University of Dayton Law Review

Volume 31 | Number 2 Article 7

2-1-2006

Affirming Michigan's Action: The Michigan Journal of Race & Law's Response to Dr. Carcieri's Grutter v. Bollinger and Civil Disobedience

Adam Blumenkrantz

Jason Belmont Conn

Amrita Mallik

Michael Murphy

AFFIRMING MICHIGAN'S ACTION: THE *MICHIGAN JOURNAL OF RACE & LAW*'S RESPONSE TO DR. CARCIERI'S "*GRUTTER V. BOLLINGER* AND CIVIL DISOBEDIENCE" ♦

Adam Blumenkrantz [a]

Jason Belmont Conn [b]

Amrita Mallik [c]

Michael Murphy [d]

FORWARD

The University of Michigan Law School's ("Michigan Law") Class of 2006 will always have a unique connection to the affirmative action debate. In Spring 2003, as our class received acceptance letters from Michigan Law, media outlets and legal scholars from around the country were publicly scrutinizing, questioning, and debating the constitutionality of the very admissions criterion used to select us.[1] Our class, indeed the entire country, waited for the Supreme Court to determine the legitimacy of

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♦ The opinions expressed in this article do not represent the official views of the University of Michigan or the University of Michigan Law School. This article represents the position of the Volume 11 Editorial Board of the *Michigan Journal of Race & Law* ("*Journal*"). The purpose of the *Journal* is to serve as a forum for the exploration of issues relating to race and law, most specifically those issues that are marginalized in mainstream legal discourse. The *Journal* seeks to provide a space for scholars of all races to expand and develop a theoretical, critical, and socially relevant race discourse. To that end, the *Journal* publishes the views of scholars, students, practitioners, and social scientists. For more information on the *Journal*, please visit http://students.law.umich.edu/mjrl/.

[a] Executive Editor, 2005-06, *Michigan Journal of Race & Law*. J.D. expected May 2006, University of Michigan Law School; B.A. 2003, University of Virginia.

[b] Executive Articles Editor, 2005-06, *Michigan Journal of Race & Law*. J.D. expected May 2006, University of Michigan Law School; A.B. 2003, Cornell University.

[c] Editor in Chief, 2005-06, *Michigan Journal of Race & Law*. J.D. expected May 2006, University of Michigan Law School; B.A., 2003, Brown University.

[d] Executive Notes Editor, 2005-06, *Michigan Journal or Race & Law*. J.D. expected May 2006, University of Michigan Law School; B.A. 2001, Oakland University.

[1] Darryl Fears, *At U-Michigan, Minority Students Find Access – and Sense of Isolation; Affirmative Action Debate Intensifies Emotions on Campus*, The Washington Post A3 (April 1, 2003); Marvin Krislov, *Open the 'Black Box' of College Admissions*, 49 The Chron. of Higher Educ. 1, 16 (August 1, 2003); Kevin Rothstein, *Case for Race; Divided Supreme Court Backs Affirmative Action*, The Boston Herald 1 (June 24, 2003).

Michigan Law's admissions process and decide what role, if any, race could play in that process.[2]

In June 2003, the Supreme Court upheld the use of race in college admissions with the companion decisions of *Grutter v. Bollinger*[3] and *Gratz v. Bollinger*.[4] Despite the Supreme Court's decisions in the Michigan cases, the debate over affirmative action raged on.[5] Indeed, over the last three years, newspapers, television programs, and legal journals have been riddled with analyses and proposals as to how America's academic institutions should respond to the Court's rulings in the Michigan affirmative action cases.[6] In this article, at the request of our colleagues at the University of Dayton Law Review, we respond to one such proposal put forth by Dr. Martin Carcieri in "Grutter v. Bollinger *and Civil Disobedience*."[7]

RACE UNCONSCIOUS: CARCIERI'S PROPOSAL

Carcieri argues that *Grutter* explicitly contradicts the "command of the 1964 Civil Rights Act" and suggests that Michigan's use of affirmative action amounts to unconstitutional racial discrimination under the Equal Protection Clause.[8] At the core of Carcieri's criticism of *Grutter* is his skepticism about the legitimacy of a diversity rationale for affirmative action.[9] Additionally, even in the face of the Court's decisions in *Gratz* and *Grutter*, Carcieri believes that affirmative action programs violate the law's "plain command" and that a college's decision to use such a program is morally and legally reprehensible.[10] Finally, Carcieri reasons that if academic institutions like Michigan continue using affirmative action programs, teachers and professors should practice civil disobedience by "distort[ing] students' grades and reference letters based on race in order to

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[2] Joan Biskupic, *Justices Take Up College Race Rules*, USA Today 1A (Dec. 3, 2002); Frank J. Murray, *Ruling On Race Likely To Spur Fight; States To Lead Way In Admission Plans*, Washington Times A1 (June 30, 2003).
[3] 539 U.S. 306 (2003).
[4] 539 U.S. 244 (2003).
[5] *See, e.g.*, V. Dion Haynes, *New Battle on Affirmative Action; Opponents Plan to Seek Ban Via Vote in Michigan*, Chicago Tribune C8 (July 8, 2003).
[6] Tametha D. Barker, *Top of the Class: Understanding the Texas Higher Education Coordinating Board, the "Ten Percent Plan," and the Future of Higher Education in Texas*, 5 Tex. Tech J. Tex. Admin. L. 231, 252 (Summer 2004) ("The Debate Continues"); John Valery White, *From Brown to Grutter: Affirmative Action and Higher Education in the South: Article: What is Affirmative Action?*, 78 Tul. L. Rev. 2117, 2179-80 (2004) ("[D]ebates rage unabated with the parties arguing past the other side. Issues are neither framed nor resolved. And some commentators long for a magical resolution of the now tired debate. That resolution begins in an analytic definition.").
[7] Martin D. Carcieri, Grutter v. Bollinger *and Civil Disobedience*, 31 U. Dayton L. Rev. 345 (2006). Dr. Carcieri is an Assistant Professor of Political Science at the University of Tennessee, Knoxville.
[8] *Id.* at 356-61.
[9] This skepticism is shared by some proponents of affirmative action as well. Luke A. Harris, *Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools*, 9 Mich. J. Race & L. 1, 2 (2003); *but see* Marty B. Lorenzo, *Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest*, 2 Mich. J. Race & L. 361 (1997).
[10] Carcieri, *supra* n. 7, at 351 n. 23.

offset the discrimination."[11] Carcieri's ultimate goal is to force schools, such as Michigan, to adopt race-blind admissions policies.

SYLLABUS

Carcieri's argument emanates from a philosophy of colorblindness.[12] We argue that looking at the law in a colorblind manner serves only to perpetuate a systematic institutionalized racial hierarchy. In Section I, we examine the history of racial inequality and its current manifestations. It is through this lens that we must analyze the Court's treatment of affirmative action. We present a brief history of the case law that served as the backbone for the Court's rulings in *Grutter* and *Gratz* and suggest that the diversity rationale in *Grutter* is strongly grounded in the Court's jurisprudence. Section II turns to the issue of civil disobedience and whether Carcieri's proposal for race-based grading and recommendations is in fact analogous to Paul Butler's theory of race-based jury nullification. After analyzing the use of race in our criminal jury system as well as highlighting power inequities in our society, we will argue that Carcieri's suggested race-based actions are antithetical both to Butler's theory of nullification and our accepted notions of civil disobedience. In Section III we examine Carcieri's specific proposal for the use of distorted grading and letters of recommendation. We dispute his assertion that these methods are a measured response to race-conscious admissions policies, arguing that his means create a significant harm to uninvolved third parties. Finally, in Section IV, we examine the myths of colorblindness and discuss the importance of utilizing race-based affirmative action programs to dismantle racial hierarchies in order to achieve true equality.

I: A HISTORY OF DISCRIMINATION

There are many different places one could begin a review of the history that led to the Court's decisions in *Grutter*[13] and *Gratz*.[14] One could easily begin with the Supreme Court's 1978 decision in *Regents of the University of California v. Bakke*,[15] which examines the race-conscious

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[11] *Id.* at 365.

[12] As former Senator Walter F. Mondale recently wrote: "As the last half-century has shown, changing the law does not necessarily change hearts and realities. We still have a long road to travel before we achieve an America that truly realizes the promise of Brown and the Civil Rights Acts." Walter F. Mondale, *Reflections on Fifty Years of Progress in Civil Rights, Liberties, and Participation*, 89 Minn. L. Rev. 1, 3 (2004). And "[the] story of judicial and legislative success, however, should not lead to complacency today. Racism still exists in our society." *Id.*

[13] 539 U.S. 306.

[14] 539 U.S. 244.

[15] 438 U.S. 265 (1978).

admissions program at the University of California Medical School at Davis.[16] One could begin by looking at the political history of affirmative action, starting with President Johnson's oft-quoted address at Howard University in which he publicly recognized the need for affirmative action.[17] Or one could begin with the governmental development of affirmative action, traced back to President Kennedy's decision to issue Executive Order 10925 in March 1961, which mandates that federally funded projects undertake "affirmative action" to make sure that employment practices were not made on the basis of racial bias.[18] But our nation's history of affirmative action really begins at the Founding with the establishment of sexist and racist structural and institutional barriers to equality.

A. *History of Educational Discrimination*

The history of educational discrimination creates the need for affirmative action. Even though the Supreme Court has ruled that affirmative action programs today pass constitutional muster because of the import of diversity,[19] there are other persuasive justifications for validating these programs. To ignore American history prior to the twentieth century and "wipe the slate clean,"[20] as many legal scholars choose to do when examining affirmative action, seems somewhat disingenuous and naïve. Disregarding this country's unique experience with race merely "whitewash[es] the relevant contextual history" and assumes a disconnect between that history and the need for diversity in the classroom today.[21]

Even though law schools have served as the main source of leaders and lawmakers since the Founding, it was less than 75 years ago that the

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[16] *Id.*

[17] In his address at Howard University, President Johnson stated:

> [F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person, who, for years has been hobbled by chains liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity.

President Lyndon B. Johnson, Commencement Address, *To Fulfill These Rights* (Howard U., June 4, 1965), in Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965, vol. II, 635-40 (Government Printing Office 1966).

[18] Daron S. Fitch, Student Author, *The Aftermath of Croson: A Blueprint for a Constitutionally Permissible Minority Set-Aside Program*, 53 Ohio St. L.J. 555, 557 (1992) ("President John F. Kennedy coined the term 'affirmative action'" and created the Committee on Equal Employment Opportunity.).

[19] *Grutter*, 539 U.S. at 325.

[20] *Cf.* Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DePaul L. Rev. 1181, 1209 (2004) ("To credit the United States with abolishing slavery does not quite wipe the slate clean. For there would have been no need for abolition of slavery in the United States unless it had been imposed by law here.").

[21] Bryan K. Fair, *Re(caste)ing Equality Theory: Will Grutter Survive Itself By 2028?*, 7 U. Pa. J. Const. L. 721, 728 (2005).

Supreme Court held that blacks were entitled to a legal education.[22] In 1938, the Court stated that the School of Law at the University of Missouri had to either admit black students or "provide negroes with advantages for higher education substantially equal to the advantages afforded to white students."[23] Many schools were slow to provide any opportunities for a legal education to minorities and these post-*Plessy* "separate but equal" schools rarely provided blacks with the same legal education as their white counterparts.[24] As Professor Oko explains:

> In 1950 law schools fell into three broad categories: schools that could and would admit blacks if found to be qualified; schools that had no statutory or constitutional inability to admit blacks but had a university or school policy of refusing admission to blacks; and schools that were prohibited by state law from admitting Blacks.[25]

The legal profession should be ashamed that the short 30-year history of affirmative action programs since *Bakke* has created more uproar within the legal community than the 300 years of racial animus and discrimination before it.[26] One can only wonder what America would look like if the many generations of white leaders who developed their views of society, equality, and constitutional law at our nation's homogenous law schools had interacted with and heard the perspectives of black classmates.[27]

As historian Roger Wilkins wrote in defense of affirmative action, "blacks have been on this North American continent for 375 years and … for 245 the country permitted slavery. [F]or the next hundred years we had legalized subordination of blacks, under a suffocating blanket of condescension and . . . [w]e've had only thirty years of something else."[28] Indeed, it is America's complex history of slavery, institutional discrimination, and racism that have created racial schisms in our society that delve deeper than socio-economic class and geographical differences. It

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[22] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 344 (1938).
[23] *Id.*
[24] *See Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
[25] Okechukwu Oko, *Laboring In The Vineyards Of Equality: Promoting Diversity In Legal Education Through Affirmative Action*, 23 S.U. L. Rev. 189, 197 (1996). In fact, in 1969, thirteen black students enrolled at Michigan Law, "the largest cohort of black students in the school's history." David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 Hous. L. Rev. 1, 46 (2004).
[26] *See* Oko, *supra* n. 25, at 195-99 (discussing the historical lack of diversity at law schools and explaining that admissions policies "resulted in the exclusion of minorities").
[27] *See* Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 Fordham L. Rev. 2301, 2320-23 (2004).
[28] Roger Wilkins, *Racism has its Privileges*, The Nation, 409, 412 (Mar. 27, 1995).

is not discriminatory for universities to recognize this history, and the diversity of experiences it has created, and develop an admissions process that takes race into account.[29]

B. *The Supreme Court and Affirmative Action*

Carcieri's argument that the courts should frame affirmative action as discrimination against non-minorities has been used repeatedly in the affirmative action debate since the inception of race-conscious admissions programs.[30] As one scholar recently wrote, "The legal and sociological debate surrounding affirmative action centers around two concepts: affirmative action as a remedy for past discrimination and affirmative action as a form of discrimination."[31] In fact, the conflict between these two perspectives has shaped the jurisprudence and social debate over affirmative action.[32]

1. *Regents of the University of California v. Bakke* [33]

In *Bakke*, the Supreme Court addressed this *reverse discrimination* argument in the context of race-conscious admissions for the first time.[34] A legal challenge was brought by Allen Bakke, a thirty-five year old white male, who had been rejected twice by the University of California Medical School at Davis. The medical school had a general admissions program, but also kept a certain number of "special admissions slots" open for minority candidates.[35] Despite scoring significantly higher on all objective measures than the average admitted student accepted under the special admissions program, Bakke was rejected.[36] Bakke brought an action against the school claiming that the medical school had violated "his rights under the Equal Protection Clause of the Fourteenth Amendment, Art. I, § 21, of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964."[37]

The Court's chaotic decision in *Bakke* spurred considerable debate within the legal community. Four of the Justices wrote that any admissions

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[29] Carla O'Connor, *I'm Usually the Only Black in My Class: The Human and Social Costs of Within-School Segregation*, 8 Mich. J. Race & L. 221 (2002) (discussing the unique experiences of blacks in the classroom setting).
[30] Characterizing modern admissions programs as "race-conscious" implies that there was a time in which admissions programs were not race-conscious. However, admissions programs were race-conscious long before the term became popularized.
[31] Shaakirrah R. Sanders, *Twenty-Five Years of a Divided Court and Nation: "Conflicting" Views of Affirmative Action and Reverse Discrimination*, 26 UALR L.J. 61, 84 (2003); *see also* Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 Mich. J. Race & L. 1 (2001).
[32] Sanders, *supra* n. 31.
[33] 438 U.S. 265.
[34] *Id*. at 413; Joyce A. Hughes, *"Reverse Discrimination" and Higher Education Faculty*, 3 Mich. J. Race & L. 395 (1998).
[35] *Bakke*, 438 U.S. at 266.
[36] *See id.* at 277 n. 7.
[37] *Id.* at 278.

program that constituted a racial quota system supported by the government violated the Civil Rights Act of 1964. Justice Powell agreed with the majority that quota systems should be prohibited and cast the needed fifth vote to force the medical school to admit Bakke. However, the remaining four Justices wrote that the use of race was constitutionally permissible because, although all racial classifications are inherently suspect, the goal of remedying the chronic minority underrepresentation in the medical field passed constitutional scrutiny. Justice Powell agreed that race could be considered in admissions, but only to the extent that it was "only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[38] Justice Powell's solo concurrence became the opinion of the Court.

Bakke's six separate opinions are difficult to navigate. Nevertheless, the decision clearly, if not strongly, endorsed the use of affirmative action in admissions programs, struck down the use of racial quotas, and held that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."[39] Thus, the Court determined that an analysis of Title VI must begin and end with the Court's equal protection jurisprudence.

2. *Grutter v. Bollinger* [40]

Three years ago, in *Grutter*, the Supreme Court affirmed the constitutionality of Michigan Law School's affirmative action program, rejecting a challenge by Barbara Grutter, a white applicant.[41] Five Justices sanctioned Michigan Law's use of race in its admissions process and

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[38] *Id.* at 314.
[39] *Id.* at 287.
[40] 539 U.S. 306. For a summary and discussion of the *Grutter* decision, *see* Soraya Fata & Amy Schumacher, *Current Event:* Grutter v. Bollinger *123 S. Ct. 2325 (2003)*, 11 Am. U.J. Gender Soc. Pol'y & L. 1215 (2003).
[41] *See Grutter*, 539 U.S. at 328 ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body.").

> Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991 until 1998). Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 78 Stat 252, 42 USC § 2000d; and Rev Stat § 1977, as amended, 42 USC § 1981.

Id. at 316-17.

"endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."[42] In a companion case, *Gratz v. Bollinger*, the Court characterized Michigan's undergraduate admissions system as a quota and rejected it, but the Court maintained that race could be used in limited circumstances.[43]

In *Grutter*, the Supreme Court reaffirmed the use of race and ethnicity as possible factors in making admissions decisions as long as their use does not "operate as a quota."[44] Reiterating the need for individualized attention to applicants, and echoing Powell's formulation of diversity in *Bakke*, the Court wrote:

> [T]ruly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.[45]

Contrary to Carcieri's view that the Court did not properly execute its Equal Protection review of affirmative action in *Grutter*, Justice O'Connor, delivering the opinion of the Court, carefully outlined the steps of the strict scrutiny analysis of Michigan's program.

First, Justice O'Connor noted that Michigan Law treated applicants differently because of race, thus triggering the Equal Protection Clause: "[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[46]

Second, Justice O'Connor stated that this "observation 'says nothing about the ultimate validity of any particular law; that determination is the

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[42] *Id.* at 325.
[43] *Gratz*, 539 U.S. 244. Since Carcieri's argument largely focuses on *Bakke* and *Grutter*, we have elected not to provide an in depth analysis of *Gratz v. Bollinger*. In that case, while recognizing that diversity is a compelling interest, the Court found that the undergraduate admissions policy of an automatic distribution of 20 points to each applicant qualifying as an "underrepresented minority" was not narrowly tailored and does not provide the "individualized consideration that 'Justice Powell considered a hallmark of a constitutionally appropriate admissions program.'" *Id.* at 269.
[44] *Grutter*, 539 U.S. at 335.
[45] *Id.* at 334 (internal citations omitted).
[46] *Id.* at 326-27.

job of the court applying strict scrutiny.'"[47] Critics of the *Grutter* decision cite the many race-based classification cases that the Court reviewed in between *Bakke* and *Grutter* as evidence that such classifications are always unconstitutional. However, the Court has "never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, [has the Court] directly addressed the use of race in the context of public higher education."[48] The "strict in theory, but fatal in fact" conception is a conclusory oversimplification, and *Grutter* instructively reflects a more methodical approach to equal protection review.[49] "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."[50]

Third, Justice O'Connor examined whether Michigan Law had justified its use of a racial preference by presenting a compelling interest, noting that "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."[51] Michigan Law asked the Court to "recognize, in the context of higher education, a compelling state interest in student body diversity."[52] Michigan Law demonstrated that there were educational benefits to enrolling a critical mass of students from underrepresented minorities. In recognizing student diversity as a compelling interest, the Court was not merely accepting a "rationale of convenience" to justify sustaining affirmative action programs.[53] Rather, the Court carefully considered evidence from many sources in the educational, business, military, and governmental communities and continued its "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[54]

Finally, Justice O'Connor stated that the "Law School's admissions program b[ore] the hallmarks of a narrowly tailored plan."[55] The Court reasoned that as long as race was used as a single factor among many, and no quota-system was in place that insulated an applicant from competition

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[47] *Id. (*quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995)).
[48] *Id.* at 328.
[49] *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980).
[50] *Grutter*, 539 U.S. at 326-27.
[51] *Id.* at 326.
[52] *Id.* at 328.
[53] *Id.* at 393.
[54] *Id.* at 328.
[55] *Id.* at 334.

with all other applicants, Michigan Law's admissions program was narrowly tailored.[56]

C. *Title VI and Equal Protection Analysis*

Carcieri describes Title VI and Equal Protection as two unrelated legal principles. However, this is not how the Court has interpreted Title VI.[57] The Supreme Court has clearly and consistently stated that Title VI only disallows programs that violate the Equal Protection Clause.[58] Indeed, Congress' decision not to change or amend Title VI in the face of repeated Supreme Court decisions, including *Bakke*, which equated Title VI's protections to those of the Equal Protection Clause and the Fifth Amendment, implicitly suggests that the Court's interpretation is correct and that affirmative action does not fall within Title VI's proscriptions.[59] Thus, in *Grutter*, the Court appropriately conducted an equal protection review of the Michigan plan. Any reliance on one's interpretation of the *plain command* of Title VI fails to account for the legal and historical reality of Title VI's breadth and its incorporationist purpose.

D. Grutter *as Approval, Not a Mandate*

Grutter provides qualified approval of race-conscious admissions.[60] In furnishing guidance for and constraints on affirmative action programs, the Michigan cases serve as a roadmap for universities that seek educational diversity. However, these cases should not be mistaken for a mandate that forces all universities to implement affirmative action programs. *Grutter* gives considerable freedom and cautious deference to the educational establishment and university elites at each institution to determine the best way to create a positive learning environment:

> [G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special

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[56] *Id.*

[57] *Bakke*, 438 U.S. at 287 ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); *Gratz*, 539 U.S. at 276 ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI."); *see also Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (using similar language).

[58] *Gratz*, 539 U.S. at 276.

[59] *See* Bradford C. Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. Cin. L. Rev. 517, 531-32 (2003) (discussing the significance of Congress' decision not to repeal Title VI); C. Mark Pickrell, *Race Preferences In State University Admissions: Fifth Circuit Decision In Hopwood v. Texas Poised For Supreme Court Review*, 48 Loy. L. Rev. 505, 512 (2002) (finding that the main point of agreement between Justices Powell and Brennan in *Bakke* was that "Bakke's case could not be resolved by Title VI").

[60] As President George W. Bush stated, "Diversity is one of America's greatest strengths. Today's decisions [*Grutter* and *Gratz*] seek a careful balance between the goal of campus diversity and the fundamental principle of equal treatment under the law." Neil A. Lewis, *The Supreme Court: Court Vacancies; Some On The Right See A Challenge*, N.Y. Times A1 (June 24, 2003).

> niche in our constitutional tradition. The freedom of a university to make its own judgments as to education includes the selection of its student body. By claiming the right to select those students who will contribute the most to the robust exchange of ideas, a university seeks to achieve a goal that is of paramount importance in the fulfillment of its mission. The Court's conclusion that a law school has a compelling interest in a diverse student body is informed by the view that attaining a diverse student body is at the heart of a law school's proper institutional mission.[61]

Many critics of the Court's decisions in the affirmative action cases provide individualized anecdotal evidence to support their general condemnation of affirmative action. This type of argument simply attempts to substitute one's own individual judgment of what creates a positive learning environment with the judgment of an entire university community that has developed an admissions process over decades, even centuries, of experiences in higher education. The Court left it up to each university to determine how it will achieve its goal of educational diversity within the parameters of *Grutter* and *Gratz*. By upholding race-conscious admissions, *but not mandating their use*, the Court recognized that what works for one school may not work for another. Although Carcieri may not agree with its decision, "The Law School has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."[62]

II: THE MISGUIDED VIEW OF CIVIL DISOBEDIENCE

Carcieri's belief that *Grutter* was wrongly decided has led him to propose a plan for compensating students through grades and recommendations for any unequal treatment they might be exposed to by graduate admissions programs. Carcieri seeks to justify his proposal for race-conscious professorial actions both by classifying them as "civil disobedience" and concurrently analogizing them to Butler's theory of race-based jury nullification.[63]

In his article, Butler proposes that black jurors in cases of non-violent offenses should ignore the evidence, testimony, and legal

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[61] *Grutter*, 539 U.S. at 330 (internal citations omitted).
[62] *Id.* at 333.
[63] Carcieri, *supra* n. 7, at 354.

instructions provided by the judge and instead vote to acquit.[64] Carcieri argues these race-conscious actions are examples of civil disobedience, and analogizes his own position to that of Butler's jurors.[65] According to Carcieri, if one is to accept Butler's proposal for civil disobedience as proper, one cannot also find fault with his own proposal for professorial disobedience:

> Indeed, given its commitment to racial discrimination, UM seems to be in a bind whether it rejects or embraces Butler's thesis. If it rejects it, it can hardly do so on the principle that race should not be used to determine how the state treats individuals seeking valuable public resources. If it embraces it, it will have a hard time convincing those in my position that we, unlike the jurors, should not also secretly allocate the public power/resources under our control based on race for "good reasons."[66]

The premises upon which Carcieri builds his comparison prove to be weak under examination. The practice of jury nullification, as explicated by Butler, enjoys a long and accepted place in our criminal justice system, emanating from the role a jury serves in our democracy. Although the widespread use of jury nullification is civil disobedience, Butler's proposal, which advocates its application only in limited circumstances by African-American jurors, should instead be deemed a legally and morally appropriate means to address and counter the pervasive racial hierarchy present in our criminal justice system and society more broadly.[67] Further, even if we concede that Butler's specific proposal for race-based jury nullification is civil disobedience, the comparison with Carcieri's proposal still breaks down upon considering the racial context in which each proposal is made. As expounded by philosophers, scholars, and activists for centuries, civil disobedience is understood as an unlawful practice executed by a powerless and subordinated group to protest the unjust practices imposed by a majority.[68] In contrast, Carcieri's proposal effectively urges a majority group to bypass the recognized political process in defiance of a single, moderate Supreme Court decision. Because his proposal fails to account for the power dynamics and inequities present in our society, it should be rejected as *unjust* and an *improper* act of civil disobedience.

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[64] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 714 (1995).
[65] Carcieri, *supra* n. 7, at 355.
[66] *Id.* at 355 n. 48.
[67] In the context of Butler's article, it does not necessarily matter whether his actions are classified as civil disobedience or not. At some points in the article Butler recognizes their legality while at other points he concedes that they are acts of civil disobedience. His argument maintains that they are *morally* proper, regardless of their legality–in fact, Butler might have an incentive to classify his proposal as civil disobedience in order to accentuate the strength of his argument.
[68] Butler, *supra* n. 64, at 714.

Finally, even if we accept Carcieri's purpose as valid, we argue that the means he proposes for attaining these ends are significantly overbroad and irrevocably harmful to innocent third parties.

A. *Why Jury Nullification is Not In Fact Civil Disobedience*

The legality of jury nullification has been examined extensively in legal scholarship;[69] this section will not address that question in great detail. Instead, it will examine the role jury nullification plays in our legal system and argue that, when utilized in specific circumstances, jury nullification is not a form of civil disobedience. As a result, Butler's proposal serves as a poor starting point for justifying Carcieri's acts of civil disobedience. To demonstrate this, we look at the purpose of the jury and the requirement that the jury represent a cross-section of the community to explain how jury nullification fits within this overall purpose. This will enable us to look at Butler's race-based jury nullification theory from a perspective that explicitly considers race and how it relates to power and the issue of democratic minority oppression. A comparison of Carcieri's suggestion for civil disobedience with Butler's reveals that the two are actually antithetical to each other.

1. The Role of the Jury

The importance of a jury to the nation's framers cannot be overestimated. The right is explicitly mentioned in three of the first ten Amendments to the U.S. Constitution, and it is the only right incorporated into all state constitutions written between 1776 and 1787.[70] The inclusion of the right stemmed from several factors: preventing government oppression, promoting self-governance, and representing the community.

a. Preventing Government Oppression

The framers believed the jury would prevent Government oppression. Just as our intricate system of checks and balances ensures that the Legislative and Executive branches do not possess unbounded power, juries prevent the judiciary from injecting its bias and overt political leanings into the criminal justice system. According to the Supreme Court in *Duncan v. State of Louisiana*, "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the

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[69] *See* Teresa L. Conaway et al., *Jury Nullification: A Selective, Annotated Bibliography*, 39 Val U. L. Rev. 393 (2004) (offering an annotated survey of many of the major articles written on the topic of jury nullification in the past several decades).

[70] Akhil Reed Amar & Alan Hirsch, *For the People: What the Constitution Really Says About Your Rights*, 55 (The Free Press 1998).

corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[71]

By participating in the criminal justice process, the jury is, in addition, serving the larger role of preventing abuse by the other branches of government. If exceedingly harsh laws are passed or enforced in a manner that blatantly discriminates against a class of citizens, the jury provides a last line of democratic accountability. Not only does the jury weigh the evidence, but it also considers how the government obtained such evidence, whether the government investigation was fair, and whether prosecutorial discretion was exercised in a manner that accords with the will of the people. While inexorably haphazard and random in its application, a nullifying statement by the jury in this institutionalized setting sends a signal to the other branches of government that flaws exist in the criminal justice system.

b. Self-Governance

In addition to preventing government oppression, the jury system also serves the important functions of promoting self-governance and a democratic culture.[72] As Akhil Amar and Alan Hirsch note, "[In] preventing tyranny, playing a role in the formation of public policy, bringing citizens together in a vital public forum to exercise and improve their capacity for self-government–the jury serves an inherently populist and republican function far transcending the role of meeting out justice to the parties in a case."[73] Juries serve as disaggregated institutions within our democracy where a unique type of dissent is encouraged–dissenting by deciding.[74] Participating on a jury, like voting, remains one of the few forms of pure democracy in our constitutional system; deliberation on important public issues is conducted on the smallest of scales, and the final decisions are stamped with the direct force of law.[75]

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[71] 391 U.S. 145, 156 (1968); *see Taylor v. La.*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power–to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."). In other words, only by replacing a government official with ordinary citizens at some stage in the criminal justice process are we certain that the preceding steps of the process were conducted in a fair and just manner. The fact that the jury is the final stage of that process further highlights its significance.

[72] Amar, *supra* n. 70, at 52, 55.

[73] *Id.* at 58.

[74] *See* Heather Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745, 1761 (2005). While minority groups, such as African-Americans, are typically prevented full participation in our democratic process, the jury provides a concrete forum, albeit imperfect, where their voices are recognized.

[75] A jury's decision to acquit a defendant cannot be overturned, even if the verdict appears unsupported by the evidence. *See* Peter Westen & Richard Drubel, *Towards a General Theory of Double Jeopardy*, 1981 S. Ct. Rev. 81, 129-31 (1981) (arguing that the only rationale for immunizing acquittals from review is in fact the desire to protect the jury's power to act against the weight of the evidence).

Broad participation by ordinary citizens in the jury process generates a perception that all facets of the criminal justice system are functioning properly. Society is less suspicious of decisions to imprison individuals when such decisions are made by a group of ordinary citizens rather than by single state officials.[76] In that way, juries indirectly inform each of these government actors that they are *doing a good job* and the system is functioning properly.

c. Representing the Community

The validating and palliative functions of the jury are buttressed by the Supreme Court's requirement that all states adopt jury selection processes that ensure no segment of the population is systematically excluded from participation. The cross-section requirement reflects the belief that the jury's attainment of a common-sense community-based sentiment can be achieved only by ensuring that all groups participate in the administration of justice.[77] The public will be more accepting of verdicts that flow from a jury representative of the local community as opposed to one that is sexually or racially homogenous, especially when the defendant is a member of the opposite sex or race.[78] Without widespread public participation in the jury system, public faith in the institution will undoubtedly decline.[79] The degree of public faith our nation maintains in our criminal justice system, therefore, seems dependent upon the approval of minorities in representative juries.[80]

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[76] *See* Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 7 (Spec. ed., Leg. Lib. Classics 1993) ("because of popular participation, the jury makes tolerable the stringency of certain decisions").

[77] As the Supreme Court stated in *Taylor*:

> Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. 'Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case.'

419 U.S. at 530.

[78] Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent. L. Rev. 1033, 1037-38 (2003).

[79] *See* Robert Walters et. al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 320 (2005) ("Nearly 70% of Americans believe that the right to have disputes decided by a jury of ordinary, randomly selected citizens is the most important element in the legitimacy of the court system in the United States."). Furthermore, representative juries, in addition to advancing the appearance of justice, also introduce a level of diversity that we value in such bodies.

[80] This is precisely O'Connor's argument in *Grutter* about maintaining diversity to sustain the legitimacy of our nation's institutions: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of

2. Jury Nullification?

A conviction by a representative jury offers a favorable vote of confidence for government institutions. Yet if our criminal justice system seeks to validate itself on the backs of minority jurors, it must also face the risk that these same jurors will reject that cause.[81] Whether as a result of perceived discrimination in the creation of laws by the legislature or perceived discrimination in their enforcement, Butler argues that African-American jurors have the opportunity, even perhaps the duty, to express their discontent with the system or the case at hand through the lawful means that the jury system provides: jury nullification.[82] For example, a vote of no confidence by a handful of African-American jurors serves as a type of miner's canary, a wake up call to the government that something is potentially very wrong in our criminal justice system.[83] While our system may not encourage such behavior, it allows for it.

In this way, jury nullification falls inside the bounds of our criminal justice system and in fact supports the rule of law.[84] Therefore, it is not civil disobedience. Nevertheless, approval of jury nullification is typically tempered by delineating specific circumstances in which it is most legitimate.[85]

Butler's theory expressly rejects the tool of jury nullification as a widespread means to foster social change. His proposal applies to only a small class of non-violent crimes. Yet we recognize that the broader practice of jury nullification, when executed outside a specific context, can contravene the rule of law, and could arguably be considered civil disobedience. Therefore, for the purposes of the next section, we will assume, as Carcieri does, that jury nullification is a form of civil disobedience. Even if we make this concession, Carcieri's analogy between Butler's theory and his own proposals, which themselves can be deemed racialized and oppressive professorial actions, remains seriously flawed. It is to these flaws that we now turn.

B. *Losing Sight of Power Differentials*

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every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." 539 U.S. at 332.

[81] *See* Butler, *supra* n. 64, at 711-14.

[82] *See id.* at 708.

[83] Lani Guinier & Gerald Torres, *The Miner's Canary* 11-31 (Harvard U. Press 2002).

[84] In fact, these acts may not be "nullification" at all. The phrase "jury nullification" seems somewhat conclusory as the term "nullification" itself seems to taint the action with the imprimatur of lawlessness. Nullification as lawlessness only results when the jurors are overriding the weight of the evidence and not seeking to express their own injustice at the substance of the law, the potential punishment then can be meted out, or the process used to obtain conviction. Daryl K. Brown, *Jury Nullification within the Rule of Law*, 81 Minn. L. Rev. 1149 (1997).

[85] *See e.g.* Amar, *supra* n. 70, at 109 (arguing that nullification is only legitimate "when [the jury] believes that a conviction would be unjust to *the particular defendant* because of the circumstances of the case") (emphasis in original).

In a truly colorblind and equal society, where socially-constructed differences do not translate into hierarchy, the civil disobedience of one group in defiance of the law would presumptively be treated the same as the defiant acts of another group. The reality, however, is that such conditions do not exist today in the United States. African-Americans presently struggle within a hierarchy that is the result of a long oppressive history of *de jure* and *de facto* discrimination. This hierarchy is "locked-in" by institutions, policies, and attitudes justified by a false vision of colorblind equality.[86] As long as a clear and pervasive hierarchy exists in American society, the civil disobedience of a subjugated minority must be treated differently than the actions of a dominant majority.[87] In order to properly evaluate Carcieri's analogy, it is necessary to understand the existing hierarchy and how it shapes the specific context in which a person chooses to practice an asserted act of civil disobedience. Only by appreciating this context can we make judgments on the validity of Butler and Carcieri's respective proposals.

1. Identifying the Hierarchy

Butler's proposal for jury nullification fits squarely into a background context of hierarchy and pervasive racial subordination. Although it is true that some political and economic improvements have been made in the African-American community and with respect to race relations in the past several decades, we are not there yet.

Economically, the conditions for African-Americans today are tragic; furthermore, data reveal that in the past several decades the gap between whites and African-Americans has widened in certain areas. A study released in 2004 by United for a Fair Economy found that while the income of an average black family in 1968 was sixty percent of the income of a white family, in 2002, the average black family earned only fifty-eight percent of the income of a white family.[88] One in nine African-Americans are unemployed, pushing black unemployment to a level more than twice

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[86] *See* Daria Roithmayr, *Barriers to Entry: A Market, Lock-In Model of Discrimination*, 86 Va. L. Rev. 727, 733-38 (2001) (using an antitrust analysis to show how a white standard has been integrated into our cultural and economic systems, effectively preventing other races from entering the market).

[87] *See* Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* 69 (Harvard U. Press 1970) (recognizing how the social and political dynamics impact the extent of a group's obligations to obey the law and addressing the subject in a chapter entitled "The Obligations of Oppressed Minorities").

[88] Dedrick Muhammad et al., *The State of the Dream 2004: Enduring Disparities in Black and White* 6-7, http://www.faireconomy.org/press/2004/stateofthedream2004.pdf (last updated Jan. 15, 2004); *see* Glenn Loury, *The Anatomy of Racial Inequality* 175-204 (Harvard U. Press 2002) (charting the level of inequality between blacks and whites in many facets of society).

the white rate–a wider gap than in 1972.[89] Finally in 2001, white households had an average net worth of $468,200, more than six times the $75,700 of black households.[90]

Politically, forty years after the passage of the Voting Rights Act, discrimination against minorities remains pervasive in our electoral system.[91] While the Voting Rights Act has created more diverse legislatures around the country, a white majority remains overwhelmingly in control of legislatures, and structural obstacles persist that serve to exclude and marginalize minority interests.[92] The two-party system prevents African-Americans from promoting competition between the parties for their community's vote.[93] Arguably, the level of substantive representation for African-Americans has declined in the past several decades.[94] This political inequality reinforces economic inequality, and vice-versa.

Political and economic powerlessness translate into a criminal justice system that disproportionately harms communities of color. Based on 2001 data on rates of first incarceration, an estimated thirty-two percent of black males will enter state or federal prison during their lifetime, compared to only 5.9 percent of white males.[95] High and disproportionate rates of imprisonment keep minorities from earning money for their communities. The economic positions of these communities remain dismal. Imprisonment also results in disproportionate rates of voter disenfranchisement, further contributing to the inequity of the political system.[96]

2. Butler's Theory Reflects the Hierarchy

It is precisely within *this* context that Butler advances his theory of race-based jury nullification. Presumptively, scholars recognize that

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[89] Muhammad, *supra* n. 89, at 4-5.
[90] *Id.* at 8-9. By contrast, in 1989 (the oldest comparable data available), average white wealth was five-and-a-half times black wealth. *Id.*
[91] Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 198*2 (Dec. 2005) (*available at* http://sitemaker.umich.edu/votingrights/files/finalreport.pdf), *reprinted in* 39 U. Mich. J. L. Reform (forthcoming 2006).
[92] *See* Lani Guinier, *Tyranny of the Majority* (Harvard U. Press 1994).
[93] *See* David T. Canon, *Race, Redistricting and Representation: The Unintended Consequences of Black Majority Districts* (The U. of Chicago Press 1999).
[94] *See generally* Kerry L. Haynie, *African American Legislators in the American States* (Robert Y. Shapiro ed., Columbia U. Press 2001).
[95] U.S. Dept. of Justice, *Criminal Offenders Statistics*, http://www.ojp.usdoj.gov/bjs/crimoff.htm#lifetime (accessed Oct. 13, 2005); Muhammad, *supra* n. 89, at 20-21.
[96] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books 2000); *see also* Jason Belmont Conn, Student Author, *Felon Disenfranchisement Laws: Partisan Politics In The Legislatures*, 10 Mich. J. Race & L. 495 (2005) (discussing the racial makeup of the prison population and the disproportionate impact felon disenfranchisement laws have on minority communities).

individuals have a duty to obey the laws where government institutions and officials are just and have acted in good faith.[97] Without some level of duty and deference, the rule of law would cease to exist. However, where the government has been exposed as unjust and the ordinary outlets for political recourse have been closed off, civil disobedience becomes the only viable option. As Michael Walzer writes, "So long as oppression persists, oppressed men and women retain the right, not to destroy the democratic state or to make war against it, but to deny it what they have to give: their loyalty, service, and obedience."[98] For African-Americans, civil disobedience targeted at oppressive laws is a logical response to centuries of hardship and oppression.[99] Butler's proposal addresses and confronts the inequality in our criminal justice system and larger society head on.

Carcieri's proposed actions exist in an opposite context to those of Butler's proposal and should not be classified as legitimate acts of civil disobedience. Carcieri's placement of professors in a college community on the same plane as African-American jurors fails for the same reason a general policy of colorblindness fails. Both proposals erroneously neglect the long history of racial inequality and the real conditions of our nation today. His proposals attempt to assert the supposed rights of the white majority, the dominant class in the United States, rather than an oppressed or disempowered minority.[100] For a group to commit an act of civil disobedience, it must be assumed that "the normal appeals to the political majority have already been made in good faith and that they have failed. The legal means of redress have proved of no avail."[101] Implicit in this statement is the condition that civil disobedience be executed by a political

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[97] John Rawls, *A Theory of Justice*, 350-62 (Belknap Press 1971); *see* Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 Mich. L. Rev. 1, 2-26 (1985) (examining the arguments of several theorists regarding a natural duty to obey the law).

[98] Walzer, *supra* n. 88, at 69.

[99] *See* Martin Luther King, Jr., *Letter From Birmingham City Jail*, in *Civil Disobedience* 81, 82 (Hugo A. Bedau ed., Western Publishing 1969) ("Recognizing this vital urge [for freedom] that has engulfed the Negro community, one should readily understand public demonstrations. The Negro has many pent-up resentments and latent frustrations. He has to get them out. So let him march . . . understand why he must have sit-ins and freedom rides.").

[100] Applying Carcieri's analogy in another context, it would appear he would argue that the courageous acts of Rosa Parks in the 1950s as a form of civil disobedience are no different than the hypothetical acts of a rejected white law school applicant, such as Barbara Grutter, coming into Michigan Law and sitting in on a day of classes. *See* E.R. Shipp, *Rosa Parks, 92, Founding Symbol of Civil Rights Movement, Dies*, N.Y. Times A1 (Oct. 25, 2005) ("Her act of civil disobedience, what seems a simple gesture of defiance so many years later, was in fact a dangerous, even reckless move in 1950's Alabama. In refusing to move, she risked legal sanction and perhaps even physical harm, but she also set into motion something far beyond the control of the city authorities.").

[101] Rawls, *supra* n. 98, at 363.

minority rather than a majority. A political majority has no need for acts of civil disobedience; rather, it can pass and execute laws.

Carcieri must either show that the issue of affirmative action has been ultimately decided and removed from the lexicon of public debate, or alternatively, that the group he seeks to vindicate, whites, have no means to sway the debate through the traditional democratic channels. Carcieri fails on both counts: First, the debate over affirmative action is certainly far from over, as witnessed by the substantial amount of literature on the topic since the *Grutter* and *Gratz* decisions.[102] Further, states such as Michigan are contemplating constitutional amendments that would prohibit government actors, such as Michigan Law, from making decisions that take race into account.[103] Although we expected the affirmative action debate to subside after the Supreme Court's decision in 2003, it has not.[104] Second, Carcieri claims that all legitimate forms of political recourse have been shut off to those interested in changing the law. This is not the case. While in the halls of academia, one's belief in colorblindness might be the minority viewpoint; in the halls of government this viewpoint actually holds significant sway. The President as well as a large segment of Congress came out against Michigan Law's plan and argued that race should not be considered in the admissions policy.[105] Other states have amended their constitutions to obtain a similar result.[106] The presence of a proposed amendment in Michigan further accentuates the ability of those majority groups interested in change to effectively participate within the traditional democratic spheres of government.

If Carcieri believes that the Supreme Court has wrongly decided *Grutter*, he should petition his state legislature to create legislation preventing such actions. Alternatively, he should spend time writing about the benefits of Michigan's initiative in newspapers and law reviews. But what he cannot do is remove himself from the proper avenues of debate by proposing overbroad and discriminatory actions that unduly harm third parties.

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[102] *See e.g.* Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855 (2005).

[103] *See* Dawson Bell, *Affirmative Action Ban on Way to Ballot*, Detroit Free Press 1A (Jan. 7, 2005); *see also* Michigan Civil Rights Initiative, *Home Page*, http://www.michigancivilrights.org/ (accessed Oct. 17, 2005).

[104] In some ways, actually, the shifting of the debate from the judicial branch to more democratic realms has increased its intensity. *See generally*, By Any Means Necessary, *Coalition to Defend Affirmative Action, Immigration, & Immigrant Rights And Fight for Equality By Any Means Necessary*, http://www.bamn.com/ (accessed Nov. 15, 2005) (a national organization dedicated to promoting affirmative action).

[105] Neil A. Lewis, *Bush and Affirmative Action: Constitutional Questions; President Faults Race Preferences as Admission Tool*, N.Y. Times A1 (Jan. 16, 2003).

[106] Cal. Const. art. I, § 31 (commonly referred to as Proposition 209).

It is important that all ideas and perspectives on this subject, including dissenting viewpoints, be heard and considered. This dialogue contributes to this important debate. Yet it is precisely because the affirmative action debate is so prominent today in the public sphere that parties must not prematurely resort to extra-legal means–especially when that group is part of the majority and remains perfectly capable of changing the law.

III: LEVELING THE PLAYING FIELD: CARCIERI'S OFFSET

Even if one believes that Carcieri's anti-affirmative action ends are justified, his means are not narrowly tailored. To protest and subvert affirmative action policies in law school admissions, Carcieri suggests that he and other undergraduate professors assign "every nonminority [student] a half a grade higher than he has actually earned, and every minority [student] a half a grade lower than he has actually earned" thus offsetting affirmative action.[107] Carcieri characterizes this action as "level[ing] the playing field without destroying the prospects of minority applicants."[108] All else being equal, he suggests writing letters of recommendation with more positive language for nonminority students than for minority students.[109]

Carcieri argues, "If my ends are compelling, then, and my means narrowly tailored to advance those ends, my actions will be justified in both moral and constitutional terms."[110] But distorting a student's grade in an undergraduate class to combat a graduate school's admissions policy is potentially illegal and unfair to all of his students. Carcieri's grading distortions make his own students unwitting and unwilling participants in his system of civil disobedience. Thus, his means are not narrowly tailored. Distorting a letter of recommendation constitutes an unfair misrepresentation of a student's qualifications. Carcieri attempts to shift the blame for this unfairness and misrepresentation onto Michigan Law, but we contest his philosophical basis.

A. *Carcieri's Offset in Grading Results is an Unfair Assessment of Classroom Performance*

Courts have generally found that "[a] grade is a mark indicating performance in a course of study."[111] Carcieri proposes grading which

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[107] Carcieri, *supra* n. 7, at 377.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 372-73.
[111] *Las Virgenes Educators Assn v. Las Virgenes Unified Sch. Dist.*, 102 Cal. Rptr. 2d 901, 907 (Cal. Ct. App. 2001).

appears to fall outside of that definition.[112] Some vaguely applicable support exists, however, for a professor's ability to assign grades based on personal prejudice rather than academic achievement.[113] Teachers are afforded academic freedom to prescribe grades based on their discretion,[114] and courts have been reluctant to overturn grading decisions.[115] In fact, teachers in situations similar to Carcieri have argued that they have a First Amendment right to assign grades, claiming that their grades constitute expressive speech.[116] But even assuming that this right exists, courts generally find this constitutional protection "not . . . dispositive, because we would then balance [a teacher's] First Amendment right against the University's interest in ensuring that its students receive a fair grade."[117] Thus, it is likely that a court would find that a university's expectation that its professors will grade fairly outweighs Carcieri's right to use grading for political purposes.

Students also have an expectation that they will be graded fairly. One district court judge in Indiana summed up this expectation:

> While the issue of reducing a student's grades as punishment for nonacademic conduct is not well-settled in this country . . . a general consensus can be reached as to what a student's grades should represent. A student's grade

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[112] Were Carcieri's actions to be, in fact, legal, then they would not be "civil disobedience." *See* Mark Edward DeForrest, *Civil Disobedience: Its Nature and Role in the American Legal Landscape*, 33 Gonz. L. Rev. 653, 655 (1998) ("Although civil disobedience does not have a single universally accepted definition, there are several criteria that have been generally recognized as necessary if a particular act of protest is to qualify as civil disobedience. The act must be illegal, 'predominately nonviolent,' intended to rouse the notice of the community to the illegal action, and for which those engaged are willing to accept punishment."); *see also United States v. Schoon*, 971 F.2d 193 (9th Cir. 1992) (defining "civil disobedience" as actions that are explicitly illegal).

[113] *See* Gary Chartier, *Truth-Telling, Incommensurability, and the Ethics of Grading*, 2003 BYU Educ. & L. J. 37 (2003) (giving an excellent discussion of the ethical issues involved in grading based on academic and nonacademic performance).

[114] The seminal case in establishing academic freedom may be *Sweezy v. New Hampshire*, in which the Supreme Court stated:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

354 U.S. 234, 250 (1957).

[115] *See Bd. of Curators of the U. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) ("[T]he decision of an individual professor as to the proper grade for a student in his course . . . requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

[116] *See Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989) (stating that professors are "entitled to some measure of First Amendment protection" in assignment of grades). This is a generalized view of a contentious circuit split. For more information, *see* Kevin A. Rosenfield, Student Author, Brown v. Armenti *and the First Amendment Protection of Teachers and Professors in Grading Their Students*, 97 Nw. U. L. Rev. 1471 (2003); Evelyn Sung, *Mending the Federal Circuit Split on the First Amendment Right of Public University Professors to Assign Grades*, 78 N.Y.U. L. Rev. 1550 (2003).

[117] *Keen v. Penson*, 970 F.2d 252, 258 (7th Cir. 1992).

> or credit should reflect the student's academic performance or achievement, including participation in class, and presence in class. Reducing grades unrelated to academic conduct results in a skewed and inaccurate reflection of a student's academic performance.[118]

Indeed, other courts have recognized that "both a university and its students have powerful interests in the comparability of grades across sections, for grades are a university's stock in trade and class rank may be vital to a student's future."[119] Courts have sharply condemned professors who give "distorted"[120] grades that operate at odds with university and public policy,[121] and at least one court has found that students possess a due process right to receive fair and unbiased grades.[122] Even grading policies that would otherwise be considered fair, such as policies dropping grades for absenteeism, have been questioned by courts if applied unfairly.[123]

B. *Carcieri's Offset in Grading Results in An Overbroad Response to Affirmative Action*

Carcieri's grading *offset* is arguably effective only when applied on an extraordinarily narrow basis. Carcieri's reasoning is flawed not because of the factors it considers, but rather, the significant factors it leaves out. Carcieri's article suggests that his grade distortions offset those applied by law schools, such as Michigan Law, in their admissions policies. The largest problem with this rationale is that Carcieri's grade distortions disregard the many uses and representations for a grade which do not involve law school admission.[124] Grades are necessarily perceived by a multitude of potential interpreters as a measure of academic performance and a proxy for academic prowess.

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[118] *Smith v. Sch. City of Hobart*, 811 F. Supp. 391, 397 (N.D. Ind. 1993).
[119] *See Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001).
[120] *See* Carcieri *supra* n. 7, at 376 (referring to his offsetting of grades as "distortions").
[121] Judge Easterbrook wrote: "No teacher has a fundamental right to hand in random or skewed grades. . . . No person has a fundamental right to teach undergraduate engineering classes without following the university's grading rules. . . . By insisting on a right to grade as he pleases, [defendant] devalues his students' right to grades that accurately reflect their achievements. *Wozniak*, 236 F.3d at 891; *see also Lovelace v. Southeastern Mass. U.*, 793 F.2d 419 (1st Cir. 1986) (discharge of professor upheld where grading violated published criteria).
[122] *See Sylvester v. Texas S. U.*, 957 F. Supp. 944, 947 (S.D. Tex. 1997) ("[T]he assignment of a test grade is a purely academic evaluation, [a student] is entitled to due process in that evaluation.").
[123] *Ochsner v. Bd. of Trustees of Wash. Community College*, 811 P.2d 985 (Wash. Ct. App. 1991) (questions existed about whether absenteeism policy was fairly applied).
[124] *See* Chartier, *supra* n. 114, at 41-42 ("Giving a grade in a particular course is a communicative act that provides prospective employers and educational institutions to which the student may apply with information regarding the student's competence in the particular subject matter of the course.").

> Grades typically send signals to a variety of audiences in addition to the students themselves: prospective employers, college or graduate schools' admissions committees, and parents include the most important. Most readers of transcripts are likely to interpret grades and transcripts in fairly predictable ways. When, for example, a college admissions committee sees high school transcripts recording Jack as having earned a B in world history and Jason an A in the same class, committee members will infer that the quality of Jason's work was superior to Jack's. [125]

For those students who have no interest in applying to Michigan Law or any other law school, Carcieri's *offsetting* is patently counterproductive. It is akin to *throwing out the baby with the bathwater*. An unfair grade will attach to a student's college transcript for a lifetime.[126] Under Carcieri's plan, the students become unwitting (and likely, unwilling) participants in a system of civil disobedience, and the harm inflicted upon them cannot be dismissed as collateral damage, for it is essentially permanent.[127] Students whose grades are distorted by the actions Carcieri suggests will have a difficult time appealing the professor's grading decision to a court of law,[128] and the grade will stay with them.

Should Michigan Law be so shocked and persuaded by Carcieri's displays of civil disobedience as to alter its admissions policies immediately, rendering *Grutter* functionally moot, the *offset* grades given by Carcieri in the last term at the University of Tennessee would be difficult (if not impossible) to change. Michigan Law's admissions policy can change from year to year in a way that a political science grade from 1999 simply cannot.[129]

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[125] *See id.* at 41 n. 24, (citing Francis Schrag, *From Here to Equality: Grading Policies for Egalitarians*, 51 Educ. Theory 63, 68-69 (2001)).

[126] This characterization is not as overdramatic as it sounds. Negative marks on a university transcript such as bad grades, honor code violations, and incompletes can have serious adverse affects far beyond a student's graduation. *See Chandamuri v. Georgetown U.*, 274 F. Supp. 2d 71, 75 (D.D.C. 2003).

[127] The idea that one's practice of civil disobedience should harm a uninvolved third party seems to offend its moral center. Martin Luther King, Jr. has described civil disobedience as an act practiced "lovingly." King, *supra* n. 100 at 74. Also, DeForrest writes "The practice of civil disobedience has a morally overt character." DeForrest, *supra* n. 113, at 660.

[128] For an excellent analysis of the reluctance of the judiciary to overrule grading decisions see Thomas A. Schweitzer, "*Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?*, 41 Am. U.L. Rev. 267 (1992). Schweitzer writes that judicial deference to academic institutions in grading decisions "has been called an integral part of our vital tradition of academic freedom, and it has won unanimous endorsement in recent years from the United States Supreme Court." *Id.* at 271 (footnotes omitted).

[129] According to Sarah Zearfoss, Michigan Law's Assistant Dean and Director of Admissions, changing the law school's admissions policy takes roughly a year of review from its Admissions Committee (staffed with rotating faculty membership), and a vote before the full faculty. The policy has not changed since 1992, and will likely not change in the near future. Dean Zearfoss credits the policy's projected stability to its distinction as "the one [law school admission] policy in the country which [is] known to be

C. *Carcieri's Distorted Letters of Recommendation May Not Meet its Ends and Constitute Misrepresentation*

A distorted letter of recommendation to a law school on behalf of an applicant offers a more "tempered and . . . measured fit" as a response to a race-conscious admissions policy than a distorted grade.[130] Again, the substance of a letter of recommendation is necessarily subjective. Letters of recommendation are meant to be tailored toward their intended source; skills and qualities germane to the position being sought are generally brought to the forefront, and irrelevant information is generally omitted. A letter of recommendation can be better or worse–but no more or less valid–based on a recommender's familiarity with the student. In other words, what Carcieri puts forth as "civil disobedience" is in fact a moral choice, not a decision to break the law.[131] Thus, it is difficult to characterize it as civil disobedience.

Carcieri recommends altering the final adverb in the letter as a means to correct for perceived discrimination.[132] He describes these means as "moderate."[133] They may be fatally so. It is difficult to characterize writing a hyperbolic letter of recommendation as "civil disobedience" because doing so does not break any laws.[134] In rare circumstances, a misrepresentative letter of recommendation could constitute an actionable

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indisputably constitutional." E-mail from Sarah Zearfoss, Asst. Dean and Dir. of Admis., U. of Mich. Law Sch., to Authors, (Oct. 6, 2005) (copy on file with Adam Blumenkrantz, Jason Belmont Conn, Amrita Mallik, and Michael Murphy). For an excellent review of the Michigan Law admissions process see Dennis J. Shields, *A View from the Files: Law School Admissions and Affirmative Action*, 51 Drake L. Rev. 731 (2003).

[130] Carcieri, *supra* n. 7, at 378.

[131] *See* Paul J. Weber, *Toward a Theory of Civil Disobedience*, 13 Catholic Law. 198, 202 (1967) (Civil disobedience "is illegal, and this is its most obvious aspect.").

[132] Carcieri, *supra* n. 7, at 377.

[133] *Id.* Carcieri declares his response to be "moderate," then cites Aristotle's Nicomachean Ethics Bks. II-V which state moderation as a moral virtue. *Id.* at 375 n. 144. Carcieri then declares his moderation to be virtuous and the combination thereof as proof that his "means are as pure as [his] ends." *Id.* For one thing, his characterization of Aristotle seems out of place. The *Nicomachean Ethics* did not draw many lines between means and ends, and in fact Aristotle only vaguely touches on free will, stating, "We deliberate not about ends, but about things that are conducive to ends… [we] establish an end and then go on to think about how and by what means it is to be achieved. If it appears there are several means available, they consider by which it will be achieved in the easiest and most noble way…" Aristotle, *Nichomachean Ethics*, (Roger Crisp, Trans., Cambridge U. Press, 2000). Bk. III Ch. 3, 1112b, lines 11-18. Further, this is also a logical fallacy. Carcieri assumes that the means of his response are "measured," declares them to be virtuous, and justifies his ends with his means. Carcieri *supra* n. 7, 377.

[134] Courts have held that "the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee" provided that the misrepresentation creates "a substantial, foreseeable risk of physical injury to the third persons." *Randi W. v. Muroc Jt. Unified Sch. Dist.*, 929 P.2d 582, 591 (Cal. 1997). This approach maps the *Restatement 2d of Torts* §§ 310-311 (1965).

tort claim, but those instances are easily distinguishable from the letters of recommendation that accompany the average law school application.[135]

The strength of Carcieri's recommendation of a student for law school admission is, at best, a subjective determination of his attitude toward that student and reasonable prediction of her ability to succeed.[136] That determination and prediction is likely to be taken with the requisite grain of salt. As Judge Kozinski writes, "of course, it is not uncommon for professors to write glowing letters of recommendation but then express serious reservations when pressed over the phone."[137] It may be possible, however, to show that Carcieri *highly recommended* a candidate for admission to other graduate schools and only *recommended* a candidate for admission to Michigan Law. Such distinctions may be trivial. It is a leap of logical faith to think that a school dedicated to providing a diverse student body would take a non-minority student over a minority student (assuming equal test scores) because of a letter of recommendation's final adverb.[138] That said, Carcieri cannot expect to specifically tailor his letters of recommendation to fit every law school's admissions policies and practices.

D. Carcieri's Philosophical Basis for Shifting the Blame for Grade and Letter of Recommendation Distortions is Poorly Supported

Carcieri preemptively responds to criticisms of his means at the end of his article.[139] First, he suggests that his letters of recommendation are narrowly tailored for law school admissions committees and are in essence a direct "offset" of their affirmative action policies.[140] Second, Carcieri argues that both his letters of recommendation and his grading offsets are

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[135] Tort claims involving letters of recommendation have generally involved a failure of a duty to warn about a candidate's criminal or disciplinary record. For a survey of such cases, see John Ashby, Student Author, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 Ariz. L. Rev. 117 (2004); J. Bradley Buckhalter, Student Author, *Speak No Evil: Negligent Employment Referral and the Employer's Duty to Warn (Or, How Employers Can Have Their Cake and Eat It Too)*, 22 Seattle U. L. Rev. 265 (1998).

[136] This communication can be through action or omission, but is necessarily imprecise and generally positively slanted. *See* Peter Meijes Tiersma, Student Author, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 Calif. L. Rev. 189, 211-12 (1986) ("In the context of a letter of recommendation, it is expected that a professor will communicate as much positive information as possible. The omission of certain expected sorts of information can only lead to the inference that in those areas the professor is unimpressed.").

[137] Alex Kozinski, *Confessions of a Bad Apple*, 100 Yale L.J. 1707, 1717 (criticism of the federal judicial clerkship hiring process).

[138] In close cases, much more is to be considered. Michigan Law's admissions policy explicitly states, "When the differences in index scores are small, we believe it is important to weigh as best we can not just the index but also such file characteristics as the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection." Admissions Committee, *The University of Michigan Law School; Report & Recommendations Of The Admissions Committee* 5, http://www.law.umich.edu/newsandinfo/lawsuit/admissionspolicy.pdf (accessed Feb. 18, 2006).

[139] Carcieri, *supra* n. 7, at 377.

[140] *Id.*.

examples of justifiable civil disobedience in the face of an unjust program or abuse of authority.[141]

In advancing these arguments, Carcieri shifts the blame for the negative consequences of his actions onto Michigan Law, suggesting that the school's unjust admissions policy created a situation to which he is morally bound to respond.[142] On the surface, Carcieri's justification seems susceptible to dismissal as a *tu quoque* logical fallacy,[143] attempting to offset his arguably bad action by its comparison to another arguably bad action. To justify his position philosophically, Carcieri quotes Rawls:

> [I]f justified civil disobedience seems to threaten civic concord, the responsibility falls not upon those who protest but upon those whose abuse of authority and power justifies such opposition. For to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions is itself a form of illegitimate force that men in due course have a right to resist.[144]

However, Rawls may not have intended to argue for an automatic transfer of responsibility in cases of civil disobedience. To illustrate, earlier in the same work, Rawls writes:

> Therefore it may be protested that the preceding account does not determine who is to say when circumstances are such as to justify civil disobedience. It invites anarchy by encouraging everyone to decide for himself, and to abandon the public rendering of political principles. The reply to this is that each person must indeed make his own decision. Even though men normally seek advice and counsel, and accept the injunctions of those in authority when these seem reasonable to them, they are always accountable for their deeds. We cannot divest ourselves of our responsibility and transfer the burden of blame to others. This is true on any

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[141] *Id.*

[142] *Id.* at 372. In colloquial terms, Michigan Law is the "devil that made him do it," and that we would not have to distort his students' grades and recommendation if Michigan Law and other schools did not distort their admissions criteria.

[143] "Tu" translates into pronoun "you." *Oxford Latin Dictionary* 1982, (P.G.W. Glare, ed. 1976) "Quoque" translates most commonly into "in the same way too, likewise, no less." *Id.* at 1568. In essence, it is the validation of one's bad act through hypocritical recognition of one's accuser's bad act. *See* S. Morris Engel, *With Good Reason: An Introduction to Informal Fallacies*, 204-206 (3d ed., 1986). In other words, two wrongs do not make a right.

[144] Carcieri, *supra* n. 7, at 378 (quoting Rawls, *supra* n. 98, at 390-91).

> theory of political duty and obligation that is compatible with the principles of a democratic constitution. The citizen is autonomous yet he is held responsible for what he does. If we ordinarily think that we should comply with the law, this is because our political principles normally lead to this conclusion. Certainly in a state of near justice there is a presumption in favor of compliance in the absence of strong reasons to the contrary.[145]

At first blush, the statements seem inconsistent, but perhaps Rawls is arguing a theory of personal *and* institutional responsibility. In other words, were Michigan Law's admissions policy to inspire widespread civil disobedience, the blame would fall on Michigan Law for creating a manifestly unjust institution toward which many citizens protested by way of civil disobedience. Even so, each individual must accept responsibility for her own actions and the harm these actions cause.[146] In a situation where the protesting is not widespread, and the institution not conclusively unjust,[147] the individual responsibility of the protestor might outweigh that of the institution. In Rawls' estimation, there are no unclean hands. A student with no intention of going to law school who receives a lower grade than she earned will question the scope of Carcieri's crusade–she will wonder why the fairness of law school admissions policy warranted such a drastic response that is detrimental to her personal well-being.

In further effort to argue that his offsets are the fault of Michigan Law, Carcieri quotes philosopher Ronald Dworkin:

> [I]f someone believes that a particular official program is deeply unjust, if the political process offers no realistic hope of reversing that program soon, if there is no possibility of effective persuasive civil disobedience, if nonviolent nonpersuasive techniques are available that hold out a reasonable prospect of success, if these techniques do not threaten to be counterproductive, then that person does the

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[145] Rawls, *supra* n. 98, at 389.

[146] *See generally* King, *supra* n. 100, at 74 (writing that those who practice civil disobedience must do so "openly, lovingly, . . . and with a willingness to accept the penalty"); *see also* DeForrest, *supra* n. 113, at 659 ("Civil disobedience is not, and must not become, an open invitation to anarchy. Even though a particular law may be unjust, the protester has a responsibility to society to uphold the fundamental integrity of the civic order.").

[147] *See Grutter*, 539 U.S. at 328 ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body."); *see also Bakke*, 438 U.S. at 312 ("The freedom of a university to make its own judgments as to education includes the selection of its student body.").

> right thing, given his convictions, to use those nonpersuasive means.[148]

Dworkin's quote suggests that someone who performs civil disobedience only "does the right thing" if her "techniques do not threaten to be counterproductive."[149] If the goal of Carcieri's proposed movement is to create a more balanced and fair grading system, Carcieri's offset is manifestly, even admittedly,[150] unfair in light of the multitude of uses for grades unrelated to law school. In this way, it is counterproductive. A letter of recommendation for law school admission or a grade given with a student's future Michigan Law application in mind will cause distortions to a student's admission to other graduate programs, job placement, and academic history. Therefore, the harm that a professor following Carcieri's proposed actions inflicts upon students at least *threatens* to be counterproductive to achieving a racially blind, and overall fair, admissions process. Using Dworkin's theories to justify Carcieri's proposals is misleading.

Indeed, Dworkin argues against the plaintiff's stance in *Bakke*.[151] He describes a narrowly tailored, anti-discriminatory right that "[e]very citizen has a constitutional right that he not suffer disadvantage, at least in the competition for any public benefit, because the race . . . to which he belongs is the object of prejudice or contempt."[152] Essentially, Dworkin argues that the Constitution does not require race-blind treatment and therefore citizens are not entitled to such.[153] Thus, although Carcieri relies heavily on Dworkin, Dworkin's own statements are in disaccord with Carcieri's proposal.

Carcieri's proposal to counter affirmative action in law school admissions policies is disharmonious with the principles of civil disobedience. If implemented, it threatens to harm third parties in a way that is overbroad and offends the overtly moral character of civil

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[148] Carcieri, *supra* n. 7, at 378 (quoting Ronald Dworkin, *A Matter of Principle*, 110 (Harvard U. Press 1985)).
[149] *See* Dworkin, *supra* n. 149, 110.
[150] Carcieri, *supra* n. 7, at 377. (Carcieri refers to his proposed actions as "distortion[s]," then writes "[t]he grades I assign and the references I write will likely be relied on by decision makers other than those whom I quite justifiably assume are engaging in racial discrimination.").
[151] *See* Dworkin, *supra* n. 149, at 300-01, cited in Frank I. Michelman, *Symposium: Borrowing: Reflection*, 82 Tex. L. Rev. 1737 (2004). Michelman notes that "[t]he key, relevant principle of political morality, in Dworkin's view, was that 'no one in our society should suffer because he is a member of a group thought less worthy of respect, as a group, than other groups.'" *Id.* at 1740.
[152] *See* Dworkin, *supra* n. 149, at 300-1.
[153] *Id.*

disobedience. Carcieri's philosophical support suggests that civil disobedience is only legitimate if it is not counterproductive, which in light of the permanence and varied uses of grades (beyond law school admission) seems impossible if his goal is an objectively fair grading system for all students.

IV: TOWARD A UNIFIED THEORY OF AFFIRMATIVE ACTION

Thus far we have critiqued Carcieri's methods, but we also take issue with the theoretical background for his vision of race relations and affirmative action. Carcieri's analysis of affirmative action is premised upon his belief that recognition of race is tantamount to racial discrimination.[154] However, we disagree. We believe that discrimination is not implicit in the act of recognizing racial difference and that the use of race in any situation must be viewed in context.

Carcieri uses the text of the Equal Protection Clause as a starting point for his analysis. His belief that colorblindness is a Constitutional imperative emanates from his reading of the phrase "equal protection" in the Fourteenth Amendment.[155] But one can examine the word "equal" for hours without garnering any additional idea of what the Equal Protection Clause truly means.[156] "A literal reading of the Constitution is utterly uninformative about the affirmative action problem. From the text alone, race neutrality might be constitutionally required, but it might not be."[157] Thus, context is an essential part of an adequate analysis of affirmative action.

In this section, we will attempt to put affirmative action into context. We will begin by critically considering the white-dominated racial hierarchy that underlies Carcieri's theories and show that the existence of this racial hierarchy provides powerful support for affirmative action programs. Second, we will argue that Carcieri's classification of merit as an

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[154] Carcieri, *supra* n. 7, at 347 ("[R]ace discrimination is just wrong, . . . you do not judge or hold individuals back based on race. Race is not only beyond anyone's control, we were shown, but it determines neither intelligence, character, nor ability, and is thus morally irrelevant to how we should be treated.")

[155] U.S. Const. amend. XIV, § 2.

[156] *See generally* Peter H. Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982) (arguing that "equality" is itself an empty concept and receives meaning only from the context in which it is applied). Currently, under the Equal Protection Clause, race discrimination is subject to much tougher scrutiny than age discrimination. As a result, the U.S. Constitution forbids the state of Michigan from firing an individual on the basis of race, but not on the basis of age. In this case, is the equal protection clause violated by this discrepancy? The same result is reached with respect to discrimination against homosexuals. Does this inequality violate the equal protection? In every constitutional system, some groups are undoubtedly treated differently than others–that itself does not generate a violation of the Equal Protection Clause. Instead, the clause is read with a specific context and background in mind. *See* Cass Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts are Wrong For America* 132-37 (2005).

[157] Cass Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts are Wrong For America* 135 (2005).

objective standard is misguided. We believe that Carcieri's formulation of merit is actually a subjective standard that preserves the status quo, and as such, it is a standard that cannot be adequately considered outside of a racial context. Third, we will show that a policy of colorblindness will have a chilling effect on diversity in classrooms and limit the incoming classes of our nation's best schools to those individuals fortunate enough to benefit from the racial hierarchy. Finally, we employ our own personal experiences to highlight the great benefit racial diversity brings to an institute of higher learning, and consequently, to all society.

A. *Racial Hierarchy, White Dominance and the Dangers of Colorblindness*

Our society is one of hierarchies, and the history of America is built on white dominance. In order to achieve true equality, one must acknowledge the historical superiority of the white racial identity and the consequential subordination of all other races which is the core of racism in American society. Or, as Justice Blackmun phrased it in his separate opinion in *Bakke*, "to get beyond racism, we must first take account of race."[158] Racism is very real and deeply integrated into the fabric of American society. Just as race has been used throughout American history for discriminatory purposes and the subjugation of minority communities, a recognition of race can be used today to remedy that same oppression.

The main counterargument to the acknowledgment of race comes from Justice Harlan's famous dissent in *Plessy v. Ferguson*.[159] In his dissent, Harlan views the Constitution as recognizing no hierarchy or superiority, claiming "Our Constitution is color-blind."[160] This sentence, however, must also be read in the proper context. In the sentences preceding this bold statement Harlan makes the observation that whites will remain dominant: "[t]he white race deems itself to be the dominant race in this country. And so it is . . . I doubt not, it will continue to be for all time."[161] Juxtaposing these two statements, Harlan implicitly recognizes that colorblind policies alone cannot overcome the deeply entrenched racial hierarchy in our society.

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[158] 438 U.S. at 407 (Blackmun, J., concurring in part and dissenting in part).
[159] 163 U.S. 537.
[160] *Id.* at 559.
[161] *Id.*

Even though the Constitution itself does not explicitly acknowledge caste or class,[162] it has facilitated and legitimized racial hierarchy since the Founding. The Constitution is both the basis for and a reflection of a society that is deeply rooted in white dominance. It is shortsighted to hold the Constitution out as colorblind, without recognizing that the Constitution has validated policies creating and perpetuating a racial hierarchy throughout American history. The law constructs and stratifies race, through mechanisms such as rules of descent, census categorizations, and the one drop rule, to perpetuate white dominance such that "under color-blind constitutionalism, when race is characterized as objective and apolitical, this history is disguised and discounted."[163]

Colorblindness has the dangerous ability to serve as a mask for white dominance. In its most extreme form, colorblindness leads to further racism, as "a form of naiveté and moral stupidity," that allows the white majority to ignore the different reality that race creates for minorities.[164] Furthermore, advancing colorblindness is an "act of denial [which] is troubling not only because it distorts reality but also because it will make less accessible the ways in which color-consciousness influences our understanding of the world and of others."[165] Indeed, the naive desire for colorblindness can lead even the most self avowed child of the civil rights movement to argue for policies that perpetuate crippling inequality.

For colorblindness to be just, an equal society must exist. Even the *Grutter* Court recognizes this ideal with the admittedly optimistic notion that we will no longer need to recognize race in order to promote equality or diversity in twenty-five years.[166] Whether we manage to achieve this in twenty-five years aside, the understanding is that we are not there yet.

B. *Merit as Subjective Standard*

Looking at college admissions through the lens of colorblindness, suggests that race should not be considered; rather, applicants should be assessed on merit alone. At the heart of this argument is the assumption that merit is an unbiased and un-raced objective standard. This is not the case.

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[162] This failure to recognize class or caste is in itself debatable, as the Constitution was originally drafted without regard for the enfranchisement of any other than white, male property owners, and set out that black male slaves may account for 3/5 of a person. U.S. Const. art. I, § 2. Clearly, race, class and gender were important considerations in the document itself.

[163] Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*," 44 Stan. L. Rev. 1, 34 (1991).

[164] Adrienne Rich, *Disloyal to Civilization: Feminism, Racism, Gynephobia* in *On Lies, Secrets, and Silences: Selected Prose 1966-1978* 275, 300 (W.W. Norton & Co. 1979). This idea of separate realities between whites and minorities is also revealed by recent polls which reveal how the majority of whites think that we have achieved equality in society in terms of equal access to education, housing and jobs, while the majority of blacks (and presumably other peoples of color) do not at all share that view. White dominance in society privileges the white understanding of reality, masking the deeply rooted inequality that remains a major problem. *Black and White: A Newsweek Poll*, Newsweek, 18, 23 (Mar. 7, 1988).

[165] T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 Colum. L. Rev. 1060, 1081 (1991).

[166] *Grutter*, 539 U.S. at 343.

Merit is a malleable concept that encapsulates social biases.[167] Thus, a formulation of merit in the context of law school admissions must account for race.[168]

"[M]erit standards necessarily defer to and depend on the very ideas that define social bias" to the point that merit becomes indistinguishable from the bias that it is supposed to oppose.[169] The appeal of merit standards, such as test scores, lies in the assumption that the objectivity of merit makes it the opposite of subjective standards such as bias. Critics of the use of race in admissions point to this dichotomy, advocating a reliance on merit as an objective alternative to racial considerations.[170] But merit is not objective;[171] the standards still used to evaluate law school applicants were developed by the beneficiaries of a biased social and racial hierarchy in a manner that confirmed and legitimized their status.

Perhaps the most seemingly objective standard for law school admission is an applicant's score on the Law School Admissions Test ("LSAT"). The importance of the LSAT is obvious to anyone involved with the law school admissions process, be they an applicant, recommender, or admissions officer. In spite of its perception as an unbiased measure of merit, a study of admissions eliminating the LSAT as a criterion found that based on undergraduate GPA alone, minorities had a forty-one percent greater chance of admittance.[172] Further, the study found that minorities need a higher GPA than their white counterparts in order to gain admission when their LSAT scores are considered.[173] These findings support the idea

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[167] *See* Susan Sturm & Lani Guinier, *Race-Based Remedies: Rethinking the Process of Classification and Evaluation: The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953 (1996); Malcolm Gladwell, *Getting In*, The New Yorker, 80 (Oct. 10, 2005) (detailing the way in which Ivy League Schools historically changed their definition of merit to limit the admission of minorities such as Jews and blacks).

[168] *Id.*

[169] *See e.g.* Patricia J. Williams, *The Alchemy of Race and Rights* 99 (Harvard U. Press 1991). Roithmayr summarizes the radical critique as the argument that "merit standards disproportionately exclude people of color and women because the standards historically have been developed by members of dominant groups in ways that end up favoring them." Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 Calif. L. Rev. 1449, 1452 (1997).

[170] *See e.g.* Daniel A. Farber & Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (Oxford U. Press 1997).

[171] Roithmayr, *supra* n. 171, at 1456 (arguing that the legal practice and education was shaped "by leaders of the profession - whose status was based in large part on race - in the context of a concerted effort by the profession to keep immigrants and Blacks out of practice and legal education").

[172] William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 Yale J.L. & Feminism 1, 9 (2000).

[173] *Id.* at 16. The results of this study also revealed the same to hold true for women when compared with men.

that the LSAT is not unbiased at all; rather, the LSAT rewards test takers who conform to a white male standard. Reliance on the LSAT disadvantages minorities and women by rewarding a standard that does not correspond to their reality. Affirmative action provides an opportunity to evaluate applicants according to their respective racial standard, thus overcoming the white male bias of the LSAT and ensuring that all qualified candidates receive fair consideration.

Unfortunately, raced standards in admissions are not limited to LSAT and GPA. Perhaps the most telling example of bias in the admissions process is the use of "legacies" in evaluating admissions. Elite institutions generally reserve spaces for incoming students who are the children of alumni to foster a more collegial environment and to promote alumni donations. By giving explicit preference to the children of a dominantly white generation of students, the legacy preference is effectively a race-based preference for whites. Again, this preference reveals how the admissions process effectuates a white male standard. It is therefore disingenuous to condemn race conscious affirmative action programs without addressing the white preference already deeply ingrained in the admissions process–a white preference that would dominate if affirmative action programs were abandoned for exclusively "merit" based criteria.

C. *Seeing Clearly In a Colorblind World*

Embracing colorblind policies makes America's racial hierarchy more visible. For an idea of what a world without race-based considerations through affirmative action programs would look like, we can turn to California. In 1996, California voters passed a state constitutional amendment, Proposition 209, which prohibits any consideration of race in higher education admissions decisions. In subsequent years, admissions for African Americans, Hispanics, Native Americans and certain Asian American groups dropped significantly. Most tellingly, University of California-Berkeley School of Law failed to admit a single African American student for the 1997-1998 academic year.[174] When an institution of higher education fails to take race into account in its admissions process, it prevents itself from admitting the most qualified class and effectively closes its doors to minorities.

Critics of current affirmative action admissions policies should recognize that the consequences of colorblind admissions policies are tantamount to a resegregation of elite institutions. Ignoring the real importance of race in the admissions process turns the progress since *Brown v. Board of Education*[175] and the judicial imperative to integrate our schools into a Sisyphean venture. Diversity in education and the ultimate equality in

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[174] Roithmayr, *supra* n. 171 at 1451.
[175] *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955).

American society are important goals, and progress toward them should not be impeded.

D. *The Diversity Rationale*

In his dissenting opinion in *Grutter*, Justice Kennedy wrote that "[m]any academics at other law schools who are 'affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.'"[176] This is a point that Carcieri emphasizes in his article, but it is not one that we are willing to concede as easily as the many academics Justice Kennedy purports to cite.[177]

In our experience, the diversity of the student body at Michigan Law creates better classroom discussions and more enriching social opportunities. Indeed, the very diversity that Michigan fought to maintain has facilitated campus debate over Michigan Law and *Michigan Law Review*'s affirmative action programs, fueled widespread student interest in journals like the *Michigan Journal of Race & Law* and *Michigan Journal of Gender & Law*,[178] and made issues surrounding race focal points of the Law School Student Senate elections.[179] Students arrive at Michigan Law from all over the country and the exposure and contact with students from different geographic, economic, ethnic, and racial backgrounds better prepares graduates to serve the American public. As the Court noted in *Grutter*, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts."[180]

As we previously wrote in our "Statement in Support of Affirmative Action":

> In the United States, race is a fundamental part of everyone's existence. To ignore a person's race is to deny

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[176] *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (citing Peter H. Schuck, *Affirmative Action: Past Present, and Future*, 20 Yale L. & Policy Rev. 1, 34 (2002) (citing Sanford Levinson, *Diversity*, 2. U. Pa. J. Const. L. 573, 577-78 (2000); Jed Rubenfeld, *Affirmative Action*, 107 Yale L. J. 427, 471 (1997)).
[177] Carcieri, *supra* n. 7, at 359 n. 73.
[178] Information on the *Michigan Journal of Gender & Law* is available at http://students.law.umich.edu/mjgl/.
[179] *See generally* Gabriel J. Chin, Sumi K. Cho, Marina C. Hsieh, & Deborah C. Malamud, *Symposium: Rethinking Racial Divides - Panel on Affirmative Action*, 4 Mich. J. Race & L. 195 (1998); *Special Feature: Perspectives on Affirmative Action*, 4 Mich. J. Race & L. 187 (1998); *Statement In Support Of Affirmative Action*, 4 Mich. J. Race & L. 188 (1998) [hereinafter *Statement in Support*]; Black Law Students Alliance, University of Michigan Law School, *The University of Michigan Law School Black Law Students Alliance Statement on Affirmative Action*, 4 Mich. J. Race & L. 189 (1998); *Affirmative Action Statements*, 5 Mich. J. Gender & L. 205 (1998).
[180] *Grutter*, 539 U.S. at 332 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

> his or her individuality. Affirmative action acknowledges race and its role in American society. By acknowledging the importance of race in furthering social equality, affirmative action redefines the concept of meritocracy from one based on arbitrary measures to a more comprehensive view of the individual. . . . A complete legal education requires that students of all backgrounds be afforded the opportunity to contribute to classroom discussion. Affirmative action makes this possible by opening doors to students who face institutionally imposed barriers to a legal education. As a public institution that trains future lawyers, judges, and policy makers, the Law School must remain open to students of color and provide opportunities that historically have been denied to them.[181]

V. CONCLUSION

If the rule of law in America means anything, it means that citizens cannot be their own interpreters of the Constitution. Citizens have an obligation to respect the decisions of the legislature and the courts, even when laws touch on sensitive social issues. Dissent is encouraged in a free society, for it exposes us to new arguments, challenges the status quo, and fosters social change. For decades, minorities actively participated in the legal debate on the definition of equality, even as our courts interpreted the Constitution in a manner that entrenched racist policies.

With his proposal, Carcieri withdraws himself from the public debate over affirmative action. He takes a decision that acknowledges the legitimate use of race in affirmative action and dismisses it as manifestly unfair. Carcieri's arguments supporting *colorblindness* ignore the pervasive social inequality that surrounds and inspires affirmative action in general and the *Grutter* decision specifically. His methodology misuses the spirit of civil disobedience to justify his harmful actions.

Whereas civil disobedience highlights the oppression of a minority group to the broader population, affirmative action seeks to remove that oppression through an equalization of opportunity across racial lines. *Grutter*'s qualified approval of race conscious admissions allows an institution of higher learning to admit diverse classes of students. Policies like Michigan Law's affirmative action program will play a central role in fulfilling the promises of the Civil Rights movement.[182] We recognize the

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[181] *Statement in Support, supra* n. 188, at 188.

[182] *Brown*, 347 U.S. 483; Genna Rae McNeil, *Essay: Before Brown: Reflections On Historical Context and Vision*, 52 Am. U.L. Rev. 1431 (2003); Robert M. Bell, *Speech: Journey To Justice: Fiftieth Anniversary of Brown v. Board of Education*, 34 U. Balt. L. Rev. 1 (2004).

great strides America has taken toward educational equality, but believe that these strides should be taken with a sense of optimism, not completion.