Bd. of State Canvassers*, 268 Mich. App. 506, 508 (2005).

⁹⁴ *See id.* and *Mich. Civ. Rights Initiative v. Bd. of State Canvassers*, 475 Mich. 903 (2006).

⁹⁵ David Waymire, *One United Michigan Stepping Up Campaign Activities*, CIVILRIGHTS.ORG, Jan. 20, 2006, <http://www.civilrights.org/issues/affirmative/remote-page.jsp?itemID=28351236> (last visited Jan. 31, 2008).

⁹⁶ *Id.*

⁹⁷ Martin, *supra* note 90.

⁹⁸ *Id.*

tive action ban would “perpetuate a ‘culture of inequity.’”⁹⁹

Despite opponents’ efforts to persuade voters to vote against Proposal 2, fifty-eight percent of Michigan voters approved the ban against affirmative action.¹⁰⁰ Out of 3.6 million voters, 2.1 million voters favored the ban, while 1.5 million voters opposed Proposal 2.¹⁰¹ CNN interviewed Michigan voters as they left polling locations and reported that almost two-thirds of white voters supported the ban on affirmative action, contrasted with only one in seven black voters.¹⁰² Despite Proposal 2’s passage, the numbers suggest that affirmative action “remains a polarizing issue in American life.”¹⁰³

The Michigan Constitution codified Proposal 2 in Article 1, §26 (the “Amendment”), which bans “preferential treatment” to individuals or groups “on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”¹⁰⁴ The Amendment explicitly prohibits the University and other public colleges and universities from using racial preferences in their admissions programs.¹⁰⁵ Upon the Amendment’s enactment, any educational institution employing racial preferences in its admission process directly violates the Michigan Constitution.¹⁰⁶

C. *The Response to Proposal 2*

1. The State

After Michigan voters approved Proposal 2 on November 7, 2006, state government agencies and public education institutions struggled with its implications.¹⁰⁷ Jennifer Granholm, Michigan’s re-elected Governor (and Proposal 2 opponent), signed an executive order on November 9, 2006 directing the Michigan Civil Rights Commission (the “MCRC”) to determine the Amendment’s impact on the state and its agencies.¹⁰⁸ The MCRC describes itself as a “quasi-

⁹⁹ Abigail Thernstrom, *Michigan Prefers Equality*, WALL ST. J., Nov. 11, 2006, <http://www.opinionjournal.com/extra/?id=110009235> (last visited Jan. 31, 2008).

¹⁰⁰ See MICHIGAN DEPARTMENT OF STATE, 2006 OFFICIAL MICHIGAN GENERAL ELECTION RESULTS, <http://miboecfr.nictusa.com/election/results/06GEN/90000002.html> (last visited Jan. 31, 2008).

¹⁰¹ *Id.*

¹⁰² Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16.

¹⁰³ *Id.*

¹⁰⁴ Article I, § 26 of the Constitution of Michigan, available at [http://www.legislature.mi.gov/\(S\(emn2gw45cksza1mp32bx5er\)\)/mileg.aspx?page=getobject&objectname=mcl-Article-I-26&queryid=16954506&highlight=26](http://www.legislature.mi.gov/(S(emn2gw45cksza1mp32bx5er))/mileg.aspx?page=getobject&objectname=mcl-Article-I-26&queryid=16954506&highlight=26) (last visited Jan. 31, 2008).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See Michigan Civil Rights Commission, “*One Michigan*” at the Crossroads: An Assessment of the Impact of Proposal 06-02, Mar. 7, 2007, http://www.michigan.gov/documents/mdcr/FinalCommissionReport3-07_1_189266_7.pdf (last visited Jan. 31, 2008).

¹⁰⁸ See *infra* note 108.

judicial body” that investigates cases of alleged civil rights discrimination.¹⁰⁹ The MCRC issued its report to Governor Granholm on March 7, 2007, and announced several findings regarding the impact of the Amendment on public education programs.¹¹⁰

First, the MCRC claimed that the Amendment does not ban all affirmative action programs, but only bans those programs “that grant preferential treatment based on race, sex, color, ethnicity, and national origin.”¹¹¹ The MCRC claims that the Amendment only prohibits those programs that give preferences to individuals based *solely* on race.¹¹² The commission further explained that if the Amendment did not allow race to be used as a factor in some circumstances, courts could strike down the Amendment as unconstitutional for placing too high of a burden “on protected groups seeking beneficial legislation.”¹¹³ In addition, the MCRC stated that the Amendment did not overturn *Bakke* and *Grutter* because the Supreme Court currently allows for the narrowly tailored consideration of race and sex as one of several factors in a public school’s admissions process.¹¹⁴

Second, the MCRC acknowledged that the use of the term “preferential treatment” in the Amendment’s language is problematic because the term may have multiple interpretations under Michigan’s Constitution.¹¹⁵ However, the MCRC specifically stated that it was their interpretation, “that the *consideration* of race, sex, color, ethnicity, or national origin *as one of many factors* in public education programs” did not create an illegal preference or constitute preferential treatment in violation of the Amendment.¹¹⁶ Furthermore, the MCRC discussed the potential inconsistencies with the Amendment’s application and interpretation.¹¹⁷ For instance, public universities currently use affirmative action practices to grant preference to athletes, legacies, and students from different geographic locations in their admissions programs.¹¹⁸ At the same

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.* at 2.

¹¹² *Id.* (emphasis added).

¹¹³ *Id.* at 2-3.

¹¹⁴ *Id.* at 3.

¹¹⁵ *Id.* at 15. Note that the exact language of the Amendment under Section (1) reads, The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant *preferential treatment* to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting.

Id. at 7 (emphasis added). Also, the MCRC notes that the term “preferential treatment” appears for the first time in the Michigan Constitution after the Amendment went into effect on December 23, 2006. *Id.* at 15.

¹¹⁶ *Id.* at 16 (emphasis added).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

time, though, the Amendment only prohibits the preferential treatment of applicants based on their race, sex, color, ethnicity and national origin.¹¹⁹ The MCRC claims that this results in a “double standard,” which directly conflicts with federal law, because the Amendment creates preferential treatment for some students (based on such factors as legacy and athlete status), but not for other students.¹²⁰ As a result, the MCRC argues that the Amendment must be interpreted in a way that does not allow for “irrational line drawing,” which may violate the Equal Protection Clause of the Fourteenth Amendment.¹²¹ Experts speculate the Michigan courts will ultimately have the responsibility of interpreting the Amendment’s language because several lawsuits have already been initiated to challenge the constitutionality of the Amendment.¹²²

Finally, the MCRC acknowledged the commission did not have an opportunity to make a complete assessment of the Amendment’s impact on public education programs,¹²³ but the report still discussed the Amendment’s potential negative impacts on public institutions and offered several recommendations for these schools to achieve or maintain diversity.¹²⁴ The report also explicitly recognized the negative impact California’s Proposition 209 had on the state’s educational system and the likelihood that Michigan’s public schools will face the same challenges in maintaining diversity enrollment after Proposal 2’s enactment.¹²⁵ The report also concluded that many scholarships in Michigan that target minorities or are based solely on ethnicity may directly violate the “preferential treatment” provision of the Amendment.¹²⁶ Nevertheless, the report proposes that in order to promote and achieve diversity, public education institutions must increase their outreach efforts to students from “different backgrounds,” modify their admissions criteria to include “a broader range of personal talents and achievements,” and improve the availability of private or non-profit scholarships based on race, color and national origin.¹²⁷

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 16-17.

¹²² Paul Egan and Marisa Schultz, *Experts: Prop 2 Likely to Hold Up*, DETROIT NEWS, Nov. 10, 2006, available at <http://card.wordpress.com/2006/11/10/legal-experts-michigans-proposal-2-likely-to-hold-up/>.

¹²³ Michigan Civil Rights Commission, *supra* note 108 at 22.

¹²⁴ *Id.* at 56.

¹²⁵ *Id.* at 24-25.

¹²⁶ *Id.* at 27. For example, the report concluded the Morris Hood Jr. Educator Development Program, which grants money only to African American and Latino college students majoring in K-12 education, likely violates the Amendment because the program is specifically based on the prohibited category of race and/or ethnicity, thereby creating a “preference.” *Id.* at 48.

¹²⁷ *Id.* at 56-57.

2. The University and Law School

Following the approval of Proposal 2, the University experienced a period of uncertainty and disruption to its current admissions process.¹²⁸ On November 8, 2006, the University of Michigan's President, Mary Sue Coleman, addressed University students and community regarding Proposal 2's approval.¹²⁹ Coleman expressed her deep disappointment in the ban against affirmative action programs and stated she would "not allow this University to go down the path of mediocrity."¹³⁰ Coleman indicated that the affirmative action ban in California was a "horribly failed experiment that has dramatically weakened the diversity of the state's most selective universities."¹³¹ Coleman further asserted that diversity was a defining characteristic of the institution and that the University must find a way to "overcome the handcuffs that Proposal 2 attempts to place on our reach for greater diversity."¹³²

Then two weeks later, on November 21st, Coleman announced that in response to Proposal 2, the University created a task force named "Diversity Blueprints" to "encourage innovative thinking" in hopes of finding effective ways to maintain and enhance the University's diverse environment.¹³³ Coleman stated that under this initiative she would encourage students, alumni, faculty, and administrators to suggest ways the University could reach out to high school students and target its admissions, financial aid programs, and overall climate to find solutions to "encourage diversity within the boundaries of the law."¹³⁴

Yet, in a sharp departure from the University's previous stance against the Amendment, several weeks later, President Coleman made a surprising announcement that the University would comply with the Amendment in the middle of its admissions cycle, rather than initiate any additional legal challenges against the Amendment.¹³⁵ To comply with the Amendment, University officials explained that admissions officers would disregard race and gender on applications already submitted to the University.¹³⁶ A University spokesperson declared "[t]here is nothing in Proposal 2 that says that race has to be a se-

¹²⁸ See discussion *supra* Part III.C.2.

¹²⁹ See *Diversity Matters at Michigan*, *supra* note 8.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Diversity Blueprints: Your Ideas Wanted*, Office of the President, University of Michigan, <http://www.umich.edu/pres/speeches/061121diversity.html> (last visited Jan. 31, 2008).

¹³⁴ *Id.*

¹³⁵ See Office of the President, *supra* note 14

¹³⁶ Brian Tengel, *Despite Prop 2, Race Will Stay On Applications: 'U' Will Trust Admissions Officers to Ignore Race, Gender*, MICH. DAILY, Jan. 11, 2007, available at <http://media.www.michigandaily.com/media/storage/paper851/news/2007/01/11/UAdministration/Despite.Prop.2.Race.Will.Stay.On.Applications-2625969.shtml?sourcedomain=www.michigandaily.com&MIHost=media.collegepublisher.com>.

cret . . . [i]t's simply not going to be a factor in our decisions."¹³⁷ Furthermore, the University said that it would "rely on trust" to make certain that admissions officers would not look at an applicant's race or gender in making its admissions decisions for the remainder of the admissions cycle.¹³⁸

After admissions statistics for the 2006-2007 admissions cycle reported that the number of minorities accepted to the University dropped substantially, the University community realized that it would have to find more effective solutions to curtail declining minority admissions numbers.¹³⁹ Prior to the Amendment's implementation, the University admitted seventy-six percent of under-represented minorities who applied to the school.¹⁴⁰ After the Amendment's implementation, however, this figure dropped forty-three percentage points.¹⁴¹

Although these numbers appear devastating to the University, they should come as no surprise. Researchers concluded back in 1998 that the enactment of race-neutral-only policies would "presumably" lower the levels of black enrollment at many of the country's most selective universities to the levels seen in the early 1960s, which was before most universities instituted "serious efforts to recruit minority students".¹⁴² This same study also concluded that law schools would experience similar declines if forced to adopt race-neutral policies.¹⁴³ For example, the University of California at Los Angeles ("UCLA") suffered significant declines in the enrollment of black undergraduates after Proposition 209's enactment.¹⁴⁴ UCLA officials acknowledged that June 2006 statistics showed African Americans would constitute only two percent of the incoming freshmen class, the lowest level the school has seen in more than thirty years.¹⁴⁵

On March 15, 2007, the Diversity Blueprints Taskforce (the "Taskforce") finally announced its findings and recommendations.¹⁴⁶ After weeks of meetings, hours of discussions, and consideration of hundreds of comments and sug-

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *From the Daily: Expected Returns, Drop in Minority Enrollment a Foreseen Result of Prop. 2*, MICH. DAILY, Feb. 22, 2007, available at <http://media.www.michigandaily.com/media/storage/paper851/news/2007/02/22/Editorials/From-The.Daily.Expected>Returns-2735823.shtml>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS*, 39 (1998).

¹⁴³ *Id.* n.25.

¹⁴⁴ Stuart Silverstein, *Connerly Still Targets Racial Preferences*, L.A. TIMES, Jan. 17, 2007, at 2.

¹⁴⁵ *Id.*

¹⁴⁶ *University of Michigan Diversity Blueprints Final Report*, Mar. 15, 2007, <http://www.diversity.umich.edu/about/bp-summary.php>.

gestions,¹⁴⁷ the Taskforce published four proposed race-neutral policies and programs as well as several “institutional practices” necessary to implement these programs at the University and its graduate programs.¹⁴⁸ In addition, the Taskforce announced that it would look to other state educational institutions, such as those in California, Washington, Texas, and Georgia, for guidance in complying with the Amendment, because these states had “cleared a path through the territory we now walk” in dealing with their own affirmative action bans.¹⁴⁹

While the Taskforce acknowledged that the University would initially face similar challenges as these other states, these challenges and “setbacks” would be “short-lived” for the University.¹⁵⁰ The Taskforce explained it viewed the University as “uniquely situated to be at the leading edge” of the challenges created by Proposal 2. This is largely because the University could avoid the mistakes other states have made and “capitalize on [the] best practices” employed by these states to address their own affirmative action bans.¹⁵¹ The University’s Senior Vice Provost, Lester Monts, who served as the co-chair of the Taskforce¹⁵², stated, “[t]he world is watching to see how we will respond to the challenges posed by Proposal 2.”¹⁵³ Indeed, the University can now only hope for the Diversity Blueprint’s success if the University seeks to maintain its status as both a premier educational institution and a provider of a diverse campus climate and academic environment.¹⁵⁴

IV. LEGAL CHALLENGES TO PROPOSAL 2

Although officials intended for the Amendment to take effect on December 22, 2006, opponents quickly mobilized after its approval in November by filing lawsuits to delay or prevent the implementation of the affirmative action ban.¹⁵⁵ The first party to file a lawsuit, a pro-affirmative action group called “By Any Means Necessary” (“BAMN”), filed a lawsuit in federal district court on November 9, 2006, seeking an injunction of Proposal 2.¹⁵⁶ The University and

¹⁴⁷ *Id.* at 2.

¹⁴⁸ *Id.* at 5. See *infra* Part V.

¹⁴⁹ See *supra* note 146, at 6.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 3.

¹⁵³ Deborah Greene, *Diversity Blueprints Task Force Issues Report*, UNIVERSITY RECORD ONLINE, http://www.umich.edu/~urecord/0607/Mar19_07/01.shtml (last visited Jan. 31, 2008).

¹⁵⁴ See *supra* note 146, at 2.

¹⁵⁵ See *Coal. to Defend Affirmative Action v. Granholm*, No. 06-15024, 2006 WL 3953321 (E.D.Mich. Dec. 19, 2006); *Cantrell v. Granholm*, No. 06-15637 (E.D. Mich. Dec. 19, 2006), available at http://www.diversity.umich.edu/legal/filings/show_case_doc-29.pdf.

¹⁵⁶ *Coal. to Defend Affirmative Action*, No. 06-15024, 2006 WL 3953321 (E.D.Mich. Dec. 19, 2006).

two other state universities then filed cross-claims for preliminary injunctive relief to delay the ban's implementation in public education institutions.¹⁵⁷ The American Civil Liberties Union ("ACLU") subsequently filed a class action suit in federal district court against Michigan's governor, Jennifer Granholm.¹⁵⁸ The group requested an injunction until the state determined how Proposal 2 would be constitutionally construed as well as a judgment declaring that the University could use race as a factor in its admissions practices, in compliance with *Grutter*.¹⁵⁹

A. *The BAMN Lawsuit*

In its initial complaint filed in federal district court, BAMN argued that Proposal 2 violated the Fourteenth Amendment's Equal Protection Clause and Titles VI and VII of the Civil Rights Act.¹⁶⁰ BAMN also alleged that Proposal 2 supporters inappropriately placed the proposal on the ballot via "racially-targeted voter fraud."¹⁶¹ On December 11, 2006, the University intervened with a cross-complaint, asking the district court for an injunction against Proposal 2's implementation.¹⁶² The University argued that it and other state universities were in "a particular and immediate crisis" and could not wait for the courts to interpret Proposal 2's impact because the universities were being asked to change their admissions policies in the middle of the admission cycle.¹⁶³ The University alleged that it was unfair to review potential students' applications under two separate admissions policies, one that considered race, and one that did not.¹⁶⁴ The universities further argued that forcing their admissions departments to discontinue the use of race in their admissions practices "would result in the loss of their First Amendment-based academic freedom to admit the class that best meets their academic goals during this cycle."¹⁶⁵ On December 19, 2006, BAMN achieved victory when the federal district judge granted temporary injunctive relief to halt Proposal 2's implementation until

¹⁵⁷ *Id.*

¹⁵⁸ Initial Complaint, *Cantrell*, No. 06-15637 (E.D. Mich. Dec. 19 2006), available at http://www.diversity.umich.edu/legal/filings/show_case_doc-29.pdf.

¹⁵⁹ *Id.* at 21-22.

¹⁶⁰ Complaint for Injunctive and Declaratory Relief at 2, Coal. to Defend Affirmative Action, available at <http://www.diversity.umich.edu/legal/filings/061108-complaint-prop2.pdf>.

¹⁶¹ *Id.*

¹⁶² Motion of the Regents of the University of Michigan, et. al. for Preliminary Injunctive Relief at 2-3, Coal. to Defend Affirmative Action v. Granholm, available at http://www.diversity.umich.edu/legal/filings/1442_001.pdf.

¹⁶³ *Id.* at 3-4.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 4.

July 1, 2007.¹⁶⁶

However, Proposal 2 supporters quickly filed an appeal seeking to overturn the temporary injunction.¹⁶⁷ The federal court judge allowed Eric Russell, a white male applicant to the Law School in the fall of 2007, to intervene in BAMN's lawsuit to oppose BAMN's request for a preliminary injunction.¹⁶⁸ Represented by the CIR, Russell subsequently appealed the district court's injunction, arguing that Article 1, §26 of the amended Michigan constitution should take effect immediately.¹⁶⁹

Upon review, the Sixth Circuit overturned the preliminary injunction, stating that federal law does not warrant suspending the enforcement of Article 1, §26.¹⁷⁰ The Sixth Circuit reasoned that, while the First and Fourteenth Amendments *permit* states to use race and gender in certain circumstances, the amendments do not *mandate* the use of race and gender preferences and therefore do not prevent states from eliminating the use of these preferences.¹⁷¹ The Sixth Circuit relied on the Court's opinion in *Grutter*, asserting that the Court never required the consideration of race, but actually encouraged the University to use race-neutral alternatives like other state universities who did not use racial preferences in their admissions programs.¹⁷² The Sixth Circuit also acknowledged Justice O'Connor's statement in *Grutter* that the Court anticipated the use of racial preferences to be unnecessary in the next twenty-five years.¹⁷³

In addressing whether one particular litigant would suffer irreparable harm as a result of the ruling, the Sixth Circuit held that neither party would suffer more than the other.¹⁷⁴ The Sixth Circuit reasoned that if it favored the University, the public interest would be harmed.¹⁷⁵ The Sixth Circuit subsequently stated that voter approval of Proposal 2 should not have surprised the University.¹⁷⁶ The court pointed out that shortly after *Grutter* and *Gratz*, affirmative action opponents immediately organized to pass the initiative and the University had adequate time to amend its 2006-2007 admissions cycle in response to the approved ban against affirmative action.¹⁷⁷

Not surprisingly, BAMN appealed the Sixth Circuit's decision to the

¹⁶⁶ *Coal. to Defend Affirmative Action v. Granholm*, No. 06-15024, 2006 WL 3953321 (E.D.Mich. Dec. 19, 2006).

¹⁶⁷ *Coal. to Defend Affirmative Action*, 473 F.3d at 242.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 243.

¹⁷⁰ *Id.* at 240.

¹⁷¹ *Id.*

¹⁷² *Id.* at 249.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 252.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Court.¹⁷⁸ On January 9, 2007, BAMN filed a motion to dissolve the stay entered by the Sixth Circuit and to reinstate the district court's temporary injunction.¹⁷⁹ BAMN argued to the Court that this case concerned issues of "fundamental national importance" and that the temporary injunction should be reinstated because it was inherently unfair to force the University to immediately comply with the ban against the use of race and gender preferences in the middle of its admissions cycle.¹⁸⁰ BAMN asserted that by forcing the University to comply with the Amendment half-way through its regular admissions cycle, the Sixth Circuit had "closed the doors of the University" to those minority students whose applications had not yet been reviewed by the admissions department.¹⁸¹ BAMN also addressed the devastating effects California's Proposition 209 had on minority students seeking admission to California's state universities.¹⁸² BAMN pointed out that the number of minority students in California's most selective colleges dropped more than fifty percent after Proposition 209's enactment.¹⁸³ Furthermore, BAMN argued that state universities in California had one year to comply with the affirmative action ban, while the Sixth Circuit ordered that the University had no choice but to comply with the ban immediately (or as BAMN called it, "cold turkey").¹⁸⁴

Russell and the CIR filed an opposition to BAMN's motion to the Court on January 17, 2006, arguing that, like California's Proposition 209, Proposal 2 is constitutional.¹⁸⁵ Russell argued that the Court should adhere to the Ninth Circuit's finding that California's Proposition 209 was constitutional because it was not a denial of equal protection for states to specifically prohibit the use of race and gender as preferential treatment in the public sphere.¹⁸⁶

On January 19, 2007, the Court denied BAMN's motion to vacate the stay entered by the Sixth Circuit.¹⁸⁷ As a result of the Court's ruling, the Amend-

¹⁷⁸ *Coal. to Defend Affirmative Action v. Granholm*, 127 S.Ct. 1146 (2007).

¹⁷⁹ Petitioners' Motion To Dissolve the Stay Entered by the United States Court of Appeals for the Sixth Circuit and To Reinstate the Temporary Injunction Issued by the United States District Court for the Eastern District of Michigan at 1-3, Jan. 9, 2007, *available at* http://www.diversity.umich.edu/legal/filings/motion_for_stay_070109_1.pdf.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 3.

¹⁸² *Id.* at 8-9

¹⁸³ *Id.* at 9.

¹⁸⁴ *Id.*

¹⁸⁵ Respondent Eric Russell's Opposition To Petitioners' Motion To Dissolve the Stay Entered by the United States Court of Appeals for the Sixth Circuit and To Reinstate the Temporary Injunction Issued by the United States District Court for the Eastern District of Michigan at 3, Jan. 5, 2007, <http://www.diversity.umich.edu/legal/filings/1-17-07StayOpp.pdf>.

¹⁸⁶ *Id.* at 13-15.

¹⁸⁷ *Coal. to Defend Affirmative Action*, 127 S.Ct. 1146.

ment is in full force today.¹⁸⁸ CIR's President, Terence Pell, stated that the Court's ruling settled the debate as to whether Proposal 2 violated federal law and noted the Court's decision "makes clear the citizens of Michigan had every right to ban the use of racial preferences in their state."¹⁸⁹

B. *ACLU Lawsuit*

On December 19, 2006, the ACLU and several named plaintiffs filed suit in the Michigan district court, seeking a declaration that the Amendment does not prohibit the University and Law School from using race as a factor in their admissions process and that the Amendment directly violates the Fourteenth Amendment.¹⁹⁰ The plaintiffs also requested that, in the event that the court did not issue a declaration allowing the University to use race in their admissions process, the court should alternatively grant injunctive relief under the Equal Protection Clause to prevent the Amendment's application.¹⁹¹ Chase Cantrell, the first plaintiff listed in the lawsuit, is an African American student at the Law School and a graduate of the University.¹⁹² Cantrell explicated the importance of diversity in the educational setting and noted that he chose to attend the Law School, as opposed to Cornell Law School, because the student body at the Law School was much more "dynamic."¹⁹³ Cantrell stated that "diversity is one of the University's greatest strengths" and fears that the Amendment would destroy the University's "rich learning environment."¹⁹⁴

Like the ACLU, BAMN also sought similar relief from Michigan's district court against the Amendment's implementation.¹⁹⁵ However, because the BAMN and ACLU lawsuits sought similar relief from the district court, the district court judge consolidated the cases.¹⁹⁶

Although it may take several months, or years, for the district court to rule on the consolidated lawsuit, the Court's recent decision to deny BAMN's request to delay the Amendment's implementation may serve as an encouraging sign to the Amendment's supporters. For instance, although *Grutter* and *Gratz* allow for the narrowly tailored use of race in a public university's admissions pro-

¹⁸⁸ The Center for Individual Rights, *U.S. Supreme Court Denies BAMN's Motion: Michigan's Section 26 Remains in Effect*, Jan. 19, 2007, <http://www.cir-usa.org/releases/90.html> (last visited Jan. 31, 2008).

¹⁸⁹ *Id.*

¹⁹⁰ Initial Complaint, Cantrell, *supra* note 158, at 2-3.

¹⁹¹ *Id.* at 3-4.

¹⁹² *American Civil Liberties Union, NAACP File Lawsuit to Allow University of Michigan Admissions Program to Continue*, US FED. NEWS, Dec. 19, 2006.

¹⁹³ *Id.*

¹⁹⁴ Initial Complaint, Cantrell, *supra* note 158, at 5.

¹⁹⁵ *Coal. to Defend Affirmative Action v. Granholm*, No. 2:06-cv-15024, 2006 WL 3885466 (E.D. Mich. Nov. 8, 2006).

¹⁹⁶ *Coal. to Defend Affirmative Action v. Granholm*, Nos. 06-15024, 06-15637, 2007 WL 120259 (E.D. Mich. Jan. 5, 2006).

grams, the district court may adhere to the Sixth Circuit's reasoning that universities are not required to consider race in their admission process and that states may ban affirmative action practices via ballot initiatives.¹⁹⁷ Moreover, the Ninth Circuit also held that California's Proposition 209 was constitutional, signaling that there is substantial precedent that may move the district court to rule in the Amendment's favor.¹⁹⁸ Nevertheless, it is now clear that unless the court later declares the Amendment unconstitutional and orders its revocation, the University and the Law School have no choice but to rely on race-neutral solutions to achieve a diverse academic environment.¹⁹⁹

V. USING RACE-NEUTRAL OPTIONS TO ACHIEVE DIVERSITY IN HIGHER EDUCATION

Given the startling decline in the number of underrepresented minorities enrolled in the University, it is imperative for the University and the Law School to choose effective solutions that will restore their diversity levels to the numbers present before the Amendment's enactment.²⁰⁰ As previously discussed, the Diversity Blueprints Report issued several recommendations for suggested race-neutral programs and institutional practices that the University should adopt in order to maintain and/or improve diversity at the institution.²⁰¹ The first policy the Taskforce suggested is the creation of educational and community outreach efforts to strengthen partnerships between the University and "underserved" schools and communities.²⁰² In reaching out to these schools, the Taskforce envisioned that the University would influence and encourage students in more demographically diverse communities to set high academic standards and better prepare for college.²⁰³ In sum, this method would attempt to minimize the "black-white achievement gap" by reaching out to minority students before they applied to the University.²⁰⁴

The second program the Taskforce suggested is the improvement of the University's existing "holistic review" admissions process and the creation of new admissions measures to assess applicants' diversity characteristics.²⁰⁵ The Taskforce suggested that under its holistic review of undergraduate and gradu-

¹⁹⁷ See *Coal. to Defend Affirmative Action*, 473 F.3d 240.

¹⁹⁸ See Respondent Eric Russell's Opposition to Petitioners' Motion to Dissolve the Stay Entered by the United States Court of Appeals for the Sixth Circuit and to Reinstate the Temporary Injunction Issued by the United States District Court for the Eastern District of Michigan, *supra* note 185, at 18.

¹⁹⁹ See discussion *supra* Section III.C.2.

²⁰⁰ See *From the Daily: Expected Returns, Drop in Minority Enrollment a Foreseen Result of Prop. 2*, *supra* note 139.

²⁰¹ See *University of Michigan Diversity Blueprints Final Report*, *supra* note 146, at 5.

²⁰² *Id.* at 8-9.

²⁰³ *Id.* at 9.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 11.

ate students' applications, applicants could include "non-traditional projects," such as videos, art, research findings and "other work projects testifying to student potential."²⁰⁶ In addition, the institutions could add new "quantifiable measures" to their applications to measure diversity, such as the distance an applicant has traveled (in an effort to determine an applicant's potential to "overcome barriers"); the direction the applicant is headed (to determine the applicant's "commitment to the improvement of the public good"); an applicant's "cognitive complexity" (to assess the applicant's "modes of diverse thinking and capacity for engaging with diverse perspectives"); and finally, the institutions could give more weight to an applicant's socioeconomic status and consider whether the applicant is a first generation student.²⁰⁷

While the Diversity Blueprints Report discussed several notable race-neutral methods to achieve diversity, I will analyze those methods suggested by the Taskforce and other race-neutral methods utilized by state universities facing similar affirmative action bans.

A. *Percentage Plan*

Although the Diversity Blueprints Report did not suggest the adoption of percentage plans as a race-neutral alternative,²⁰⁸ this method is currently employed by several state institutions that are banned from using race in their admissions programs.²⁰⁹ For instance, California, Texas and Florida employed percentage plans after their states prohibited the consideration of race in their admissions practices.²¹⁰ Under percentage plans, a specified percentage of the top students in each graduating high school class are automatically admitted to their state colleges and universities, regardless of their ACT scores, SAT scores, and race.²¹¹ While the percentage plans in California, Texas, and Florida vary according to the percentage of students each school automatically admits to public universities, some statistics have shown that, over time, the implementation of such plans slowly increased the number of underrepresented minorities that declined after the states enacted the affirmative action bans.²¹²

Author Eboni S. Nelson argues that percentage plans may serve as an effec-

²⁰⁶ *Id.* at 10.

²⁰⁷ *Id.* at 11.

²⁰⁸ See generally *supra* note 146.

²⁰⁹ Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1, 34 (2005).

²¹⁰ *Id.* at note 210.

²¹¹ Michele Sherretta, *An Alternative to Affirmative Action: Attributing Lack of Diversity in Undergraduate Institutions to a Failing Education System*, 65 U. PITT. L. REV. 655, 662 (2004).

²¹² See Nelson, *supra* note 210, at 36, showing that before the enactment of Proposition 209 in California, the number of underrepresented minorities at Berkeley and UCLA equaled 24.3% and 30.1%, respectively; following the enactment of Proposition 209, the percentages of underrepresented minorities dropped to 11.2% and 14.3%, respectively; finally, following

tive tool in assisting higher education institutions to achieve their diversity goals. Such plans, Nelson suggests, grant educational opportunities to minority applicants who would not have been admitted otherwise.²¹³ For instance, Nelson asserts that percentage plans admit more minority students by granting automatic admission to state universities for students who graduated in the top percentage of their school's graduating class, but who may have been denied admission in the past because of lower grades.²¹⁴ Nelson claims, however, that if an institution seeks to benefit from percentage plans, the institution must experiment with these plans and spend considerable time and effort implementing them because universities are not likely to see increased diversity levels for several years.²¹⁵

While the percentage plan system serves as a popular race-neutral solution for some public educational institutions, percentage plans are not without their critics. Author Michele Sherretta argues that although results vary from state to state, minority enrollment is likely to decrease at public institutions employing percentage plans.²¹⁶ In addition, Sherretta also criticizes percentage plans because they provide only a partial solution for undergraduate admissions and do not adequately address graduate schools' admissions needs.²¹⁷ Sherretta asserts that graduate programs may have to rely more heavily on standardized test scores in the absence of race-based preferences.²¹⁸ Minorities typically score lower than their white counterparts on standardized tests and, as a result, graduate schools' extra reliance on these scores may cause a school's diversity level to decrease dramatically.²¹⁹ Moreover, if law schools decided to admit students based solely on their grades and test scores, studies show that African Americans would constitute only 1.6 percent of the total number of accepted students to U.S. law schools and Hispanics would make up only 2.4 percent of this total.²²⁰

Authors William Bowen and Derek Bok suggest that race-neutral admissions would have an even greater effect on minority applicant enrollment for higher-ranked law schools (such as the University of Michigan's Law School, which is currently ranked ninth in the country²²¹).²²² For instance, if students were ad-

the implementation of California's "Four Percent Plan", each school increased their under-represented minority enrollment to 15.6% and 19.3%, respectively.

²¹³ *Id.* at 36-37.

²¹⁴ *Id.* at 37.

²¹⁵ *Id.*

²¹⁶ Sherretta, *supra* note 211, at 665.

²¹⁷ *Id.* at 664.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Bowen & Bok, *supra* note 142, at 44-45.

²²¹ See U.S. NEWS AND WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS 2007-TOP LAW SCHOOLS, available at http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php (last visited Jan. 31, 2008).

mitted solely based on their LSAT and GPA at the top tier law schools, the number of African Americans enrolled would decline to less than one percent, contrasted with 30.4 percent of African American students enrolled in the bottom tier of law schools.²²³ Such numbers suggest that higher education institutions, like the University, should not focus solely on standardized test scores or a rigid percentage plan system because diversity enrollment could decline sharply.

It is unlikely that utilizing percentage plans as a race-neutral alternative in the University and Law School could address the schools' declining diversity levels after the Amendment's implementation. Furthermore, it is doubtful that the University would even consider using percentage plans, given President Coleman's disapproval of the plans²²⁴ and the lack of consideration for these plans in the Diversity Blueprints Report.²²⁵ Coleman stated that she does not prefer percentage plans because they take away admissions officers' discretion and are typically more effective in states that have rapidly changing demographics.²²⁶ Moreover, the University could justify rejecting the use of percentage plans based on the Court's approval of the highly individualized and holistic review process utilized by the Law School in *Grutter*.²²⁷

B. *Emphasis on Socioeconomic Status*

Another possible race-neutral solution the University and the Law School could employ is to place a heavier emphasis on an applicant's socioeconomic status. Advocates of this form of "class-based affirmative action" theorize that, because African Americans are "disproportionately numbered among the poor," an emphasis on a person's class would help to achieve racial diversity while giving preference to those applicants who experienced or overcame "economic disadvantage."²²⁸ Socioeconomic status, unlike the use of race and gender, is not a protected class under the U.S. Constitution; therefore, any allegations of discrimination on the basis of wealth are not subjected to a court's strict scrutiny analysis.²²⁹ Justices Clarence Thomas and Antonin Scalia both announced their support for economic-based affirmative action before their appointments to the Supreme Court, arguing that this initiative better addresses an individual's life burdens and assists the truly disadvantaged.²³⁰

²²² Bowen & Bok, *supra* note 142, at 45.

²²³ *Id.*

²²⁴ David Gershman, *Reach Out to High Schools, U-M Advised*, ANN ARBOR NEWS, Jan. 9, 2007, at A3.

²²⁵ See generally *supra* note 146.

²²⁶ *Reach Out to High Schools, U-M Advised, supra* note 224.

²²⁷ *Grutter*, 539 U.S. at 337.

²²⁸ Bowen & Bok, *supra* note 142, at 46.

²²⁹ Sherretta, *supra* note 211, at 666.

²³⁰ *Id.* at 667.

Class-based preferences are not without their flaws. For instance, studies show that it is unrealistic for highly selective universities (like the University) to achieve diversity, while retaining high academic qualifications, by relying more heavily on class-based preferences.²³¹ Bowen and Bok claim that universities already seek to recruit and admit students from “poor” backgrounds, but there are too few qualified applicants from these backgrounds from which the universities can select.²³² The authors ultimately argue that class-based preferences cannot replace the consideration of race if universities seek to admit a class that is both diverse and “academically excellent.”²³³

The Diversity Blueprints Report recommends the consideration of an applicant’s socioeconomic status in its holistic review process.²³⁴ The University already considers an applicant’s socioeconomic status as one of more than fifty admissions criteria.²³⁵ However, before the announcement of the report, University officials stated that questions regarding an applicant’s socioeconomic status do not ultimately contribute to a diverse student population because a far greater number of white students from low-income households apply to the University than minority students from low-income households.²³⁶ This conclusion is supported by studies which show that there are not enough African Americans from poor families to make class-based affirmative action successful in achieving high diversity levels.²³⁷ African Americans are more likely than whites to come from economically disadvantaged households, but they still constitute a minority of all college-age Americans from poorer families.²³⁸ Therefore, while socioeconomic status could assist admissions officers in selecting more minority students, it appears that this race-neutral factor may only play a small role in achieving greater racial diversity at the University.

C. Diversity Outreach Programs

An additional race-neutral solution the University should adopt and aggressively promote is the creation of outreach programs to underrepresented school districts in Michigan. Race-neutral outreach programs are described as a developmental approach, rather than an admissions approach, to “increase the number and quality of diverse applicants who make their way into the application pipeline.”²³⁹ These outreach measures encourage those students who are not

²³¹ Bowen & Bok, *supra* note 142, at 50.

²³² *Id.*

²³³ *Id.* at 51.

²³⁴ *University of Michigan Diversity Blueprints Final Report, supra* note 146, at 11.

²³⁵ *Reach Out to High Schools, U-M Advised, supra* note 224.

²³⁶ *Id.*

²³⁷ Bowen & Bok, *supra* note 142, at 47.

²³⁸ *Id.*

²³⁹ Charles R. Calleros, *Law, Policy and Strategies for Affirmative Action Admissions In Higher Education*, 43 CAL. W. L. REV. 151, 166 (2006).

typically admitted to select universities by offering them “guidance, inspiration, or tutoring.”²⁴⁰ As a result, universities are able to increase the number of available minority students to select from in the applicant pool.²⁴¹

According to the Diversity Blueprints Report, it is important for the University to establish a “center for educational outreach and engagement” in order to reach out to underrepresented school districts and communities in Michigan.²⁴² The assumption is that potential students in wealthier school districts are typically better prepared for the college application process and have far superior counseling resources than minority school districts.²⁴³ Through these outreach programs, the University can target freshmen and sophomore high school students in higher minority districts and encourage them to prepare early for the college application process.²⁴⁴ In reaching out to students in less represented areas, the University can therefore still achieve diversity.²⁴⁵

Furthermore, the MCRC’s study explicitly recommends that universities create outreach programs and partnerships with K-12 schools in order to better prepare students for college and close the achievement gap between students from “different backgrounds.”²⁴⁶ The MCRC also asserts that state agencies could employ outreach programs based on race, color, or ethnicity in compliance with the Amendment, but only if those outreach programs do not rely solely on a group’s race, color, or ethnicity.²⁴⁷

This race-neutral solution appears promising because in theory, these efforts will only select schools that are underrepresented in the University’s admissions process and will not rely on the racial makeup of students in these districts.²⁴⁸ While the University could ultimately select a disproportionate number of schools that are more racially diverse than those schools not selected in these outreach efforts, this process should not appear as a pretext for the consideration of race, so long as the University selects school districts based solely on application data.²⁴⁹ Nevertheless, as the University noted, it will take several months and years to develop these outreach efforts and actually achieve the

²⁴⁰ *Id.*

²⁴¹ *Id.* at 166-67.

²⁴² *University of Michigan Diversity Blueprints Final Report, supra* note 146, at 8.

²⁴³ *See Reach Out to High Schools, U-M Advised, supra* note 224.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Michigan Civil Rights Commission, *supra* note 108, at 56.

²⁴⁷ *Id.* at 4.

²⁴⁸ While the Diversity Blueprints Report does not explain the intended logistics for selecting these “underserved” K-12 schools, the report does not discuss selecting schools based on the racial makeup of the schools’ students. *See supra* note 146, at 8-9.

²⁴⁹ For instance, the University will have to collect data from past admissions periods to determine which school districts provided the fewest number of qualified applicants to the University. The Diversity Blueprints Report recognized the need for the collection of data in order to establish specific outreach efforts. *See id.*

University's desired diversity levels.²⁵⁰

D. *Highly Individualized and "Holistic" Review*

One of the most promising race-neutral alternatives for the University and the Law School to employ is to improve their individualized, holistic review process used after the *Grutter* and *Gratz* rulings.²⁵¹ Here, the institutions could review many factors on a person's application related to race, without specifically asking the applicant to identify her race.²⁵² As the Diversity Blueprints Report noted, the University should ask applicants to submit non-traditional projects and/or presentations to show their "student potential."²⁵³ The University could encourage applicants to send submissions that highlight their experiences with diversity or their potential for contributing to a diverse campus climate.²⁵⁴ University officials already announced their belief that admissions officers can consider factors *related to* race on an application (without explicitly looking at an applicant's race) in compliance with the Amendment.²⁵⁵ The University claims that the Amendment only prohibits the University from granting preferences to an applicant based solely on his race.²⁵⁶

Author Daria Roithmayr suggests a similar program, called "The Direct Measures Program," which would question applicants regarding their experiences with race and grant preferences to applicants based on certain qualities, without actually looking at an applicant's racial background.²⁵⁷ Under this program, universities should ask certain questions of applicants, such as whether the applicant has experienced racial discrimination, whether the applicant can "contribute a perspective or viewpoint on issues of racial justice that is currently not well-represented in the student population," and whether the applicant can provide services to communities that are disproportionately underserved or excluded from the institution.²⁵⁸

Another public institution in Michigan, Wayne State University Law School, announced that it would use a similar approach to comply with the Amendment.²⁵⁹ In order to accomplish their diversity initiatives, school officials stated that, in addition to considering an applicant's GPA and LSAT score, the

²⁵⁰ Greene, *supra* note 153.

²⁵¹ See generally *supra* note 6.

²⁵² See discussion *supra* Section V.

²⁵³ *University of Michigan Diversity Blueprints Final Report*, *supra* note 146, at 10.

²⁵⁴ These types of submissions would not appear to violate the Amendment, so long as the University does not explicitly ask applicants to identify their race, but only encourages applicants to discuss their experiences with diversity. See Roithmayr *infra* note 257.

²⁵⁵ Tengel, *supra* note 136 (emphasis added).

²⁵⁶ *Id.*

²⁵⁷ Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 8 (2001).

²⁵⁸ *Id.* at 8-9.

²⁵⁹ *Affirmatively Active*, BOSTON GLOBE, Jan. 14, 2007 at 8D.

school will also consider such factors as the applicant's capacity to overcome socioeconomic disadvantage, whether the applicant has a leadership and volunteering background, whether the applicant's residence constitutes "geographic diversity," and if the applicant is the first in his family to attend college or graduate school.²⁶⁰ Applicants will also have an opportunity to discuss their abilities to overcome discrimination.²⁶¹

After the passage of the Amendment, the University announced the admissions criteria the school would utilize in trying to achieve a diverse student body.²⁶² The University stated that it would use a "thorough, holistic and personal and individualized process."²⁶³ More specifically, admissions offices would focus primarily on academic achievements, and would then review an applicant's essays, extra-curricular activities, the student's life experiences (i.e. has the student overcome any personal challenges?), and finally, consider if the student was from "a geographic area, socioeconomic profile, neighborhood, or high school that is currently underrepresented in our student community."²⁶⁴

The individualized and holistic review process, with an emphasis on questions related to an applicant's experience with diversity, may serve as one of the best race-neutral solutions for the University and the Law School to employ.²⁶⁵ The University can continue to individually assess the merits of each applicant, but establish new quantifiable measures to better assess a person's experience with diversity and ability to contribute to a diverse atmosphere.²⁶⁶ While this modified application process may take time to develop and possibly require more of the admissions officers' time (in reviewing each application),²⁶⁷ this process could serve as an effective way to admit diverse student populations in the absence of the consideration of race.

VI. CONCLUSION

After Proposal 2's approval in Michigan, Ward Connerly, the driving force behind the creation of the proposal, announced that he hopes to expand his campaign against affirmative action by putting similar measures on state ballots in as many as five states next year.²⁶⁸ Connerly stated that, while the use of race-based decision-making was not "dead," it was "on life support" and he

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *See supra* note 10.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *See discussion supra* Section V.D.

²⁶⁶ *See supra* note 146, at 11.

²⁶⁷ For instance, a potential student's application already goes through several levels of review. *See supra* note 6. If the University recommends for students to submit additional materials, this may lengthen the time required to review each application.

²⁶⁸ Silverstein, *supra* note 144.

believed that affirmative action practices would be eradicated in five or ten years.²⁶⁹ Whether or not voters in other states actually approve the ban against race-based preferences in the public sphere, universities across the country may soon realize that the use of race in admissions practices may be limited or eradicated in the near future.

It is clear that absent a court ruling striking down the Amendment, the University must embrace the new challenge of complying with the Amendment and serving as a leader in successfully using race-neutral alternatives to achieve diversity. The recommendations set forth in the MCRC's report and the Diversity Initiatives Report provide promising solutions, but the University and the Law School must remain vigilant in testing these recommendations, applying a combination of these recommendations, and continually seeking out new race-neutral solutions. As evidenced by *Grutter* and *Gratz*, the University and the Law School have led diversity initiatives for many years. Despite the struggles other state universities have faced with affirmative action bans, the University and the Law School now have the opportunity to demonstrate to the educational community that they can craft effective solutions to maintain and improve their diverse student environments, without compromising their academic excellence.

Monica L. Rose

²⁶⁹ *Id.*

