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I. INTRODUCTION[1]

In December, 2006, the Supreme Court heard oral argument in a pair of cases that once again thrust racial classification to the forefront of public debate. The two cases, *Meredith v. Jefferson City Board of Education*,[2] and *Parents Involved in Community Schools v. Seattle School District*,[3] are the Court's first review of racial

1. Despite my Anglo last name, I come from both White and Mexican ancestry. A brief autobiographical statement may help the reader understand my own particular perspective on the issue of affirmative action:

> My mother is Mexican American and grew up working in migrant camps. Her family was poor and struggled to put food on the table due to her thirteen brothers and sisters. She experienced racism and other inequalities throughout most of her upbringing and passed that knowledge on to me.
>
> My father is white. He grew up in modest surroundings because of a single-mother situation and a brother with cerebral palsy. He struggled to make ends meet and was able to attend college through a combination of hard work and intellect.
>
> I spent most of my childhood in California where my mix of friends included Mexicans, African Americans, Indians, Native Americans, and Caucasians. I followed the example of my parents and made it to college. I had never noticed any real difference between races until the world of higher education and corporate America forced the question. In fact, I have had various experiences where I have not "checked the box" and employers, hoping to pad their racial demographics, have objected—leaving me with a semi-bitter taste of stereotypes.
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> On paper, my last name is "Thomas" and so, in the limited terms of a paper application, I am white. I have often gone to an interview, or similar situation, and found the person interviewing me confused by the contradiction between my name and my appearance. In addition, many ask where I am *really* from and how to spell my last name. Simply put, I have experienced unconscious and conscious racism but have often wondered if I am the type of person to whom affirmative action should apply.

2. Transcript of Oral Argument, Meredith v. Jefferson City Bd. of Educ., No. 05-915 (Dec. 4, 2006), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-915.pdf.

3. Transcript of Oral Argument, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 05-908 (Dec. 4, 2006), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-908.pdf.

On the eve of this Comment's publication, the Supreme Court released a consolidated opinion addressing both of these cases entitled Parents Involved in Cmty. Sch. v.

classification under the leadership of Chief Justice John Roberts. Amidst the controversy surrounding whether or not government can constitutionally engage in racial classification, however, a crucial question is all too often overlooked: who, in a society that increasingly reflects a kaleidoscope of different ancestries and heritage, qualifies as racially diverse?

The Supreme Court last considered race-based affirmative action in *Grutter v. Bollinger*, where the Court upheld the University of Michigan's affirmative action plan based on critical mass.[4] Legal scholarship has widely praised and criticized that decision.[5] Affirmative action advocates generally argue that the *Grutter* majority correctly applied a heightened level of scrutiny while permissibly adapting traditional strict scrutiny analysis.[6] More conservative-minded scholars argue that *Grutter* was a legal aberration because any racial preference not only invites, but requires the application of strict scrutiny to all aspects of a racial-preference system.[7] Unfortunately, largely absent from these popular arguments

Seattle Sch. Dist., Nos. 05-908, 05-915, 2007 WL 1836531 (U.S. June 28, 2007). This Comment will briefly address relevant issues in the footnotes.

4. Grutter v. Bollinger, 539 U.S. 306, 334–35 (2003).

5. *See, e.g.*, *id.* at 388 (Kennedy, J., dissenting) (stating that the decision "proceeds to nullify the essential safeguard" in the use of race); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1478 (2005) (reiterating that "the *Grutter* majority fail[ed] to cogently explain under what circumstances race-conscious policies should be considered sufficiently narrowly tailored to avoid offending the Constitution"); Carol Daugherty Rasnic, *The U.S. Supreme Court on Affirmative Action: Are Some of Us "More Equal" Than Others? (With Some Comparison to Post-Good Friday Agreement Police Hiring in Northern Ireland)*, 7 SCHOLAR 23, 49 (2004) (mentioning that *Grutter* has received praise from affirmative action advocates).

6. *See, e.g.*, Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357, 395–96 (2003) (reviewing Justice O'Connor's position that critical mass passes strict scrutiny standard and her rejection of the notion "that the school must pursue all conceivable nonracial alternatives in its quest for diversity"); David G. Savage, *Court Affirms Use of Race in University Admissions*, L.A. TIMES, June 24, 2003, at A1 (declaring that for the "first time in a long time, civil rights lawyers celebrated a major victory in the Supreme Court").

7. *See, e.g.*, Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 NW. U. L. REV. 249, 283–84 (2004) ("The majority's rejection of Rehnquist's analysis—or more accurately, his unrebutted demonstration—together with its reshaped conception of a compelling governmental interest, effectively reduces strict scrutiny to something like rational basis review. So long as the Court can imagine or hypothesize some connection between a government's decision and some purpose of which the Court approves on grounds of social policy, it can now be upheld. And this is so even in a case where the facts show that the government is actually engaged in a sham that conceals a practice that the Court itself says is 'patently unconstitutional.'") (citation omitted); *see also* Dana Milbank, *Affirmative Action*

is the important debate concerning mixed-race individuals who are rapidly becoming the face of modern America.

The *Grutter* majority's failure to provide a clear definition of *who* is a racial minority makes the concept of racial preference somewhat illusory. The Court sanctioned the use of racial preference, but gave no direction regarding how to go about making that classification.[8] American society is itself increasingly diverse,[9] making any absolute definition of who is included in the definition of "minority" particularly elusive.[10] Now the Roberts Court is tasked with determining whether diversity is still a compelling government interest, and if so, how to correctly apply narrow tailoring, yet it must do so without any clear criteria as to what actually constitutes diversity.

All men may be "created equal," but not all minorities are similarly situated. At one extreme of a racial continuum exist minorities who have a dramatically different outlook on life than the typical middle-class Caucasian: a decidedly racial perspective.[11] They contribute to racial diversity through their very appearance and life experience.[12] At the continuum's other extreme are what may be best described as "phantom minorities": they *look* white,[13] have Anglo

Opponents Preparing for a Ballot Battle, WASH. POST, July 4, 2003, at A7 (noting the breadth of the opposition to affirmative action).

8. *See Grutter*, 539 U.S. at 334–35 (endorsing Justice Powell's opinion that race could be used as a plus factor in university admissions proceedings but not mentioning how to identify who is a racial minority).

9. *See id.* at 321.

10. *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (holding that "at a minimum," minority includes persons who are "genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*." (internal citations omitted)).

11. *See generally* Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 1–2 (1988) (advocating that women and minorities have a decidedly different perspective than the white majority).

12. A more in depth discussion of legitimate contributions under critical mass appears at the end of Part II and throughout Part III of this Comment. There is a very strong and pervasive argument that poor applicants contribute just as much to critical mass as a racial minority, but that argument breaks down as the consequences of critical mass are analyzed. Part IV of this Comment addresses the socioeconomic argument and finds that it would not solve the over arching problems of phantom minorities and their effects on critical mass.

13. The use of "white" is intentional. Throughout this Comment the author uses white to refer to Anglo-American ancestry and to mean advantaged, either economically, academically, or perhaps unconsciously. This does not always hold true but in a law school setting it is not uncommon for most students to be advantaged in some stereotypical way. For a more in depth discussion, see CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK 181–82 (1997). Of course, categorizing white as advantaged is not entirely accurate

names, and come from backgrounds void of racial-life experience, but nevertheless, exploit race-based affirmative action. Like a phantom that passes through a crowded room undetected, they are otherwise unidentifiable as minorities; their ethnicity emerges only momentarily when filling out applications for work or school, only to quickly disappear once again. Phantom minorities have the same advantages and perspectives as their white counterparts, but in contrast, can check the proverbial "box"[14] and use their marginal minority status to reap the benefits of affirmative action without contributing to racial diversity. Furthermore, phantom minorities provide an easy solution for schools and employers to satisfy their "diversity" goals without actually increasing diversity.[15]

This Comment argues that a clearer method to determine who qualifies as an ethnic minority is necessary in order for affirmative

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but there is some truth to the stereotype—as evidenced by Professor López, who indicated that some advantaged persons of Mexican ancestry disavow their Mexican roots and consider themselves white—particularly those who are fair-skinned. *See* Ian Haney López, *White Latinos*, 6 HARV. LATINO L. REV. 1, 3 (2003).

> In both Mexico and the United States, fair features enabled upward mobility. As a result, middle-class Mexicans in the United States were not only more acculturated, educated, and wealthy than other community members, but also more likely to bear European features. In contrast, laborers and more recent immigrants from Mexico were often darker and in other ways more distant from white ideals (for instance, by virtue of menial occupation, limited English ability, or poor education), and thus less able and less likely to avail themselves of a white identity. Having said that, it remains the case that Mexican Americans throughout the Southwest, in particular those who fashioned themselves as community leaders, typically claimed for themselves a white identity.

Id.

14. This is one of the most interesting elements in affirmative action because it leaves the possibility of error or abuse to the individual. By leaving the decision to the individual, several problems of categorization and regulation are avoided, but at what cost? See Part IV of this Comment for a discussion of alternatives that would result in diminished abuse by phantom minorities. Also, for a very interesting article dealing with affirmative action and "checking the box," see Barbara Lauriat, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L. REV. 1171, 1199 (2003) (arguing that "a criterion based on *checking a box* to indicate one's membership in a racial or ethnic group is much easier for admissions officers to deal with than criteria based on overcoming hardship or having had an unusual upbringing," but such a method contains inherent flaws (emphasis added)).

15. *See* G. Jeffrey MacDonald, *Law School Verdict's Still Out: Race vs. Ranking*, USA TODAY, Apr. 24, 2006, *available at* http://www.usatoday.com/news/education/2006-04-24-law-school-race_x.htm ("The USA 'is becoming more diverse, but the profession that broke down barriers (through landmark cases) is the least diverse' . . . ." (quoting interview of G. Jeffrey MacDonald with Leonard Baynes, St. John's University law professor and Law Review editor (2006))).

action to survive stringent, narrow tailoring requirements[16] and enjoy continued implementation in institutions of higher learning.[17] The lack of scrutiny on minority status undermines the legitimacy of critical mass rationale and seriously threatens the constitutionality of affirmative action itself.[18] In order to legitimize the pursuit of a critical mass, programs that rely on racial classification must clearly articulate the criteria of what "racial minority" includes, and look beyond simply whether or not the proverbial box was checked to account for the presence of phantom minorities.[19]

16. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., Nos. 05-908, 05-915, 2007 WL 1836531, at *25 (U.S. June 28, 2007) ("Our established strict scrutiny test for racial classifications, however, insists on 'detailed examination, both as to ends *and* as to means.'" (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995))); *see also* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 519–20 (2007) (arguing that the Court should return to a more consistent application of narrow tailoring—one which applies to the ends and the means of an affirmative action program). It is also important to note that Justice O'Connor was the crucial fifth vote in *Grutter* and was replaced by Justice Alito. *See* Jeffrey Rosen, *The Way We Live Now*, N.Y. TIMES, Sept. 24, 2006, at 6 (stating that some liberals fear that Justice Alito's appointment threatens the constitutionality of affirmative action).

17. *Parents Involved* maintained that *Grutter*'s affirmative action plan was still constitutional because of its "'holistic review'" of each candidate and focus on the "'broader assessment of diversity'" instead of "an effort to achieve racial balance." *Parents Involved*, 2007 WL 1836531, at *13 (quoting Grutter v. Bollinger, 539 U.S. 306, 330, 337 (2003)). The *Grutter* majority predicted that in twenty-five years consideration of race would no longer be necessary. *Grutter*, 539 U.S. at 343. In addition to being a generous prediction, the sunset clause (as it is known) indicates the disfavor that any race-based program endures and recognizes the inherent flaws in any approval of affirmation action. One of those flaws is the plight of disfavored minorities (i.e. those of Asian decent, who have not benefited as much from affirmative action due to disproportionately high academic performance). *See* Gabriel J. Chin, Bakke *to the Wall: The Crisis of* Bakkean *Diversity*, 4 WM. & MARY BILL RTS. J. 881, 936 (1996) ("[A]ffirmative action program[s] put[] disfavored minorities in an impossible and unfair dilemma."). Where some minorities are actively favored by admissions boards, other minorities' situations are worsened by affirmative action. *See id.* Also, implicit in the *Grutter* decision was the anticipation that the continued use of affirmative action as an impetus for social progress could make the "sunset" a reality. *Grutter*, 539 U.S. at 342 ("In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."). Unfortunately, the presence of phantom minorities in an affirmative action equation not only endangers the constitutionality of critical mass justification, but also seriously undermines the effectiveness of race-based affirmative action by stunting the progress that effective affirmative action tries to achieve via a true critical mass.

18. *See Grutter*, 539 U.S at 315–16 (explaining what critical mass meant to the University of Michigan).

19. *See* Dorothy A. Brown, *Taking* Grutter *Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 18 (2006) ("Race is a contentious subject. Everyone fears saying something

Part II of this Comment reviews *Grutter* and its strict scrutiny analysis, focusing on why student body diversity (i.e. *racial* diversity) is a compelling state interest. Part II also identifies several of the reasons the *Grutter* Court held that the University of Michigan's racial preferences were narrowly tailored, and considers how the Supreme Court's perspective on narrow tailoring may shift given the additions of Chief Justice Roberts and Justice Alito. Part III sets forth how the presence of "phantom minorities" jeopardizes the pursuit of legitimate "diversity" and cripples narrow tailoring. Part IV considers several possible solutions to achieve diversity in our modern society in which race is becoming an ever more fluid and intangible criteria. Self-identification coupled with a university's good faith effort to parse out phantom minorities is the approach most likely to assure a meaningful contribution to critical mass. Such an approach promises to overcome the problem of "phantom minority dilution" while increasing overall diversity.

II. *GRUTTER* AND STRICT SCRUTINY

In 1996, Barbara Grutter, "a white Michigan resident," applied to the University of Michigan's "Law School . . . with a 3.8 GPA and 161 LSAT score" but was placed on the "waiting list" and "subsequently rejected."[20] Consequently, she filed suit against the University of Michigan for discriminating against her based on race and claimed that the University did not have a compelling interest that would allow it to use racial preference in the admission process.[21] This case provided the Supreme Court with its first review of race-based affirmative action in twenty-five years.[22] The Court ultimately ruled against Barbara Grutter, holding that the University of Michigan's use of racial preference was constitutional.[23]

wrong and being labeled a racist. It is far safer not to talk about race than it is to talk about race. Therefore, most students do not come to higher education with a developed skill set enabling them to have interracial discussions about race.").

20. *Grutter*, 539 U.S. at 316.

21. *Id.* at 316–17. Grutter filed suit against "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), Jeffery Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991 until 1998)." *Id.*

22. *Id.* at 322.

23. *See id.* at 325.

When making racial classifications, the Supreme Court has repeatedly emphasized the "absolute necessity" for using "strict scrutiny when the State uses race as an operative category."[24] Such emphasis on strict scrutiny is necessary whenever a citizen challenges the constitutionality of a race-based affirmative action program.[25] Under traditional strict scrutiny, a court must first determine whether there is a compelling state interest and then whether that compelling interest is narrowly tailored.[26]

Justice O'Connor carefully crafted the *Grutter* opinion in an attempt to prove that strict scrutiny does not always result in striking down the use of racial preference.[27] Instead of endorsing racial diversity as a compelling state interest, she followed Justice Powell's concurring opinion in *Regents of the University of California v. Bakke*[28] that "*student body* diversity is a compelling state interest that can justify the use of race in university admissions."[29] In this way, she embedded racial preference as one of many important elements of student body diversity, claiming that race alone was not outcome determinative.[30] Accordingly, this Part will review the majority's strict scrutiny analysis in preparatiou for the phantom minority problem. First, it will review why the Court found there was a compelling state interest and then why the Court held that the University of Michigan's race-based approach was narrowly tailored.

24. *Id.* at 388 (Kennedy, J., dissenting) (explaining that the only way to satisfy the Equal Protection Clause's strict scrutiny test with regard to race is by narrow tailoring); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224, 227 (1995) (reaffirming that any government actor subject to the Constitution must justify any racial classification subjecting that person to unequal treatment under strict scrutiny); Richmond v. J. A. Croson Co., 488 U.S. 469, 493–94 (1989) (reaffirming that any racial preference must survive strict scrutiny).

25. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289–91 (1978) (Powell, J., concurring) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination [under the Equal Protection Clause].").

26. *See Grutter*, 539 U.S. at 326–27 ("This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. . . . We apply strict scrutiny to all racial classifications to '"smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" (quoting *Croson*, 488 U.S. at 493) (alteration in original)).

27. *Id.* at 326 (quoting *Adarand*, 515 U.S. at 237) ("Strict scrutiny is not 'strict in theory, but fatal in fact.'").

28. *See Bakke*, 438 U.S. at 315.

29. *Grutter*, 539 U.S. at 325 (emphasis added).

30. *Id.* at 339.

A. Compelling State Interest

The University of Michigan argued that obtaining the "educational benefits that flow from a diverse student body" was a compelling interest that justified its admissions program.[31] In conjunction, the University argued that a diverse student body could only be realized if it admitted "a 'critical mass' of underrepresented minorities."[32] The Court agreed and held that benefits flowing from diversity are "important," "laudable," and not merely theoretical.[33] In determining whether a compelliug state interest existed, the Court established that it would presume a good faith effort on the part of the University and then scrutinized whether there were legitimate benefits associated with critical mass affirmative action.[34] Those benefits largely fall under two categories: cross-racial understanding and promotion of learning outcomes.[35]

31. *Id.* at 328 (internal citation omitted).

32. *Id.* at 333. In contrast, the dissent vociferously argues that critical mass can also be seen as a way to constitutionalize racial quotas. *See id.* at 389 (Kennedy, J., dissenting) ("The dissenting opinion by THE CHIEF JUSTICE, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."). Justice O'Connor, however, argues that there is no quota because the number of minorities attending the University of Michigan ranges more than a few percentage points from year to year. *Id.* at 335–36 (majority opinion). She also argues that there is no problem with the Equal Protection Clause because there are applicants with lower LSAT and GPAs than minorities that are admitted due to other "plus factors." *Id.* at 338.

33. *Id.* at 328, 330. In conjunction with the several amicus briefs that were filed, the Court went as far as to say that national security and leadership of this country depended on diversity. *Id.* at 331–32.

34. *See id.* at 329–30.

35. These two categories do not include all of the benefits of diversity, but they do indicate the major ways in which the Court rationalized critical mass under utilitarianism. It makes sense that a white majority would not continue the use of affirmative action based solely on personal preference, but only if it would benefit them in some way. The difficulty with using personal preference is that there would have to be some sort of vote to determine what the exact outcome should be. It is much more external because it would benefit the society as a whole, and in particular, minorities and their inclusion in society. *Cf.* Gabriël A. Moens, *Preferential Admission Programs in Professional Schools:* Defunis, Bakke, *and* Grutter, 48 LOY. L. REV. 411, 469–70 (2002) (arguing that race should be used as one factor among many in university admissions). Also it appears that the Court uses critical race theory, a movement that largely favors affirmative action, in its rationale. Critical race theory justifications are found in the Court's broad language that indicates there is intrinsic value in the educational benefits such as diminishing stereotypes and advancing a minority perspective—even if that perspective is not a classic minority perspective—because it will help break down stereotypes. *See Grutter*, 539 U.S. at 328–35 (2003); *cf.* Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855, 871–72 (2003) (advancing

1. Deference to a university's good faith

The *Grutter* majority largely based its decision that there was a compelling interest justifying racial preference by deferring to the University of Michigan's good faith.[36] The majority held that since "complex educational judgments," such as whether student body diversity is essential to a university's educational mission, lie "primarily within the expertise of the university," universities deserve broad deference.[37] Also, the Court stated that "'good faith' on the part of a university is 'presumed'" unless a party proves otherwise.[38] This means that the Court will presume that universities are sincere in their determination that the use of race (or another practice) is necessary to the university's educational mission.[39] After establishing its reliance on the University of Michigan's good faith determination, the Court scrutinized the University's "assessment that diversity will, in fact, yield educational benefits."[40]

2. Benefits of critical mass affirmative action

a. Cross-racial understanding. The Court held that a critical mass of underrepresented minorities qualified as a compelling state interest because it leads to cross-racial understanding, which, in turn, erodes stereotypes and increases understanding of persons of different races, and thereby benefits society as a whole.[41] A critical mass of minorities, under the Court's reasoning, diminishes stereotypes by close interaction with non-minorities and facilitates livelier and more enlightened classroom experience.[42] Such classroom benefits, however, are only realized if a critical mass, or "meaningful

the notion that many minorities do not believe in affirmative action: "Everyone knows of defector cases, like Richard Rodriguez or Linda Chavez, the Latino/a writers who deplore affirmative action, . . . [and] Clarence Thomas, the African-American Supreme Court justice who almost always votes with the conservative majority . . . ." (internal citations omitted)).

36. *See Grutter*, 539 U.S. at 327–29.

37. *Id.* at 328.

38. *Id.* at 329 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978)).

39. *See id.* at 327–29.

40. *Id.* at 329.

41. *Id.* at 330.

42. *See id.* While the Court was specifically addressing the law school classroom experience, this same benefit reasonably recurs in most educational settings.

number," of underrepresented minorities is present so that minorities do not feel isolated.[43] This does not mean that minorities must provide a characteristic viewpoint;[44] instead, it means that being a racial minority, in a society where race still matters, is likely to affect a person's viewpoint, even if it is not a characteristic viewpoint.[45]

To advance cross-racial understanding within a student body, it is necessary that students recognize the fact that their peers come from different racial backgrounds. Thus, inherent in the Court's judgment is the unspoken insinuation that non-minorities and minorities will be able to recognize who is a racial minority—otherwise no stereotypes would break down and lively classroom participation would not be attributed to racial diversity.[46] When university students recognize racial diversity, the Court holds that this recognition promotes cross-racial understanding and could reduce racial tension and prejudice in the future.[47] The Court also agrees that critical mass facilitates the sharing of different perspectives and could reinforce a racial minority's motive to communicate his or her viewpoint.[48]

b. Promotion of learning outcomes. Another important benefit derived from critical mass is the promotion of learning outcomes for

43. *Id.* at 318 (quoting Petition for Writ of Certiorari app. at 208a–209a, *Grutter*, 539 U.S. 306 (No. 02-241), 2002 WL 32101133). Critical mass could also be defined as "meaningful representation." *Id.* (quoting Petition for Writ of Certiorari app. at 208a–209a, *Grutter*, 539 U.S. 306 (No. 02-241), 2002 WL 32101133 (internal citations omitted)).

44. *See id.* at 333.

45. *See id.*; *cf.* Brown, *supra* note 19 (arguing that race still matters even though most students do not know how to address the issue because of a fear that others will label them racist). This is likely one of the reasons why *Grutter* held that there was a compelling state interest to include people from diverse backgrounds in law schools.

46. *See Grutter*, 539 U.S. at 333. If students in the classroom could not discern that someone was from another race, then there would be no point to critical mass because all of the benefits would dematerialize. This could either mean that the country is so diverse that affirmative action is no longer needed (because racism is gone), or that universities are not focusing on obtaining the right type of minorities in their classrooms.

47. *Id.* at 330. If there are more minorities in law school, then, ideally, others will see that they are also intelligent and certain barriers will break down in that area. *See* Carla D. Pratt, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 HOUS. L. REV. 55, 60 (2006) ("It is my hope that law schools will consider the post-law-school benefits of diversity in legal education and will incorporate those back-end benefits into the mission of the institution . . . .").

48. *Grutter*, 539 U.S. at 330; *see* Brown, *supra* note 19, at 16–17. Brown advances the idea that all first year law students should have courses based in critical race theory to further the purposes advanced by the *Grutter* Court's justifications for critical mass. *Id.* at 27.

students of all races as well as minority students.[49] The Court reasoned that exposure to underrepresented minorities in an educational environment could better prepare students for "an increasingly diverse workforce and society, and better prepare[] them as professionals."[50] The Court held that these benefits were not merely theoretical, indicating that "American businesses have made clear that the skills needed in today's global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[51] Additionally, the Court opined that the education of minorities was central to this nation's "'political and cultural heritage' with a fundamental role in maintaining the fabric of society."[52]

Furthering its utilitarian viewpoint, the Court determined that cross-racial understanding and effective participation by members of all racial and ethnic groups is "essential if the dream of one Nation, indivisible, is to be realized."[53] In particular, the Court emphasized that law schools[54] and other avenues to leadership, such as elected

49. *Grutter*, 539 U.S. at 330.

50. *Id.* (citing Brief for American Educational Research Association et al. as Amici Curiae at 3, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 398292); *see also* Jessica Bulman-Pozen, Grutter *at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1414–15 (2006) (explaining how Title VII illuminates the *Grutter* opinion by showing the benefits to society as a whole).

51. *Grutter*, 539 U.S. at 330–31 (citing Brief for General Motors, Corp. as Amicus Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 399096).

52. *Id.* at 331 (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)). Many of these benefits are unmistakably utilitarian because they focus on the future good that diversity-based learning outcomes might have on the entire country. Also, by citing amicus curiae representing entities such as General Motors, the American Educational Research Association, the ROTC, and the United States, the Court demonstrated a strong external and personal preference, entwined within critical mass justification. *See id.* at 331–32. Of course, one could argue that since those companies and the government do not want to be liable for Equal Protection Clause violations, they must support affirmative action.

53. *Id.* at 332. See also Ronald Dworkin, *Affirmative Action: Is It Fair?*, J. BLACKS IN HIGHER EDUC. 79, 87–88 (2000), for an interesting comparison between Dworkin's utilitarian viewpoint and the benefits that the Court cites as essential to one nation, indivisible. He uses mostly utilitarianistic arguments but does not endorse such a view entirely. For a more in depth discussion of sections within utilitarianism, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227–34 (1977).

54. Not surprisingly, the Court, whose members consist of law school graduates from very prestigious schools, seems to show personal and external preferences for law school diversity. *See Grutter*, 539 U.S. at 332 ("The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.").

offices, need to be "*visibly* open" to members of all races in order to legitimize the country's leadership in the eyes of its citizenry.[55]

Phantom minorities, discussed in Part III, inhibit race-based affirmative action from fully realizing the benefits outlined by *Grutter*: by diluting the pool of "qualified" applicants, phantom minorities weaken attempts to erode stereotypes, prepare individuals for a more diverse workforce, and provide a visibly open path to leadership.

B. Narrow Tailoring

After holding that there was a compelling state interest in obtaining student body diversity,[56] the Court focused on whether the University of Michigan's critical mass program was narrowly tailored.[57] The *Grutter* Court acknowledged that "[w]hen race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection *so long as the narrow-tailoring requirement is also satisfied*."[58] Nevertheless, many claim that the majority failed to apply the narrow-tailoring requirement correctly to the University of Michigan's implementation of race-based affirmative action.[59]

The *Grutter* majority identified several factors a court should consider when evaluating whether a "race-conscious admissions program" is narrowly tailored.[60] Under the Court's reasoning, a university cannot use a quota system, meaning it cannot completely insulate "each category of applicants with certain desired qualifications from competition with all other applicants."[61] Second, the Court explained that an admissions program should be flexible enough that race is only one factor "in a particular applicant's file" and there should not be a mechanical acceptance based on race.[62]

55. *Id.* at 332–33 (emphasis added).

56. *Id.* at 328.

57. *Id.* at 333.

58. *Id.* at 327 (emphasis added).

59. *See id.* at 388 (Kennedy, J., dissenting). Justice Kennedy also states that "[t]he majority fails to confront the reality of how the [University of Michigan] Law School's admissions policy is implemented." *Id.* at 389; *see also* Lund, *supra* note 7, at 279–88 (advocating that the *Grutter* majority's failures go much further than failing to correctly apply strict scrutiny).

60. *Grutter*, 539 U.S. at 334.

61. *Id.* (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).

62. *Id.* (quoting *Bakke*, 438 U.S. at 317).

Third, racial preferences should not unduly burden those who are not from under-represented ethnicities,[63] meaning that their applications should not be foreclosed "simply because [they were] not the right color or had the wrong surname."[64] Perhaps the best way the Court described narrow tailoring was "highly individualized, holistic review of each applicant's file."[65]

In addition to the way in which a university should consider applicants, the Court mentions other important concerns attached to narrow tailoring. First, there should be a logical end point to racial preference.[66] This means a university should have "sunset provisions in race-conscious admissions policies" and should conduct "periodic reviews to determine whether racial preferences are still necessary to achieve . . . diversity."[67] Second, narrow tailoring necessitates a "serious, good faith consideration of workable race-neutral alternatives."[68] The Court, however, held that race-neutral alternatives that "require a dramatic sacrifice of diversity" or "the academic quality of all admitted students" undermine the compelling state interest in diversity.[69] Notably, the good faith requirement only calls for the consideration of race-neutral alternatives—it does not encompass how a university implements its race-based affirmative action program, which is one reason there were four dissenting opinions.[70]

According to Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, the majority failed to correctly apply strict

63. *Id.* at 341.

64. *Id.* (quoting *Bakke*, 438 U.S. at 318).

65. *Id.* at 337.

66. *Id.* at 342.

67. *Id.* One danger inherent to such sunset clauses is the risk that those responsible for evaluating the state of racism may optimistically declare racism extinct and end remedial programs such as affirmative action prematurely. In addition to overt racism, any consideration of whether the "sunset" has arrived must also consider more unsubtle, unconscious racism. *See* Richard Salgado, *Dan the Xenophobe Rides the A-Train, or The Modern, Unconscious Racist in "Enlightened America,"* 15 AM. U. J. GENDER, SOC. POL'Y & L. 69, 109–10 (2006) ("The absence of burning crosses, white hooded infantrymen, and swastikas might convince some that racism is dead, while it is actually as well entrenched in our society as it has ever been . . . . [We must not] mistakenly believ[e] it's already gone because no one is burning a cross on our neighbor's front lawn.").

68. *Grutter*, 539 U.S. at 339.

69. *Id.* at 340.

70. This is why Justice Kennedy was categorically opposed to this opinion. *See id.* at 388 (Kennedy, J., dissenting).

scrutiny.[71] While many of their disagreements are outside the scope of this Comment, Justice Kennedy's opinion identifies a central problem: "the Court confuse[d] deference to a university's definition of its educational objective with deference to the implementation of this goal."[72] In other words, the Court was right to give deference to whether racial diversity was central to the University of Michigan's educational goals, but should not have given such broad deference to whether the University's implementation of its critical mass program was narrowly tailored.[73]

C. Change in the Supreme Court

Since the *Grutter* decision, the Court has changed significantly. Justice O'Connor, the author and swing vote in *Grutter*, has been replaced by Justice Samuel Alito[74] and the passing of Chief Justice Rehnquist brought the nomination of Chief Justice John Roberts.[75] Justice Roberts appears to be as conservative as Chief Justice Rehnquist, and Justice Alito's previous record as a judge is more conservative than Justice O'Connor's.[76]

71. *Id.* at 394 ("As to the interpretation that the opinion contains its own self-destruct mechanism, the majority's abandonment of strict scrutiny undermines this objective."); *id.* at 380 (Rehnquist, C.J., dissenting).

72. *Id.* at 388 (Kennedy, J., dissenting). As mentioned previously, Justice Kennedy also states that "[t]he majority fails to confront the reality of how the [University of Michigan's] Law School's admissions policy is implemented." *Id.* at 389.

73. *See id.*

74. *See, e.g.*, Mark C. Rahdert, *In Search of a Conservative Vision of Constitutional Privacy: Two Case Studies from the Rehnquist Court*, 51 VILL. L. REV. 859, 877–78 (2006) ("More importantly, with Justice Alito's confirmation, there is now a solid conservative majority that is likely to hold firm on many civil liberties issues on the Court, including many aspects of the privacy-related issue of abortion. That conservative phalanx, moreover, includes all the Justices on the Court who are under the age of sixty-five. Given the Court's age demographics it is thus likely that the Court will speak with a conservative voice for years, even if the prevailing national political mood becomes more liberal. Thus, if constitutional privacy is to advance in the first third of the twenty-first century, it must do so as a conservative doctrine.").

75. *See id.*

76. *See generally* L. Darnell Weeden, *Justice Alito and the Issue of Racial Discrimination: From Racial Segregation to Racial Diversity*, 33 S.U. L. REV. 469, 510–11 (2006) (concluding based on Justice Alito's record as a judge that he will not approve of race as an operative category but will likely side with Justice Thomas and hold that race-neutral means are possible); Charles Lane, *Alito Leans Right, Where O'Connor Swung Left*, WASH. POST, Nov. 1, 2005, at A1; Todd S. Purdum, *Court in Transition: News Analysis; Potentially, the First Shot in All-Out Ideological War*, N.Y. TIMES, Nov. 1, 2005, at A22.

While "conservative" leanings may not prove how Chief Justice Roberts and Justice Alito will rule on race-based programs, the 2005 and 2006 Terms have hinted that they generally side with the *Grutter* dissenters.[77] In the 2005 Term, Chief Justice Roberts sided with Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito eighty six and a half percent of the time.[78] Additionally, Chief Justice Roberts only voted in a non-conservative way once in the 2005 Term, while Justice Alito never strayed from his conservative leanings.[79] Further, a 2006 dissenting opinion authored by the Chief Justice and joined by Justice Alito stated that "divvying us up by race" was "a sordid business."[80]

If Chief Justice Roberts and Justice Alito continue to agree with the *Grutter* dissenters, it seems likely that the Roberts Court will apply a stricter interpretation of narrow tailoring to race-based affirmative action.[81] While institutions of higher learning have been

77. Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas dissented in *Grutter*. *Grutter*, 539 U.S. at 310. For a graph showing how many times each Justice agreed with each other in the 2005 Term, see Jeffrey Rosen, *Robert's Rules*, ATLANTIC MONTHLY, Jan.–Feb. 2007, at 104, 107. Notably, in *Parents Involved* the Roberts Court held that racial integration programs were unconstitutional because "racial balancing" was not a compelling interest. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., Nos. 05-908, 05-915, 2007 WL 1836531, at *3 (U.S. June 28, 2007). At the same time, however, the Court maintained that *Grutter* was still good law because it merely used race as one element of student body diversity. *Id.* at *13.

78. *See* Rosen, *supra* note 77 (adding the percentages and dividing by four).

79. Erwin Chemerinsky, *The Rookie Year of the Roberts Court & a Look Ahead*, 34 PEPP. L. REV. 535, 536 (2007).

80. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., dissenting). Additionally, Chief Justice Roberts ends *Parents Involved* by saying that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 2007 WL 1836531, at *28.

81. With the added perspective of Chief Justice Roberts' majority opinion in *Parents Involved*, it is even clearer that the Roberts Court is stricter in its application of narrow tailoring. *See id.* at *26 ("It is evident, however, that JUSTICE BREYER's brand of narrow tailoring is quite unlike anything found in our precedents. Without any detailed discussion of the operation of the plans, the students who are affected, or the districts' failure to consider race-neutral alternatives, the dissent concludes that the districts have shown that these racial classifications are necessary to achieve the districts' stated goals."). Of course, conservatives have hoped for changes before only to be disappointed—i.e., when President George H. W. Bush nominated Justice Souter and he quickly became a staunch liberal. *See* Jan Crawford Greenburg, *The Cause Bush Did Justice To*, WASH. POST, Jan. 21, 2007, at B1 ("Souter, an unknown New Hampshire jurist who edged out favored nominee Kenneth W. Starr, quickly became one of the court's most liberal justices. Conservatives consider his selection one of the biggest blunders of a Republican president in the 20th century."). For an admittedly biased view of Chief Justice Roberts and Justice Alito's political affiliations and conservative leanings, see Editorial, *Senators in Need of a Spine*, N.Y. TIMES, Jan. 26, 2006, at A22 (asserting that

afforded a great deal of deference in their admission processes,[82] that deference—as Justice Kennedy noted—does not extend to the implementation of an affirmative action program under strict scrutiny analysis.[83] It seems likely that the new Justices, Chief Justice Roberts and Justice Alito, will follow Justice Kennedy's criticism and strictly apply narrow tailoring to the implementation of a race-based affirmative action program. Such narrow tailoring would reject phantom minorities' claim to race-based affirmative action, which is discussed in the next Part.

III. PROBLEMS WITH PHANTOM MINORITY DILUTION

Based on the Court's justifications for critical mass, phantom minorities pose a serious threat to the constitutionality of race-based admissions policies because they do not contribute to cross-racial understanding or promote diversity-based learning outcomes under a narrow tailoring requirement. By assuming all persons that claim racial minority status qualify for affirmative action, universities endanger race-based affirmative action. Even though Justice O'Connor's majority opinion re-legitimized the consideration of race in admission policies, it also acknowledged the possibility of "serious problems of justice" in race-based admissions and emphasized the need to carefully tailor admissions policies.[84] For this reason, Justice Kennedy's dissent in *Grutter* argued that narrow tailoring must include emphasis on the way in which a university applies a race-based admission program.[85] In order to filter out phantom minorities from the pool of qualified candidates, an

Justice Alito, in particular, will support President Bush in all his political power needs and will combine with Chief Justice Roberts to be very conservative).

82. *See, e.g.*, Sweezey v. New Hampshire, 354 U.S. 234, 250 (1957) ("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.").

83. Grutter v. Bollinger, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting). As mentioned previously, Justice Kennedy also states that "[t]he majority fails to confront the reality of how the [University of Michigan] Law School's admissions policy is implemented." *Id.* at 389.

84. *Id.* at 341 (majority opinion) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).

85. *See id.* at 388–89 (Kennedy, J., dissenting).

affirmative action program must increase scrutiny on who is a racial minority or suffer phantom minority dilution.[86]

A. The Racial Continuum: From Bona Fide to Phantom Minorities

To ascertain what type of minority fulfills the *Grutter* Court's justifications for critical mass, this Comment looks at five fictional, arguably "Mexican"[87] law school students—each claiming a varying

86. *See* Kenneth E. Payson, Comment, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1223, 1256–57 (1996). Payson addresses the problem of self-identification among minorities. He cites to Directive No. 15 and criticizes it for lack of inclusion of those who do not want to identify themselves with a particular ethnicity. *Id.* For example, what if a person is half Asian and half black? What if they do not want to choose either ancestry because they feel affiliated with both racial groups? Could this person, then, abuse the system by claiming black when applying to jobs or universities? Is that really abuse? A part of Payson's article, which discusses the one drop rule and its effect on all racial groups, states: "[M]any mixed-race persons, including mixed-Black/White persons, are asserting their mixed-race identities and resisting monoracial classification. Consequently, mixed-race persons are often inconsistently and arbitrarily reclassified under the current scheme, which renders race data used to track and remedy race-based discrimination unreliable." *Id.* at 1257.

87. Some use "Hispanic" or "Latino" as an all-inclusive racial category, but those terms do not encompass the same issues, like illegal immigration or some of the prevalent biases based on the United States' proximity to Mexico. This Comment specifically uses "Mexican" because of the recent controversy over illegal immigrants and the negative sentiments towards Mexicans, likely due, at least in part, to the immigrant situation. *See* Gustavo Arellano, *A Chicken in Every Pot of Gold*, PHOENIX NEW TIMES, Nov. 16, 2006, *available at* http://www.phoenixnewtimes.com/2006-11-16/news/a-chicken-in-every-pot-of-gold/ (using stereotypes of Mexicans to describe local culture); Patrik Jonsson, *Backlash Emerges Against Latino Culture: The Influx of Immigrants Has Some Cities and Towns Restricting Taco Stands and Spanish Speakers*, CHRISTIAN SCI. MONITOR, July 19, 2006, at 3; Maura Reynolds & Sam Enriquez, *Calderon Pressures Bush on Immigration*, L.A. TIMES, Mar. 14, 2007, at A6 (reporting on President Calderon's opposition to the Bush Administration's immigration policies regarding Mexico—i.e., the 700 miles of fencing).

Admittedly there are many types of minorities not discussed in this Comment that range from women, who also benefit from affirmative action, to religious minorities. In addition, because of the wide range of degrees among Mexicans and their long history in the United States, they are sometimes mistaken as white—just as the old Jim Crow laws identified them as white. *See* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 888 (1995) (citing RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURALISM IN AMERICA 330–31 (1993)). It is interesting that even within the Hispanic culture there are many Mexican Americans that discriminate against Mexicans from Mexico because of the negative effect the huge influx of immigrants has on people in general. *See Spanish 'Banner' Draws Protest*, USA TODAY, Apr. 29, 2006, *available at* http://www.usatoday.com/news/nation/2006-04-28-spanish-anthem_x.htm ("A remix to be released in June will contain several lines in English that condemn U.S. immigration laws. Among them: 'These kids have no parents, cause all of these mean laws . . . let's not start a war with all these hard workers, they can't help where they were born.'").

degree of Mexican ancestry. Due to the nature of the phantom minority problem, this Part may appear driven more by social policy considerations than a strict legal analysis,[88] but such a description is necessary to establish the problems with the current system, which can then be analyzed legally. Each of the hypothetical characters has blatant stereotypes, which the author does not agree with, but includes them here to make the reader aware of the possible racial differences worthy of affirmative action. It is the author's hope that each reader will appreciate these hypotheticals for the issues they raise, not the stereotypes they might contain. After all, one of the reasons the *Grutter* Court endorsed racial preferences within critical mass was to break down racial stereotypes.[89]

Removing gender from the equation,[90] each Mexican student is male and a beneficiary of affirmative action in law school. A description of each student follows and is accompanied by a brief analysis of his minority status and contribution to critical mass. Of course, this list is in no way comprehensive of all possible degrees of Mexican ancestry or minority status, but it will provide a sufficient vehicle for discussion.

1. Juan Rodríguez del Carmen

Juan is originally from Obregón, Mexico. His family moved to the United States when he was ten years old so his parents could become

88. Outside of remedial measures, affirmative action advocates generally support their arguments with social policy. *See* James P. Sterba, *Completing Thomas Sowell's Study of Affirmative Action and then Drawing Different Conclusions*, 57 STAN. L. REV. 657, 661 (2004) ("[A]ll forms of affirmative action can be understood, in terms of their immediate goals, as being either outreach, remedial, or diversity affirmative action, where remedial affirmative action further divides into two subtypes, with one subtype simply seeking to end present discrimination and create an equal playing field, and the other subtype attempting to compensate for past discrimination and its effects. So Sowell's comparative analysis of affirmative action needs to be completed with a more adequate definition of affirmative action, one that should be acceptable to both defenders and opponents of that social policy." (reviewing THOMAS SOWELL, AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY (2004))); *see also* Yolanda Flores Niemann & John F. Dovidio, *Tenure, Race/Ethnicity and Attitudes Toward Affirmative Action: A Matter of Self-Interest?*, 41 SOC. PERSP. 783, 785 (1998) (discussing several social policy arguments such as reverse discrimination, negative impact on self-esteem, equalizing opportunities, and other harms to race relations).

89. *See Grutter*, 539 U.S. at 333.

90. Although possible, generally gender differences are more apparent and easier to define than racial differences, making a phantom female less problematic constitutionally than a phantom racial minority.

migrant workers in Nebraska and, hopefully, provide a better life for themselves. Juan is easily recognized as Mexican because he has darker skin and frequently refers to his Mexican ancestry. Although Juan's family has been in the United States for nearly fifteen years his mother still has not learned English beyond common shopping words and farm terminology. Juan struggled in elementary school but had a Hispanic guidance councilor[91] *in high school that encouraged him to get good grades and attend college, which he did.*[92] *He is now finishing his first year of law school.*

Based on the policy justifications given in *Grutter*, there is little doubt that Juan is a bona fide minority—even if the Supreme Court were to apply a closer scrutiny of his minority status. Juan is *likely* to have a unique racial perspective that would add to "student body diversity"[93] because his family does not speak English, he was born in another country, he speaks another language, he grew up as a migrant laborer alongside his father, and he has likely experienced racial prejudice—at least to the extent that it exists in Nebraska.[94] He could, most likely, contribute to critical mass because other students

91. Some argue that the main function of affirmative action is to provide role models, like this counselor, that help other minorities advance because of encouragement or just by example. *See* Kim-Sau Chung, *Role Models and Arguments for Affirmative Action*, 90 AM. ECON. REV. 640 (2000). Again, phantom minorities negate this potential benefit. Current Supreme Court Justice Clarence Thomas' open opposition to affirmative action stands in stark contrast to the role model justification. *See* Ernest Holsendolph, *Skills, Not Bias, Seen as Key for Jobs*, N.Y. TIMES, July 3, 1982, at A5 (noting that Justice Clarence Thomas described himself as "unalterably opposed to programs that force or even cajole people to hire a certain percentage of minorities").

92. Encouragement is important because as recent studies have shown, Black and Hispanic student enrollment and graduation from college has increased but is still not in line with their percentage enrollment in high school. *See, e.g.*, Laura Walter Perna, *Differences in the Decision to Attend College Among African Americans, Hispanics, and Whites*, 71 J. HIGHER EDUC. 117, 117, 119–21 (2000) (explaining how different ethnic groups might misunderstand financial benefits versus the debt involved in attending college resulting in lower numbers of minorities going to college).

93. *Grutter*, 539 U.S. at 325.

94. Some have argued that social status plays a larger part in discrimination than race. *See, e.g.*, Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35, 38–39 (2005) ("Exploited migrant workers in the United States face increased workplace abuses and a decrease in rights, and risk deportation for exercising those rights to which they are entitled. Employers are increasingly fighting unionization campaigns by firing or threatening undocumented workers, thwarting labor organizers, and defying immigration law. This is occurring while retaliatory firings have increased as unions aggressively recruit immigrants and as the economy employs more undocumented workers.").

will recognize that he is Mexican because of his appearance and comments.[95] He could help change stereotypes about Mexican migrant workers and make class discussion more enlightening.[96] He could also help his peers prepare for the workforce by allowing them to interact with someone with a different racial background and with unique life experiences. It appears that Juan is exactly the type of minority that will meaningfully contribute to critical mass.[97]

2. Miguel Sanchez

Miguel was born in Pocatello, Idaho to an upper middle class Mexican family that believed in education. He has always received good grades and performs well on standardized tests. His parents did not allow Spanish in the house because they wanted their family to blend in with the local culture. Miguel has mostly white friends but is darker-skinned and, like Juan, is very open about his ancestry.

Miguel is also a type of minority that should qualify for admission under critical mass because he will help promote cross-racial understanding and add to *Grutter*'s learning outcomes. The major difference between Miguel and Juan is social class.[98] Miguel will add to the deconstruction of stereotypes because of his family's socioeconomic status and because, based on his test scores, he is likely to excel as much as his white counterparts.[99] Depending on the

95. This assumption, however, is under-inclusive because there are several fair-skinned persons from Mexico and most other Spanish speaking countries.

96. One clear example would be a torts class, where a reasonable person from a "Mexican American" perspective could be different than a reasonable person from an "Anglo-American" perspective. Under the *Grutter* reasoning, this would help break down stereotypes and add to student body diversity. *See Grutter*, 539 U.S. at 333. Juan's differing perspective could help the white majority see a viewpoint that might otherwise have remained unarticulated.

97. Admittedly, there are flaws with this line of thought. For example, if Juan attended law school where there were predominately Hispanic students, he would not add to cross-racial understanding in the same way he would in a predominately white law school. This is, of course, why Justice O'Connor provided the sunset clause—because after a while cross-racial understanding and the other learning outcomes become self-executing. *See Grutter*, 539 U.S. at 342.

98. *See* de la Vega & Lozano-Batista, *supra* note 94, at 36–39 (explaining that "migrant worker" is a classification by itself); *see also* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1053–57 (1995) (explaining how social status influences, or at least has influenced, how racial groups interact with each other).

99. Of course, LSAT scores are not entirely indicative of performance in law school. For an interesting criticism of affirmative action based on blacks' lower LSAT scores, see *Grutter*,

composition of his law school class, many of Miguel's classmates may have never had significant exposure to Mexicans, particularly in an educational or scholarly environment. Upon interacting with Miguel, his classmates will see that not all Mexicans fall into stereotypical roles—i.e., cleaning houses or speaking with foreign accents;[100] hopefully, they will see someone intellectually just like them—but racially distinct.

This distinction will promote critical mass educational benefits because Miguel looks different, which will open his classmates' minds to other perspectives and begin to erode racial stereotypes. While Miguel is not disadvantaged economically, his background and experiences may still provide valuable insights and a different viewpoint to non-minority classmates; for example, Miguel may have experienced actual incidents of racism and he may not have received the same encouragement as his white counterparts prior to entering law school.[101] Thus, because Miguel has at least a strong likelihood of contributing to the diversity of viewpoints at his school, like Juan, his enrollment appears to fulfill the policies enumerated by the

539 U.S. at 369–70 (Thomas, J., dissenting) ("Similarly no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to 'correct' for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body."); *see also* Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. TOL. L. REV. 377, 383 (1970) (arguing that affirmative action only furthers inequities because it sets up minorities to fail by placing unqualified minorities with other students that have met stringent academic standards which "means that few can meet the normal standards for admission to the highly competitive law schools; but it does not mean that substantial numbers of minority students who seek to become lawyers are unable to meet the normal standards for admission to other accredited law schools").

100. Of course, this is a blatant (and pejorative) stereotype, which is perpetuated in movies such as *The Goonies* and *A Day Without a Mexican*. A DAY WITHOUT A MEXICAN (Altavista Films 2004) (creatively depicting what California would be like without Mexicans doing all the stereotypical jobs such as gardening, house cleaning, and selling produce); THE GOONIES (Warner Bros. 1985) (showing a Spanish-speaking housekeeper imbued with stereotypes).

101. No matter how privileged a minority might be, he is still at a disadvantage. *See* LAWRENCE & MATSUDA, *supra* note 13, at 181 ("The myth that affirmative action helps only the privileged is often accepted, even among students of color. It assumes that the sole beneficiaries of affirmative action are 'privileged' women and minorities. In fact, the opposite is true. Affirmative action has been least effective in forcing integration of high-status jobs—professors, CEOs, law firm partnerships—where subjective evaluation and white male social capital still reign supreme.").

Supreme Court in determining a constitutionally significant critical mass.[102]

3. Christian J. Miller

Christian is from a small town in Iowa and is half Mexican. His father is a white accountant for a major accounting firm. Christian has always received good grades largely because his parents stressed the importance of school. Some of his siblings look full-blooded Mexican. While his skin is not very dark, he does tan well in the summertime and has cold black hair.

Christian becomes uncomfortable whenever someone asks about his heritage because he knows about racial stereotypes and does not want to be associated with them.[103] *He does, however, claim to be half Mexican when asked. He does not usually spell out his middle name, Javier, but when applying for law school he checked the Mexican box and made sure that his middle name was spelled out on all the applications. He was admitted with a partial scholarship from a Minority Lawyers Association even though his white counterparts with the same test scores may not have been admitted.*

Christian's ethnicity is increasingly common in the university setting because he, and others like him, can simultaneously benefit from being white and racially diverse.[104] Christian receives the benefit of affirmative action policies even though he has arguably received the stereotypical advantages of growing up in an Anglo-American home: established professional and educational opportunities, an Anglo-American last name, and an ability to socially homogenize himself with other non-minority friends, for whom race may still

102. Remember that Juan does come from another country while Miguel was born in the United States. It is important, under the *Grutter* rationale, that the other law students recognize that Mexican Americans exist and are different than Mexicans, otherwise there is not cross-racial understanding—just flawed assumptions. *See Grutter*, 539 U.S. at 333; *see also* Ian F. Haney López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 208–09 (2001) (explaining some of the differences between Mexicans and Mexican-Americans).

103. *See, e.g.*, Lynette Clemetson, *The Racial Politics of Speaking Well*, N.Y. TIMES, Feb. 4, 2007, § 4, at 1 (focusing on Senator Biden's characterization of Barack Obama as articulate, which may imply that other minorities are not); Marcelle S. Fischler, *Long Island Journal; Bartering Away Hispanic Stereotypes*, N.Y. TIMES, Mar. 6, 2005, § 14LI, at 4.

104. *See* Felicity Barringer, *Mixed-Race Generation Emerges But Is Not Sure Where It Fits*, N.Y. TIMES, Sept. 24, 1989, § 1, at 22 (describing how the increase of mixed-race babies has forced hospitals to record the baby's race as the same as the mother's to avoid confusion).

matter.[105] Concurrently, he has benefited from affirmative action even though he could have probably advanced in life without extra aid.[106] Due to his socioeconomic status and Anglo-American last name he has probably had life experiences very similar to most white students. Just like the students from the white majority, he has likely received the same level of encouragement from teachers, grown up in largely white communities, and experienced the opportunities that money provides.[107] In addition, others could fail to recognize Christian as a minority student because he is not dark-skinned and is hesitant to volunteer racial information—which, presumptively, does not help break down skin-color stereotypes.[108] Therefore, it is possible he will fill a university or law firm's diversity needs without actually contributing to *Grutter*'s critical mass benefits.[109]

Although there are reasons he might not qualify as a bona fide minority, Christian will likely satisfy the *Grutter* majority because of his *potential* contribution to critical mass. He is *still* half Mexican,[110]

105. *See* LAWRENCE & MATSUDA, *supra* note 13, at 181–82.

106. Many think that just because one is not disadvantaged economically that society will accept him or her and not consider race. People might argue that Martin Luther King's quote on judging people by the content of their character has already come to pass and that our country is beyond racial exclusion when applicants are of the same background. *See* Kimberle Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196, 198–99 (1999). Crenshaw's article is very informative about different defenses that she believes should be advanced in favor of affirmative action. *Id.* at 211–14. As an advocate and co-founder of Critical Race Theory, she also points to the flaws in rejecting affirmative action. *Id.* (formulating a ten-point strategy to advance affirmative action over opponents' positions).

107. Another ancillary issue that invokes ire in affirmative action supporters is the criticism they receive, while favoritism in elite schools like Harvard receives significantly less focus. *See, e.g.*, HENRY ROSOVSKY, THE UNIVERSITY: AN OWNER'S MANUAL 64–74 (1990).

108. It is possible, however, that since Christian has a lighter complexion, he will add to cross-racial understanding and help break down light-colored-skin stereotypes.

109. This statement assumes that others do not recognize him as a racial minority. Of further interest is Justices Scalia and Thomas' assertion that the University of Michigan, likely, had an ulterior goal for race-based admission policies—the University wanted to remain one of the most elite law schools in the country and it needed diversity to accomplish that objective. *See* Grutter v. Bollinger, 539 U.S. 306, 361–62 (2003) (Thomas, J., dissenting). The University still, however, made the LSAT and undergraduate GPAs important for everyone else. *Id.*

110. This country has long considered someone that is half white not as white, but from the intermingled race. *See* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 964–65 (1995). This was/is particularly true for blacks and the "one drop rule." *Id.* Also, those claiming Native American heritage who want tribal benefits try to perpetuate the argument that only a partial amount of Native American ancestry will suffice. *Id.*

and that is better than no diversity.[111] Under cross-racial understanding, he could break down stereotypes because he claims (albeit, only when asked) both Mexican and white ancestry, which could help his classmates, if nothing else, remove negative perceptions of racial intermingling.[112] He has a unique perspective because his mother is Mexican and she has likely provided him with different opinions—even though he is reluctant to identify himself with his Mexican ancestry.[113] He has likely not experienced racism to the same degree as Juan or Miguel but has, probably, experienced *some* racism, which could be why he is careful about revealing his ethnicity.[114] Christian will likely sympathize with minorities because

> Though aimed at blacks, the "one-drop rule" incidentally fostered a pervasive American belief that all individuals belong to one racial group or another, but not more than one. As a result, partly out of ignorance, partly out of choice, and partly because of a racist American cultural tradition, most individuals choose not to identify themselves in multiracial terms.

Id. at 965.

111. *See* Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents' Perspective*, 20 HARV. BLACKLETTER L.J. 167, 194 (2004) (explaining how diversity can broaden the minds of those that are already less prone to prejudice, i.e. parents that adopt transracially, stating that "[Transracial adoption] plays a part in changing societal preconceptions about families, and it helps people develop new notions of the family. Although parents who adopt minority children are likely to be racially open-minded, many of these parents said that they became even more accepting of others after adopting transracially").

112. *See id.*; *see also* PAUL R. SPICKARD, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 3–5 (1989).

> People came to America from all over the world. They bore every conceivable color, religion, and national heritage. Within a generation or two after arriving here, most socialized and mated with people who were not like them—who did not share their color, their religion, or their national heritage. America was founded, in one sense, upon a vision of intermarriage.

Id. at 4. This is a pertinent topic in the discussion of affirmative action because it seems that where intermarriage blended the United States (melting pot myth) to the extent that "white" became more of a racial identifier than someone's ancestral origin. *Id.* at 4–5. One of the challenges, today, is that affirmative action attempts to do what intermarriage accomplished—with varying degrees of success. That success, however, is seriously curtailed when phantom minorities reap the benefits of affirmative action (assuming the phantom minorities are the ones that have already blended in with others due to cross-racial marriages).

113. Whether or not a mother instills an ethnic perspective in her children will vary from household to household. When one parent, however, is racially diverse, that alone could break down stereotypes in an intimate and more effective way than the classroom. *See* Morrison, *supra* note 111.

114. *See* John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 298 (1997) ("Because much of their cultures have been systematically dismantled and ridiculed, people of color tend to view their native values with great ambivalence and sometimes with shame.").

of his ancestry, making it less threatening for minorities to participate in discussions, and make comments that reflect his unique mixed-race perspective.[115] He could promote learning outcomes by exposing classmates to mixed-race in general, which they will surely encounter in the workplace.

The way in which Christian views his racial status is the most compelling reason, from a policy perspective, he should qualify for race-based affirmative action.[116] If Christian considers himself white, and renounces his Mexican ancestry in an attempt to blend in with the white majority, then he would fail to contribute to critical mass because he would not break down stereotypes or help classmates understand a unique mixed-race perspective.[117] If Christian, however,

115. This assumes that the others in his class will recognize him as "different" racially. If no one can recognize him as racially diverse, then there is the possibility that Christian does not qualify under critical mass rationale and is the ultimate phantom minority. Christian, however, claims his bi-racial identity when asked—which furthers the question whether he should qualify for affirmative action because if he only volunteers his racial background when asked, and no one identifies him as racially diverse otherwise, then he would, hypothetically, not further the affirmative action benefits outlined by *Grutter*.

116. Ian F. Haney López is half white but considers himself a Latino, while his brother is half white but considers himself white. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 10 (1994). In addition, he proudly claims his Latino ancestry and, consequently, has likely helped break down stereotypes. *Id.* López describes his ethnicity:

> My older brother, Garth, and I are the only children of a fourth-generation Irish father, Terrence Eugene Haney, and a Salvadoran immigrant mother, Maria Daisy López de Haney. Sharing a similar morphology, Garth and I both have light but not white skin, dark brown hair and dark brown eyes. We were raised in Hawaii, far from either my father's roots in Spokane, Washington, or my mother's family in San Salvador, El Salvador. Interestingly, Garth and I conceive of ourselves in different racial terms. For the most part, he considers his race transparent, something of a non-issue in the way whites do, and he relates most easily with the Anglo side of the family. I, on the other hand, consider myself Latino and am in greatest contact with my maternal family. Perhaps presciently, my parents gave Garth my paternal grandfather's name, Mark, for a middle name, thus christening him Garth Mark Haney. They gave me my maternal father's name, Fidencio. Affiliating with the Latino side of the family, in my first year of graduate school I followed Latino custom by appending my mother's family name to my own, rendering my name Ian Fidencio Haney López. No doubt influencing the theories of race I outline and subscribe to, in my experience race reveals itself as plastic, inconstant, and to some extent volitional.

Id.

117. It would be catastrophic to the *Grutter* Court's justification of critical mass if Christian, fleeing any ties to his ethnicity, still claimed minority status. In that scenario, Christian would be someone that refuses to be ethnically diverse, except when it benefits him on paper. *See* López, *supra* note 13, at 5 (explaining that the boundaries of radical designation are diminishing as our culture becomes more diverse and racially mixed).

considers himself as Mexican, Mexican American, Hispanic, or mixed-race, then he would be able to contribute meaningfully to critical mass[118]—even if he were not immediately recognizable as racially diverse.[119] For example, in a classroom setting he might analyze a case differently because he has experienced some racism or because of his Mexican mother. In addition, someone like Christian is more likely to serve racial minorities with whom he identifies.[120] Christian seems to meet the *Grutter* Court's justifications for critical mass, but the increasing presence of minority candidates with even less minority status than Christian could endanger support for affirmative action as it now functions.[121]

4. Steven Hansen

Steven Hansen is white, from English descent, and was born in Mexico because a Fortune 500 Company assigned his father to oversee operations there. At age five, he moved to Manhattan because his father was promoted. Steven is fluent in Spanish and scored in the ninetieth percentile on the LSAT. He received a large diversity scholarship for law school and another diversity scholarship from a major law firm after his first year. He identifies himself as white but claims minority status on applications solely because of his foreign birth.

118. According to the *Grutter* Court, meaningful contribution entails offering a racially unique perspective. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

119. Others have also advanced this thought and acknowledged the difficulty in determining whether someone like Christian, who feels he is white, is white or Mexican. *See, e.g.*, Brest & Oshige, *supra* note 87, at 875–76.

120. *See* LAWRENCE & MATSUDA, *supra* note 13, at 184 (stating that Latinos who benefit from affirmative action are more likely to serve disadvantaged Latinos than their white counterparts).

121. *See Grutter*, 539 U.S. at 372–73 (Thomas, J., dissenting) ("[N]o social science has disproved the notion that this discrimination 'engender[s] attitudes of superiority or, alternatively, provoke[s] resentments among those who believe that they have been wronged by the government's use of race. . . . These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.' (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in judgment))).

Steven is a phantom minority.[122] He may add a unique perspective—a very beneficial perspective—but not a perspective derived from life as a racial minority. Steven would not add to critical mass because unlike Juan, Miguel, or even Christian, Steven does not actually have Mexican ancestry. Under cross-racial understanding, he does not look any different than other white students,[123] nor does he advocate a racial perspective due to his birth in Mexico. Apart from his memories as an infant, Steven adds marginally, if at all to racially-diverse learning outcomes. He does not look any darker, his family is white and affluent, and he has never experienced racial prejudice.

A reasonable inference from the *Grutter* Court's inclusion of *underrepresented* racial minorities in critical mass is that those minorities must actually be from another race.[124] Unfortunately, without a definition of who qualifies as a minority or guidelines to make that determination, people like Steven can exploit affirmative action. For example, Steven has extremely marginal minority status, yet has taken away at least one scholarship from a bona fide racial

122. Steven is similar to Christian, provided Christian is not identifiable as a minority in either appearance or manner. In actuality, however, Steven's claim to minority status is more marginal than Christian's; where Christian has minority blood, Steven can only claim living in Mexico for a time. Should that qualify him for the minority plus factor in school admissions? Steven might add to cross-racial understanding but at what cost? One of the costs would be denying someone, a bona fide minority or a more qualified student (according to our current quasi-meritocracy), the scholarships that Steven received.

123. This is another element not analyzed in depth due to the limits of using only five examples. There are many persons that look darker than other whites even though they are also from European ancestry. It is increasingly difficult to discern who is from what racial background, especially in the United States' "mixing bowl" evolution combined with "melting pot" rationale. For a more in-depth discussion of races that qualify for affirmative action and the effects of different skin color, see James Boyd White, *What's Wrong with Our Talk About Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1948–53 (2002) (discussing affirmative action and the United States' unique experience with race).

124. *See Grutter*, 539 U.S. at 333. While the *Grutter* Court held that student body diversity included more than just race—otherwise it would have been patently unconstitutional—critical mass reasoning was specifically limited to racial diversity and the benefits that flow from it. *See id.* The dissenting opinions attacked the majority for this, arguing that the University of Michigan was using "critical mass" to unconstitutionally use a quota system. *See id.* at 346–47 (Scalia, J., dissenting) ("[T]he University of Michigan Law School's mystical 'critical mass' justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions."). Under the *Grutter* rationale, Steven is still entitled to consideration as being diverse, but not racially. A university could make the determination, however, that it wants persons who have lived abroad because of their unique perspectives.

minority.[125] Such abuse worsens the ire engendered by reverse discrimination because Steven receives an advantage over students with similar racial backgrounds. Further, the law school he attends can now claim diversity without incorporating the benefits that *Grutter* identified as flowing from critical mass.[126]

5. Robert Salazar

Robert is from a middle-class family in Spokane, Washington. He is white, and does not claim otherwise—even on resumes and applications. At first he was surprised that highly ranked law schools accepted him even though his LSAT score and GPA were below each law school's median. Now he believes that he has some special intrinsic quality. His last name is "Mexican" because his great grandmother married a Mexican so that her two-month-old son would have a father—but the marriage did not endure and she never remarried, endowing Robert's lineage with a Mexican last name void of Mexican blood.

Robert is white in every possible way except for his last name. He is an unconscious, phantom minority who will not meaningfully add to *Grutter*'s critical mass justification, but is nevertheless sometimes unwittingly[127] classified as a minority by diversity-seeking admissions boards. Under cross-racial understanding, the only way he could break down stereotypes is by asserting that his ex-step grandfather was Mexican. Ironically, a white student that grew up with Mexican friends, or someone like Steven Hansen who has lived abroad, is more likely to have a racial perspective than Robert. Furthermore, he does not promote racially diverse learning outcomes because he does

125. It is also possible that he has not taken away scholarships from other minorities because law schools are not supposed to use a quota-based system for admissions. Law firms and other employers, however, award a limited number of scholarships, one of which Steven has accepted. *See* NALP – Diversity Initiatives, http://www.nalp.org/content/index.php?pid=55 (last visited Apr. 3, 2007) (listing several law firms and their limited diversity scholarships for law students).

126. Another possibility, however, is that Steven has less prejudice towards Mexicans because he lived in Mexico and understands their racial viewpoint. Although this is a commendable goal, the *Grutter* Court's rationale requires reaching a critical mass of "underrepresented" ethnic minorities, not wealthy white children who have lived abroad. *Grutter*, 539 U.S. at 333.

127. It is doubtful Robert has remained unconscious of his Mexican last name. In order to not be considered for affirmative action, however, he would have to state his ethnicity (i.e., declare he is only white) and not appear Mexican to avoid law school admission boards and employers' racial considerations.

not look or act Mexican.[128] In fact, he subtracts from diversity because he further homogenizes the already dominant white presence.[129]

Despite these reasons, Robert could potentially promote learning outcomes and add to cross-racial understanding because some students might mistakenly believe he is racially diverse because of his last name. This justification, however, is undone when someone asks about Robert's racial background or discovers it through other means.[130] Upon discovery, there is a danger of increased hostility towards affirmative action in general and, possibly, diminished self-esteem[131] because Robert would realize that he did not have a

128. The *Grutter* Court did not find that a racial minority had to advance an ethnically diverse way of life but it did infer that those admitted under critical mass should be recognizable as minorities in some way. *See supra* Section II.A.2. By referring to "acting Mexican" one need not assume Robert needs to own a sombrero, but he does need to advance some form of identification with the Mexican/mixed-race culture or *Grutter's* cross-racial understanding and learning outcomes would not be realized. *See id.*

129. Again, universities are not permitted to have quota-based admissions criteria but law firms and other private entities may use their affirmative action efforts on phantom minorities and, thereby, reduce the opportunities for bona fide racial minorities.

130. This sentence assumes the inquirer discovers that Robert got into law school largely because of race, which could happen in several ways (e.g. compare LSAT scores, GPAs, or other special qualities).

131. Diminished self-esteem is a widely debated element of affirmative action. Here, Robert is not a minority but he could still feel some of the same effects that a bona fide minority might feel if he found out that his merits were not good enough and that race was the reason he was admitted to law school. For a more comprehensive discussion of self-esteem, including arguments by Thomas Sowell, the economist, and John Rawls, see BERNARD R. BOXILL, BLACKS AND SOCIAL JUSTICE 188–200 (1984). Also consider the following quote:

> Let us grant that qualified blacks are less deserving of compensation than unqualified blacks, that those who most deserve compensation should be compensated first, and finally that preferential hiring is a form of compensation. How does it follow that preferential hiring of qualified blacks is unjustified? Surely the assumption that unqualified blacks are more deserving of compensation than qualified blacks does not require us to conclude that qualified blacks deserve no compensation. Because I have lost only one leg, I may be less deserving of compensation than another who has lost two legs, but it does not follow that I deserve no compensation at all.

Id. at 148; *see also* Thomas Nagel, *Equal Treatment and Compensatory Discrimination*, *in* PHILOSOPHY OF LAW 433, 438–39 (Joel Feinberg & Jules Coleman, eds., 7th ed. 2004) (explaining the reduced self worth that accompanies knowledge of affirmative action). In addition, many prominent African Americans such as Justice Clarence Thomas and Thomas Sowell do not favor affirmative action and frequently quote Frederick Douglass' refrain:

> [I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. . . . I have had but one

"special intrinsic quality."[132] Such an outcome would fuel opposition to affirmative action, evidencing that affirmative action has "poisonous and pernicious" consequences.[133] Sadly, discovery of Robert's true ethnicity would advance stereotypes, suggesting that a "real" Mexican could not have made it to law school or have been as smart as Robert.[134]

B. Major Problems Caused by Phantom Minorities

The above examples of Juan, Miguel, Christian, Steven, and Robert show the degree of variance inherent in any racial categorization.[135] Phantom minorities, consciously or unconsciously, take advantage of that variance and create problems for the implementation of affirmative action.

Although the Supreme Court has pointedly rejected quota-based systems, it has approved racial consideration as a "plus" factor so that a school may reach a critical mass of underrepresented minorities.[136]

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answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us!

Grutter, 539 U.S. at 349–50 (Thomas, J., dissenting) (quoting Frederick Douglass, What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, *reprinted in* 4 THE FREDERICK DOUGLAS PAPERS 59, 68 (J. Blassingame & J. McKivigan eds., 1991) (internal citations omitted)); *see also* Thomas Sowell, *"Affirmative Action" Quotas on Trial*, CAPITALISM MAG., Jan. 8, 2003, http://www.capmag.com/article.asp?id=2340 (discussing many of the negative effects of affirmative action and the logical flaws that other countries have avoided).

132. This assumes, however, that those who discover that Robert is not racially diverse also know that he benefited from affirmative action. They could discover whether he benefited from affirmative action if he told others his entrance scores or if others just recognized the last name as worthy of affirmative action as it now stands. Also, Robert could hear other people's scores without divulging his and make the inference that he did not have a special intrinsic quality but, in fact, would not have been admitted save his last name.

133. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) ("[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race.")

134. Aside from intellectual capacity stereotypes, those less exposed to Mexicans, or any other race, might continue to develop a superiority complex. *See id.*

135. Even though the Mexican race was used in this Comment, the same is true for every race, which makes analysis that much more complicated.

136. *Grutter*, 539 U.S. at 334.

In the absence of an effective method of determining who is an underrepresented racial minority certain problems arise. The first and most troubling problem occurs when phantom minorities fill positions that an admission board intended for a bona fide racial minority, thereby displacing bona fide minorities who would genuinely contribute to racial diversity and advance the benefits of critical mass. Essentially, a "Robert Salazar" or "Steven Hansen" benefits from affirmative action and is admitted to the exclusion of a "Miguel Sanchez" or possibly even "Juan Rodriguez del Carmen." Considering this phenomenon, affirmative action may actually provide an additional obstacle to the otherwise qualified minority applicant, while doing little to overcome racism in the long term.[137] While the Court will grant deference to a university's assumption that racial diversity is a compelling interest, it will not likely hold an affirmative action program, tainted by phantom minority dilution, as constitutional.[138]

The Supreme Court optimistically—perhaps unrealistically, according to some commentators[139]—set an expectation that within twenty-five years the use of race would not be necessary to promote the educational benefits of critical mass.[140] Such a goal is unattainable if phantom minorities take bona fide minorities' positions within the critical mass framework.[141] This abuse of racial preference detracts from critical mass justification and increases the dominance of the majority. While phantom minority abuse will not likely eliminate all bona fide minorities from universities, it could increase affirmative action's lifespan and potentially destroy the constitutionality of the entire system.[142]

137. *See id.* at 319–20 (noting that a critical mass of minority students is designed to eliminate/reduce racial stereotypes).

138. *Id.* at 388 (Kennedy, J., dissenting). As mentioned previously, Justice Kennedy also states that "[t]he majority fails to confront the reality of how the [University of Michigan's] Law School's admissions policy is implemented." *Id.* at 389.

139. *See, e.g.*, Harold McDougall, *School Desegregation or Affirmative Action?*, 44 WASHBURN L.J. 65, 79 (2004) (arguing that until educational opportunities are equally available to minority students, the sunset clause will not become a reality).

140. *Grutter*, 539 U.S. at 343.

141. *See id.* at 342–43.

142. Justice O'Connor reasoned that race-conscious programs should not "unduly burden individuals who are not members of the favored racial and ethnic groups." *Id.* at 341 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., concurring), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)). When a phantom minority takes a bona fide racial minority's place in admission to a university, it is hard to argue

University admission boards, particularly of professional schools, receive many more applications than they can accommodate.[143] In the filtering process, many schools provide a section in which applicants can choose whether to disclose minority status, but such efforts are prone to frequent abuse.[144] Phantom minorities appear on paper to be racially diverse as bona fide minorities, and many universities rely on ineffective ways to discern ethnicity, including an applicant's nomenclature or racial disclosure.[145] For this reason, phantom minorities are able to continue to dilute the pool of minority applicants and detract from a university's attempt to reach critical mass. Even the universities may further phantom minority abuse by admitting a "Robert Salazar" instead of a "Juan Rodríguez del Carmen" or "Miguel Sanchez" because Robert's test scores are higher and the university wants to boost its law school ranking.[146] In this way, universities can sometimes simultaneously increase average LSAT scores, under the guise of critical mass, while increasing racial diversity only on paper.

In addition to making it more difficult to discern minority status, phantom minorities deplete the chances that a university will accept bona fide minorities. This could lead to polarization that strictly

that members of favored racial groups with backgrounds similar to the phantom minority (at least racially speaking) are not unduly burdened.

143. *See id.* at 312–15; LSAC, The Admission Process, http://officialguide.lsac.org/ (follow "Applying to Law School" hyperlink; then follow "The Admission Process" hyperlink) (last visited May 11, 2007) (stating that there are many more applicants than places available in first-year law classes).

144. *See* Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, The Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 367, 369 (2006) ("While it is unclear how often such incidents occur, they do not appear to be rare." (internal citations omitted)); *see also* John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 HARV. BLACKLETTER L.J. 49, 49 (1995) (relating a personal experience interviewing a woman who checked the minority box but was not a minority); Dirk Johnson, *Census Finds Many Claiming New Identity*, N.Y. TIMES, Mar. 5, 1991, at A1 (reporting on the increase in people reporting their minority status to get benefits—a one-sixty-fourth American Indian procured nineteen million dollars in contracts).

145. *See* R. Lawrence Purdy, *Prelude:* Bakke *Revisited*, 7 TEX. REV. L. & POL. 313, 349–50 (2003) (explaining the difficulty in determining who is an ethnic minority when a university desires to promote critical mass). "One supposes this professor is also capable of visually discerning who may be 'brown' or 'red' (or brown or red *enough*) to qualify as an Hispanic or Native American eligible to receive diversity consideration . . . ." *Id.*

146. Remember Justice Thomas' inference that the University of Michigan wanted to remain an elite law school and diversity may have been one of the factors it considered vital to maintaining that status. *See Grutter*, 539 U.S. at 361–62 (Thomas, J., dissenting).

favors those with marginal minority status because phantom minorities have the same advantages as the white majority. Such advantages increase the likelihood that phantom minorities will appeal to law school admission boards because of higher test scores, higher grades, and a check mark in the "minority" box. In addition, phantom minority abuses will likely increase because of racial intermingling and the nature of a global economy.[147]

Similarly, the danger of phantom minorities could artificially lengthen affirmative action's lifespan because of inequitable results. Although a utilitarian might interpret phantom minority abuse as an unavoidable consequence to promote affirmative action, in reality such abuse could increase and eventually disintegrate effective affirmative action—because applicants frequently act in their own self-interest regardless of their desire for the common good.[148] If this occurs, the "racial minorities" that enter universities will not consist of underrepresented minorities; instead, they will consist of advantaged students, enhanced with marginal minority status and privy to the accoutrements of wealth and privilege, but insulated from possible social detriments, which often accompany minority status.[149]

IV. APPROACHING A SOLUTION

Solving the phantom minority dilemma does not require a bright-line racial definition; it requires a workable solution that considers true ethnicity. Due to the "serious problems of justice

147. *See* Patrick F. Linehan, *Thinking Outside of the Box: The Multiracial Category and Its Implications for Race Identity Development*, 44 HOW. L.J. 43, 46–49 (2000) (reporting on the dramatic increase in racial mingling). In addition, there is increasing data that shows that there is a correlation between financial success and diversity in the workplace, which phantom minorities would undermine because they lack true diversity); Shankar Vedantam, *In Boardrooms and in Courtrooms, Diversity Makes a Difference*, WASH. POST, Jan. 14, 2007, at A2 ("Cedric Herring recently decided to take things one step further. Given that discussions about morality are often divisive, the sociologist decided to take a more scientific approach. In other words, beyond the question of whether diversity is a good thing, is there evidence that it makes a difference? Herring has just completed his study. He found that companies that are more diverse have more customers, a larger share of their markets and greater profitability. In fact, when Herring puts his numbers on a graph, he finds a linear relationship between diversity and business success, meaning that as diversity increases, those business indicators increase in step.").

148. *See* Yang, *supra* note 144, at 369.

149. *See* Nina Eliasoph, *"Everyday Racism" in a Culture of Political Avoidance: Civil Society, Speech, and Taboo*, 46 SOC. PROBS. 479, 481–84 (1999).

connected with the idea of preference itself,"[150] the Court requires narrow tailoring that does not "unduly burden individuals who are not members of the favored racial and ethnic groups."[151] In an effort to design a workable model for eliminating phantom minorities, this Comment proposes and considers three possible alternatives. The first alternative considers the possibility of a government-sanctioned definition for "minority"; the second alternative considers an affirmative action system based on socioeconomic factors; and the third alternative considers continuing to allow individuals to self-determine their minority status but adds the requirement of a serious good faith effort by universities to determine racial status. While each alternative cannot completely solve the phantom minority problem, such alternatives may increase acceptance of bona fide minorities and may disfavor phantom minorities. After considering the effects of the respective alternatives, this Comment concludes that the approach most likely to assure a meaningful contribution to critical mass is an approach that requires a good faith effort to determine true ethnicity. Such an approach promises to overcome the problem of "phantom minority dilution," while increasing overall diversity.

A. Imposing a Government-Sanctioned Definition of "Minority"

Any attempt to construct a universal definition for "minority" is laden with problems. A brief history lesson on the Third Reich's citizenship laws,[152] South Africa's Population Registration Act,[153] or the Jim Crow era's definition of a Negro[154] depicts the ethical problems involved when defining a race. Aside from the historical precedent of increased racism and genocide, a government-sanctioned definition might be appealing because it could eradicate

150. *Grutter*, 539 U.S. at 341 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (internal citations omitted)).

151. *Id.* (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (internal citations omitted)).

152. *See Metro Broad.*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) ("If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs [sic] Citizenship Law . . . ." (quoting Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980)) (internal citations omitted)).

153. *See id.*

154. *See* Brest & Oshige, *supra* note 87, at 876 (citing CHARLES MANGUM, THE LEGAL STATUS OF THE NEGRO 1–17 (1940)).

phantom minority abuse. The task, however, of defining race is nearly insurmountable because of the prevalence of racial mixing and different categories within each race.[155] In order to avoid the impossibility of formulating—and the negative precedent of imposing—a uniform definition, the only alternative is to allow minorities to self-determine whether they are racially diverse. Such a system, however, needs restraints or phantom minority abuse will continue.

Some propose that if race has become so difficult to categorize, then the time has come to end race-based affirmative action.[156] Such an approach is an attempt to claim a color blind society currently exists in the United States. Although the actual progression of racial equality goes beyond the scope of the Comment, on the surface this claim seems out of touch with reality.[157] Fortunately, requiring a

155. For an enlightening discussion on how our country has become a mixed-race society, see Ramirez, *supra* note 110. Within the broad terminology of Hispanics alone there are many categories such as Puerto Rican, Mexican, Argentine, Chilean, etc. *See id.* In addition, those that are mixed races between whites, Hispanics, Jews, blacks, etc., complicate the equation because even the people themselves sometimes are unable to classify to which race they belong. *See id.* Even further complications arise within the United States because of increased categories like Chicano, Mexican American, etc. *See id.* Another problem that increases phantom minority abuse is the antiquated Directive No. 15, which attempted to identify people within five ethnic descriptions: American Indian or Alaskan Native; Asian or Pacific Islander; Black; Hispanic; or White. Such constraints on racial identification have led many mixed-race persons to not know how to identify themselves when the federal government requires them to check one of the five categories. For more information and a unique perspective by a half Japanese, half white writer, see Payson, *supra* note 86, at 1233–38.

156. *See* Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1059–67 (1996) (arguing that a class-based affirmative action model is morally, politically, and legally more sound than a race-based model); Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1678–81 (1997) (explaining Richard Kahlenberg's position that the time has come to end race-based affirmative action and replace it with class-based affirmative action because middle class minorities do not deserve affirmative action in comparison to poor whites); Douglas M. Raines, Comment, Grutter v. Bollinger*'s Strict Scrutiny Dichotomy: Diversity is a Compelling State Interest, But the University of Michigan Law School's Admissions Plan is Not Narrowly Tailored*, 89 MARQ. L. REV. 845, 876 (2006) (advancing the thought that a class-based affirmative action program could survive either a rational basis or strict scrutiny standard).

157. *See* Crenshaw, *supra* note 106, at 204–07. Crenshaw highlights a 1991 ABC Primetime piece called "True Colors" that followed a black man and a white man shopping, buying a car, searching for a job, etc. *Id.* It found that the white man received many more opportunities to excel and even buy merchandise at a lower cost than the black man, even though they both were dressed the same and had equal means and qualifications—which Crenshaw argues is an example of the ongoing struggle for equality. *See id.*

government-sanctioned definition is not the only way to solve the phantom minority problem.

B. Changing Affirmative Action from a Race-Based to Class-Based System

One of the more popular solutions to the complexity of race-based affirmative action is implementing a class-based approach.[158] This approach is promising because it is a "conceivable race-neutral alternative"[159] that could include more racial minorities without considering race as a factor, which mandates strict scrutiny.[160]

While it is true that a significantly large portion of minorities are disadvantaged economically,[161] it does not follow that each university should ignore race and endorse a class-based system.[162] The decision to use race as a plus factor, according to *Grutter*, is the choice of a university[163] and if the Court were to mandate a class-based approach it would contradict its tradition of giving deference to a school's "educational judgment."[164] Currently, the Court will not require a university to consider a race-neutral approach, like class-based affirmative action, if that approach requires a dramatic sacrifice to diversity.[165]

Another counter argument is that as long as racial classifications exist, even benign classifications, society will match Justice Harlan's color blind description of the Constitution. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time . . . . But in view of the [C]onstitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."). This argument is well-founded but does not offer a solution to the current problem of phantom minority abuse.

158. *See* Malamud, *supra* note 156, at 1678–81.

159. Grutter v. Bollinger, 539 U.S. 306, 339 (2003).

160. *Id.* at 308 (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).

161. Maria Cancian, *Race-Based Versus Class-Based Affirmative Action in College Admissions*, 17 J. POL'Y ANALYSIS & MGMT. 94, 103 (1998).

162. Some advocates of class-based affirmative action cite Martin Luther King's famous quote about judging people by the content of their character and not by the color of their skin. Crenshaw, *supra* note 106, at 198–99. This could be used to suggest that only socioeconomic factors are important because that is where the true disadvantage comes from, not from race.

163. *See Grutter*, 539 U.S. at 328.

164. *Id.* at 328–29 (citations omitted).

165. *See id.* at 340.

Although a class-based approach would ensure that underrepresented minorities were selected without the inherent problems of phantom minority abuse, political unrest, or the need to justify race-based affirmative action,[166] this approach has significant problems. It would surely increase diversity of experience but would not parallel racial demographics because minority groups currently assisted by race-based affirmative action programs "are on average poorer than whites," but "*many* more whites apply to law school."[167] Consequently, a class-based approach would devastate minority enrollment[168] because a university interested in racial diversity could no longer distinguish a poor minority from a poor white student. Additionally, a class-based approach would not advance the educational benefits of critical mass because poor white students (although they should be represented in critical mass) are not a substitute for racial diversity,[169] which a university may find essential to its educational mission.[170]

Also, a class-based approach would thwart a major utilitarian purpose of affirmative action—educating those likely to serve their own racial community.[171] This approach could drastically set back

166. *See* Brest & Oshige, *supra* note 87, at 897 (explaining two prominent arguments for class-based affirmative action).

167. *Id.* at 898 (emphasis added); *cf.* Cancian, *supra* note 161, at 102–03 ("[C]lass-based affirmative action would result in a substantially different pool of eligible individuals than race-based programs. Even though racial and ethnic minorities are overrepresented among the socioeconomically disadvantaged, class-based programs are unlikely to achieve the same ends as race-based programs."); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1850 (1996) ("The ideological and practical constraints on the legal system will tend to lead the system to view economic inequality through a purely individualistic and synchronic lens and to measure economic inequality by a relatively simple quantitative metric. These choices will impoverish the legal system's understanding of economic inequality by causing it to reject the representation of class as a structured phenomenon that transcends the transitory economic rank-ordering of individuals.").

168. *See* Cancian, *supra* note 161, at 102–03 ("[A] substantial majority of youths who are eligible for class-based affirmative action in college admissions would not be from racial or ethnic groups currently targeted for such programs. . . . [C]lass-based programs are unlikely to achieve the same ends as race-based programs.").

169. This Comment does not, however, advocate that the contribution to law school from non-racial diversity is unnecessary. On the contrary, contributions from economic, social, or political diversity could be as important as a racially diverse contribution, but *Grutter*'s focus is on race.

170. *See Grutter*, 539 U.S. at 328.

171. This is commonly known as the "multiplier effect." Brest & Oshiga, *supra* note 87, at 867–72. It advances the thought that by admitting more minorities, society will be better off because minorities are more prone to service in disadvantaged areas to which they can

progress in race relations and propel minorities even further behind in the struggle for economic equality.[172] In response to the argument that a school's affirmative action program does not help poor kids from the barrio, one scholar wrote, "middle-class Chicano students are far more likely to know and care about the barrio and to act on that basis in their life's work."[173] Thus, by removing race consideration from affirmative action, universities will likely accept fewer racial minorities and hinder efforts to achieve cross-racial understanding and learning outcomes. The Court has already declared that alternatives to race-based consideration that require a "dramatic sacrifice of diversity" are not acceptable.[174] Therefore, in order to ensure the educational benefits of ctitical mass, class-based affirmative action fails to constitute a reasonable alternative to race-based affirmative action.

C. Requiring a Good Faith Effort to Determine Ethnicity

In *Grutter*, the importance of a *serious* good faith effort to consider race-neutral alternatives was paramount,[175] but the Court did not require the same serious good faith effort to determine who should qualify for race-based affirmative action.[176] With the conservative additions of Chief Justice Roberts and Justice Alito, the Court is now less likely to "confuse[] deference to a university's definition of its educational objective with deference to the implementation of this goal."[177] Consequently, race-based affirmative action plans should make more concentrated efforts to determine who qualifies as a racial minority.

The Court should, therefore, apply the serious good faith requirement to the consideration of whether someone considers himself/herself a racial minority before that individual qualifies for

relate. Ramirez, *supra* note 110, at 980. There are, of course, flaws in this approach because not all minorities care to serve disadvantaged minorities because they were not disadvantaged themselves. *Id.* For a more in depth treatment of this argument, see *id.* at 980–81.

172. See Brest & Oshige, *supra* note 87, at 877–97, for an interesting discussion on how far behind blacks, Hispanics, Asians, and Native Americans are in the economic battle and what that means as far as who should qualify for affirmative action.

173. LAWRENCE & MATSUDA, *supra* note 13, at 184.

174. *Grutter*, 539 U.S. at 340.

175. *Id.* at 339.

176. *Id.* at 394 (Kennedy, J., dissenting).

177. *Id.* at 388.

the plus factor from admissions boards.[178] Requiring admission boards to make a good faith effort to correctly identify bona fide minorities strengthens the constitutionality of race-based affirmative action by screening out phantom minorities that thwart bona fide racial diversity.[179] There are many possible ways to implement a serious good faith effort and very few negative consequences.

In order to implement a serious good faith effort, many universities will have to increase scrutiny on each applicant's degree of ethnicity and question what qualities each applicant would contribute to critical mass. Universities could accomplish this in several ways. First, a school could require a personal interview for all applicants to discuss what they would add to the law school.[180] In such an interview, if the applicant had willingly claimed racial diversity, then the interviewer could ask in what way racial diversity has affected the applicant. There are problems with this approach because not all applicants would be able to meet for an interview, but it is possible—as evidenced by the rigorous interviewing process for medical school.[181]

178. Affirmative-action jurisprudence already makes very clear that a court will defer to a university about its educational mission and will presume good faith, which is different than deference to the implementation of a university's affirmative action plan. *See id.* at 329 (majority opinion) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978) (Powell, J., concurring)).

179. *See* Mexican American Legal Defense and Educational Fund et al., *Blend It, Don't End It: Affirmative Action and the Texan Ten Percent Plan After* Grutter *and* Gratz, 8 HARV. LATINO L. REV. 33, 77 (2005) ("In terms of the mechanics of the admissions process, institutions practicing affirmative action are much more vulnerable to legal challenge if they make admission decisions almost entirely on the basis of test scores or index formulas that combine tests and grades. In such a scenario, a court is more likely to find that the institution is not making a good faith effort at individualized review. If test scores and/or index scores truly dominate the admissions process, a court would be more likely to find that the institution's use of affirmative action is not narrowly tailored, since race would then function as a substantial departure from 'regular' admissions (i.e., race as the decisive factor). Framed more positively, the lesson of *Grutter* is that there is a deep connection between the goal of treating *all* applicants fairly by individualized review, and the goal of creating a racially and ethnically diverse class.").

180. One law school, Northwestern, already requires a personal interview, if at all possible. It, just like many schools, maintains a significant emphasis on student body diversity. *See* Admissions, School of Law, Northwestern University, http://www.law.northwestern.edu/admissions/ (last visited Apr. 3, 2007).

181. For many years, medical schools have maintained the importance of interviews to determine how an applicant will contribute to the medical school and the community at large. *See, e.g.*, Princeton University, The Medical School Interview, http://web.princeton.edu/sites/hpa/handouts/medical_school_interview.pdf (last visited Apr. 3, 2007). In contrast to medical schools, law schools could choose to only interview those who claim

Another feasible alternative might involve a telephone interview, if a university combined it with other methods. This alternative has the potential to deter conscious phantoms like "Steven Hansen," because such applicants might realize the university wants to know them more intimately, which could lead to ethnicity questions that phantom minorities might not want to answer. At the same time, telephone interviews will likely filter unconscious phantoms like "Robert Salazar" because the interview could easily reveal their racial background even though recruiters might initially presume an applicant has minority status. Although not all phantom minorities will disclaim minority status, an interview will likely screen out many, if not most, phantom minorities.

A third, and much more practical, means of scrutinizing an applicant's minority status is to require an essay about racial diversity. This would prevent unconscious phantom minorities from unknowingly benefiting from affirmative action while also deterring conscious phantom minorities from mindlessly checking the minority box. A possible consequence, however, is that those from mixed-race backgrounds might not feel that they qualify.[182] A written encouragement on application materials may give confidence to such persons and overcome this negative consequence. It is far more likely that those who choose to complete the essay will add to the educational benefits of affirmative action because they are aware of and associate themselves with racial diversity.[183] Under this approach a "Christian J. Miller" must decide whether he qualifies as a minority and, if so, grapple with how his racial diversity has affected him.

Another approach could be as simple as sending a photograph. Although a photograph would not determine ethnicity it may serve as a deterrent for phantom minorities. This approach is problematic

minority status, which could potentially make the burden on students in general much lighter. This approach, however, is laden with problems—mostly because it would burden racial minorities significantly more than other applicants.

182. This, of course, depends on how the mixed-race person views himself. While Christian Miller could consider himself white or Mexican, the decision seems to be ultimately his.

183. *See* Brest & Oshige, *supra* note 87, at 875–76. There are many persons of mixed race that associate themselves with a minority race while there are equally as many that choose to disassociate themselves from that race. *Id.* Some believe that persons who do not associate themselves with the minority race would not add to diversity and would, therefore, not add to any of the goals or affirmative action. *Id.*

because many racially diverse persons are white in appearance,[184] but universities can overcome this by combining mandatory photographs with another method to scrutinize ethnicity.

Yet another approach is requiring a letter of recommendation that includes an applicant's contributions to either cross-racial understanding or other learning outcomes specified in *Grutter*.[185] This could prove particularly effective because it would more likely ensure the benefits of critical mass and possibly increase overall awareness of the benefits of race-based affirmative action. *Grutter* also stated that a racial minority should not have to express a characteristic viewpoint[186] and this method might encourage emphasis on non-characteristic benefits, which may more accurately indicate why racial diversity contributes to educational environments.

Undoubtedly, some phantom minorities will continue to reap the rewards of marginal minority status because at some point the costs become too high to justify further scrutiny. Some phantom minorities like "Steven Hansen" will continue to submit essays describing their minority status and will not refrain from in-person interviews because they either feel they should qualify for racial minority consideration, or they are merely self-interested and know they may qualify even under good faith efforts by universities. A few phantom minorities slipping through, however, should not force schools to give up their good faith efforts at narrow tailoring.

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184. *See, e.g.*, *Bay Area News in Brief*, SAN JOSE MERCURY NEWS, Dec. 19, 2006, at B3 (describing light skinned Hispanic man). In addition to Hispanics that look white, there are several Hispanics that consider themselves white, instead of Hispanic. *See* López, *supra* note 116, at 1. The following quote is particularly helpful:

> The majority of those who consider themselves leaders in Latino communities are white. I do not contend by this that race is fixed or easily ascertained. Nor do I mean that the Latino community is led by Anglos—that is, by persons from the group historically understood as white in this country. Rather, Latino leaders are often white in terms of how they see themselves and how they are regarded by others within and outside of their community. . . . In this context, many Latino leaders believe they are—and are understood to be—white by virtue of class privilege, education, physical features, accent, acculturation, self-conception, and social consensus. True, these Latinos are rarely white in the sense that they are accorded the full range of racial privileges and presumptions Anglos reserve for themselves. But then, as with all racial categories, there are various shades of white, and many Latino leaders are arrayed along this continuum.

Id. at 1–2.

185. *See supra* Section II.A.2–3.

186. Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

In contrast to the abuses that may still remain, by requiring a university to apply a good faith effort to identify racial minorities, phantom minorities will surely decrease. Unconscious phantom minorities like "Robert Salazar" will no longer pass as racially diverse because they will not write essays explaining why they have benefited from their racial diversity, nor will they likely claim racial minority status on other application material. Even persons like "Christian J. Miller" will refrain from claiming racial minority status unless they feel that they should qualify, meaning that those who are more likely to contribute to the benefits of cross-racial understanding and learning outcomes identified by the Supreme Court will self-select in, while those who will not feel they contribute will self-select out.[187]

The importance of a *serious* good faith effort is to discourage phantom minorities from abusing the current system of race-based affirmative action. Although there will still be phantom minorities, their presence will shrink with added scrutiny. This will in turn create a greater opportunity for the admittance of bona fide minorities and will provide a more correct assessment of student body diversity. In summation, a serious good faith effort would avoid the problems of class-based affirmative action and the negative outcomes of providing a government-sanctioned definition, while still lowering the number of phantom minorities abusing affirmative action. In practice, a school should consider several approaches to determine an applicant's bona fide minority status. Without incorporating procedures to ensure a good faith effort in the implementation of diversity policies, universities may find that phantom minorities have made traditional race-based affirmative action practices an unconstitutional attempt at reaching a critical mass.

V. CONCLUSION

The *Grutter* majority recognized the importance of the educational benefits that flow from a critical mass of racial minorities but did not appropriately apply narrow tailoring to the implementation of the University of Michigan's affirmative action plan. That flaw allows phanrom minorities to corrupt the pool of qualified minority applicants and hinder the benefits of affirmative action. Currently, phantom minorities like "Steven Hansen" and

187. *See* López, *supra* note 102.

"Robert Salazar" may gain admission to universities through race-based affirmative action unless universities apply a *serious* good faith effort to scrutinize an applicant's self-defined minority status. Without phantom minorities to dilute critical mass, space will open up, making room for bona fide minorities, and affirmative action will be propelled closer to its sunset. Until universities increase scrutiny and stop phantom minority abuse, the constitutionality of affirmative action remains in peril.

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