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Not as Easy as Black and White: The Implications of the University of Rio de Janeiro's Quota-Based Admissions Policy on Affirmative Action Law in Brazil

Ricardo Rochetti

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Not as Easy as Black and White: The Implications of the University of Rio de Janeiro's Quota-Based Admissions Policy on Affirmative Action Law in Brazil

ABSTRACT

Brazil's socio-economic structure has long been characterized by a wide disparity in educational, employment, and wealth-accumulation opportunities available to blacks and whites. In recent years, Brazil's government, at both the federal and state levels, has begun experimenting with affirmative action as a means of rectifying these inequalities. In one such program, the state government of Rio de Janeiro implemented admissions quotas that favored blacks and graduates of public high schools who applied to the state's largest public university. The results of the quota caused great controversy, culminating in a constitutional challenge that has reached Brazil's Supreme Federal Tribunal. The Court now finds itself grappling with the meaning of terms such as "equal before the law" and "university autonomy." The racially mixed identity of Brazilian society has complicated the problem, making it nearly impossible to determine who is "black" for affirmative action purposes. The Author relies on affirmative action jurisprudence in the United States to predict how the Court will rule. The Author concludes that an affirmative action program based on class, rather than race, would allow the government to begin bridging the gap between the haves and the have-nots while avoiding Brazil's seemingly irreconcilable racial classification issues.

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I. INTRODUCTION

"In a country like Brazil, everyone's blood is mixed together."¹ With those words, nineteen-year old Gabriella Fracescutti captured the way most Brazilian citizens view race distinctions in their country.² This sentiment made it all the more difficult for Fracescutti to understand why she was denied admission into the medical school at the University of Rio de Janeiro (Uerj) even though she scored a significantly better mark on the *vestibular* (the national college entrance exam) than half of the students admitted ahead of her.³ The fact of the matter is that Uerj denied Fracescutti admission because "she is neither black nor poor."⁴

The denial of Fracescutti's application was a result of Uerj's incorporation of "affirmative action" into its admissions policy, an act that has become increasingly common since Luiz Inácio Lula da Silva assumed the nation's presidency in 2003.⁵ A racial-equality law proposing the establishment of "20 percent quotas for 'Afro-Brazilians' in government jobs and public universities, enterprises with more than 20 employees and among actors in television programmes . . . [and pursuant to which] 30 percent of political parties' candidates would have to be black" may follow.⁶

Given how most Brazilians view the nation's racial history, the recent trend toward the implementation of quotas has raised eyebrows. Nigeria is the only country that has a larger black population than Brazil's sixty-seven million citizens of African descent.⁷ With sixty-five million mulattos, Brazil is also the most racially mixed nation in the world.⁸ Because of this racial mixing, some Brazilians have deemed their country to be a "racial democracy."⁹ But in reality, "Brazilian racism is like a gun at the back of the head rather than one pointed between the eyes."¹⁰ Open discrimination is rare, but the results speak for themselves:

Note: All documents in Portuguese are translated by the Author.

1. John Jeter, *Affirmative Action Debate Forces Brazil to Take Look in the Mirror*, WASH. POST, Jun. 16, 2003, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See generally Out of Eden—Affirmative Action in Brazil*, ECONOMIST, Jul. 5, 2003.

6. *Id.*

7. *See* Italo Ramos & Sheila Walker, *Affirmative Action in Brazil* (July 20, 2003), at <http://www.swagga.com/brazil.htm> (last visited Sept. 20, 2004).

8. *Id.*

9. *Id.*; *see also* Jeter, *supra* note 1.

10. *Out of Eden*, *supra* note 5 (quoting Jose Vicente).

The unemployment rate for Brazilians considered either black or mixed race is twice that of whites, according to the Brazilian Institute of Geography and Statistics (IBGE). . . . White Brazilians generally earn 57 percent more than black Brazilians working in the same field, and a white Brazilian without a high school diploma earns more, on average, than a black Brazilian with a college degree. Blacks in Brazil die younger, are more likely both to be arrested and to be convicted of crimes, and are half as likely as whites to have running water or a working toilet in their homes, according to IBGE. And of the 1.4 million students admitted to universities in Brazil each year, only 3 percent identify themselves as black or mixed race; only 18 percent come from the public schools, where most black Brazilians study.¹¹

Given those glaring inequalities, proponents of affirmative action have felt comfortable advocating racial preferences not only for college admissions, but also for many other aspects of the Brazilian infrastructure.¹² This Note specifically addresses the propriety of affirmative action pertaining to admissions to institutions of higher education. The focus will be on Uerj's quota system because, of all of Brazil's neophyte quota systems, it has received the most publicity and attracted the most scrutiny.

Part II of this Note will analyze Uerj's program and highlight the reasons for its ineffectiveness and the arguments that both proponents and opponents of the program have advanced. Part III will introduce the issues that the Supreme Federal Tribunal, Brazil's highest court, will encounter in deciding the challenge that the National Confederation of Teaching Establishments has brought against the constitutionality of Uerj's program.¹³ Part IV will first discuss the U.S. experience with race definition and racial preferences in higher education before establishing the U.S. framework as a model that will facilitate Brazil's current efforts. In Part V, the Author will conclude that, because of the glaring differences between the countries' objectives and racial experiences, Brazil will not have the same success with race-based affirmative action as the United States. Instead, the Author will propose a model that is more in tune with Brazil's social infrastructure.

II. UERJ'S QUOTA SYSTEM HAS BEEN INEFFECTIVE AND UNPOPULAR

It is important to note at the outset that Uerj's affirmative action program is not the first instance in which a Brazilian legislature, state or federal, has acted in a racially conscious manner. Brazil's Congress in the past has enacted several laws that, while not specifically referring to "quotas" or "affirmative action," recognize the

11. Jeter, *supra* note 1.

12. *See generally Out of Eden, supra* note 5.

13. *Id.*

legitimacy of providing special treatment to “vulnerable groups.”¹⁴ Such legislative measures included (1) quotas of up to twenty percent for physically disabled individuals in both the public and private sector, (2) a requirement that enterprises maintain a workforce in which two-thirds of their members are Brazilian citizens, and (3) the adoption of policies destined to correct the distortions responsible for the inequality of rights between males and females.¹⁵

No other program, however, has been as heavily criticized regarding its fairness and reasonableness as the Uerj program.¹⁶ For example, about 300 white students who obtained the required scores in the *vestibular*, but did not gain admission to Uerj, filed lawsuits in state court against the school.¹⁷ On August 14, 2003, as a response to the legal backlash, Rio de Janeiro’s government responded by implementing a “scaled back” version of its affirmative action program for the 2004–2005 school year.¹⁸

Under the [new version of the] policy, 20 percent of the seats in the incoming freshman class are reserved for black students, another 20 percent for those from disadvantaged public schools, and 5 percent will be shared by those with physical disabilities and students of Indian descent. All students admitted through quotas also must come from low-income families.¹⁹

The new version, however, has not escaped the scrutiny that accompanied the original program. While the more recent version is

14. Luiz Fernando Martins da Silva, *Sobre a Implementação de Cotas e Outras Ações Afirmativas* [Regarding the Implementation of Quotas and Other Affirmative Action Policies] (Dec. 31, 2001), at http://www.achegas.net/numero/cinco/1_fernando_2.htm (last visited Sept. 20, 2004).

15. *Id.*

16. Raquel Coelho Lenz Cesar, *Ações Afirmativas no Brasil: e agora doutor?* [Affirmative Action in Brazil: what now, doctor?], *CIENCIA HOJE*, Jul. 29, 2003, at 26, available at <http://www2.uol.com.br/cienciahoje/chmais/pass/ch195/acoes.pdf> (referring to other quota programs that have been implemented in Brazil, and noting that none “has resulted in the public outcry like Uerj’s admission quotas have.”); see also Jeter, *supra* note 1 (stating that the dispute has forced Brazil to re-evaluate its self-image as a “harmonious ‘racial democracy’ in which race has never been publicly articulated the way it was by the United States’ Jim Crow laws or South Africa’s apartheid government.”).

17. Jeter, *supra* note 1.

18. Patrice M. Jones, *In Brazil, Race Not Black, White*, *CHI. TRIB.*, Nov. 1, 2003, at C1. In contrast, the original program reserved forty percent of the admission slots for black and “pardo” (mixed) students and half for students who completed their schooling in Brazil’s notoriously under-funded public school system. See also Rodrigo Morais, *Rio divide cotas nas universidades entre carentes da escola pública, negros e deficientes* [Rio divides quotas in the universities between underprivileged public school students, blacks, and the disabled], *Agencia Estado* (Aug. 14, 2003), at <http://www.estadao.com.br/educando/noticias/2003/ago/14/306.htm>.

19. Jones, *supra* note 18.

facially a more “reasonable” quota, it is a quota nonetheless.²⁰ The ineffectiveness of several aspects of the program in its first year of operation has harmed the state’s chance of garnering support for its efforts. Given the reasons for the program’s flawed results, it is doubtful that the “scaled back” version will correct any of its shortcomings.

A. *The program has been ineffective because it has been improperly applied and was premised on a number of false assumptions*

The original version of the program has proved to be, at best, a “clumsy solution to a complex problem.”²¹ Under that system, Uerj reserves forty percent of its admission slots for blacks and pardos²² and fifty percent for graduates of Brazil’s “notoriously overcrowded [and] under-financed” public high schools.²³ The state expected that, because of overlap between the two criteria, roughly half of Uerj’s newly admitted class would be accepted through the affirmative action program.²⁴ Instead, fifty-seven percent of Uerj’s incoming class for the 2003–2004 school year gained admission because of the quota system.²⁵ That number was even higher for some of the school’s more “popular” areas of study.²⁶

This unexpected result occurred because there were not enough students admitted through the “public school” quota in order to fill up the “race” quota.²⁷ In order to comply fully with the “race” quota, the school had to admit a number of blacks and pardos whose scores on the *vestibular* would not have, absent the quota, granted those

20. See generally *id.* (“Just as in the United States, the fight over affirmative action in Brazil has generated a public backlash from those who don’t believe that race should be a consideration in admissions.”).

21. *Out of Eden*, *supra* note 5.

22. The term “pardo,” which the Brazilian Institute of Geography and Statistics officially recognizes as a racial category, applies to a person of mixed race. Mark Wells, *Where Did All the Blacks Go?*, BRAZZIL, Mar. 2003, available at <http://www.brazzil.com/p148mar03.htm>.

23. Jeter, *supra* note 1. Note that a single student could fill a reserved slot under both quotas. Hector Tobar, *A Racial Quake in Brazil*, L.A. TIMES, Oct. 7, 2003, at A1.

24. Cesar, *supra* note 16.

25. *Id.*

26. *Id.* (Thirty-two of thirty-six students in graphic design program admitted through quotas, “creating reverse discrimination and jeopardizing the school’s socio-political diversity.”); Ronaldo França, *Não Deu Certo; Sistema de cotas para negros, pardos e alunos de escolas públicas desmoraliza o vestibular da Universidade do Estado do Rio de Janeiro [It Didn’t Work: Quota system for blacks, pardos and public school students demoralizes the University of Rio de Janeiro’s vestibular]*, VEJA, available at http://www2.uerj.br/~clipping/fevereiro03/d27/d27_cotas_veja.htm (seventy-six percent in medicine program admitted through quotas); *Out of Eden*, *supra* note 5 (seventy-eight percent of industrial-design program admitted through quotas).

27. França, *supra* note 26.

students admission.²⁸ Consequently, Uerj denied admission to certain students who attained the requisite score on the *vestibular* but did not fall into either category.²⁹ Many students who did not have the requisite scores for admission to Uerj found it difficult to succeed academically, and forty-four percent of those students dropped out of Uerj halfway into the school year.³⁰

Other factors also support the conclusion that the quota system has not truly benefited those whom the state intended to assist. Uerj's program is part of an initiative to remedy the substantial inequality between the wealthy and the destitute in Brazil, a division that is plainly reflected in racial terms.³¹ In other words, the state intended to provide assistance to blacks and public school students because by doing so, it assumed it would be reaching those who truly need assistance—the poor. That assumption has proved to be mistaken.

The state's attempt to provide assistance to the poor has failed for several reasons. First, wealthy blacks, pardos, and graduates of the few remaining elite public schools have been able to take advantage of the program.³² The state relied on the false premise that a student who attends a private secondary school is necessarily privileged.³³ In reality, most students who attend private schools belong to lower-middle-class families; their parents, cognizant of the dire state of the nation's public school system, make great efforts to provide private schooling for their children.³⁴ A white student living under such circumstances would not fall under either protected category and therefore would not benefit from the program.³⁵ The fact

28. *Id.*

29. *Id.* Brazil's university admission system, unlike the United States', is based entirely on a student's entrance exam scores. If a student attains the required score, that student is admitted. If she does not, she is not. As a result, as of the date of França's article, three "qualified" white students who were excluded obtained admission by way of court-ordered remedies. *Id.*

30. Jones, *supra* note 18.

31. *Id.* ("Only about 2 percent of current students in Brazil's universities are black. Blacks also earn the lowest wages in Brazil, suffer the highest unemployment rates and constitute the nation's poorest citizens."). See also Cristovam Buarque, *Reserva de Vagas Divide Opiniões* [Reserved Sports Create a Division of Opinions], CORREIO DO POVO, Feb. 24, 2003, available at http://www.universiabrasil.net/html/noticia_dgghi.html (stating that the average monthly income of whites is more than twice that of negros and pardos); Jeter, *supra* note 1.

32. *Out of Eden*, *supra* note 5 ("A third of the blacks admitted . . . had household incomes of about 2,000 reais, or \$700, a month—at least ten times the minimum wage."). In comparison, the average household income for blacks is 314 reais a month. Buarque, *supra* note 31.

33. França, *supra* note 26.

34. *Id.*

35. *Id.* (interviewing a white student who would have been unable to attend a private secondary school had she not received an outside scholarship and received an

that a substantial number of whites actually live below the poverty line has only exacerbated the situation and shown that the state's program of targeting blacks and pardos did not necessarily produce the desired socio-economic effects.³⁶

B. *The program has been ineffective because of difficulties in determining who is "black"*

The program has also been ineffective because students have been able to "cheat" with relative ease. Uerj has identified the race of applicants by "self-declaration," whereby the applicant simply checks a box declaring his race and the university accepts, without verifying, that the applicant belongs to that race.³⁷ As a result, some white students have identified themselves as black on their application in order to improve their chances of being admitted.³⁸ Ironically, the ease with which whites may exploit the system in this way has caused black activists to speak unfavorably of the state's efforts.³⁹ Uerj's admission officers do not deny this flaw in the quota system, but they have not established any means of identifying such frauds and doubt that they will be able to do so.⁴⁰

The lack of a clear-cut distinction between whites and blacks in Brazil may be the greatest bar to the effectiveness of *any* affirmative action program in Brazil, in part because it raises doubt as to whether such students are actually "cheating." In the 2001 census, forty percent of the population identified itself as pardo, while only six percent of Brazilians identified themselves as black.⁴¹ Despite this

"excellent" mark on the *vestibular*, but was nonetheless denied admission into the university).

36. Buarque, *supra* note 31.

37. *Sinepe Prepara Ação Contra Cotas em Universidades [Spinepe Prepares Action Against Quotas in Universities]*, Folha On Line (Feb. 12, 2003), at <http://www.adufepe.com.br/noticias/not-13-02-2003l.htm> (last visited Sept. 21, 2004) [hereinafter *Sinepe*].

38. See Jeter, *supra* note 1 ("14 percent of applicants who declared themselves "white" when they took the entrance exam declared themselves either black or pardo when they submitted their applications to the university."); Jones, *supra* note 18.

39. *Sinepe*, *supra* note 37.

40. See also Jeter, *supra* note 1 (quoting Paulo Fábio Salgueiro, "I don't think there's any doubt that some middle-class white kids are taking advantage of the system by declaring themselves black. It's disappointing because that means the program is not always benefiting poor or underprivileged kids. But at the same time, what can you do? We have no idea really who is black and who is not. This is Brazil."); Jones, *supra* note 18 ("With our history of racial mixing, there can be two white parents who have a child that essentially is dark-skinned or vice versa. So trying to make this program work is difficult.").

41. Rodrigo Davies, *Brazil Takes Affirmative Action in HE* (Aug. 4, 2003), at <http://education.guardian.co.uk/higher/worldwide/story/0,9959,1012157,00.html> (last visited Sept. 20, 2004). Davis does suggest that the low number of blacks may be "distorted by the racial stigma attached to being black." *Id.*

low number, eighty percent of Brazilians claim to have at least some African heritage.⁴² The result is an extremely racially heterogeneous nation, where the census form contains more than one hundred classifications based on skin color⁴³ and inter-racial relationships are the norm.⁴⁴ Consequently, racial lines have never been as clearly drawn in Brazil as they have in other countries because, until recently, no one has felt a necessity to distinguish "blacks" from "whites."⁴⁵

The current controversy has given rise to two competing viewpoints. On one side of the line are those who believe that affirmative action is "a solution imported from the United States."⁴⁶ They believe that the two nations' differences in racial classification and relations make the United States model ill-suited for the purpose of giving blacks equal access to wealth and opportunity.⁴⁷ On the other side of the line are those who view Brazil's purported harmonious "racial democracy" as a longstanding farce that has protected a race-based system of domination akin to an informal caste system.⁴⁸ Those who support the latter viewpoint contend that Uerj's affirmative action system, even if ineffective, has stimulated debate and forced the government to admit there is a problem.⁴⁹

Both sides have found reasons to justify their respective positions. Those who support the quota system, such as Minister of Education Cristovam Buarque, do so largely from a "fairness" standpoint but acknowledge that it is, at best, "a provisory measure to resolve a moral problem."⁵⁰ On the other hand, those who oppose

42. *Id.*

43. Jeter, *supra* note 1 ("One category is 'coffee with cream' . . . Even former president Fernando Henrique Cardoso, by all appearances a white man, boasted of having a 'foot in the kitchen,' a Brazilian colloquialism for mixed ancestry and a subtle reference to the proliferation of black maids in white households.").

44. Larry Rohter, *Racial Quotas in Brazil Touch Off Fierce Debate*, N.Y. TIMES, Apr. 5, 2003, at A5.

45. *Id.*

46. *Id.*

47. *Id.* (referring to a recent article from a Brazilian newspaper accusing the government of "officializing racial discrimination."); see also Jeter, *supra* note 1 ("We don't have the kind of anger between black and whites like you find in the U.S. We've always had segregation here, but it's never been legally mandated like it was in other places. People . . . wonder if this kind of acrimony is good for Brazilians.")

48. Rohter, *supra* note 44; Tobar, *supra* note 23 (quoting Ivanir dos Santos) ("Without a single law in place to support it, we have a hierarchy of skin color where blacks appear to know their place.").

49. Davies, *supra* note 41; Jeter, *supra* note 1 (quoting Paulo Fábio Salgueiro) ("[T]he debate over quotas has forced everyone to confront the fact that racism, discrimination and social exclusion are alive and well here.").

50. João Novaes, *Cristovam diz ser favorável a reserva de cotas em universidades* [Cristovam claims to be in favor of quotas in universities], FOLHA DE SÃO PAULO, Jun. 26, 2003, available at <http://www.ufpa.br/imprensa/clipping/clipping%2026%2006%202003.htm>. Note that, while a supporter of the quota system, Buarque

the quota system contend that, even as a short-term measure, it distracts the government from its real task of “improving the quality and access to public education at the primary and secondary school levels so that poor Brazilians can be admitted to the universities at greater rates.”⁵¹ Opponents have also focused on the program’s ineffectiveness, discussed above, and contend that addressing the shortcomings would not come without a price.⁵² Finally, both sides have made what are perhaps the most basic affirmative action arguments, pitting the possible debt that society owes blacks because of slavery⁵³ against the merit-based argument that there is no rational basis for excluding those who obtained the required score on the entrance exam.⁵⁴

The question of who should be allowed to benefit from the program remains a critical and unresolved issue. President Lula has suggested that “scientific” criteria could be used to determine who is black, a suggestion that has been widely criticized.⁵⁵ In the alternative, attorney Helio Silva Junior, a specialist in anti-discrimination legislation, has suggested using applicants’ civil identification files as a means of determining their race.⁵⁶ Under Silva Junior’s proposition, a person would be deemed black when his or her parents’ files, compiled when one receives his or her civil

has declared that the Ministry of Education will not impose such measures on universities, but will instead leave the universities to take the initiative on their own.

51. Pueng Vongs, *Affirmative Action in Other Countries*, PACIFIC NEWS SERVICE, Jul. 11, 2003, at <http://www.alternet.org/story.html?StoryID=16391> (last visited Sept. 20, 2004); see also *Alunos Estariam Sendo Preteridos* [Students Would Be Left Out], A TARDE, Feb. 24, 2003, available at <http://www.universiabrasil.net/html/noticia/dggfi.html> (noting that a student admitted through the public school quota runs the risk of not acquiring “professional competence” because of his perfunctory secondary education).

52. Supporters of the system have suggested instituting “remedial courses” for students who come in through quotas. See França, *supra* note 26. França rejects this suggestion, contending that it will unreasonably increase the duration of the school’s educational programs. *Id.* The end result is a “watering down” of the quality of the education, which imposes costs on the students and on society. *Id.* Further discrimination will follow, as “quota doctors” and “quota lawyers” will be regarded as unfit to practice by society. *Id.* For that reason, even some who may benefit from the affirmative action program have opposed it. See Jeter, *supra* note 1.

53. Rohter, *supra* note 44. Brazil did not abolish slavery until 1888, making it the last nation in the Western Hemisphere to do so. Jeter, *supra* note 1.

54. Cesar, *supra* note 16. Judges have been very protective of the “merit-based” scheme, refusing to compel Uerj to accept white students who, by virtue of their entrance exam scores, would not have been accepted into the university even if the quotas had not been in place.

55. Rohter, *supra* note 44; see Also Mauro Chaves, *Querem Guerra Racial no Brasil?* [Do They Want a Racial War in Brazil?], O ESTADO DE SÃO PAULO, Feb. 22, 2003, at A2, available at <http://txt.estado.com.br/editoriais/03/02/22/aberto002.html> (comparing the use of “scientific criteria” to the means used to identify Jews under the Nuremberg laws, and dismissing the concept as “ridiculous.”).

56. Sinepe, *supra* note 37.

identification card, revealed a classification other than “white, yellow, or Indian.”⁵⁷ While being able to identify those whom the university intends to benefit is essential, such an issue will be moot if the quota program violates the federal constitution.

III. THE DETERMINATION OF BRAZIL'S VALIDITY OF UERJ'S QUOTA-BASED AFFIRMATIVE ACTION WILL DEPEND ON THE SUPREME FEDERAL TRIBUNAL'S ANALYSIS OF VARIOUS CONSTITUTIONAL ISSUES

On or about March 20, 2003, the National Confederation of Teaching Establishments (Confenem) instituted an action in the Supreme Federal Tribunal (STF) challenging the constitutionality of Uerj's affirmative action system.⁵⁸ A ruling upon this challenge will require the STF to resolve two overarching issues. First, the STF must decide whether the constitution provides the state government with the power to implement an admissions policy for the university.⁵⁹ If the STF answers the first question in the affirmative, then the STF must engage in an extensive exercise of constitutional interpretation to determine whether the federal constitution allows Uerj to treat applicants differently.⁶⁰

The federal government has taken a hands-off approach, declaring that it will leave it to state governments or universities to implement such systems.⁶¹ The federal government has, however, attempted to settle the issue legislatively.⁶² A bill currently before

57. *Id.* Note that Silva Junior is advocating a generational cut-off point as well.

58. Antônio Gois, *No Brasil, Reserva de Vagas para Negros Está no Supremo [Reservation of Spots for Blacks Has Reached the Supreme Court]*, FOLHA DE SÃO PAULO, Jun. 24, 2003, available at <http://www1.folha.uol.com.br/folha/educacao/ult305u13121.shtml> (last visited Sept. 20, 2004).

59. *Id.* A member of Brazil's Ministry of Justice contends that a program such as this could only be implemented by federal law or by the universities themselves, in accordance with the right to autonomy that the constitution has allegedly granted these institutions. *Id.* Moreover, Nina Ranieri, General Counsel for the University of São Paulo, has also mentioned that a student, insofar as public universities are concerned, may be able to challenge the constitutionality of these programs under Article 37 of the constitution, which demands that public matters be administered in an efficient and impersonal manner. José Goldemberg, *Vagas nas universidades públicas [Spots in Public Universities]*, O ESTADO DE SÃO PAULO, Aug. 7, 2001, available at <http://txt.estado.com.br/editorias/2001/08/07/aberto002.html?>

60. Gois, *supra* note 58.

61. Novaes, *supra* note 50. Confenem also mentions, as part of its attack on the affirmative action program, Article 208 of the federal constitution of 1988, discussed *infra*.

62. Tânia Monteiro, *Cotas para Negros em Universidades Vai ao Congresso [Quotas for Blacks in Universities Goes to Congress]*, Agência Estado (Jan. 20, 2004), at <http://www.estadao.com.br/educando/noticias/2004/jan/20/166.htm>. While Monteiro does not expressly state that the issue is still pending before the STF, she alludes to the controversy without mentioning any resolution. *Id.* Moreover, the Author has not located any authorities indicating that the STF has closed the matter.

Congress (hereinafter, the Quota Bill), resulting from a joint effort between the Ministry of Education and the Office of the Secretary of Promotion of Racial Equality, would provide incentives for schools to choose to adopt quota systems.⁶³ Under the Quota Bill, schools would determine how many spots they will reserve for blacks, as well as the means by which applicants would identify themselves as members of a protected race.⁶⁴ The government believes that allowing each school to determine the mechanics of its own quota program will prevent the Quota Bill from running afoul of the constitutional principle of “university autonomy.”⁶⁵

The Quota Bill, however, fails to address two crucial issues. First and foremost, it entirely overlooks the proposition that quotas may be unconstitutional.⁶⁶ Therefore, the Quota Bill fails to quell the controversy before the STF. Hence, the analysis that follows is still relevant in predicting the path that affirmative action law will take in Brazil. Moreover, the Quota Bill has been proposed as an ongoing law, rather than a temporary measure, thus running counter to a central tenet of affirmative action.⁶⁷

A. The STF will struggle to find clear answers in attempting to determine whether Uerj’s quota system complies with principles such as “equality before the law” and “university autonomy”

The constitution has provided the government with certain powers that allow it to engage in certain forms of “positive discrimination.”⁶⁸ The provisions granting the government such powers may be grouped into three categories: (1) provisions imposing a duty on the government to abolish “marginalization and

63. *Id.* Such “incentives” would come both in the form of financial rewards and higher placement when the government issues its ranking of institutions of higher education.

64. *Id.* A number of schools have declared an intention to continue to rely on self-declaration as a means of identifying an applicant’s race, while others are considering requiring photographic evidence.

65. *Id.*

66. *See infra* Part V, where the Author predicts that quota-based affirmative action programs are likely to be found unconstitutional.

67. *See infra*, Part VI.d, for the conclusion that affirmative action programs are, at best, temporary measures and ought to have a limited life span.

68. Relatório do Comitê Nacional Para a Preparação Da Participação Brasileira na III Conferência Mundial Das Nações Unidas Contra o Racismo, Discriminação Racial, Xenofobia e Intolerância Correlata [Report from the National Committee for the Preparation for Brazilian Participation in the Third United Nations Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance] (Durban, 31 Aug. – Sept. 7 2001), Aug. 2001, available at <http://www.socioambiental.org/website/indiosemitares/xenofobia.htm#antid>. *See also* Lourival Sant’anna & Christiane Samarco, *Lei de Cotas Esbarra na Mistura de Raças [Quota Law Runs Into Racial Mixing]*, ESTADO DE SÃO PAULO, Feb. 17, 2003, available at <http://www.estadao.com.br/educando/noticias/2003/fev/17/60.htm>.

inequalities,” (2) provisions entrusting the government with the power to “promot[e] and integrat[e] disfavored segments,” and (3) provisions specifically providing for some “just discrimination” in order to compensate for inequalities of opportunity and to foster development in certain sectors (mainly small enterprises).⁶⁹ The STF must decide whether its power to engage in “positive discrimination” extends so far as to validate the state government’s affirmative action program.⁷⁰

Raquel Coelho Lenz Cesar, a professor at Uerj’s School of Judicial Sciences, has suggested that the STF’s decision will depend on whether the STF views the right of equality in educational opportunities as granted individually or collectively.⁷¹ The fact that universities have long predicated the access to education on merit alone, with no interference from any governmental unit, would suggest that equality in educational opportunities is regarded as an individual right.⁷² Consequently, Uerj’s affirmative action program would run afoul of the constitutional principle of equality.⁷³ But Cesar also has demonstrated that historical data, as well as general views on equality, suggest that equality has long been premised on the existence of equivalent rights and benefits for everyone.⁷⁴ Under that view, it would be perfectly reasonable for the STF to conclude that those who historically have faced exclusion and discrimination should have equal access to education through governmental protection.⁷⁵

The STF’s decision may also depend on whether it chooses to view the affirmative action program as establishing a privilege, in

69. *Id.* Note that the provisions the Committee grouped under the third prong favor women and the financially underprivileged (for taxation purposes). The constitution is completely silent on race, however. The Committee also suggests that the constitutional text itself may contain a “bright line” rule regarding the permissibility of discrimination. Art. 5(XLI) states that “the law will punish any discrimination harmful to fundamental rights and liberties.” Therefore, the Committee concluded, any discrimination posing no such threat should be allowed.

70. *See* Cesar, *supra* note 16.

71. *Id.*

72. *Id.*

73. Adriana Castelo Branco, *Para OAB-RJ, cota fere Constituição [In OAB-Rj’s opinion, quotas violate the Constitution]*, O GLOBO, Feb. 24, 2003, available at http://www.andes.org.br/Clipping%2024_02_2003.htm. Note that even those who do not oppose a quota-based affirmative action program, per se, believe that this particular system produces results that violate the 1988 federal constitution’s promise of equality before the law. *Id.* Octavio Gomes, the president of OAB-RJ, a group akin to a bar association, believes such equality will only be obtained through reforms in the education system that address the demise of the public school system. *Id.*

74. Cesar, *supra* note 16.

75. *Id.* Cesar has suggested a third option: evaluating affirmative action systems on a case-by-case basis, possibly through set criteria aimed at measuring arbitrariness (reasonableness, proportionality, legality, and existence). *Id.*

which case it would find the program unconstitutional,⁷⁶ or as guaranteeing a right, in which case it would not.⁷⁷ Even that statement, however, is not a foregone conclusion. After all, the white students challenging Uerj's affirmative action program have argued that they are being denied a *right* of "equality of access to schooling" that is guaranteed by the federal constitution.⁷⁸

The STF will find no guidance by way of binding precedent and has only one non-binding instance that it may find relevant. The Commission on Constitution, Justice and Citizenship (hereinafter, the Commission) issued a judgment on a proposal for a similar project in 1995.⁷⁹ The Commission rejected the proposal as running afoul of Article 5, Brazil's equivalent of the Equal Protection Clause, and decided that equality before the law has long meant that the laws must treat all alike, "*without accounting for distinctions.*"⁸⁰

The federal constitution, however, does provide for preferential treatment for certain groups, so the STF would have some support if it chose to adopt an opposing interpretation.⁸¹ For instance, "the Magna Carta established in its text the possibility of unequal treatment for people or groups historically prejudiced in exercising their fundamental rights." The key issue before the Court, then, would be whether the federal constitution's allowance of "unequal treatment"—i.e., preferential treatment—extends to either the field of education or to blacks.⁸²

Celso Antônio Bandeira de Mello, a member of the Brazilian Judiciary, has explored the law's occasional allowance for preferential treatment and attempted to define the proper circumstances for such allowances.⁸³ Mello has developed three criteria under which the law

76. Sabrina Moehlecke, *Ação afirmativa: História e Debates no Brasil* [*Affirmative action: History and Debates in Brazil*], 117 CADERNOS DE PESQUISA [CAD. PESQUI.] 197 (2002), available at <http://www.scielo.br/pdf/cp/n117/15559.pdf>. In this case, "the program would amount to 'reverse discrimination' by favoring one group over another. The program would also go against the merit-based system of admissions, resulting in a feeling of inferiority by the protected group, as it would be seen as incapable of 'winning by itself.'"

77. *Id.* If the program serves to guarantee a right, then it would in effect aim at correcting an existing discriminatory situation, thereby establishing its validity.

78. Rohter, *supra* note 44.

79. Moehlecke, *supra* note 76. The project in question called for a twenty percent quota in public universities for the benefit of underprivileged applicants. *Id.*

80. *Id.* ("There are only exceptions to the principle of equality before the law, which is a fundamental right . . . when the constitution itself establishes them.").

81. *Id.* See *supra* discussion of "positive discrimination" Part III.a.

82. Moehlecke, *supra* note 76.

83. *Id.* Mello begins with Aristotle's contention that equality means to treat those who are equal equally and those who are unequal unequally. For some, that statement sufficiently establishes a constitutional basis for Uerj's program. Mello, however, viewed that proposition as merely a starting point, and continued to search for malleable criteria that allow for different treatment of different individuals or groups without harming the principles of equality. See also *Movimento Negro e*

permits preferential treatment without violating the federal constitution. According to Mello, the following criteria must be satisfied: (1) an inherent personal trait exists that is identified by law as a "differentiating factor" (e.g., gender, race, religion) that, by itself, would not justify preferential treatment; (2) a "logical correlation" between the differentiating factor and the preferential treatment being allowed by the law; and (3) a consistency between the benefits being conferred upon the group bearing that differentiating factor and the basic interests upon which the Brazilian Constitution was founded.⁸⁴

Mello's framework justifies the constitution's provision of certain protections for women in the workplace, so it could arguably do the same with regard to race and education.⁸⁵ But Mello's interpretation is by no means dispositive. If a law does not unequivocally validate affirmative action, it may be subject to a conflicting interpretation. For instance, Articles VI and VII of the U.S.'s Civil Rights Act of 1964 were once used to uphold affirmative action schemes and are now employed to restrict such programs.⁸⁶ Moreover, even though the federal constitution has specifically allowed some privileges for certain groups, as noted above, Article 208(V) provides that access to higher education must be based on an individual's capabilities.⁸⁷ Uerj will be hard-pressed to persuade the STF to overlook the specific language found in the federal constitution.⁸⁸

The STF, however, may not even reach the issue of whether the quota system's preferential treatment of blacks is constitutional. The federal constitution has granted universities (without distinguishing between public and private) autonomy in determining the terms and criteria for admitting candidates.⁸⁹ While this point has not received the same attention as the equality issue, if the STF decided that Rio de Janeiro was infringing on the rights that the constitution grants to universities, it would be able to rule that the quota is

Universidade Debates Sistema de Cotas [Black Movement and University Debate Over Quota System], available at <http://www.portalpopular.org/movimento2003/mov-populares/mov-populares-03.htm>.

84. Moehlecke, *supra* note 76.

85. *Id.* The characteristic of gender satisfies the first prong. The "logical" prong is satisfied by the long-standing inequalities in the access to the job market for women. The provision also satisfies the third prong, as it is supported by overriding constitutional notions of promoting general welfare, with no prejudice or gender discrimination.

86. *Id.*

87. CONSTITUIÇÃO FEDERAL [C.F.] title VIII, ch. III, § 1, art. 208(V).

88. *See* Buarque, *supra* note 31; Novaes, *supra* note 50.

89. C.F. title VIII, ch. III, § 1, art. 207.

unconstitutional on this basis alone.⁹⁰ This possibility has caused concern among supporters of Uerj's efforts.⁹¹

Conversely, the constitution has also imposed certain duties on the government with regard to the education system.⁹² Of note is the duty to provide access to higher education *in accordance with the candidate's capabilities*.⁹³ The STF must, therefore, determine how it ought to analyze an applicant's "capabilities."⁹⁴

From a textual perspective, the inquiry should arguably end with Article 208(V). After all, its language seemingly addresses precisely the issue at hand: access to higher education. This has not, however, prevented certain scholars from contending that affirmative action programs (though not necessarily Uerj's) are valid even in spite of the language of Article 208(V).⁹⁵ Author Jose Carlos Gal, for instance, offered the following defense to affirmative action programs:

[A]n extremely substantial part of the inequality in incomes in modern [Brazilian] society is not so much a result of an unequal allocation of resources as it is a function of the fact that some have been fortunate to enjoy the access to schooling while others have not. Those that possessed that opportunity have equipped themselves with life-long earning power [not possessed by all]. It is evident, in carefully conducted empirical studies, that an extremely important part of the inequality in the distribution of income is owed to the level of schooling obtained, more so than any other variable.⁹⁶

The differences in income, Gal argues, along with the language in the preamble to the federal constitution,⁹⁷ make notions of "formal" equality irrelevant in this case.⁹⁸ As a result, perhaps the STF should feel free to interpret the text of the federal constitution vis-à-vis the obstacles that the victims of colonial slavery have had to overcome.⁹⁹ In interpreting "capabilities," the STF will encounter the same problems as it will with interpreting "equality." Should it take a

90. See Ramos & Walker, *supra* note 7.

91. See generally *id.* (stating that the possibility exists that the Brazilian Supreme Court will condemn affirmative action in order to preserve universities' Article 207 rights).

92. C.F. title VIII, ch. III, § 1, art. 208. For example, the constitution imposes upon the state a duty to institute programs providing for assistance via school supplies, transportation, meals, and health maintenance. *Id.*

93. *Supra* note 87 (emphasis added).

94. See Moehlecke, *supra* note 76.

95. See generally JOSE CARLOS GAL, LINHAS MESTRAS DA CONSTITUIÇÃO FEDERAL DE 1988 [KEY PROVISIONS OF THE FEDERAL CONSTITUTION OF 1988] (Saraiva 1989).

96. *Id.* at 61.

97. C.F. pmbl. The preamble, in essence, pledges that Brazil will operate as a "multicultural" and "pluralistic" nation. Cf. C.F. title VIII, ch. III, § II, art. 215-16 (bringing up the concept of multiculturalism again).

98. da Silva, *supra* note 14.

99. *Id.* ("[Classical notions of] meritocracy are no more than a perpetuation of inequality.")

purely textualist view, which appears to favor the whites challenging Uerj's program? Or should it take into account Brazil's racial history and the program's goal of overcoming income disparity? In other words, where do one group's rights end and another's begin?

B. The STF must ensure that its decision is consistent with the text of certain foreign treaties to which Brazil is a party

As noted above, the specificity to which Article 208(V) applies to this matter arguably makes a textual interpretation of that provision the most convincing argument against the constitutionality of Uerj's affirmative action system. The federal constitution, however, is not limited to its own text. Art. 5(LXXVII) states that "the rights and guarantees expressed in this Constitution do not exclude others granted . . . by international treaties to which the Federal Republic of Brazil is a party."¹⁰⁰ This article has the effect of incorporating such treaties into the text of the federal constitution.¹⁰¹ Because of that incorporation, the government will be acting unconstitutionally if it fails to comply with the mandates of the following treaties and conventions.¹⁰²

One treaty of relevance to this matter is the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter, the 1968 Convention), which Brazil ratified on March 27, 1968. According to Article I(4),

[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.¹⁰³

Even assuming that Uerj's affirmative action program is the type of "special measure" that the drafters of the 1968 Convention envisioned, however, the 1968 Convention's support of the program is not without qualification. The Convention also states that "such

100. C.F. title II, ch. I, art. 5, ¶ 2.

101. See Luiz Fernando Martins da Silva, *Aspectos Jurídicos e Constitucionais das Políticas de Ação Afirmativa e Seus Mecanismos* [*Judicial and Constitutional Aspects of Affirmative Action Policies and Mechanisms*], Dec. 11, 2003 (analyzing the arguments, both constitutional and non-constitutional, in opposition of affirmative action programs in Brazil).

102. *Id.*

103. International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, art. I(4), 660 U.N.T.S. 195, I.L.M. 352. Note that, on the general comment to Part I, Article I(4), the Convention supports the principle of self-declaration, the same principle that many have considered part of the problem with the current quota system. However, the Convention supports self-declaration so long as "no justification exists to the contrary." Thus, a potential issue is whether the potential for abuse of the quota system is such a justification.

measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and . . . shall not be continued after the objectives for which they were taken have been achieved."¹⁰⁴ At the very least, this suggests that the affirmative action program must last no longer than is required for its goals to be achieved. This language could also present a problem if Congress approves the Quota Bill, which has not been proposed as a temporary measure.¹⁰⁵

The 1993 World Conference on Human Rights (hereinafter, the Human Rights Conference) in Vienna is also an important treaty. The Human Rights Conference purports to establish that those groups that have historically endured infringements upon their "human rights" are entitled to a degree of special protection from their respective home nations.¹⁰⁶ Specifically, Item 24 of the Vienna Declaration and Programme of Action (hereinafter, the Programme of Action) places upon adopting nations "an obligation to create and maintain adequate measures at the national level, in particular in the fields of *education* . . . for the promotion and protection of the rights of persons in vulnerable sectors of their populations."¹⁰⁷

Furthermore, the Programme of Action states that the Human Rights Conference views "the codification of human rights instruments" in a favorable manner.¹⁰⁸ At first glance, it appears that the drafters of the Human Rights Conference would look favorably upon a formal affirmative action system. But the opponents of Uerj's system do not oppose affirmative action programs in general, or even quota systems, but merely this particular one, based on its structure and its results.¹⁰⁹ Whether the Human Rights Conference would support *any* "human rights instrument," regardless of how the instrument operates, is unknown.

Another U.N. treaty that the Brazilian Government committed itself to obeying is the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (hereinafter, the World Racism Conference). This treaty

encourages States to develop or elaborate national action plans to promote diversity, equality, equity, social justice, equality of opportunity and the participation of all. Through . . . *affirmative or*

104. *Id.*

105. *See supra* Part III.

106. World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc., A/Conf 157/24.

107. *Id.* art. 24 (emphasis added).

108. *Id.* art. 26.

109. *See Sant'anna and Samarco, supra* note 68. Noted constitutional scholar Luis Roberto Barroso, for example, does not believe quotas are unconstitutional "as long as they do not create blatant discrimination of other groups." *Id.* Much of the opposition surrounding Uerj's program also centers around the principle of self-declaration. *Id.*

positive actions and strategies, these plans should aim at creating conditions for all to participate effectively in decision-making and realize civil, cultural, economic, political and social rights in all spheres of life on the basis of non-discrimination.¹¹⁰

The World Racism Conference comments specifically on “Africans and people of African descent,” urging ratifying nations “to facilitate the participation of people of African descent in all political, economic, social and cultural aspects of society.”¹¹¹ For reasons previously stated, however, this text does not automatically lead to a decision affirming Uerj’s program. First of all, one of the problems with the program has been discerning who is “black” and, consequently, who is meant to reap its benefits.¹¹² Second, a term such as “equality of opportunity” is subject to more than one interpretation.¹¹³ It is not necessarily unambiguous in the context of the World Racism Conference, just as it is not so within the federal constitution, although the Conference’s specific aim of combating racism may add clarity to its meaning of the term.¹¹⁴

One conclusion that can be drawn from Brazil’s ratification of the aforementioned treaties and conventions is that the federal government no longer chooses to ignore the existence of racism and racial discrimination.¹¹⁵ In order to comply with these treaties, it is virtually inevitable that the government will adopt some type of affirmative action program, at least as a temporary measure.¹¹⁶

IV. AFFIRMATIVE ACTION IN THE UNITED STATES: A MODEL FOR DEVELOPING NATIONS

The U.S.’s influence on the affirmative action efforts of many countries, including Brazil, cannot be denied.¹¹⁷ For example,

110. General Issues, World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, ¶ 99, CEDAW/C/2001/I/CRP.3Add.9 (Jan 29, 2001) (emphasis added).

111. Programme of Action, World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, ¶ 4 CEDAW/C/2001/I/CRP.3Add.9 (Jan. 29, 2001).

112. See *supra* Part II.b.

113. See *supra* Part III.a.

114. See General Issues, *supra* note 110. Under “General Issues,” the Convention emphasizes the importance of the “global fight against racism, racial discrimination, xenophobia and related intolerance and all their abhorrent and evolving forms and manifestations.” It appears fairly clear, then, that the Conference is more focused on creating equality of opportunity that has not existed because of racism, as opposed to treating those who are unequal equally.

115. da Silva, *supra* note 101.

116. Novaes, *supra* note 50.

117. See Vongs, *supra* note 51 (“[T]he U.S. Supreme Court’s recent split ruling in two affirmative action cases—which allowed race to be used in admissions decisions but banned quotas and systems based on points—emboldened critics of Rio’s policy.”)

Brazilian civil rights activists have compared the potential impact of the STF's decision to the impact that *Brown v. Board of Education of Topeka*¹¹⁸ had on the U.S. education system.¹¹⁹ Moreover, Eric Oliveira Guaraná, Fracescutti's attorney, has used the U.S. Supreme Court's well-known *Bakke*¹²⁰ decision in support of his suit against Uerj.¹²¹ Although the conditions in the two countries vis-à-vis racism are not mirror images of each other,¹²² there are certainly significant lessons that the Brazilian government and universities can learn from the history and experience of the United States.

A. *The history and roots of affirmative action in the United States*

The Supreme Court's decision in *Brown* represented the first significant piece of judicial activity in the battle against racial segregation.¹²³ Even post-*Brown*, however, it soon became clear that anti-discrimination laws were insufficient to combat the inequalities created by slavery and by laws permitting racial discrimination.¹²⁴ It thus became the duty of the federal and state governments to go beyond remedying past suffering and create a system that would prevent the vestiges of slavery and racial discrimination from detrimentally affecting blacks in the future.¹²⁵

The first significant step toward creating such a system arose in 1961, when President John F. Kennedy issued Executive Order No. 10925, creating the Equal Employment Opportunity Committee (EEOC).¹²⁶ Executive Order No. 10925 imposed on the EEOC the duty to "scrutinize and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps, which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination within the executive branch of the

(discussing the current struggles with affirmative action by Brazil, India, and South Africa).

118. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (ending to segregation in public schools in the United States by holding that separate educational facilities are inherently unequal).

119. Rohter, *supra* note 44.

120. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

121. See *generally* Jeter, *supra* note 1.

122. See *supra* Part V.a.

123. See *Brown*, 347 U.S. at 483.

124. Sabrina Moehleck, *Propostas de Ações Afirmitivas no Brasil: O Acesso da População Negra ao Ensino Superior* [Proposed Affirmative Action in Brazil: Black Population's Access to Higher Education] (2000) (unpublished thesis, Universidade de São Paulo) (on file with Universidade de São Paulo Library), available at <http://www.teses.usp.br/teses/disponiveis/48/48134/tde-20072003-172034/publico/dissertacao.pdf>.

125. *Id.*

126. Exec. Order No. 10925, 3 C.F.R. 339 (1964-1965).

Government.”¹²⁷ The Executive Order also featured the first documented use of the term “affirmative action,” with respect to employment practices of government contractors and subcontractors.¹²⁸ In 1964, Congress passed the Civil Rights Act, which, in essence, extended Executive Order No. 10925 to public and private employers alike.¹²⁹

The EEOC, in its role of enforcing federal non-discrimination laws, “recognizes that race, sex, and national origin conscious decisions may be required in order to eliminate the effects of past discrimination and the adverse effects of present policies and practices.”¹³⁰ This language has essentially allowed the EEOC to use affirmative action as a remedial measure when it finds that employment discrimination has occurred.¹³¹ In 1979, the EEOC began to extend protection from reverse discrimination charges to any employer who voluntarily takes affirmative action measures to remedy past discriminatory practices.¹³²

Similar to President Kennedy, President Lyndon B. Johnson played an essential role in furthering the affirmative action cause in the United States. He first left his mark in a Commencement speech at Howard University on June 4, 1965 in which he emphasized the need to “open the gates of opportunity” to blacks, thus capturing the concept underlying affirmative action.¹³³ True to his words, President

127. *Id.*

128. *Id.* (“The [government] contractor [or sub-contractor] will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”); see also Los Angeles County Office of Affirmative Action Compliance [L.A. County], *Affirmative Action: A Historical Perspective in Los Angeles County Government*, at <http://oaac.co.la.ca.us/AAMain.shtml> (last visited Sept. 20, 2004).

129. 42 U.S.C. § 2000e-2(a) (2003) (“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race. . . .”) (emphasis added).

130. L.A. County, *supra* note 128.

131. *Id.*

132. *Id.* Note that employers do not have *carte blanche* to implement such plans; rather, there are certain requirements that must be met: (1) the plan must be designed to achieve the purposes of Title VII; (2) the plan must be in effect only as long as necessary to achieve its objectives; and (3) the plan must “avoid unnecessary restrictions on opportunities for the workforce as a whole.” *Id.*

133. President Lyndon B. Johnson, Commencement Address at Howard University: “To Fulfill These Rights” (Jun. 4, 1965) (transcript available at <http://teachingamericanhistory.org/library/index.asp?documentprint=531>). President Johnson states:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair. . . . We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but

Johnson passed Executive Order No. 11246, which was the first governmental directive that specifically required and enforced affirmative action.¹³⁴ Once affirmative action programs that addressed employment in the public sector gained legitimacy, the focus in the 1970s shifted to universities and reached a watershed moment in 1978, with the Supreme Court's *Bakke* decision.¹³⁵

B. *Bakke*: The U.S.'s landmark decision regarding the role of affirmative action in university admissions

In *Bakke*, the Supreme Court was called upon to decide the constitutionality of the Medical School of the University of California at Davis' (hereinafter, UC-Davis) "special" admissions program.¹³⁶ The program targeted applicants labelling themselves as "economically and/or educationally disadvantaged" or as members of a "minority" group.¹³⁷ The applicants had their applications evaluated by a separate committee made up mostly of minorities.¹³⁸ After this initial screening, the admissions process paralleled that of the general admissions program, except that "special" applicants not meeting a 2.5 grade point average were not automatically dismissed.¹³⁹ The special committee then reported its top candidates to the general committee, which then only compared the special applicants against each other.¹⁴⁰ The special committee continued to recommend applicants until the general committee admitted sixteen "special" applicants into the incoming class of 100.¹⁴¹

Plaintiff Allan Bakke, a white male, applied to UC-Davis in 1973 and again in 1974; both times his application was considered under the general program.¹⁴² Despite strong benchmark scores, UC-Davis

equality as a fact and equality as a result. . . . To this end equal opportunity is essential, but not enough, not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.

Id.

134. Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965) (prohibiting federal contractors from discriminating in employment because of race, creed, color, and national origin and requiring government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment).

135. Cesar, *supra* note 16.

136. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 273 (1978).

137. *Id.* at 274.

138. *Id.*

139. *Id.* at 275

140. *Id.*

141. *Id.*

142. *Bakke*, 438 U.S. at 276

denied Bakke's application in both years,¹⁴³ yet it admitted "special" applicants with lower academic "measurables" than Bakke.¹⁴⁴ Bakke brought suit in the Superior Court of California on the basis that the school, by conducting an admissions program that excluded him based on his race, violated his rights under the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁵ The case eventually made its way to the United States Supreme Court, which decided the constitutionality of admissions programs that factor in an applicant's race¹⁴⁶ and, more specifically, of programs requiring a set number of students of a certain racial or socio-economic background.¹⁴⁷

The Supreme Court, with Justice Powell writing for the Court, decided that an admissions program that took race into account was constitutionally permissible only to the extent that the interest behind the racial classification was substantial and the racial classification was necessary to safeguard that interest.¹⁴⁸ UC-Davis advanced four interests that it attempted to protect through its special admissions program,¹⁴⁹ only one of which the Supreme Court upheld. The Supreme Court summarily rejected the school's purpose of reducing the deficit of minorities enrolled in the school, labelling it as "discrimination for its own sake."¹⁵⁰ Next, the Supreme Court invalidated the admissions program's purpose of "countering societal discrimination"¹⁵¹ because, although a state does have a substantial interest in "[redressing] the wrongs worked by specific instances of racial discrimination," there is no justification for imposing a disadvantage upon someone who did not inflict any of the harm that the "special" applicants may have suffered.¹⁵² Finally, the Supreme Court found that, even assuming the importance of the state's interest in increasing the number of physicians practicing in disadvantaged communities, the admissions program did not necessarily promote that goal.¹⁵³

143. *Id.* at 276-77. The benchmark scores were determined by UC-Davis by combining interview summaries, grade point averages, Medical College Admissions Test scores, letters of recommendation, extracurricular activities, and other personal data. *Id.* at 274.

144. *Id.* at 277.

145. *Id.* at 277-78.

146. *Id.* at 305-15.

147. *Id.* at 315-20.

148. *See Bakke*, 438 U.S. at 305.

149. *Id.* at 306.

150. *Id.* at 307.

151. *Id.*

152. *Id.* at 307-10 ("To hold otherwise would be to convert a remedy . . . reserved for violations of legal rights into a privilege that all institutions . . . could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. This is a step we have never approved.")

153. *Id.* at 310. UC-Davis failed to demonstrate that minority students who were admitted under the "special" program were more likely to practice in

The interest that the Supreme Court did find sufficiently substantial, and that therefore justified race-based classification, was "the attainment of a diverse student body."¹⁵⁴ The Supreme Court acknowledged that the "informal learning" that takes place when students with various "interests, talents, and perspectives" come together and "stimulate one another to re-examine . . . their assumptions . . . about themselves and the world" is an essential component of a well-rounded education.¹⁵⁵ The Supreme Court, however, recognized that ethnic diversity is but one element of a diverse student body.¹⁵⁶ The Court then proceeded to examine whether UC-Davis' racially based quota program was necessary to achieve that goal.¹⁵⁷

The Supreme Court struck down UC-Davis' program because its sole focus was on race.¹⁵⁸ According to Justice Powell, a program that considers an applicant's race as a "plus" in the applicant's file, but does not place that applicant in a separate category to be compared only with applicants of the same race, would have been acceptable.¹⁵⁹ It is perfectly acceptable for race to be one element of diversity, along with others such as "unique work or service experience . . . [,] a history of overcoming disadvantage . . . [, and] ability to communicate with the poor."¹⁶⁰ If the university takes all of an applicant's qualifications into account, an applicant who is denied admission cannot claim he was "foreclosed from all consideration from that seat simply because he was not the right color" and, consequently, the applicant has no claim of unequal treatment under the Equal Protection Clause.¹⁶¹

disadvantaged communities than a white doctor. *Id.* at 311. Even assuming that this is the case, the Supreme Court decided there were better means of identifying which applicants would be interested in practicing in minority areas, such as an applicant's past concern for disadvantaged minorities and a declaration that practicing in such a community was his or her primary goal. *Id.*

154. *Bakke*, 438 U.S. at 311-12.

155. *Id.* at 313 n. 48 (quoting the then-president of Princeton University).

156. *Id.* at 314.

157. *Id.* at 314-15.

158. *See id.* at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.")

159. *See id.* at 317-18.

160. *Bakke*, 438 U.S. at 317 ("[A]n admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.")

161. *Id.* at 318. Note that the dissent did not believe there was a distinction between the UC-Davis program and one that the court would have deemed acceptable, as racial preference is accorded to minorities in either case, albeit more subtly in the latter. *See id.* at 378 (Brennan, J., concurring in part, dissenting in part). The majority distinguished the two programs on the admittedly narrow basis that the UC-Davis program contains a facial intent to discriminate. *Id.* at 318.

UC-Davis' program did not ultimately fall within the Supreme Court's boundaries of acceptability.¹⁶² The program prevented white applicants from competing for the sixteen seats reserved for minority candidates, regardless of their qualifications and "potential for contribution to educational diversity."¹⁶³ Conversely, minority applicants would have been able to compete for seats in the class through both admissions programs.¹⁶⁴ In arriving at its decision, the Supreme Court contrasted the UC-Davis program and the Harvard College Admissions Program (hereinafter, the Harvard Program).¹⁶⁵ The Harvard Program, operating out of the belief that "diversity adds an essential ingredient to the educational process," did not deny the existence of a "relationship between numbers and achieving the benefits to be derived from a diverse student body."¹⁶⁶ That relationship, however, meant that Harvard's admissions committee paid some attention to the different types of students and their qualities in order to admit a mix of students whose diversity created a beneficial environment.¹⁶⁷ Harvard had certain goals for minority enrollment, but did not have a specific number in mind.

Lower courts long struggled with determining whether Justice Powell's opinion, which no other Justice joined, is binding precedent.¹⁶⁸ The Supreme Court eventually turned Justice Powell's characterization of diversity as a compelling and substantial interest into binding law when it revisited the issue in 2003.¹⁶⁹ The Supreme Court's remaining task, then, was to decide the means by which such diversity may be reached.

162. *Id.* at 319-20.

163. *Id.* at 319.

164. *Id.* at 319-20.

165. *Id.* at 321-24.

166. *Bakke*, 438 U.S. at 322-23.

167. *See id.* at 323.

168. *See generally* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."). Compare, e.g., Johnson v. Board of Regents of Univ. of Ga., 263 F.3d 1234, 1245 (11th Cir. 2001) (stating that Justice Powell's diversity rationale was not the holding of the Court); Hopwood v. Texas, 236 F.3d 256, 274-275 (5th Cir. 2000) (ditto); Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (ditto), with Smith v. Univ. of Wash. Law School, 233 F.3d 1188, 1196-1200 (9th Cir. 2000) (holding that Justice Powell's opinion, including the diversity rationale, is controlling under *Marks*).

169. *Grutter v. Bollinger*, 539 U.S. 306, 324-25 (2003).

C. The University of Michigan cases: Affirmative action still permitted, but to what extent?

In 2003, two of the University of Michigan's divisions, its Law School¹⁷⁰ and its undergraduate college,¹⁷¹ had their respective affirmative action admissions policies challenged as violations of the Equal Protection Clause. The Supreme Court found that the Law School's policy did not violate the Equal Protection Clause,¹⁷² but arrived at the opposite conclusion when it examined the policy of the College of Literature, Science and the Arts (CLSA).¹⁷³ In the process, the Supreme Court shed further light on the characteristics of an acceptable program.

The challenge to the Law School's program came from Barbara Grutter, a white applicant who was denied admission to the Law School despite having a grade point average and Law School Admissions Test (LSAT) score superior to those of some of the admitted minority students.¹⁷⁴ The Law School had attempted to design a program that would accomplish its goal of "[achieving] that diversity which has the potential to enrich everyone's education and thus make a law class stronger than the sum of its parts."¹⁷⁵ Besides the aforementioned predictors of academic success, "admissions officials evaluate[d]," and were instructed to focus on, "each applicant based on . . . a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School."¹⁷⁶

While the Law School did not restrict itself to certain types of diversity, it did recognize the importance of admitting a "critical mass" of students from historically under-represented groups.¹⁷⁷ In achieving this "critical mass," however, the admissions committee did not admit a specified number of minorities, but merely considered race as one of a number of relevant factors.¹⁷⁸ The school did concede

170. *Id.* at 306.

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

172. *Grutter*, 539 U.S. at 343-344.

173. *Gratz*, 539 U.S. at 275-76.

174. *See Grutter*, 539 U.S. at 317. Grutter applied with a 3.8 GPA and 161 LSAT score. *Id.* By comparison, the Law School regularly admits minority students who score below 150—the national median—on the LSAT. *Id.* at 370 (Thomas, J. dissenting).

175. *Id.* at 315.

176. *Id.* at 338.

177. *Id.* at 316 ("By enrolling a 'critical mass' of [underrepresented] minority students, the Law School seeks to ensure their ability to make unique contributions to the character of the law school.") (internal quotations omitted). "Critical mass" was understood to mean "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." *Id.* at 318.

178. *See id.* at 318-19. Therefore, the extent to which race was a factor varied from one applicant to another.

that, in comparing the academic indicators of each applicant, that minority applicants received a substantial allowance in their scores.¹⁷⁹

After reiterating that the Equal Protection Clause guarantees an individual, rather than a collective, right to equal protection, the Supreme Court noted that racial classifications are subject to a "strict scrutiny" test, pursuant to which they will not be upheld unless they are "narrowly tailored to further compelling governmental interests."¹⁸⁰ The Court also emphasized the importance of considering the context in which the racial preference occurred, as not all instances of racial classification are equally objectionable.¹⁸¹

The Supreme Court decided that the Law School's admissions policy was not a quota, but rather a narrowly tailored means of achieving the legitimate interest of obtaining a diverse student body.¹⁸² The Law School engaged in an individualized review of each applicant's file, considering all the ways in which an applicant would add to the diversity of the incoming class.¹⁸³ All of the "soft variables," such as race, were given equal weight, and no single factor alone guaranteed an applicant admission.¹⁸⁴ Moreover, the Law School did not limit the types of experiences that would be deemed valuable to a diverse student body and gave each applicant an opportunity to highlight his or her contributing characteristics.¹⁸⁵

The Supreme Court also held that a narrowly tailored program must avoid any undue harm to those who are not members of protected racial and ethnic groups.¹⁸⁶ The Law School's program inflicted no such harm, for it considered "all pertinent elements of diversity," with race being no more than one of those elements.

179. *Grutter*, 539 U.S. at 320.

180. *Id.* at 327 ("When 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."); *see also* *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("The [narrow tailoring] test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.").

181. *See id.* at 326; *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995) (asserting that strict scrutiny must take "relevant differences" into account).

182. *Id.* at 334.

183. *See id.* at 337-38. Note that the Supreme Court has recognized flexibility, whereby each applicant is evaluated individually, with race not being the defining characteristic of his or her admission, to be a hallmark of a narrowly tailored program. *Id.* at 337-39

184. *See id.* at 336-37.

185. *Grutter*, 539 U.S. at 337-38. Possible characteristics of contributions to diversity included time spent abroad, fluency in other languages, overcoming of personal hardships, history of community service, and careers in other fields. Also, the Law School showed that it "frequently accepts non-minority applicants with grades and test scores lower than under-represented minority applicants who are rejected." *Id.*

186. *Id.* at 341.

Therefore, it would be theoretically possible for a non-minority applicant to be admitted because he or she contributed more significantly to diversity than a minority applicant.¹⁸⁷

Finally, the Supreme Court determined that race-conscious admissions policies must last no more than a reasonable amount of time.¹⁸⁸ Such a requirement is consistent with the Fourteenth Amendment's policy of eventually terminating *all* governmental race-based discrimination, no matter how compelling its purpose, once its purposes are achieved.¹⁸⁹ Universities can ensure that their policies contain a logical endpoint through measures such as sunset provisions and periodic reviews of necessity.¹⁹⁰ The Supreme Court accepted the Law School's statement that it hoped to terminate its race-conscious admissions policy in favor of a race-neutral formula as soon as practicable.¹⁹¹ The increase in academically high-achieving minority applicants since the *Bakke* decision has created an expectation in the Supreme Court that there is a foreseeable end to the use of racial preferences.¹⁹²

If the Law School's program was an example of how properly to conduct a race-conscious admissions program, the CLSA's was the opposite. In *Gratz*, the University denied admission to two Caucasian petitioners, one who applied in 1995 and another in 1997, despite the fact that the former was "well qualified" and the latter's "academic credentials were in the qualified range."¹⁹³ Under the admissions policies that the CLSA had in place during the relevant period, applicants received points based on a number of different factors, such as the academic quality of the applicant's high school, the strength of its curriculum, geographic residence, alumni relationships, and unusual circumstances.¹⁹⁴

The factor at issue in the case was race. In the 1995–96 period, applicants with the same point totals received different treatment depending on their race.¹⁹⁵ In 1997, the admissions committee could specifically award an applicant points for "underrepresented minority status . . . or attendance at a high school with a predominantly underrepresented minority population."¹⁹⁶ Beginning in 1998, the University used a "selection index" that awarded to an applicant a

187. *See id.*

188. *Id.* at 342.

189. *Id.* at 341-42.

190. *Id.* The Supreme Court, in fact, encourages universities to adopt reasonable race-neutral policies once they develop such policies. *Id.*

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

192. *Id.*

193. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

194. *Id.* at 253.

195. *Id.* at 254.

196. *Id.* at 255.

maximum of 150 points.¹⁹⁷ An applicant belonging to an underrepresented minority group would automatically receive twenty points, or one-fifth of what he or she needed for automatic admission.¹⁹⁸ Under all of its policies, the University admitted virtually every qualified minority applicant, and did so as soon as possible in order to encourage minority enrollment.¹⁹⁹ Moreover, from 1995 to 1998, the University retained “protected seats” for applications submitted later in the academic year.²⁰⁰ Underrepresented minorities were one group eligible for those “protected seats.”²⁰¹

The Supreme Court found that the CLSA’s policy did not meet the “narrow tailoring” requirement.²⁰² The court emphasized that the policy, instead of providing for an individualized review of each applicant’s qualifications, simply granted points to minority applicants for no reason other than their minority status.²⁰³ The only review accompanying the distribution of points was a factual review of whether the applicant belonged to an under-represented minority group.²⁰⁴ Moreover, the automatic granting of twenty points based on race proved to be decisive in practice, “for virtually every minimally qualified under-represented minority applicant” was admitted to the CLSA.²⁰⁵

To illustrate the system’s flaws, the Supreme Court used an example from Harvard’s Admissions Program that Justice Powell discussed in *Bakke*.²⁰⁶ That example consisted of three hypothetical students:

A, the child of a successful black physician in an academic community with promise of superior academic performance[;] B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power[;] . . . [and] C, a white student with extraordinary artistic talent.²⁰⁷

Under the Harvard program, each of the three applicants would be evaluated individually, with the committee considering not only each applicant’s race, but also the uniqueness of each applicant, and how many applicants of similar backgrounds had already been

197. *Id.*

198. *See id.*

199. *Gratz*, 539 U.S. at 256.

200. *Id.*

201. *Id.*

202. *Id.* at 275.

203. *Id.* at 271.

204. *Id.* at 271-72.

205. *Gratz*, 539 U.S. at 272.

206. *Id.* (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978)).

207. *Bakke*, 438 U.S. at 324.

admitted.²⁰⁸ Under the University of Michigan's program, by contrast, students A and B would automatically receive twenty points on the basis of their race alone.²⁰⁹ Student C would automatically be at a disadvantage, regardless of the extent of his artistic talent.²¹⁰ Such a system did not provide for an individualized consideration of how each applicant's background and experiences would contribute to the student body.²¹¹

The CLSA's "flagging" of certain applications for individual review did not constitute the type of "individualized consideration" that prevented a violation of the Equal Protection Clause.²¹² The Admissions Review Committee could, at its discretion, flag applicants who accumulated either seventy-five points (for in-state residents) or eighty points (for out-of-state residents).²¹³ Under that system, however, individual consideration was the exception and not the rule.²¹⁴ First, the flagging occurred at the discretion of the admissions counselors.²¹⁵ Second, students such as A, by way of their superior academic performance and protected racial status, would almost certainly have escaped review altogether.²¹⁶ As for B and C, there is no guarantee that either would have received such review.²¹⁷ Finally, the flagging only came into play after the minority applicants had received the decisive twenty points in their application.²¹⁸

The challenges to the University of Michigan's admissions programs appear to have clarified how schools may use racial preferences in admissions without running afoul of the Equal Protection Clause. As a threshold matter, a university must act in furtherance of a compelling interest.²¹⁹ State interests that the Supreme Court accepts as compelling include the attainment of the educational benefits of a diverse student body²²⁰ and remedying

208. *Id.* ("Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.") (emphasis added).

209. *Gratz*, 539 U.S. at 273.

210. *See id.*

211. *Id.*

212. *Id.* at 273-74.

213. *Id.* at 256 n.8.

214. *Id.* at 274.

215. *Gratz*, 539 U.S. at 256.

216. *Id.* at 273-74.

217. *Id.* ("It is possible that students B and C would be flagged and considered as individuals. This assumes that student B was not already admitted because of the automatic 20-point distribution, and that student C could muster at least 70 additional points.")

218. *Id.*

219. *Bakke*, 438 U.S. at 299.

220. *Grutter*, 539 U.S. at 328; *see also Bakke*, 438 U.S. at 311-13.

specific occurrences of past discrimination, the latter being a goal not to be confused with "societal discrimination."²²¹

In addition, a university must narrowly tailor its program to serve its interest.²²² Under the "narrow-tailoring" requirement, each applicant is entitled to an individualized review of all of his or her relevant characteristics.²²³ A program that merely counts race as a "plus" in an applicant's file and still provides for a review of the other aspects of the applicant's background and experiences would adequately protect all applicants' Fourteenth Amendment Rights.²²⁴ In addition, a university may not implement an affirmative action program that unduly harms those who are not members of the underrepresented minority group.²²⁵ A university can avoid inflicting such undue harm by considering "all pertinent elements of diversity."²²⁶ Finally, a race-conscious program must last for a limited amount of time, with a "logical end point."²²⁷

D. *But who benefits? Racial classification in the United States*

Racial classifications became important in the United States during the time of slavery, when many understood the subordination of certain races to others as a necessary part of social order.²²⁸ This sentiment led a number of states to statutorily define race.²²⁹ Their definitions ranged from the rudimentary²³⁰ to the quantifiable²³¹ to

221. *Grutter*, 539 U.S. at 328; *Bakke*, 438 U.S. at 310; see also *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").

222. *Grutter*, 539 U.S. at 333 ("The purpose of the narrow tailoring requirement is to ensure that 'the means chosen fit . . . the[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'") (citing *Richmond v. J.A. Croson Co.*, 488 U.S. at 493).

223. *Id.* at 334.

224. See *id.* at 334-38; *Bakke*, 438 U.S. at 321-24 (listing the Harvard College Admissions Program as an example of an acceptable use of race in higher education admissions).

225. *Grutter*, 539 U.S. at 341.

226. *Id.*

227. *Id.* at 342 ("[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.").

228. A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1969 (1989).

229. Luther Wright, Jr., *Who's Black, Who's White, and Who Cares? Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 522 (1995).

230. See *id.* at 524 (Early statutes in Virginia and Arkansas used a "look and see" approach, where someone was black if he or she had "a visible and distinct admixture of African blood.").

the downright strict.²³² Naturally, slavery-era courts struggled with the concept of racial classification and often relied heavily on an individual's appearance as a means of enforcement.²³³ The struggle continued in the post-slavery era, and the substantial benefits of being white even led many blacks to try to pass for white, a phenomenon appropriately called "passing."²³⁴ The State of Louisiana even laid out sub-classifications of "colored," making a person's legal rights dependent on their status.²³⁵

Currently, in spite of the U.S.'s "color-blind" society,²³⁶ affirmative action programs have created a need for a workable system of racial classification.²³⁷ The EEOC has been delegated the job of defining race for purposes of such programs.²³⁸ It has attempted to do so by creating five different sub-categories of race.²³⁹ The EEOC defined some of the races based on "origins in any of the original people" from a certain area,²⁴⁰ others based on "culture or origin regardless of race,"²⁴¹ and others based on tribal affiliation.²⁴² Evidently, the EEOC's definitions lack consistency.

The most blatant example of this lack of consistency is the EEOC's failure to account for interracial mixing. For instance, if a black and a white marry, the resulting offspring could claim to fit under either race, because of the definitions' use of the word "origin."²⁴³ Most biracial individuals, however, end up forced into the

231. See Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2110 (1993) (noting that some states adopted rules where people with certain fractional amounts of black ancestry, from one-fourth to one-thirty-second, were considered black under the law).

232. Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 955 (1993); Wright Jr., *supra* note 229, at 524 (Under the "one-drop" rule, any African or black blood in an individual's veins made said individual black under the law. This was the predominant practice amongst Southern states in the early 1900s.).

233. Wright Jr., *supra* note 229, at 526-27.

234. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 683-86 (Harper & Brothers 1944).

235. *State v. Treadway*, 52 So. 500, 508 (La. 1910) (dividing colored people into mulatto, quadroon, and octoroon categories, and deciding that octoroons are not negroes); see also Finkelman, *supra* note 231, at 2089-92.

236. See Finkelman, *supra* note 232, at 938-39.

237. *Id.* at 991.

238. Employer Information Report EEO-1 and Standard Form 100, Appendix § 4, Race/Ethnic Identification, 1 Empl. Prac. Guide (CCH) § 1881, 2065-66 ("EEOC Report") (1981).

239. *Id.* The EEOC has promulgated definitions for the following categories: (1) White (not of Hispanic origin); (2) Black (not of Hispanic origin); (3) Hispanic; (4) Asian or Pacific Islanders; and (5) American Indian or Alaska Native. *Id.* at 1625. Note that, under the EEOC's definitions, someone who is classified as a Hispanic could also be "white" or "black," although not for classification purposes.

240. *Id.* at 1825 (white, black, and Asian or Pacific Islander).

241. *Id.* (Hispanic).

242. *Id.* (American Indian or Alaskan Native).

243. See Wright, Jr., *supra* note 229, at 538.

"black" category because of societal perceptions of mixed-race individuals.²⁴⁴ According to scholar Neil Gotanda, courts have generally advanced four different means of classification for mixed-race individuals: (1) mulatto,²⁴⁵ (2) named fractions,²⁴⁶ (3) majoritarian,²⁴⁷ and (4) social continuum.²⁴⁸

The EEOC system also lacks a proper verification scheme for racial classifications.²⁴⁹ Because birth certificates in most states no longer indicate race, racial classification has been left largely to self-declaration.²⁵⁰ This has left the affirmative action system open to abuse similar to that occurring in Uerj's quota system.²⁵¹ For example, in 1977, twin brothers were accepted for positions as firefighters in Boston with virtually the same civil service test scores that had caused them to be rejected two years before.²⁵² The only change in their application was in their racial classification, from "white" to "black."²⁵³ The issue of the brothers' race came into question in 1988 when they applied for promotions and, after a state hearing, were fired for committing "racial fraud."²⁵⁴ After further investigation, the city discovered that anywhere from ten to sixty other firefighters obtained their jobs through racial fraud.²⁵⁵

Much like the EEOC, courts have struggled to define race in a consistent manner. Courts have developed different doctrines, with the applicability of a particular doctrine depending on the context in

244. *Reisman v. State of Tenn. Dept. Of Human Services*, 843 F. Supp. 356, 358-59 (W.D. Tenn. 1993).

245. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 25 (1991). ("All mixed offspring are called mulattoes, irrespective of the percentages or fractions of their Black or white ancestry.")

246. *Id.* ("Individuals are assigned labels according to the fractional composition of their racial ancestry. Thus, a mulatto is one-half white and one-half Black. A quadroon is one-fourth Black and three-fourths white, a sambo one-fourth white and three-fourths Black, etc.")

247. *Id.* ("The higher percentage of either white or Black ancestry determines the white or Black label.")

248. *Id.* (This is a variation on the Named Fractions scheme: Labels generally correspond to the proportion of white or Black ancestry, but social status is also an important factor in determining which label applies. The result is a much less rigid system of racial classification.) Note that the "social continuum" method is "the prevailing scheme in several Latin American societies." *Id.* at 25 n.100.

249. See 29 C.F.R. § 1607.4(B) (1994) (banning misuse of the classifications, but giving no means for discovering such abuse).

250. Art Harris, *Louisiana Court Sees No Shades of Gray in Woman's Request*, WASH. POST, May 21, 1983, at A3. Note that all states still require racial data at birth for statistical purposes but there is, likewise, no system to verify this procedure. *Id.*

251. See *supra* Part II.b.

252. Peggy Hernandez & John Ellement, *Two Fight Firing Over Disputed Claim That They Are Black*, BOSTON GLOBE, Sept. 29, 1988, at 28.

253. *Id.*

254. Peggy Hernandez, *Firemen Who Claimed to be Black Lose Appeal*, BOSTON GLOBE, July 26, 1989, at 13.

255. Hernandez & Ellement, *supra* note 252, at 29.

which the issue of race arises.²⁵⁶ The courts, however, also determine the context in which the classification arises; therefore, that decision is virtually outcome-determinative.²⁵⁷ Courts have also struggled with the relationship between race and national origin. For instance, the Supreme Court has allowed Arabs, who fit under the EEOC's definition of "white," to bring race discrimination claims under 42 U.S.C. § 1981 against other whites.²⁵⁸ The Supreme Court further complicated the matter by stating, without explanation, that there is a difference between being "an Arab" and being of Arabian national origin.²⁵⁹ In so doing, the Supreme Court appeared to renounce the scientific concept of race in favor of a social one.²⁶⁰ But the Court did not altogether abandon genetic notions of race.²⁶¹ The legislative branch has also failed to clearly distinguish between national origin and race. Its previous attempts to define "national origin" have failed to determine whether the definition should account for color, religion, or race.²⁶²

Since the Supreme Court has not closed the door on genetic-based definitions of race, courts have been called upon to address the issue of proof of an individual's inclusion in a protected class. The Northern District of Ohio addressed this issue in *Perkins v. Lake County Dept. of Utilities*,²⁶³ a Title VII action in which the employer challenged plaintiff's Native American status.²⁶⁴ Because Title VII is an equality statute, as opposed to a "benefit" statute, the Court stated that African Americans need only to *appear* African American to be protected as such; they need not present proof of descent or of active

256. See Gotanda, *supra* note 245, at 36-43 (discussing the judicially developed classification doctrines of status-race, formal-race, historical-race, and cultural-race).

257. See *Ortiz v. Bank of America*, 547 F. Supp. 550, 565 (E.D. Cal. 1982) ("Just what constitutes a race is a hard question to answer, since one's classification usually depends on the purpose of [the] classification.") (quoting S. MOLNAR, RACES, TYPES AND ETHNIC GROUPS: THE PROBLEM OF HUMAN VARIATION 13 (Englewood Cliffs 1975)).

258. *St. Francis College v. Al-Kazaraji*, 481 U.S. 604, 613 (1987) ("§ 1981, at a minimum, reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.'").

259. *Id.*

260. *Id.* ("Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. . . . [I]t is clear from our holding . . . that a distinct physiognomy is not essential to qualify for § 1981 protection."); see also Gotanda, *supra* note 245, at 29-30.

261. *St. Francis College*, 481 U.S. at 613.

262. Compare 32 CFR 51.3(e); 29 C.F.R. 1601.1 (1994) (national origin includes not only place of origin, but physical, cultural, and linguistic characteristics associated with a national group) with James Harvey Domingeaux, Comment, *Native-Born Acadians and the Equality Ideal*, 46 LA. L. REV. 1151, 1157 (1986) (quoting U.S. Congressmen Roosevelt and Dent's argument that national origin is unrelated to one's color, religion, or race. For example, a British immigrant can still be considered a colored person in America).

263. 860 F. Supp. 1262 (N. D. Ohio 1994).

264. *Id.* at 1263.

participation within their race.²⁶⁵ The Court then applied this principle to the plaintiff's claim that he was of Native American ancestry.

In determining whether the plaintiff had made out a *prima facie* case under Title VII, the Court focused not on ancestry or tribal membership, but rather on physical appearance, belief, and presentation of himself as a Native American and the defendant's own belief that the plaintiff was a Native American.²⁶⁶ The Court found that the last of those factors was especially controlling.²⁶⁷ In the aftermath of decades of litigation, it appears that the courts, rather than developing a uniform system of racial classification, will rely on self-declaration, physical appearance, and reasonable belief (both of the individual and those around him) as the key determinants.

It is certainly true that some commentators believe that race classification is an issue of paramount importance.²⁶⁸ That point of view, however, is not a unanimous one. In Neil Gotanda's opinion, for instance, the courts' struggle with defining race is of little consequence.²⁶⁹ After all, Gotanda contends that anyone who either is visibly of black ancestry (rule of recognition) or has a known trace of African ancestry (rule of descent) is black. This view appears to suggest that America still possesses a "racial purity" mindset whereby one drop of African blood makes an individual a member of the African race.²⁷⁰ But while Gotanda believes the issue of defining who is black "rarely provokes analysis,"²⁷¹ he also recognizes that "affirmative action programs . . . may resurrect the question."²⁷²

265. *Id.* at 1276. While there is no specific statute delineating its parameters, "affirmative action" finds its roots in the Equal Protection Clause of the Fourteenth Amendment. *See supra* Parts IV.b-c (for a discussion of *Bakke* and the University of Michigan cases.) Therefore, it is not far-fetched to say that affirmative action is a concept that aims to assimilate, rather than dissimilate, races.

266. *Perkins*, 860 F. Supp. at 1276.

267. *Id.* at 1277 ("This Court believes that, consistent with the intent of Title VII, when racial discrimination is involved perception and appearance are everything.")

268. *See, e.g.*, Wright, Jr., *supra* note 229, at 518 ("Because race is such a significant factor in American life, society's failure to define race substantively is one of the most compelling legal problems currently facing this nation.")

269. Gotanda, *supra* note 245, at 24 ("Americans no longer have need of a system of judicial screening to decide a person's race; the rules are simply absorbed without articulation.")

270. *Id.* at 26.

271. *Id.* at 23.

272. *Id.* at 24 n.93.

V. THE SOLUTION: A CLASS-BASED AFFIRMATIVE ACTION PROGRAM,
IMPLEMENTED AND ENFORCED BY THE SCHOOL ITSELF

After reviewing the analytical frameworks upon which the two countries base their respective affirmative action programs, it is evident that the system in the United States is not a perfect paradigm for evaluating the tenability of affirmative action in Brazil. Some of the differences are quite obvious. For example, whereas the constitutionality of a quota is an issue of first impression in Brazil, the U.S. Supreme Court shut that door in *Bakke*.²⁷³ Another difference is that the state government of Rio de Janeiro implemented Uerj's affirmative action program. In the United States, the universities themselves decide whether to use affirmative action.²⁷⁴

Other points of comparison are not as superficially apparent, but are altogether critical to a proper comparison between the two frameworks. The U.S. Supreme Court addressed two constitutional issues that are very similar, if not virtually identical, to issues before the STF. The first issue arises out of the resemblance between the Equal Protection Clause of the Fourteenth Amendment and Article 5 of Brazil's Constitution. The former, which was the chief basis for the challenges in *Bakke*²⁷⁵ and the University of Michigan cases,²⁷⁶ states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."²⁷⁷ In comparison, Article 5 of the Brazil's Constitution provides that "all persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured inviolability of the right to life, to liberty, to equality, to security, and to property. . . ."²⁷⁸ The clauses are sufficiently similar textually that they may plausibly be subjected to the same interpretation.²⁷⁹

Raquel Coelho Lens Cesar suggested that the outcome of the case may depend on whether the STF interprets Article 5 as

273. Gois, *supra* note 58.

274. *Id.* Note that the STF will visit this question under the issue of "university autonomy," discussed *supra* pp. 16-17.

275. Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 266 (1978).

276. Gratz v. Bollinger, 539 U.S. 244, 249 (2003); Grutter v. Bollinger, 539 U.S. 306, 317 (2003).

277. U.S. CONST. amend. XIV, § 1.

278. CONSTITUIÇÃO FEDERAL DE 1988 art. 5. [*hereinafter* Const. Fed.].

279. The text of the Fourteenth Amendment preceding the Equal Protection Clause strengthens the comparison between the Constitutions of the two nations. The Fourteenth Amendment also guarantees those "subject to the jurisdiction [of the United States] . . . [that no] State shall deprive any person of life, liberty, or property." U.S. CONST. amend. XIV, § 1. Therefore, both Constitutions guarantee such "basic rights" to those subject to them.

guaranteeing an individual right or a collective right, with the former likely leading to a decision of unconstitutionality.²⁸⁰ Therefore, the STF may find it relevant that the U.S. Supreme Court decided that the rights guaranteed by the Equal Protection Clause are individual rights.²⁸¹ “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to [an individual] of another race. If both are not accorded the same protection, then it is not equal.”²⁸² Ergo, any action that draws a line based on race and ethnic status naturally causes an individual to be denied his or her constitutional right to equal protection under the law.²⁸³ A quota is precisely the type of action that draws such a line. Therefore, to the extent that Article 5 of Brazil’s Constitution parallels the Fourteenth Amendment of the U.S. Constitution, Uerj’s program is unconstitutional.

But the second comparable constitutional issue may preclude a finding by the STF on the constitutionality of the program itself. As discussed above, Article 207 of Brazil’s Constitution grants universities autonomy with regard to curricular, extracurricular, administrative, and financial matters.²⁸⁴ By contrast, educational autonomy is not a specifically enumerated right in the U.S. Constitution. The Supreme Court, however, has interpreted the First Amendment to grant universities the right to make their own judgments as to education via four “academic freedoms”: the freedom to determine who may teach, what may be taught; how it shall be taught; and of great relevance to this Note, who may be admitted to study.²⁸⁵

Article 207 of Brazil’s Constitution does not explicitly grant universities the freedom to select their own student bodies.²⁸⁶ But if the STF considers the educational autonomy that the federal constitution explicitly grants to universities to be as important as the Supreme Court considers the academic freedom that the First Amendment impliedly grants to U.S. universities to be,²⁸⁷ it will likely consider student admissions to be within the university’s province. Moreover, the STF could easily read the selection of its student body to be within a university’s “administrative” functions, which Article 207 explicitly delegates to universities.

280. See *infra* pp. 13-14.

281. *Shelley v. Kramer*, 334 U.S. 1, 21-22 (1948).

282. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978).

283. *Id.* at 289.

284. Const. Fed. tit. VIII, ch. III, § I, art. 207 (F.R.B.).

285. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

286. Const. Fed. tit. VIII, ch. III, § I, art. 207.

287. *U.S. v. Associated Press*, 52 F.Supp. 362 (S.D.N.Y. 1943).

In contrast, Article 208 enumerates the states' duties with regard to education.²⁸⁸ Generally, those duties begin and end with the provision of access to education, regardless of whether the access is to higher education²⁸⁹ or pre-school.²⁹⁰ The most reasonable interpretation of the two articles is that the states must make available adequate opportunities and facilities for education, and the universities then determine which individuals will have access to those opportunities and facilities. Therefore, the universities' "administrative" powers likely include the selection of the student body, placing affirmative action programs within the ambit of the universities, and not the states. The fact that the federal government is considering the Quota Bill, discussed above, demonstrates that it, too, shares this view of "university autonomy."²⁹¹

A. Because of differing attitudes on racism and racial classification, the U.S.'s model for university admissions may not address Brazil's needs

Both Brazil and the United States have long struggled with issues of racism. But their respective struggles have not followed similar paths. For example, in the United States, segregation and discrimination were explicitly legal even after slavery was abolished, and they continued to be until the inception of affirmative action.²⁹² By contrast, racial discrimination in Brazil has not been "legal" since the abolition of slavery, but it has been alive and well nonetheless, as evidenced by public attitudes²⁹³ and socio-economic conditions.²⁹⁴

Perhaps more important, the two nations differ significantly in the ways their citizens view race in general. First, Brazil does not appear to subscribe to any type of genetic-based racial classification that relies on descent. If that were the case, it is unlikely that the applicants who listed themselves as "black" because of some distant

288. Const. Fed. tit. VIII, ch. III, § I, art. 208.

289. *Id.* art. 208(V).

290. *Id.* art. 208(IV).

291. *See supra* Part III.

292. *Creation of the Jim Crow South: Segregation in the South*, African American History, at <http://afroamhistory.about.com/library/weekly/aa010201a.htm>.

293. *See Jeter, supra* note 1 ("People here say that it's impossible to say who is white and who is black," said Jocelino Freitas, 25, a first-year law student at the State University of Rio who was admitted under the quota system and considers himself pardo. "Really? Ask the police. I bet they can tell you who is black. Ask any doorman who can go through the front door and who goes through the service entrance. I bet they can tell you who is black. What color is the maid? We may not spend a lot of time talking about who is black and who is white, but we live in color every day").

294. *Id.* Some go as far as to argue that, because of the differences between the racial histories of the two nations, Brazil will not experience the same success with affirmative action that the United States has. *See supra* note 47 and accompanying text.

trace of black ancestry would have been accused of abusing the system.²⁹⁵ Instead, there appears to exist within Brazilian society a much more “fluid” concept of racial classification than in U.S. society. Whereas the United States appears to insist on “objective” racial labels,²⁹⁶

in the Brazilian system . . . it is possible for people to change their racial identity during their lifetimes. It is known, of course, that a certain number of United States Negroes annually pass into the white group in defiance of our racial rule of descent. . . . In Brazil, however, the changing of “race” does not require the secrecy and the agonizing withdrawal from family and friends which are necessary in this country. . . .²⁹⁷

Under this fluid concept of racial classification, a Brazilian can easily “pass” from one racial category to another.²⁹⁸ Brazilian lawmakers must find this fluidity detrimental to their attempts to establish a race-based affirmative action system. After all, how can someone be said to “abuse” the self-declaration system when Brazilian notions of racial classification allow its citizens to move from one race to another? If the government and universities hope to implement an effective affirmative action system, they must nullify the effects of the customarily “fluid” Brazilian concept of racial classification. If they simply allow people to “pass” from one racial category to another, it will be the citizens, at their own discretion, who will determine the beneficiaries of the affirmative action program, and not the promulgators of the program.

Because of Brazil’s “color-based” notions of racial classification, governmental, educational, and business entities will be unable to sustain affirmative action schemes predicated on race. Largely because of the preference for color over descent as a means of classification, racial classification has been extremely fragmented.²⁹⁹ Therefore, any affirmative action scheme would either have to (1) benefit an infinitesimally small sector of the population, if restricted to one classification, or (2) require preferential treatment for a large

295. See *supra* Part II.b.

296. Gotanda, *supra* note 245, at 31.

297. MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 59 (Walker 1964).

298. *Id.* (“Brazilians say ‘Money whitens,’ meaning that the richer a dark man gets the lighter will be the racial category to which he will be assigned by his friends, relatives and business associates”).

299. *Id.* at 57-58. Harris, studied racial classification in Brazil by showing nine portrait drawings, with different “racial” features, to a sample of one hundred Brazilians. He elicited forty different “racial” terms to describe the drawings, each with a different sense of skin color and social status. No drawing received the same classification more than seventy percent of the time, and none fewer than eighteen percent. Furthermore, one of the drawings received nineteen different classifications. Harris summed up the confusion by stating that “if the people of this village ever decided to become segregationists . . . they would have to build forty different kinds of schools rather than merely two.” *Id.* at 58.

number of races.³⁰⁰ Even then, there is virtually nothing to prevent Brazilians from simply changing their racial identity to one that would allow them to benefit from the law,³⁰¹ as noted in the preceding paragraph.

Moreover, there is an interplay in Brazilian society between an individual's socio-economic status and racial classification. According to author Marvin Harris, as an individual accumulates more wealth, even that individual's own friends will view him or her as being of a lighter color, and therefore belonging to a different race.³⁰² In other words, Brazilians have virtually perpetuated a racial classification scheme that at the very least suggests³⁰³ that an individual belongs to a certain race based on his or her economic status, as opposed to being rich or poor because of his or her ethnicity.³⁰⁴ Such a scheme appears to defeat the contentions of those who oppose affirmative action in Brazil on the basis of the country's status as a "racial democracy."³⁰⁵

This view of racial classification also helps form the basis for the subordinating and discriminatory attitudes that the Brazilian society harbors toward certain individuals. Class and race in Brazil are two virtually inseparable concepts.³⁰⁶ A poor and uneducated black person, therefore, is a victim of discrimination likely more because of his or her socio-economic status than his or her race.³⁰⁷ Similarly, a white person under similar socio-economic distress would likely be subjected to the same discrimination. In sum, discrimination in Brazil occurs with respect to class, with race being incidental to one's status.³⁰⁸ Therefore, it seems counter-productive to implement an affirmative action system aimed at remedying racial discrimination when that system focuses on skin color and overlooks socio-economic status.

300. HARRIS, *supra* note 297, at 57-58.

301. *Id.* at 59 ("In Brazil one can pass to another racial category . . . regardless of how dark one may be without ever changing one's residence").

302. *Id.*

303. Recall, after all, that there is a substantial number of Brazilians who are classified as "white" who live below the poverty line. Buarque, *supra* note 31. Moreover, Harris refers to the views of distinguished Brazilian anthropologist Thales de Azevedo to corroborate his assertions of interplay between racial and class discrimination. According to de Azevedo, the social hierarchy of the state of Bahia consists of three classes, two of those being "the rich" and "the poor." While the rich are sometimes called "the whites" and the poor are sometimes called "the negroes," both classes have a small percentage, but still significant numbers, of the race with which the other class is equated. HARRIS, *supra* note 297, at 61-62.

304. HARRIS, *supra* note 297, at 61.

305. See Jeter, *supra* note 1.

306. HARRIS, *supra* note 297, at 61 ("A Brazilian is never merely a 'white man' or 'colored man'; he is a rich, well educated white man or a poor, uneducated white man; a rich, well educated colored man or a poor, uneducated colored man").

307. *Id.*

308. *Id.*

Moreover, the U.S. framework of racial preference in university admissions cannot be consistently applied in Brazilian universities because the two nations do not share the same government interests in affirmative action. The U.S. Supreme Court has expressly recognized two interests that are sufficiently compelling to justify the use of race in admissions: remedying specific instances of past discrimination and obtaining the benefits of a diverse student body.³⁰⁹ As to the former, affirmative action is an ineffective solution to this problem in Brazil because the bulk of the racial discrimination is informal and covert. The U.S. Supreme Court expressly limited the validity of affirmative action as a remedy to the identifiable interest of past discrimination, such as pre-*Brown* school segregation.³¹⁰ The Court steered clear of upholding attempts at remedying "societal discrimination," labeling injuries from such discrimination "amorphous" and possibly "ageless in its reach into the past." Other than slavery, racial discrimination has never been legislatively, judicially, or administratively encouraged in Brazil, but it is of the "social" form to which the U.S. Supreme Court referred.³¹¹ In fact, some even believe that Uerj's quota system would exacerbate the negative view that the racial majority has toward the "subordinate" classes.³¹²

With regard to student body diversity, the more vocal and influential supporters of Uerj's program have not argued for the benefits of a diverse student body, even though they have had numerous opportunities to do so through the media. The argument in favor of affirmative action, instead, has focused on the constitutional and moral issues of the gross under-representation of minorities in Brazilian universities.³¹³ Moreover, to the extent that racial discrimination is, indeed, merely incidental to class discrimination in Brazil, an affirmative action program predicated on race would be an ineffective means of acquiring a more diverse class. In a nation with such a large number of racial classifications, the question of proper representation within an incoming class in order to achieve the benefits of diversity is a difficult one. In addition, there is statistical evidence that the issue ought to be framed in terms of class, not race, discrimination.³¹⁴ If an incoming class does indeed lack diversity, therefore, it would be because its members are all from privileged socio-economic backgrounds.

309. See *supra* Part IV.b-c.

310. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

311. See *supra* note 47 and accompanying text.

312. See Jeter, *supra* note 1.

313. See Novaes, *supra* note 50.

314. In 2002, for example, "65% of university students were educated at private [high] schools and two out of three were drawn from the wealthiest 20% of the population." See Davies, *supra* note 44.

Finally, the current university admissions system in Brazil, quotas aside, does not lend itself to the type of holistic review that the U.S. Supreme Court requires of its universities. U.S. universities take into account a wide array of criteria in determining the contribution an applicant would make to the student body, whereas Brazilian universities admit students based solely on entrance exam scores.³¹⁵ With that being the only non-demographic information that the universities have to evaluate students, it is impossible for Brazilian universities to engage in the individualized review that the U.S. Supreme Court has long required. Such revisions to the admissions system—and the notion that the revisions would address the problem of student body diversity in Brazil, if that is even a goal of the relevant institutions—go beyond the purview of this Note’s legal analysis.

B. A class-based affirmative action system would be consistent with the Brazilian government’s objectives and the nation’s notions of racial classification

Because of the inequalities in wealth and obstacles to the improvement of economic status that have historically plagued Brazil,³¹⁶ there is certainly a place for affirmative action programs in multiple institutions, in particular public schools, as a means of redistributing wealth. These inequalities of wealth are also sufficiently wide that class-based distinctions are possible. The most appropriate redistributive effort, therefore, would be based on relative economic disadvantage.

Class-based affirmative action has a number of advantages over race-based affirmative action. First, institutions implementing it will avoid the sensitive proposition of classifying people by race.³¹⁷ Second, individuals who oppose affirmative action from a meritocracy standpoint will find a system oriented toward mitigating economic inequality much more appealing.³¹⁸ After all, according to columnist Mickey Kaus, “lower-class candidates, with their hidden abilities, will

315. See França, *supra* note 26.

316. As of 2002, the richest ten percent of the Brazilian population held forty-eight percent of the income. Only in Swaziland and Nicaragua did the wealthiest sector hold a greater percentage. By comparison, the poorest ten percent of the population holds slightly less than one percent of the income. Comparing the richest and poorest twenty percent is no less alarming. Graphs and statistics of Brazil’s economy, available at <http://www.nationmaster.com/country/br/Economy>.

317. In the United States, for instance, the Supreme Court declared that a program based on economic disadvantage would only receive “rationality review,” whereas a racial preference is subject to the more stringent “strict scrutiny” standard. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

318. Mickey Kaus, *Class Is In*, THE NEW REPUBLIC, Mar. 27, 1995, at 6.

eventually outperform more privileged rivals."³¹⁹ Moreover, the beneficiaries of a class-based system would be less likely to feel stigmatized and inferior to other applicants³²⁰ because, arguably, there is no long-standing stereotype that the economically disadvantaged are less qualified.³²¹

A class-based affirmative action program would also address two issues that are specific to the Brazilian socio-economic infrastructure. First, such a system, by benefiting the white Brazilians living below the poverty line, would not run afoul of overriding notions of fairness.³²² Second, unlike racial classifications, class membership is "less mutable."³²³ Therefore, universities would not have to concern themselves with the possibility of students seeking to benefit from the system by "crossing over" from one race to another. Whether or not such a "cross-over" student is really cheating the system, a class-based system would prevent students who were not intended to benefit from the system from doing so.³²⁴

Class-based affirmative action would not be a radical departure from the aims of the current program, as the more recent version the Rio de Janeiro government's program required that all beneficiaries come from low-income families.³²⁵ As a threshold matter, however, the government should leave it up to the universities to promulgate these programs on their own. The Ministry of Education likely realized a possible conflict with Article 207's principle of educational autonomy and therefore combined its support of the program with a refusal to implement any programs of its own.³²⁶ The federal government, by proposing the Quota Bill, also likely realized this conflict.³²⁷ The scaled-back version of the program gives any university that decides to implement an affirmative action program a starting point.

Next, for the reasons enumerated herein, universities should eliminate racial classifications from the scaled-back program and focus instead on economic inequality. To the extent that one's economic status affects one's racial classification in Brazilian society, a class-based affirmative action system should encompass a sufficient amount of the black population to comply with the numerous United

319. *Id.*

320. *See Jeter, supra* note 1 ("As in the United States, some blacks here oppose a policy of quotas because, they say, it taints all blacks with a subtle slur.")

321. Kaus, *supra* note 318 ("Richard Kahlenberg . . . argues that there is no pre-existing stereotype of the poor as 'less-qualified' for [self] doubts to play into").

322. *See supra* Part II.b.

323. *See Harris, supra* note 297, at 61.

324. *See supra* Part II.b.

325. Jones, *supra* note 18.

326. *See supra* note 50 and accompanying text.

327. *See supra* Part III.

Nations treaties to which Brazil is a party.³²⁸ But universities should not altogether dismiss the current program's bestowal of benefits upon applicants from public secondary schools. Identifying which applicants come from those schools could help Brazilian universities in addressing class-based affirmative action's most difficult issue: defining the economically disadvantaged class that is to benefit from the program.

Trying to pinpoint some type of "class disadvantage" scale is, no doubt, an arduous task.³²⁹ Because of this difficulty, some believe it is best that a class-based system clearly be "limited to a small, well-defined class, at the very bottom of society," a group aptly referred to as the "underclass."³³⁰ At the same time, sociologist William Julius Wilson argues that affirmative action programs tend to benefit the more advantaged members of disadvantaged groups.³³¹ In Brazil's case, however, that is not a substantial concern. Because of the drastic disparity in income distribution,³³² the lines between the top of the lower class and the bottom of the middle class are not as blurred as they are in the United States.

Universities will be best-served by adopting a "gradational" view of economic inequality under which classes are labeled for convenience ("upper class," "lower class," "upper middle class," etc.) along a "scale of material [or] non-material benefits."³³³ For purposes of class-based affirmative action, this is a better system of classification than a "categorical"³³⁴ or "relational"³³⁵ point of view, mainly because of the simplicity of its application. The gradational

328. See *supra* Part III.b.

329. Kaus, *supra* note 318 ("Who gets more bonus points—a poor white from a lousy rural school or a black ghetto kid from a decent 'magnet' school?").

330. *Id.*; see also Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1850 (1996) (suggesting that a proper approach to class-based affirmative action is one "marked by modesty and self-reflection").

331. See Malamud, *supra* note 330, at 1862 ("To be a candidate for affirmative action in higher education, one must have finished high school and taken college-preparatory courses, prerequisites that place those in the bottom of the economic hierarchy out of contention"); see also STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 80 (1991) (arguing that whenever an institution seeks to benefit disadvantaged students via a special admissions program, "it will select for admission through that program those disadvantaged students most likely to succeed").

332. See *supra* note 316.

333. See FRANK PARKIN, CLASS INEQUALITY AND POLITICAL ORDER: SOCIAL STRATIFICATION IN CAPITALIST AND COMMUNIST SOCIETIES 24 (1971); See also ERIK O. WRIGHT, CLASSES 34-35 (1985).

334. Under a categorical approach, classes are distinguished by a "significant indicator of economic status," such as white-collar workers versus blue-collar workers. Malamud, *supra* note 330, at 1864. Under this approach, universities may distinguish between applicants based on whether they attended public or private high school.

335. This approach takes into account not only "patterns of affinity and difference, but also . . . intrinsically antagonistic social relations with other economic groups." *Id.*

view enables the university to “compare the ranked economic positions of the different candidates and give the position to the qualified person with the lowest economic rank.”³³⁶ To the extent that an institution is not establishing its preferential scheme on the basis of promoting diversity or that no one has alleged that the “haves” have wrongfully obtained their benefits, the gradational approach is the best suited of the three available approaches.³³⁷

The preferred and most appropriate method of analyzing an applicant’s economic status is the applicant’s family or household income.³³⁸ Although such a method may be overly simplistic, subscribing to it will keep universities and applicants from attempting to resolve cumbersome, perhaps irreconcilable, issues such as the relationship between income and wealth³³⁹ and the impact of other “factors that shape the economic situations of individuals and families”³⁴⁰ on class analysis.³⁴¹ Moreover, while studies of income often look at individual incomes,³⁴² it is more sensible to use family or household incomes for the purposes of higher education, as it is likely a safe assumption that many applicants are still dependent on their guardians and families for support. If the universities think that income is too simplistic a measure, another possibility is an “inequality index” whereby the occupation and/or education of those who support the student are somehow taken into account.³⁴³

Next, universities must determine the maximum amount of family income that an applicant can declare and still be eligible for the affirmative action program. The most popular approach is to divide the population into quintiles.³⁴⁴ The lowest quintile in Brazil earns a mere 2.2 percent of the nation’s income.³⁴⁵ Also, in 2002, two out of every three university students in Brazil belonged to the

336. *Id.* at 1865.

337. *Id.* at 1866.

338. *Id.* at 1866, 1878 (“Income-based measures also have the practical advantage that the measurement of income is more straightforward than the construction and implementation of occupational hierarchies.”).

339. *Id.* at 1870-72.

340. *Id.* at 1870.

341. *Id.* at 1895 (“Working sophisticated versions of multiple elements into a legal definition of economic inequality would be beyond the technical capacity of most social scientists, let alone most governmental agencies.”).

342. Neal H. Rosenthal, *The Shrinking Middle Class: Myth or Reality?*, MONTHLY LAB. REV., Mar. 3, 1985, at 3.

343. Malamud, *supra* note 330, at 1894.

344. GREG J. DUNCAN, YEARS OF POVERTY, YEARS OF PLENTY: THE CHANGING ECONOMIC FORTUNES OF AMERICAN WORKERS AND FAMILIES 12-13 (Survey Research Center, Institute for Social Research, University of Michigan, 1984).

345. *See supra* note 316. Such a figure is the fifth worse in a 115-country sample.

wealthiest quintile of the population.³⁴⁶ Therefore, any university that promulgates a class-based system to benefit the lowest quintile will serve common notions of fairness by reaching those who have not been granted access to higher education. Moreover, if universities do opt for the "inequality index" measurement, they will be required to gather educational and occupational data of families of every citizen, a most impractical proposition. If a university nonetheless opts to follow that approach, it should then focus on the applicants that rank, according to the index, in the lowest twenty percent of all applicants.

Universities must then decide the means by which they will tailor their admissions program to confer the benefit upon the bottom quintile of the population. Considering that Brazilian universities base their admissions solely on entrance exam scores rather than a review of all of an applicant's relevant qualifications, as a starting point, the affirmative action program should provide admission to every applicant from the bottom quintile who achieves the required score. This is unlikely to cause a disproportionate number of qualified students who live above the bottom quintile to be denied admission. The percentage of university students coming from public high schools is very small.³⁴⁷ Brazilian public schools are so grossly underfunded that even families that cannot afford to send their children to private school somehow find the means to do so.³⁴⁸ Therefore, it is safe to assume that it is those at the bottom of the earning pool that are sending their children to public school, which has in large part led to the under-preparedness and the inability of those students to claim university slots. Therefore, the number of applicants who are both underprivileged and qualified is likely not substantial.

Universities must avoid implementing a program in which, in the end, they find themselves admitting large numbers of students who did not obtain the required score on the entrance exam.³⁴⁹ Even though the chance of an affirmative action decision being free from controversy is virtually non-existent,³⁵⁰ a result that excludes as few qualified students as possible is less likely to come under scrutiny. On the other hand, universities also must admit enough underprivileged students for the program to make a significant impact on Brazil's socio-economic structure. To balance those two concerns, universities, in the event that they cannot find enough qualified students in the bottom quintile, should pursue a course of action that does not

346. Davies, *supra* note 41.

347. See Jeter, *supra* note 1.

348. França, *supra* note 26.

349. See *supra* Part II.a.

350. Michael Kinsley, *Class, Not Race*, NEW REPUBLIC, Aug. 19, 1991, at 4 (noting that someone who loses to an affirmative action candidate would not likely "be comforted because he lost his job to someone else adjudged to be socioeconomically preferable rather than racially preferable").

involve admitting students who do not have the required test scores. They may, in the alternative, admit qualified students from the next-to-last quintile in order to fill up the reserved seats. There is, after all, evidence suggesting that the "fourth" quintile's experience with higher education has been quite similar to that of the "fifth."³⁵¹

It is insufficient for Brazilian universities, however, to admit underprivileged students and leave them to fend for themselves entirely. It is, at best, a moral victory for an economically disadvantaged student to be admitted into a university if he or she cannot succeed academically because of his or her lack of financial resources. Not only may a disadvantaged student not be able to afford some of the "essentials" to a successful higher education, such as books and transportation, but that student may have to spend nights and weekends working to afford his or her education, whereas his or her more financially secure classmates can direct their efforts toward studying. Universities, therefore, must supplement their affirmative action programs with appropriate financial aid. Other than scholarships, Uerj has developed different methods "to assist students from low income families."³⁵² Such efforts must become commonplace among Brazilian universities.

In addition, even the most enthusiastic proponents of affirmative action in Brazil view it as no more than a temporary solution to the country's problems. The ultimate goal, supporters and opponents of affirmative action agree, must be the improvement of the public secondary education system, so that those who must attend public school may properly compete for admission to universities and perform successfully once they have gained admission.³⁵³ Universities must, therefore, work closely with state governments to improve public education at the primary and secondary level until they reach a point at which students of public high schools no longer need a special program to gain admission into universities.

VI. CONCLUSION

Uerj's attempt to confer benefits on blacks and the poor via a quota-based admissions policy has been ineffective for many reasons, but none more prominent than the blurred racial lines in Brazilian society. For example, blacks accused white students of "cheating" the

351. José Márcio Camargo & Francisco H.G. Ferreira, *Missing the Target: Assessing Social Expenditures in Brazil*, 8.2 BROWN J. HUM. AFFAIRS 97, 101-106 (Winter 2002).

352. Davies, *supra* note 41 ("UFRJ offers some free courses at weekends to about forty students a year. And in some of Brazil's favela communities pupils are being offered evening classes").

353. See *supra* Part II.b.

system, but because nearly all Brazilians contain at least a drop of African blood, not even proponents of affirmative action could declare with certainty whether that was the case. Both sides have also advanced arguments that have long been at the core of affirmative action issues, such as whether it is "right" to pass over a highly qualified candidate because he or she does not belong to a protected group, and whether society owns a debt to blacks because of slavery.

The STF will eventually issue a ruling on the constitutionality of Uerj's program. Within the federal constitution, different articles and different interpretations of the same articles could lend support either for or against the constitutionality of the program. As a whole, the federal constitution appears to approve and, to an extent, even encourage affirmative action programs. But whether this particular program is constitutional depends mainly on two issues: the meaning of Article 208's statement that "all are equal before the law," and whether the authority to pass rules pertaining to student body selection belongs to the state or to the university.

The STF has not previously addressed these issues, as affirmative action is a recent phenomenon in Brazilian society. The U.S. Supreme Court, in contrast, has visited the issues currently before the STF on numerous occasions. While the Brazilian and U.S. experiences with racism do not by any means mirror each other, Brazil, along with many other nations, considers the U.S. affirmative action experience to be very influential. Judging from the way the U.S. Supreme Court has interpreted the issues now before the STF, Uerj's program is unlikely to withstand constitutional scrutiny.

Because of the differences between the two nations, Brazilian universities cannot subscribe to a race-based affirmative action system that is identical to the one that U.S. universities operate. First, Brazilian society currently sustains a curious interplay of color and socio-economic status in the definition of race, as opposed to the genetic-based U.S. concept of racial classification. Second, neither the Brazilian government nor Brazilian universities, in their affirmative action efforts, have emphasized the promotion of student body diversity and the remediation of specific instances of past discrimination. Such goals have been the backbone of racial preference in higher education admissions in the United States. Finally, the current admissions system in Brazil would not support the type of "holistic, individualized" applicant review that the U.S. system requires.

The best suited affirmative action program for Brazilian universities is one premised on applicants' economic status. Because of the way wealth is distributed in Brazil—where a very small minority controls the bulk of the wealth, the bottom quintiles hold a small fraction of it, and an ascertainable middle class is nowhere to be seen—class-based affirmative action is consistent with the government's objectives. Moreover, such a system will not be

subjected to the kind of scrutiny that accompanies racial preference, and it appears to address issues of meritocracy and stigmatization. It will be up to the universities to work out the logistics of the system, such as which factor of inequality will be used to determine who is "economically disadvantaged," which sector of the economically disadvantaged will receive the benefit, and how benefit upon that sector will be conferred.

Uerj's efforts have compelled Brazilians to recognize the existence of previously unaddressed issues of racism within the nation's boundaries. Whether such social discourse is positive or negative is beyond the purview of this Note. The STF, the state and federal governments, and the universities have been given an opportunity to correct a glaring inequality in Brazil's higher education system. It is their duty to modify the system and, in doing so, to improve conditions in a country in dire need of equality. The key, however, is for those actors to concentrate on addressing the *right* type of inequality.

*Ricardo Rochetti**

* J.D. Candidate, May 2005, Vanderbilt University Law School. B.B.A., 2002, Baylor University. The Author would like to thank his parents for all their love and support.
