

# The Power of Procedure: The Critical Role of Minority Intervention in the Wake of *Ricci v. DeStefano*

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*Federal Rule of Civil Procedure (“FRCP”) 24(a)(2) permits third parties whose interests are not adequately represented by existing parties to intervene in ongoing litigation to protect those interests. This Comment considers whether intervention can and should be used as a tool for nonparty racial minorities in the fight for social justice. Ultimately, it posits that in light of the Civil Rights Act of 1991 and Ricci v. DeStefano, minority intervention is imperative—not only to give voice to minority interests and to influence the outcome of “reverse discrimination” litigation, but also to avoid forfeiture of related claims in future suits.*

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## INTRODUCTION

Over the past few decades, a large number of legal challenges to race-conscious policies have surged through the courts.<sup>1</sup> Ironically, plaintiffs in these matters have relied on antidiscrimination law to allege that race-based programs targeted at ensuring equal opportunity are, in fact, examples of unconstitutional “reverse discrimination.”<sup>2</sup> Although much has been written

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1. See, e.g., *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658 (2009) (plaintiffs challenged the City’s decision to discard the results of a promotional exam that disparately impacted minority test takers); *Miller v. Johnson*, 515 U.S. 900 (1995) (plaintiffs alleged that Georgia’s congressional redistricting plan was unconstitutional because race was the overriding factor in districting determinations); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plaintiff challenged the City’s set-aside ordinance, which required contractors to subcontract to Minority Business Enterprises on city construction projects).

2. See, e.g., *Grutter v. Bollinger (Grutter I)*, 539 U.S. 306 (2003) (plaintiff alleged that the University of Michigan’s law school admissions policy discriminated against nonminority groups); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (plaintiff challenged a federal program that gave incentives for hiring minority business enterprises); *Shaw v. Reno*, 509 U.S. 630 (1993) (plaintiffs argued that considering race when creating voting districts to improve representation of black voters violated the Equal Protection Clause); *Regents of the Univ. of Cal. v. Bakke (Bakke II)*, 438 U.S. 265 (1978) (plaintiff challenged the University of California’s use of quotas in its affirmative action program for excluding Caucasians in violation of the Fourteenth Amendment). The term “reverse discrimination” developed in response to affirmative action programs that reallocated resources to disadvantaged minorities. Joyce A. Hughes, *Reverse Discrimination and Higher Education Faculty*, 3 MICH. J. RACE & L. 395, 404 (1998) (describing “reverse discrimination” as a “conceptual outgrowth of affirmative action”). The phrase suggests that such actions, taken to correct a pattern of discrimination against historically disadvantaged groups, are themselves discriminatory. Under this theory, traditional discrimination against minorities is simply “reversed” to be “discrimination” in their favor, and both forms should be deemed unconstitutional. However, there is a substantial difference between policies created to subjugate disfavored groups and policies designed to remedy systemic discrimination, like

about the constitutional and statutory implications of these cases, relatively few scholars have addressed the pertinent procedural issues underlying these claims.<sup>3</sup> This Comment attempts to begin filling that void by analyzing the role of minority intervenors in reverse discrimination suits and arguing for the necessity of their intervention. More specifically, it examines three major reverse discrimination cases—*Regents of the University of California v. Bakke*,<sup>4</sup> *Grutter v. Bollinger*,<sup>5</sup> and *Ricci v. DeStefano*<sup>6</sup>—to evaluate the effectiveness and importance of Federal Rule of Civil Procedure (“FRCP”) 24(a)(2)<sup>7</sup> as a tool for nonparty racial minorities seeking to sustain policies that ameliorate the impact of racial discrimination.

FRCP 24(a)(2) protects third parties not initially named in a lawsuit.<sup>8</sup> It permits intervention when a nonparty “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest.”<sup>9</sup> Provided that the existing parties do not already adequately represent that interest, intervenors may join the litigation and enjoy

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affirmative action. I use quotes around “reverse discrimination” to acknowledge the term’s conflation of invidious discrimination with efforts to promote equality.

3. Hundreds of articles have been published regarding the substantive consequences of reverse discrimination jurisprudence. See, e.g., Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781 (1996); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73 (2010); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010). Far fewer, however, focus on key procedural aspects like intervention. See, e.g., Edward Chen, *The Case for Minority Participation in Reverse Discrimination Litigation*, 67 CALIF. L. REV. 191 (1979); Danielle R. Holley, *Narrative Highground: The Failure of Intervention as a Procedural Device in Affirmative Action Litigation*, 54 CASE W. RES. L. REV. 103 (2003) (the author has since changed her last name to Holley-Walker); Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263 (1999); Emma Coleman Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31 (1979); Charles Lawrence, *When the Defendants Are Foxes Too: The Need for Intervention by Minorities in “Reverse Discrimination” Suits Like Bakke*, 34 GUILD PRAC. 1, 7–12 (1976).

4. *Bakke II*, 438 U.S. 265 (1978).

5. *Grutter*, 539 U.S. 306 (2003).

6. *Ricci III*, 129 S. Ct. 2658 (2009).

7. FRCP 24 divides intervention into two categories, intervention of right and permissive intervention, and into two subcategories, statutory and nonstatutory intervention. FED. R. CIV. P. 24. This Comment focuses on nonstatutory intervention of right under FRCP 24(a)(2). However, practitioners should consider moving to intervene under all relevant grounds. In fact, “[i]n many cases in which intervention is sought the parties . . . often assert[] that three or even all four types of intervention apply.” Jones, *supra* note 3, at 38 n.21.

8. See 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1901 (3d ed. 1998) (citing intervention, joinder (FRCP 19), and class actions (FRCP 23) as the three principal devices created to address the fact that lawsuits are often “not merely a private fight and will have implications on those not named as parties”).

9. FED. R. CIV. P. 24(a)(2).

near-equal standing with the original parties.<sup>10</sup> They may “participate in discovery, file motions and other papers, introduce direct testimony and conduct cross-examination at trial, and appeal adverse substantive determinations.”<sup>11</sup>

But how useful is FRCP 24(a)(2) in reverse discrimination cases? Has the rule offered a meaningful opportunity for people of color who will be affected by reverse discrimination lawsuits to assert their rights and contribute to pending litigation? And, more importantly, are there any significant penalties for failing to intervene?

Both skeptics and supporters of intervention have relied on affirmative action jurisprudence to help answer these questions.<sup>12</sup> To illuminate the debate, this Comment focuses on two pivotal affirmative action cases: *Bakke*, where the California Supreme Court denied intervention and the U.S. Supreme Court struck down the affirmative action policy in question, and *Grutter*, where the Sixth Circuit granted intervention and the Supreme Court subsequently upheld the defendant’s affirmative action plan. In Part I, I describe the consequences of denying intervention in *Bakke* and the academic debate about the value of intervention through the minority intervenors’ experiences in *Grutter*.

In Part II, I consider the procedural implications of failing to intervene. I begin by introducing *Martin v. Wilks*<sup>13</sup> and Congress’s reaction to *Wilks*: the Civil Rights Act of 1991, which prevents nonparties who had actual notice and a reasonable opportunity to present objections, or whose interests were already adequately represented in an ongoing litigation, from later challenging a “judgment or order that resolves a claim of employment discrimination.”<sup>14</sup> The Act suggests that failing to intervene could bring about severe consequences, including being bound to a judgment and estopped from filing related lawsuits despite not having been involved in the original action.

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10. WRIGHT ET AL., *supra* note 8, § 1920; 5 C.F.R. § 1201.34(d) (2010) (“Intervenors have the same rights and duties as parties, with the following two exceptions: (1) Intervenors do not have an independent right to a hearing; and (2) Permissive intervenors may participate only on the issues affecting them.”).

11. Carl Tobias, *Intervention After Webster*, 38 U. KAN. L. REV. 731, 738–39 (1990). Thus, unlike the amicus curiae brief, intervention allows nonparties to participate directly in the litigation and “insure that the range of issues and the evidence introduced in support of these issues conform to the viewpoint asserted by that party.” Jones, *supra* note 3, at 33 (discussing the differences between the amicus curiae brief and intervention and highlighting the advantages of intervening where a dispute concerns factual matters related to the defendant); *see also* Coal. of Ariz./N.M. Cntys. v. Dep’t of Interior, 100 F.3d 837, 844 (10th Cir. 1996) (“[T]he right to file a brief as *amicus curiae* is no substitute for the right to intervene as a party in the action under Rule 24(a)(2).”).

12. *See, e.g.*, Holley, *supra* note 3, at 107 (arguing that intervention “fails as a procedural device” for minority intervenors in higher education affirmative action lawsuits); Jones, *supra* note 3, at 34 (discussing intervention’s “great potential for safeguarding . . . [minority] interests in affirmative action litigation”).

13. *Martin v. Wilks*, 490 U.S. 755 (1989).

14. Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076.

I discuss these potential consequences in Part III, using *Ricci* as a case study. I consider how minority intervention could have affected the *Ricci* litigation and explore the lessons *Ricci* offers about the modern need to intervene. In light of *Ricci* and its progeny, I contend that intervention may not only be wise and beneficial, but also procedurally imperative. Failing to intervene in a timely manner could forever preclude minorities affected by a reverse discrimination lawsuit from having their day in court. Thus, I argue that practitioners interested in protecting minority rights should move to intervene as soon as possible in pending litigation that may affect those rights. Doing so may be the only means of ensuring that their clients ever have an opportunity to be heard.

## I.

### THE POWER OF INTERVENTION

Under FRCP 24(a)(2), prospective intervenors must file a timely motion illustrating that: (1) they have an interest in the subject of the action, (2) disposition of the case may impede or impair their interests, and (3) the existing parties do not adequately represent or protect their interests.<sup>15</sup> Movants must have an interest “relating to the property or transaction” at issue<sup>16</sup> and must demonstrate that resolution of the case could affect their interests in practice.<sup>17</sup> They must also show that the representation of their interests “may be” inadequate.<sup>18</sup> This burden upon the intervenors “should be treated as minimal.”<sup>19</sup> If the movant’s “interest is similar to, but not identical with, that of one of the parties . . . intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee.”<sup>20</sup>

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15. FED. R. CIV. P. 24(a)(2).

16. *Id.* (emphasis added).

17. WRIGHT ET AL., *supra* note 8, § 1908.2 (“It generally is agreed that in determining whether disposition of the action will impede or impair the movant’s ability to protect its interest the question must be put in practical terms rather than in legal terms.”). Several courts have concluded that adverse stare decisis is one type of threatened impairment that falls under the purview of Rule 24(a)(2). *See, e.g.,* *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 826–28 (5th Cir. 1967) (stating that while the judgment in the case had no direct impact upon the intervenors, the case addressed legal questions that had a prospective effect upon subsequent cases in which the intervenors were parties); WRIGHT ET AL., *supra* note 8, § 1908.2 (“[S]everal cases now have held that stare decisis by itself may, in a proper case, supply the practical disadvantage that is required for intervention under Rule 24(a)(2)”). The threat of adverse stare decisis was at issue in *Bakke*.

18. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *see also* *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (“In assessing the adequacy of . . . representation, we consider several factors, including whether the Secretary will undoubtedly make all of the intervenor’s arguments, whether the Secretary is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected.”).

19. *Trbovich*, 404 U.S. at 538 n.10. For example, the requirement is satisfied where the potential intervenors seek “to address relevant issues that the existing party may not—due to conflicts, collusion, or nonfeasance.” *Jenkins*, *supra* note 3, at 305.

20. WRIGHT ET AL., *supra* note 8, § 1909.

Judges exercise discretion in determining if nonparties meet these requirements and are therefore entitled to intervene.<sup>21</sup> Courts in various jurisdictions have applied this rule inconsistently in the affirmative action context—while some judges have permitted minority movants to intervene in suits challenging the constitutionality of remedial policies, others have not. The judges who deny intervention thereby decide the future of affirmative action programs without the direct participation or input of those meant to benefit from such policies.<sup>22</sup> This Part analyzes two fundamental affirmative action cases with divergent rulings and ultimate holdings and explores the efficacy of intervention as a procedural mechanism for protecting minority interests.

#### A. Regents of the University of California v. Bakke

In 1973 and 1974, the University of California, Davis School of Medicine (“Davis” or “the University”) had two admissions programs for its entering class: the regular admissions program and the special admissions program for “economically and/or educationally disadvantaged” individuals or members of particular “minority group[s],” including Blacks, Chicanos, Asians, and American Indians.<sup>23</sup> Unlike other applicants, candidates for the special admissions program were not subjected to minimum grade point average requirements and were not ranked against candidates in the general admissions process.<sup>24</sup> Sixteen places in every one-hundred-person class were reserved for special admissions program admits.<sup>25</sup>

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21. See, e.g., David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 758 (1968) (“[I]t is always misleading to speak of one having a requisite interest as possessing a *right* to intervene, since the determination of interest necessarily involves an exercise of discretion rather than the application of a mechanical formula.”).

22. In cases concerning affirmative action programs, courts find that a nonparty racial minority group’s interest is inadequately represented in some circumstances, but not in others. Courts have reached these different decisions even absent clearly distinguishable facts. Compare *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 263 F.3d 1234, 1238 (11th Cir. 2001) (affirming the lower court’s grant of intervention), *Grutter v. Bollinger (Grutter II)*, 188 F.3d 394 (6th Cir. 1999) (reversing the lower court and granting minority intervention), *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 32 F. Supp. 2d 1370, (S.D. Ga. 1999) (permitting the Georgia State Conference of the NAACP to intervene), and *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (which originally denied intervention), *with Order Denying Motion to Intervene, Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324 (W.D. Wash. Apr. 22, 1998), available at [http://www.cir-usa.org/legal\\_docs/smith\\_v\\_washington\\_deny\\_intervene.pdf](http://www.cir-usa.org/legal_docs/smith_v_washington_deny_intervene.pdf) (denying intervention), and *Hopwood v. Tex.*, 21 F.3d 603, 605–06 (5th Cir. 1994) (finding that the State already represented the interests of African American students).

23. *Bakke II*, 438 U.S. 265, 274 (1978) (“On the 1973 application form, candidates were asked to indicate whether they wished to be considered as ‘economically and/or educationally disadvantaged’ applicants; on the 1974 form the question was whether they wished to be considered as members of a ‘minority group.’”).

24. *Id.* at 274–75.

25. *Id.* at 275. When the University opened in 1968, it had no special admissions program and enrolled only three Asians into its fifty-person class. *Id.* at 272 (“[T]he first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians.”). In 1971, Davis

Allan Bakke, a white male, applied to Davis in 1973 and 1974 and was denied admission both times.<sup>26</sup> Upset that special admissions program applicants with lower academic scores than his were admitted while he was denied, Bakke filed suit in state court.<sup>27</sup> He argued that the University held places for minorities and illegally excluded him on the basis of his race.<sup>28</sup> On that basis, he sought injunctive and declaratory relief to compel his admission to Davis.<sup>29</sup> In response, the University cross-complained for a declaration that its affirmative action program was lawful.<sup>30</sup>

The Superior Court of Yolo County sustained Bakke's challenge, finding that Davis's special admissions program operated as an unconstitutional racial quota system.<sup>31</sup> The court enjoined the University from considering an applicant's race when making admissions decisions.<sup>32</sup> The trial court refused, however, to order Bakke's admission because he failed to prove that he would have been admitted but for the special program.<sup>33</sup> Both Bakke and the University appealed.

### *1. The Denial of Minority Intervention*

Because of the importance of the issues involved, the Supreme Court of California transferred the case to its docket directly from the trial court.<sup>34</sup> The National Association for the Advancement of Colored People ("NAACP") filed a Petition for Leave to File as Amicus Curiae on Petition for Rehearing, requesting that the California Supreme Court remand the case to the trial court to allow third parties "to present evidence on the full range of issues."<sup>35</sup> The organization sought to intervene<sup>36</sup> on behalf of minority students who had a

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increased its class size from fifty to one hundred students, reserving sixteen of the additional fifty seats for special admissions program admits. *Id.*

26. *Id.* at 276.

27. *Id.* at 277.

28. *Id.* at 277–78.

29. *Id.*

30. *Id.* at 278.

31. *Id.* at 278–79.

32. *Id.* at 279.

33. *Id.* at 279.

34. *Id.*

35. Petition of NAACP for Leave to File as Amicus Curiae on Petition for Rehearing at 6, *Bakke v. Regents of the Univ. of Cal. (Bakke I)*, 553 P.2d 1152 (Cal. 1976) [hereinafter NAACP Petition], reprinted in 1 ALLAN BAKKE VERSUS REGENTS OF THE UNIVERSITY OF CALIFORNIA, YOLO COUNTY, CALIFORNIA, SUPERIOR COURT, CALIFORNIA STATE SUPREME COURT (Alfred A. Slocum ed., Council on Legal Education 1978–79).

36. When the NAACP moved to intervene, intervention in California was wholly discretionary. CAL. CIV. PROC. CODE § 387 (West Supp. 2004) ("Any person *may*, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both.") (emphasis added). However, in 1977 the California legislature amended section 387 to add section (b), which directly parallels intervention of right under FRCP 24(a). CAL. CIV. PROC. CODE § 387(b) (West Supp. 2004) (creating a right to intervene where, upon timely application, a nonparty "claims an interest relating to the property or

stake in the continuation of the special admissions program<sup>37</sup> and who wished to submit evidence demonstrating the University's long history of discrimination against students of color.<sup>38</sup>

However, the court ignored the NAACP's request, issued an order denying the University's petition for rehearing, and affirmed the trial court's ruling that the special admissions program was invalid.<sup>39</sup> The California Supreme Court held that the University's affirmative action plan was unconstitutional because it afforded "preference on the basis of race to persons who, by the University's own standards, are not as qualified for the study of medicine as nonminority applicants denied admission."<sup>40</sup>

The U.S. Supreme Court affirmed the California Supreme Court's decision, finding that the Davis special admissions program used racial and ethnic classifications considered suspect under the Fourteenth Amendment without showing "that its purpose or interest [wa]s both constitutionally permissible and substantial, and that its use of the classification [wa]s 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."<sup>41</sup> Although Justice Powell's majority opinion acknowledged that the University's goal of achieving a diverse student body justified the consideration of race under certain circumstances, he found that the Davis program was unnecessary to the achievement of that goal and was therefore invalid under the Equal Protection Clause.<sup>42</sup> Additionally, the Court held that without "judicial, legislative, or administrative findings of constitutional or statutory violations," the "purpose of helping certain groups . . . perceived as victims of 'societal discrimination' d[id] not justify a [racial] classification" like that used in the

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transaction which is the subject of the action" and which is not "adequately represented by the existing parties" and where the putative intervenor "is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest"). Thus, although *Bakke* technically dealt with a state provision, given the similarity between California's code and FRCP 24, it is possible to examine federal intervention doctrine using *Bakke* as a case study. This Comment focuses on the federal rules and discusses *Bakke* in relation to FRCP 24(a)(2).

37. NAACP Petition, *supra* note 35, at 7 ("The real parties in interest in the instant case are Blacks, Mexican-Americans, Asians, Native Americans and other minority persons who will as a result of this decision be denied the opportunity to become doctors.").

38. *Id.* at 10–13.

39. See *Bakke I*, 553 P.2d 1152 (Cal. 1976) (modified on denial of rehearing). The procedural posture of the case at the time the NAACP sought to join the litigation helps explain the California Supreme Court's decision. The court initially ordered remand for a new trial to determine whether Bakke would have been admitted but for the special admissions program. See *Bakke II*, 438 U.S. at 280. However, in its Petition for Rehearing, the University conceded that it could not meet its burden of proving this fact. *Id.* Consequently, the California Supreme Court amended its opinion, entering a judgment in favor of Bakke rather than remanding for a new trial. *Id.* at 280–81. Because the NAACP's petition came after the University's concession, the request was moot; there would no longer be a trial in which to intervene.

40. *Bakke I*, 553 P.2d at 1155.

41. *Bakke II*, 438 U.S. at 305 (citations omitted).

42. *Id.* at 311–20.

University's special admissions program.<sup>43</sup> The Court ultimately struck down the Davis plan.<sup>44</sup>

## 2. Interest Impairment and Inadequate Representation of Nonparty Minorities

*Bakke* serves as an example of the danger of nonparty minorities failing to intervene in a timely fashion in reverse discrimination lawsuits. This Subsection outlines how the NAACP met FRCP 24(a)(2)'s two principal requirements for intervention and describes how the organization's failure to attempt to join the case at the outset negatively affected the proceedings.

The putative intervenors in *Bakke* met all of the requirements for intervention under FRCP 24(a)(2). First, they had key interests that may have been impaired by the final outcome of the litigation. For example, minority students like the NAACP's members had a stake in competing for the limited number of slots available at the Davis Medical School.<sup>45</sup> Under the "common fund" theory,<sup>46</sup> if "one claimant to a common, limited fund or pool of property seeks to have her rights determined in court, adverse claimants to the same fund or pool [also] have the right to intervene to protect their interests in the fund."<sup>47</sup> This logic is consistent with the basis of Allan Bakke's original lawsuit: if Bakke's interest in competing for a place in the class was sufficient to grant him standing to sue, then the minority applicants' parallel interest should also have been sufficient to warrant their intervention.<sup>48</sup>

Second, and perhaps most notable, was the intervenors' interest in exposing and remedying past and ongoing discrimination—a claim the University was unlikely to represent.<sup>49</sup> Unsurprisingly, the University presented no evidence of its long history of discrimination against students of color<sup>50</sup> or

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43. *Id.* at 307, 310.

44. *Id.* at 320.

45. Courts have recognized minority students' interest in competing for admission into graduate schools. *See, e.g., Grutter v. Bollinger (Grutter II)*, 188 F.3d 394, 399 (6th Cir. 1999) ("The proposed intervenors have enunciated a specific interest in the subject matter of this case, namely their interest in gaining admission to the University.").

46. Jones, *supra* note 3, at 64 (citing the common fund theory as a concept underlying the earliest origins of intervention). *See also* Chen, *supra* note 3, at 212–13 (recognizing the common fund situation as the classic instance of an absentee being adversely affected by litigation and noting that with respect to the "fund" of finite admissions slots and financial aid at universities, the claims of reverse discrimination plaintiffs and minority beneficiaries are mutually exclusive).

47. *See* Jones, *supra* note 3, at 64. *See also Grutter II*, 188 F.3d at 399–400 (permitting minority intervention and recognizing that a "decision in favor of the plaintiff will adversely affect the [intervenors'] educational opportunity by diminishing their likelihood of obtaining admission to the University").

48. *See* Jones, *supra* note 3, at 64.

49. *See* NAACP Petition, *supra* note 35, at 7–8 ("The record produced in the trial court in the present case is wholly inadequate and almost non-existent. . . . With respect to the defendants' failure to present evidence of past discrimination there was a clear conflict between the interest of the University and that of minority students.").

50. *See* NAACP Petition, *supra* note 35, at 9–15; Chen, *supra* note 3, at 192 (reviewing the University's discriminatory practices); Jones, *supra* note 3, at 65 (also examining evidence of the

its tenuous reliance on standardized test scores and other inherently biased selection criteria.<sup>51</sup> It never challenged the questionable assumption that Bakke was “better qualified” simply because he had relatively higher test scores and undergraduate grades,<sup>52</sup> even though the admissions committee considered a host of other factors in its admissions decisions.<sup>53</sup> Moreover, although the University submitted voluminous briefs, it did not provide any testimony from expert witnesses, students, or members of the minority community.<sup>54</sup> Instead, it stipulated to the matter being heard solely “upon the pleadings, declaration, and interrogatories and the deposition of Dr. George Lowrey, Chairman of the Admissions Committee at U.C. Davis Medical School, together with attached exhibits.”<sup>55</sup> The University entered no oral testimony into the record.<sup>56</sup>

In light of the University’s priorities and conflicting interests, its decision to avoid directing scrutiny toward its admission policies was understandable. Admitting to past or present discriminatory practices and selection criteria may have invited additional lawsuits from applicants who had been rejected previously.<sup>57</sup> Additionally, challenging its reliance on standardized tests and undergraduate grade point averages would have called into question two criteria that the University relied upon in selecting candidates. The substantial

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University’s past discrimination); Lawrence, *supra* note 3, at 7–12 (offering evidence of the University’s past discrimination against minorities and describing the affirmative action program’s remedial function).

51. See NAACP Petition, *supra* note 35, at 10–13; Chen, *supra* note 3, at 192 n.10 (citing extensive evidence to show that the Medical College Admissions Test (“MCAT”) has a discriminatory impact and bias against students of color); Lawrence, *supra* note 3, at 8–9 (critiquing the MCAT for being culturally biased, unrelated to student performance in medical school, and arbitrary and irrational as a criteria of selecting candidates for admission); see also Jones, *supra* note 3, at 73 (noting that the University could not have been expected to confess that the use of criteria like standardized test scores and undergraduate grades disparately impact minority applicants).

52. See NAACP Petition, *supra* note 35, at 17 (“[I]ntervenors would demonstrate that Mr. Bakke’s relatively higher scores on the medical school’s admission index do *not* necessarily indicate he was ‘better qualified,’ even when measured by the school’s own standards, than admitted minorities”); JOEL DREYFUSS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 32, 39–53 (1979) (also denouncing the University for claiming that Bakke was “better qualified”); Lawrence, *supra* note 3, at 5–6 (criticizing the University’s limited defense of affirmative action, including its admission that Bakke was “better qualified”).

53. Interviewers and members of the admissions committee rated each applicant on a scale of one to one hundred, taking into account the interviewers’ summaries and the candidate’s GPA, MCAT scores, letters of recommendation, extracurricular activities, and other biographical data. *Bakke II*, 438 U.S. at 274. Then, the full admissions committee “reviewed the file and scores of each applicant and made offers of admission on a ‘rolling’ basis.” *Id.* In 1974, Bakke’s faculty interviewer, Dr. George H. Lowrey, gave Bakke a rating of eighty-six because he found Bakke’s approach to the problems of the medical profession “rather limited” and “based more on his personal viewpoints than upon a study of the total problem.” *Id.* at 277.

54. Lawrence, *supra* note 3, at 4.

55. NAACP Petition, *supra* note 35, at 7; Lawrence, *supra* note 3, at 4.

56. NAACP Petition, *supra* note 35, at 7; Lawrence, *supra* note 3, at 4.

57. NAACP Petition, *supra* note 35, at 10 (“[A remedial] defense would have subjected the defendant University to legal attack by minority students who had been denied admission.”).

administrative costs that would accompany a large-scale review and revision of those evaluation tools likely disincentivized the University from raising claims that would adequately represent the minority intervenors' interests.

Despite the pragmatic bases for the University's decisions, its choices were detrimental to the NAACP and the students it represented. By the time the NAACP sought to join the case, the major litigation decisions regarding what arguments and evidence to present to the court had already been made. Moreover, the University had already stipulated that it could not meet its burden of proving that Bakke would not have been admitted even in the absence of the special admissions program.<sup>58</sup> This stipulation shut the door to remanding the case and prevented the NAACP from intervening and adding evidence to the extremely deficient trial court record. Unfortunately, as Justice Powell's majority opinion made clear, this deficiency played a central role in the Supreme Court's decision-making process.<sup>59</sup> The minimal evidence from the trial court failed to "even remotely suggest[] that the disparate impact of the general admissions program at Davis Medical School . . . [wa]s without justification."<sup>60</sup> Without proof of a compelling justification for its existence, the majority was required to strike down the Davis plan.

Had the minority intervenors been permitted to join the litigation, perhaps they could have provided the necessary proof to justify the University's special admissions program. According to the NAACP's Petition for Leave to File as Amicus Curiae on Petition for Rehearing, the organization sought to introduce extensive evidence demonstrating the University's previous use of quotas to limit the number of nonwhite students, its discriminatory use of recommendation letters and interviews, and its continued reliance on the MCAT, an "arbitrary, and irrational" standardized test.<sup>61</sup> Additionally, the intervenors intended to submit evidence demonstrating that Bakke's denial of admission was not the result of invidious discrimination and that but for the special admissions program, Davis would be a segregated facility.<sup>62</sup>

Because the NAACP did not move to intervene soon enough, it lost its opportunity to submit evidence that the University's race-conscious admissions policy was constitutionally appropriate to remedy the effects of discrimination against minority students. The Court never considered this critical evidence and instead struck down the Davis plan based solely on the University's limited defense.<sup>63</sup> *Bakke* thus serves as a cautionary tale about the danger of failing to

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58. *Bakke II*, 438 U.S. at 320.

59. *Id.* at 307–08 (concluding that a "judicial, legislative, or administrative finding of constitutional or statutory violations" is necessary before the Court can approve the use of a suspect classification, and holding that the requisite finding of wrongdoing to justify the University's remedial admissions program had not been made in *Bakke*).

60. *Id.* at 308 n.44.

61. NAACP Petition, *supra* note 35, at 9–15.

62. *Id.* at 16–22.

63. *See Bakke II*, 438 U.S. at 319–20.

intervene in a timely fashion and relying on institutional defendants to represent minority interests. Both can be costly for putative minority intervenors, resulting, as in *Bakke*, in the elimination of necessary and legally justified affirmative action programs.

### B. Grutter v. Bollinger

Nearly twenty years after the Supreme Court's ruling in *Bakke*, another pivotal affirmative action case began making its way through the courts. The plaintiff, Barbara Grutter, was a white Michigan resident with a 3.8 undergraduate grade point average ("UGPA") and a score of 161 on the Law School Admission Test ("LSAT") who had been denied admission to the University of Michigan Law School ("the Law School" or "the University") in 1996.<sup>64</sup> In 1997, she filed suit in the United States District Court for the Eastern District of Michigan, alleging that the Law School had rejected her due to its policy of using race as a "predominant" factor in its admissions decisions.<sup>65</sup> She argued that the approach gave minority applicants a "significantly greater chance of admission than students with similar credentials from disfavored racial groups" and that the Law School had no compelling interest to justify such a use of race.<sup>66</sup> As a result, she requested compensatory and punitive damages, an order instructing the Law School to offer her admission, and an injunction prohibiting the continued use of the race-based admissions policy.<sup>67</sup>

The Law School had drafted its admissions policy to comply with Justice Powell's majority opinion in *Bakke*.<sup>68</sup> Reflecting its goal of enrolling a diverse class, the Law School's admissions policy affirmed "a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."<sup>69</sup> The policy was modeled after the Harvard Plan,<sup>70</sup> which Justice Powell praised in *Bakke* as an example of a constitutional race-conscious affirmative action program.<sup>71</sup> Like the undergraduate college at Harvard, the University of Michigan Law School evaluated each applicant individually, considering race

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64. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

65. *Id.* at 316–17.

66. *Id.* at 317 (citations omitted).

67. *Id.*

68. *Grutter v. Bollinger (Grutter IV)*, 288 F.3d 732, 735 (6th Cir. 2002). *See also id.* at 742 (reiterating Justice Powell's conclusion that states have a compelling interest in creating a diverse student body within graduate institutions and that race-conscious admissions policies like Harvard's are constitutionally sound (citing *Bakke II*, 438 U.S. at 314, 316)).

69. *Grutter IV*, 288 F.3d at 737 (citations omitted).

70. *Id.* at 746 ("the Law School's consideration of race and ethnicity . . . closely tracks the Harvard Plan").

71. *Bakke II*, 438 U.S. at 316–19.

and ethnicity as potential “plus” factors in the applicant’s file.<sup>72</sup> Although the Law School rejected quotas and set-asides, its goal was to enroll a “critical mass” of underrepresented minority students “to ensure that all students—minority and majority alike—will be able to enjoy the educational benefits of an academically diverse student body.”<sup>73</sup>

### *1. The Grant of Minority Intervention*

In March 1998, a group of forty-one minority students and three pro-affirmative action organizations moved to intervene.<sup>74</sup> They identified themselves as “black, Latino/a, Mexican-American, Filipino/a, Asian-American and other students who currently attend the University of Michigan (the University), including some who attend the University of Michigan Law School (the Law School), or who plan to attend the University of Michigan and/or its Law School” and “interracial coalitions which actively seek to preserve affirmative action programs at the University of Michigan.”<sup>75</sup>

The putative intervenors sought to join the litigation because their access to and experiences in higher education could be directly affected by the results of the case. They contended that the University of Michigan could not adequately represent their interests and would “fail to raise a number of available defenses . . . including particularly those which call into question its own past discriminatory practices and/or passive participation in present discriminatory practices—for example, the Law School’s continued use of LSAT scores as a factor in determining admissions, when the discriminatory impact of such use has been documented.”<sup>76</sup> Additionally, they asserted that the University would not pursue particular defenses as vigorously as the intervenors would, “in part because the evidence to support those defenses is more readily available to applicants as persons who have direct knowledge of segregated and/or resegregated educational institutions.”<sup>77</sup>

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72. *Grutter IV*, 288 F.3d at 746 (citations omitted).

73. *Id.* at 746–47.

74. Motion to Intervene, *Grutter v. Bollinger (Grutter I)*, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-75928), 1998 WL 35235440 [hereinafter *Grutter I* Motion to Intervene]. The pro-affirmative action organizations included United for Equality and Affirmative Action (“UEAA”), The Coalition to Defend Affirmative Action By Any Means Necessary (“BAMN”), and Law Students for Affirmative Action (“LSAA”). *Id.*

75. *Id.* at 1–2.

76. *Id.* at 7.

77. *Id.* at 7–8. The putative intervenors were in “a position to present a fuller and more vigorous set of defenses” than the University because of their extensive knowledge of the debilitating effects of racial and sexual discrimination in educational settings. *Grutter I* Motion to Intervene, *supra* note 74, at 30. They could provide direct evidence showing “that a hostile environment for minority and women students at the Law School w[ould] be created—or exacerbated . . . by the elimination of affirmative action” and could more readily argue, without fear of legal liability, that the University had a compelling state interest in establishing an affirmative action program to remedy its past and present discriminatory practices. *Id.*

The district court denied the applicants' motion to intervene because they failed to show that the University would not adequately represent their interests.<sup>78</sup> Relying on the Fifth Circuit's more demanding standard for inadequate representation, the court explained that "where the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required."<sup>79</sup> The court held that the putative intervenors in *Grutter* had not met this burden because they failed to demonstrate that their "ultimate objective" was different from the University's and that the University would not adequately represent that interest.<sup>80</sup>

However, the Sixth Circuit overturned the lower court decision. The appellate court criticized the district court's use of a higher standard for inadequate representation, noting that the "proposed intervenors were only required to show that the representation *might* be inadequate."<sup>81</sup> The court agreed that the University may be unlikely to present evidence of past discrimination or disparate impact based on its admissions criteria, both of which were relevant to determining the legality of the race-conscious admissions policy. Thus, the court held that the intervenors had sufficiently established the possibility of inadequate representation as required under FRCP 24.<sup>82</sup>

## 2. A Favorable Outcome for Social Justice

On remand, Judge Bernard A. Friedman of the U.S. District Court for the Eastern District of Michigan presided over the trial and identified three issues before the court:

(1) the extent to which race is a factor in the law school's admissions decisions; (2) whether the law school's consideration of race in making admissions decisions constitutes a double standard in which minority and non-minority students are treated differently; and (3) whether the law school may take race into account to "level the playing field" between minority and non-minority applicants.<sup>83</sup>

He gave each party thirty hours to present their respective cases, but only the Defendant-Intervenors used their entire allotted time.<sup>84</sup> During that time, they presented extensive evidence "about the history and current status of racial

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78. *Grutter v. Bollinger (Grutter II)*, 188 F.3d 394, 397 (6th Cir. 1999).

79. Opinion and Order Denying *Grutter I* Motion to Intervene, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-75928), available at <http://www.vpcomm.umich.edu/admissions/legal/grutter/gruord.html> (citing *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994)).

80. *Id.*

81. *Grutter II*, 188 F.3d at 400.

82. *Id.* at 401.

83. *Grutter v. Bollinger (Grutter III)*, 137 F. Supp. 2d 821, 825 (E.D. Mich. 2001).

84. *Id.* at 856 ("The court listened intently to nearly 30 hours of testimony from the intervenors' witnesses."); William Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 BERKELEY LA RAZA L.J. 173, 176 (2001).

discrimination in this country; the causes of the ‘achievement gap’ between underrepresented minority and non-minority students; the alleged cultural bias in standardized tests such as the SAT and the LSAT; and the recent experiences of some African American and Mexican American students.”<sup>85</sup> Relying on expert witnesses in history, sociology, psychology, and education, as well as students from local high schools, colleges and universities, the Defendant-Intervenors argued in favor of a remedial justification for the Law School’s admissions policy and suggested that without affirmative action, institutions of higher education were in danger of resegregating.<sup>86</sup>

The University, on the other hand, used only about sixteen of its thirty allotted hours to present evidence to the court.<sup>87</sup> Four of its five witnesses emphasized the value of diversity in the classroom<sup>88</sup> and its final witness, Professor Stephen Raudenbush, testified as its statistician.<sup>89</sup> Raudenbush challenged the analysis of the plaintiff’s statistician, who argued that minority applicants had a large advantage in admissions over Caucasian applicants with similar GPAs, LSAT scores, and residency status.<sup>90</sup> He also shared his prediction that eliminating the University’s affirmative action program would have a “very dramatic, negative effect on minority admissions,” reducing minority enrollment considerably, from 14.5 percent to 4 percent.<sup>91</sup>

After a fifteen-day trial, Judge Friedman issued his ruling enjoining the Law School from considering race as a factor in its admissions decisions.<sup>92</sup> Rejecting *Bakke*, he found that diversity in higher education was not a compelling state interest and concluded that the Law School’s “very heavy emphasis on an applicant’s race” in order to achieve a critical mass of diverse students was therefore unconstitutional.<sup>93</sup> Sitting en banc, however, the Sixth

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85. *Grutter III*, 137 F. Supp. 2d at 855–56. For a detailed description of the intervenors’ case, see *id.* at 855–63. See *infra* Part I.C.2.a.

86. *Grutter I* Motion to Intervene at 2–7, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-75928); Defendant-Intervenors’ Brief in Support of Defendants’ Motion for Summary Judgment and in Opposition to the Plaintiff’s Motion for Summary Judgment at 3 *Grutter III*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), 2000 WL 35575808 (“Should plaintiff prevail, the real outcome is a foregone conclusion: the resegregation of law schools in particular and higher education in general.”).

87. Kidder, *supra* note 84, at 176 n.14.

88. Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, in EDUCATION LAW STORIES 10 (Michael A. Olivas & Ronna Greff Schneider eds., 2007). These witnesses included: “Bollinger, former law school dean and then university president; Michigan law professor Richard Lempert, the chairman of the committee that drafted the [admissions] policy; Jeff Lehman, then dean of the law school; and Kenty Syverud, a former Michigan law school professor and then dean of Vanderbilt Law School.” *Id.*

89. *Id.*

90. *Grutter III*, 137 F. Supp. 2d at 839. Raudenbush considered this conclusion flawed, as it failed to “consider the effect of ‘unquantifiable’ factors such as applicants’ letters of recommendation and essays, or the reputation of the applicants’ undergraduate institutions.” *Id.*

91. *Id.*

92. *Id.* at 872.

93. *Id.* at 840, 849.

Circuit reversed the lower court.<sup>94</sup> Finding *Bakke* to be binding precedent, the court held that the University had a compelling interest in achieving a diverse student body.<sup>95</sup> It further concluded that the Law School's admissions policy was narrowly tailored because race was merely a "potential 'plus' factor[]" and because the policy was "virtually indistinguishable from the Harvard plan."<sup>96</sup>

In 2003, the Supreme Court affirmed the Sixth Circuit's opinion, holding that *Bakke* established that diversity was a compelling state interest and that the Law School's use of race was narrowly tailored to that interest.<sup>97</sup> The Court found that, like Harvard, the Law School's admission policy did not establish racial or ethnic quotas or set-asides; rather, it used race in a valid, "flexible, nonmechanical way . . . as a 'plus' factor in the context of individualized consideration of each and every applicant."<sup>98</sup>

### C. *The Debate Over Intervention*

The proceedings in *Grutter* have left legal scholars and practitioners divided about the utility of Rule 24. While some view *Grutter* as proof of the ineffectiveness of intervention as a means of protecting minority interests,<sup>99</sup> others have heralded it as a decisive victory and a shining example of Rule 24's potential power.<sup>100</sup> This Section explores the major arguments on both sides of this debate, ultimately concluding that intervention in a reverse discrimination case can be beneficial for minorities with an interest in the outcome of the litigation.

#### 1. *The Failure of Intervention to Benefit Nonparty Minorities*

In her 2003 article, *Narrative Highground: The Failure of Intervention as a Procedural Device in Affirmative Action Litigation*, Professor Danielle R. Holley suggests that intervention has failed as a procedural device for nonparty minorities in the affirmative action context. She assesses intervention along two axes: (1) "the policy considerations underlying the rule,"<sup>101</sup> and (2) the Defendant-Intervenors' ability "to ensure that the courts hear the voices of minority students."<sup>102</sup> Examining cases from *Bakke* to *Grutter*, she concludes

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94. *Grutter v. Bollinger (Grutter IV)*, 288 F.3d 732, 739, 752 (6th Cir. 2002).

95. *Id.* at 739.

96. *Id.* at 747.

97. *Grutter v. Bollinger (Grutter V)*, 539 U.S. 306 (2003).

98. *Id.* at 334.

99. Holley, *supra* note 3.

100. Miranda Massie, *Litigators and Communities Working Together: Grutter v. Bollinger and the New Civil Rights Movement*, 15 BERKELEY LA RAZA L.J. 109 (2004).

101. Holley, *supra* note 3, at 108. Holley identifies four main policy considerations behind Rule 24: "(1) preventing injury to nonparties; (2) assisting the court in information gathering and providing expertise; (3) judicial economy; and (4) adding legitimacy to the court's decision." *Id.* at 126.

102. *Id.* at 108.

that “courts at varying levels have either refused to hear, or have marginalized, the minority students’ narrative.”<sup>103</sup> Accordingly, she suggests that “minority students should abandon further efforts at intervention,” and instead focus on filing lawsuits and engaging in legislative action to challenge and replace biased admission criteria.<sup>104</sup>

Because Holley’s work offers a comprehensive account of the arguments against minority intervention, I briefly summarize some of her main points below, focusing on her critiques of *Grutter*.

*a. Intervention Does Not Ensure that Minority Voices Are Heard*

Holley asserts that intervention fails to offer nonparty minorities a meaningful voice in ongoing litigation. As discussed in Part I.B, one of the central interests of the Defendant-Intervenors in *Grutter* was to present evidence of the Law School’s past and ongoing discrimination and the inherent bias in its admissions criteria in order to justify a remedial affirmative action policy.<sup>105</sup> Yet, as Holley points out, the trial court, the Sixth Circuit, and the Supreme Court all rejected the Defendant-Intervenors’ arguments. At the district court level, Judge Friedman considered and then quickly dismissed each one of their claims as legally unpersuasive. He questioned the legitimacy of the evidence and testimony presented by the Defendant-Intervenors’ renowned expert witnesses.<sup>106</sup> Then, despite arguments to the contrary, he wrote off evidence of disparate impact in standardized testing and grades as the “effects of general, societal discrimination [that] cannot constitutionally be remedied by race-conscious decision-making.”<sup>107</sup> Indeed, as the Defendant-Intervenors stated in their final brief, he refused to “engage[] with either side of the fundamentality of race—not with the students’ arguments about racism and meritocracy and not with their arguments for integration, diversity, and progress.”<sup>108</sup>

According to Holley, matters only worsened for the Defendant-Intervenors at the appellate level. Whereas Judge Friedman had offered detailed rebuttals to each of their claims, the Sixth Circuit ignored their arguments altogether. Because the court found diversity to be a compelling state interest, it declined to consider whether the Defendant-Intervenors’ interest in remedying

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103. *Id.* at 107.

104. *Id.* at 109.

105. *See supra* Part I.B.

106. *See, e.g.,* *Grutter v. Bollinger (Grutter III)*, 137 F. Supp. 2d 821, 825 (E.D. Mich. 2001) (“The court is unable to find that anything in the content or design of the LSAT biases the test for or against any racial group. If such bias exists, it was not proved at trial.”).

107. *Id.* at 868–69. In fact, the Defendant-Intervenors argued that the UGPA and LSAT gaps were “attributable to past and present discrimination against underrepresented minorities in the form of segregation in housing and schools, a racially hostile environment at undergraduate institutions, cultural bias in standardized tests, and stereotype threat.” *Id.* at 868.

108. Defendant-Intervenors’ Final Brief at 40 *Grutter v. Bollinger (Grutter IV)*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1516).

past discrimination was “sufficiently compelling for equal protection purposes.”<sup>109</sup> Similarly, the Supreme Court “completely ignored past discrimination as an alternative justification for the Law School’s admissions policy.”<sup>110</sup> It was only interested in the diversity justification espoused by the University.<sup>111</sup>

Thus, Holley concludes that intervention in *Grutter* failed to protect minority students’ interests.<sup>112</sup> The district court rejected the Defendant-Intervenors’ expert testimony and arguments and the appellate courts completely ignored them, focusing only on the initial terms set forth by the original parties.<sup>113</sup> In effect, both the Sixth Circuit and the Supreme Court “summarily dispose[d] of the intervenors’ narrative[] because it was not adopted by the university.”<sup>114</sup> Intervention accomplished very little; after expending significant time and resources, the *Grutter* intervenors were unable to redefine the scope of the litigation.

## 2. *The Critical Role and Effectiveness of Intervention*

In stark contrast to Holley, the *Grutter* intervenors and their attorney, Miranda Massie, have argued that their role in the case was a success, both in terms of helping to uphold affirmative action policies and demonstrating the efficacy of intervention in reverse discrimination litigation.<sup>115</sup> They and others in the prointervention camp have taken a broader view on the matter, considering it a victory just to be in the courtroom and have an opportunity “to shape the trial court record, to present their own experts, to contribute to the larger public debate and to build a student movement in support of affirmative action.”<sup>116</sup> In this light, even if courts do not primarily rely on intervenors’ narratives when issuing their decisions, minority intervention is still worth the time and effort.

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109. *Grutter IV*, 288 F.3d at 739 n.4; see also Parker, *supra* note 88, at 12–13 (“The Sixth Circuit largely ignored the intervenors’ arguments of societal discrimination and of bias in LSAT and undergraduate GPA scores.”).

110. Holley, *supra* note 3, at 123.

111. *Grutter v. Bollinger (Grutter V)*, 539 U.S. 306, 322 (2003) (granting certiorari “to resolve the disagreement among the Courts of Appeals on . . . [w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities”). Given this framing, it is not surprising that the Court denied the Defendant-Intervenors an opportunity to participate in oral arguments. See Parker, *supra* note 88, at 13 (“The Court was interested solely in the diversity justification.”).

112. Holley, *supra* note 3, at 127 (“Despite the objective that intervention will give an outside party a procedural method to protect their interests in the litigation, intervenors remain outsiders in the litigation.”).

113. *Id.* at 121–24.

114. *Id.* at 130; see also *Grutter IV*, 288 F.3d at 795 n.17 (Boggs, J., dissenting) (“The Law School’s disavowal is why I do not discuss whether the remediation of past discrimination is a compelling state interest that could justify the Law School’s actions.”).

115. See Miranda Massie, *Representing the Student Intervenors in Grutter*, JURIST LEGAL NEWS AND RES. (Sept. 5, 2003), <http://jurist.law.pitt.edu/forum/Symposium-aa/massie-printer.php>.

116. Kidder, *supra* note 84, at 175–76.

This Subsection will showcase the experiences of the *Grutter* intervenors to demonstrate how intervention can be an effective tool for nonparty minorities. Unlike in *Bakke*, the Defendant-Intervenors in *Grutter* accomplished their goals and fulfilled the policy rationales behind Rule 24, ultimately resulting in a Supreme Court decision upholding the Law School's affirmative action plan.

*a. Measuring Success Along Different Metrics*

The Defendant-Intervenors in *Grutter* had three main goals:

[F]irst, to use the attack on affirmative action as an opportunity to air the truth about race and racism in America in a court proceeding that promised to receive media and public attention; second, to make a holding for the University more likely by supporting its diversity arguments and supplementing them with arguments for integration and equality, which are deeper and truer; and third, and most importantly, to use the litigation as a means of inspiring, galvanizing, and mobilizing a new generation of civil rights activists and leaders—a new civil rights movement.<sup>117</sup>

They accomplished each of these objectives through intervention. First, the Defendant-Intervenors were able to expose and critique institutional racism and inherently biased admissions criteria, such as the LSAT.<sup>118</sup> Through a wide range of expert and student testimony,<sup>119</sup> they offered evidence of past and ongoing segregation in American life and higher education and “began debunking the myth of race-neutral merit measures.”<sup>120</sup> For instance, they entered into the record: (1) testimony from renowned scholars and historians regarding the history of racial inequality in the United States;<sup>121</sup> (2) research and testimony about the disparate impact of the LSAT on people of color;<sup>122</sup> (3) a focus-group study based on four of the top ten feeder schools to the University of Michigan Law School showing that the hostile environment at the relevant campuses

117. Massie, *Representing the Student Intervenors*, *supra* note 115.

118. *Id.* (“Admissions criteria for law schools in the United States are saturated with racial bias. This is especially true of the LSAT, which gives white law school applicants major unearned advantages over their black, Latino, and other minority peers.”)

119. *Grutter v. Bollinger (Grutter III)*, 137 F. Supp. 2d 821, 855–63 (E.D. Mich. 2001) (summarizing the evidence the *Grutter* intervenors presented at trial).

120. Massie, *Litigators and Communities Working Together*, *supra* note 100, at 112.

121. *Grutter III*, 137 F. Supp. 2d at 857–60.

122. This included, for example, “a national matching study showing that, if you match black and white students from the same college with the same GPA in the same major, there’s a nine-point gap in their LSAT scores, despite their identical prior academic and intellectual achievement.” Massie, *Litigators and Communities Working Together*, *supra* note 100, at 111. In effect, “[n]ine white privilege points get handed out to the white student when she sits down to take the test.” *Id.* Although the gap is slightly smaller for Latinos, Native Americans, and Asian Pacific Americans, this bias still exists and affects the performance of each group of racial minorities. *Id.* at 111–12.

depressed GPAs for Black, Latino, and Native American students;<sup>123</sup> (4) research demonstrating a low correlation between success after graduation from law school and undergraduate GPAs, LSAT scores, and law school grades;<sup>124</sup> and (5) novel testimony “on Latinos and affirmative action, on Asian Pacific Americans and affirmative action, and on women of all races and affirmative action.”<sup>125</sup> In short, by participating in the litigation, the *Grutter* intervenors were able to force the court to confront the reality of racial and gender inequality in the United States and in the American higher education system.

Second, the Defendant-Intervenors made a decision upholding the University’s affirmative action program more likely. Contrary to Holley’s contention that the *Grutter* courts completely dismissed or ignored the Defendant-Intervenors, the Supreme Court’s opinions suggest that the Defendant-Intervenors’ narrative, which was centered on integration and equality,<sup>126</sup> did in fact influence a few justices. For instance, Justice O’Connor, the swing vote on the Supreme Court at the time, issued a majority opinion that was broader and deeper than *Bakke*, the case she relied upon to support her findings. Rather than offering a “whittled-away version of diversity, as some projected, [Justice O’Connor gave] a much more robust one . . . [that went] beyond *Bakke* to frame the question partially in terms of *Brown*.”<sup>127</sup> She linked race-conscious admissions programs to “our Nation’s struggle with racial inequality”<sup>128</sup> and to the “goal of equality itself,”<sup>129</sup> and she emphasized the importance of integration in educational settings.<sup>130</sup> Then, going one step further, she “la[id]

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123. Defendant-Intervenors’ Appeal Brief at 4–5, *Grutter v. Bollinger (Grutter IV)*, 288 F.3d 732 (6th Cir. 2002) (No. 01-1516), available at [www.bamn.com/doc/2001/0107-intervenors-appeal-brief.pdf](http://www.bamn.com/doc/2001/0107-intervenors-appeal-brief.pdf).

124. *Grutter III*, 137 F. Supp. 2d at 863.

125. Massie, *Litigators and Communities Working Together*, *supra* note 100, at 111 (“I think we were the first parties in an affirmative action case to specifically present separate testimony on [these groups] . . . and affirmative action.”).

126. *Id.* at 110 (“[W]e wanted to ensure that the record and arguments in the case centered on questions of equality. . . . It was imperative, we believed, to demonstrate to the courts and the public that affirmative action is also an indispensable step toward equality—toward integration and toward fair admissions practices.”).

127. *Grutter v. Bollinger (Grutter V)*, 539 U.S. 306, 337–38 (2003) (“With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”).

128. Massie, *Representing the Student Intervenors*, *supra* note 115, at 3. See *Grutter V*, 539 U.S. at 331 (“This Court has long recognized that ‘education . . . is the very foundation of good citizenship.’ For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

129. *Id.* at 342 (citations omitted).

130. *Id.* at 332–33 (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so

the foundation for extending the diversity rationale to the employment context.”<sup>131</sup> Undoubtedly, these comments had elements of the Defendant-Intervenors’ integration and equality narrative embedded within them.

Similarly, Justice Ginsburg’s concurring opinion suggested that she considered, and was ultimately influenced by, the Defendant-Intervenors’ claims regarding the negative effects of segregation and discrimination on people of color. She lamented the fact that “conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”<sup>132</sup> Justice Ginsburg then proceeded to cite statistics documenting the ongoing segregation and lack of resources in elementary and secondary schools in many minority communities.<sup>133</sup> Although the Defendant-Intervenors did not provide these statistics to the Court, and although Justice Ginsburg never explicitly linked these facts to the need for remedial graduate-level affirmative action programs, her reliance on such evidence is telling. It indicates that Justice Ginsburg agreed with the Defendant-Intervenors about the relevance of “markedly inadequate and unequal educational opportunities” in many communities of color.<sup>134</sup> Ultimately, this played a role in both her support of *Grutter* and her skepticism about the twenty-five year sunset clause to affirmative action included in the majority opinion.<sup>135</sup>

Third, the Defendant-Intervenors successfully used *Grutter* as an organizing tool. By making the case “a referendum on racism and race in America, [and] on racial equality and inequality in America,” they helped transform the debate about affirmative action into a call to action.<sup>136</sup> Joining forces with community organizations and coalitions, they held large rallies, protests, and marches that brought together individuals committed to

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that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”)

131. Massie, *Representing the Student Intervenors*, *supra* note 115, at 3. *See also Grutter V*, 539 U.S. at 330 (“The[] benefits [of diversity] are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. . . . “[i]t requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.”).

132. *Grutter V*, 539 U.S. at 345 (2003) (Ginsburg, J., concurring).

133. *See id.* at 345–46 (“[D]ata for the years 2000–2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. And schools in predominantly minority communities lag far behind others measured by the educational resources available to them. . . . [I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.”).

134. *Id.* at 346.

135. *Id.* (“From today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”).

136. Massie, *Litigators and Communities Working Together*, *supra* note 100, at 110.

reinvigorating the fight for civil rights.<sup>137</sup> The Defendant-Intervenors challenged Americans to stand up, and to stand together, for progress and integration, and thousands of activists, students, and youths answered their call.<sup>138</sup> With *Grutter* as a catalyst, a new, integrated, and progressive struggle for equality was born.

Therefore, unlike Holley and other skeptics of intervention, those in the ppointervention camp considered *Grutter* proof that Rule 24 could be an effective tool for serving minority interests. They measured their success broadly, against their own goals and long-term visions for progress rather than just against the rulings of the court. As Professor Lawrence eloquently stated:

The measure of success in this effort will not turn on whether [*Grutter's* companion case] *Gratz v. Bollinger* is won or lost, but will depend on what is learned in the process. During the course of this litigation, will we discover, document, and better understand the myriad ways that the university's past and present practices contribute to and reinforce societal racism? Will the faculties and administrations at elite colleges and universities develop new and creative affirmative action strategies that can withstand the scrutiny of a conservative Court while increasing the number of students who come to their schools from diverse race and class backgrounds? Will progressive advocates for more radical versions of inclusion be inspired to engage in the political battle to transform the hearts and minds of their brothers and sisters?<sup>139</sup>

Thus, for the Defendant-Intervenors the question was not simply whether their presence in the litigation guaranteed a particular outcome based on a particular rationale; rather, they were concerned with creating a record of the University's past and continuing discriminatory practices, informing the deliberative process, and helping start a movement for change. By this metric, *Grutter* represented a decisive victory. Not only did the Court uphold the University of Michigan Law School's affirmative action plan, but the litigation also afforded the intervenors a valuable opportunity to raise political consciousness, inspire a broad-based movement for equality, and "subvert[] the legal fiction that only recognizes . . . the University [as] a defender, never a violator, of minority rights."<sup>140</sup>

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137. See *Educating the Nation*, UNITED FOR EQUAL. & AFFIRMATIVE ACTION LEGAL DEF. FUND, <http://www.ueaa.net/education.htm> (last visited Mar. 28, 2011).

138. See *id.*

139. Charles R. Lawrence III, *Two Views of the River*, 101 COLUM. L. REV. 928, 968 (2001).

140. *Id.* at 967.

*b. Intervention Fulfilled the Goals of Rule 24(a)(2)*

In addition to helping achieve the affirmative action advocates' goals, intervention was also successful when measured against the protective,<sup>141</sup> truth seeking,<sup>142</sup> and judicial economy<sup>143</sup> rationales behind FRCP 24. The *Grutter* intervenors were able to present arguments and evidence in defense of their unique interests—namely, preserving the Law School's race-conscious admissions policy to offset past and present discrimination and to promote integration and equality.<sup>144</sup> They created an extensive record documenting bias in admissions criteria and higher education generally,<sup>145</sup> which, as described above, the University was unlikely to do.<sup>146</sup> By actively participating in the case and helping ensure that the Law School's admissions policy was upheld,<sup>147</sup> they reduced the need for subsequent litigation to affirm the constitutionality of the University's plan. Clearly, intervention not only met the goals of Miranda Massie and her clients, but of Rule 24 as well.

In sum, intervention in *Grutter* can be viewed as a success. The case serves as an important reminder of the power of intervention to protect minority interests and to give the underrepresented a voice when they may need it the most.

## II.

### THE MODERN CONSEQUENCES OF FAILING TO INTERVENE

In Part I, I summarized two major affirmative action cases to highlight the debate over whether intervention is a useful procedural tool for minorities affected by reverse discrimination litigation. In this Part, I push the discussion one step further by considering the potential procedural consequences of failing to intervene. To lay the groundwork for this discussion, I begin with a summary of the case law and legislation governing collateral estoppel in employment discrimination cases. Then, I provide a brief account of the proceedings in *Ricci v. DeStefano* and use *Ricci* as a modern case study to explore (1) how the case

141. Holley, *supra* note 3, at 127 (citations omitted) (“The most prominent policy reason underlying intervention is the need to protect the interest of third parties that are not present in the lawsuit.”).

142. *Id.* at 130 (citations omitted) (“Many commentators and courts have insisted that intervenors provide valuable assistance to the courts . . . by providing additional facts and expertise needed to make the complex choices and decisions inherent in public law litigation.”).

143. *Id.* at 132 (citations omitted) (“Another policy goal of intervention is to encourage judicial economy by consolidating related issues.”).

144. See *supra* Part I.B.1; Massie, *Litigators and Communities Working Together*, *supra* note 100, at 110 (“[W]e wanted to ensure that the record and arguments in the case centered on questions of equality. . . . It was imperative, we believed, to demonstrate to the courts and the public that affirmative action is also an indispensable step toward equality—toward integration and toward fair admissions practices.”).

145. See *supra* Part I.C.2.a.

146. See *supra* Part I.B.1.

147. See *supra* Part I.C.2.a.

may have differed had minority firefighters been granted intervention, and (2) the lessons *Ricci* and its progeny teach us about intervention in reverse discrimination litigation.

*A. Key Twentieth-Century Developments in the Collateral Estoppel Doctrine*

*I. Martin v. Wilks: The Unexpected Rejection of the Impermissible Collateral Attack Doctrine*

In 1974, seven black individuals and the local NAACP filed a federal lawsuit alleging that the City of Birmingham, Alabama and the Jefferson County Personnel Board (“the Board”) had engaged in racially discriminatory hiring and promotion practices involving firefighters.<sup>148</sup> After a bench trial but before the judge’s ruling, the parties entered into consent decrees, which outlined race-conscious promotion and hiring goals to increase the number of black firefighters in the Birmingham Fire Department.<sup>149</sup> The district court provisionally approved the decrees, but reserved final approval until it convened a fairness hearing to consider the objections of interested parties.<sup>150</sup> Two local newspapers published a notice of the hearing, along with a general description of the decrees.<sup>151</sup>

Members of the Birmingham Firefighters Association (“BFA”)<sup>152</sup> attended the fairness hearing and filed objections to the proposed decrees as *amicus curiae*.<sup>153</sup> Following the hearing, but before the decrees were approved, the BFA and two of its members moved to intervene in the federal lawsuit, alleging that the decrees would negatively impact their rights.<sup>154</sup> The district court denied the motions as untimely and approved and entered the decrees.<sup>155</sup> The Eleventh Circuit affirmed.<sup>156</sup>

Shortly thereafter, a group of white BFA firefighters brought a separate suit against the City and the Board challenging hiring and promotion decisions

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148. *Martin v. Wilks*, 490 U.S. 755, 759 (1989).

149. *Id.*

150. *Id.*

151. *Id.*

152. The BFA is a labor association comprised of city firefighters charged with “represent[ing] the interests of the majority of the City-employed firefighters and negotiat[ing] on their behalf.” *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1515 (11th Cir. 1983). The association “filed formal objections and opposed the Decrees in oral argument on behalf of the City’s white firefighters. . . . argu[ing] that the Decrees should not be entered because of the lack of an adequate predicate of discrimination . . . and because the settlement ‘unreasonably goes too far in the scope of relief.’” Brief of Petitioners Richard Arrington, Jr. and the City of Birmingham, *Martin v. Wilks*, 490 U.S. 755 (1989) (No. 87-1668), 1988 WL 1026075 at \*5 (citations omitted).

153. *Jefferson Cnty.*, 720 F.2d at 1515.

154. *Id.*

155. *Id.*

156. *Id.* at 1519.

made pursuant to the decrees.<sup>157</sup> They alleged that the City and the Board were making decisions based on race and that “they were being denied promotions in favor of less qualified blacks in violation of federal law.”<sup>158</sup> The District Court for the Northern District of Alabama granted the defendants’ motion to dismiss,<sup>159</sup> but the appellate court reversed. Rejecting the applicability of the “doctrine of ‘impermissible collateral attack,’”<sup>160</sup> the Eleventh Circuit found that, “[b]ecause . . . [the respondents] were neither parties nor privies to the consent decrees, . . . their independent claims of unlawful discrimination [we]re not precluded.”<sup>161</sup>

In 1989, the Supreme Court affirmed the Eleventh Circuit, reiterating that “[i]t is a principle of general application . . . that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”<sup>162</sup> Although the white firefighters “knew at an early stage in the proceedings that their rights could be adversely affected [by the consent decrees],”<sup>163</sup> and although they failed to seek intervention in a timely fashion, the Court refused to preclude them from later challenging the City’s employment decisions taken pursuant to the decrees.

## 2. Section 108 of The Civil Rights Act of 1991: Congress’s Response to Wilks

Congress quickly responded to *Wilks* by enacting section 108 of the Civil Rights Act of 1991.<sup>164</sup> Under the statute, a prior decree in an employment litigation suit can bind nonparties if they have received “actual notice of the

157. *In re Birmingham Reverse Discrimination Emp’t Litig.*, 833 F.2d 1492, 1495 (11th Cir. 1987).

158. *Martin v. Wilks*, 490 U.S. 755, 760 (1989).

159. *Id.* at 760–61 (concluding that the defendants had “establish[ed] that the promotions of the black individuals . . . were in fact required by the terms of the consent decree,” and that, accordingly, the City “would not be guilty of [illegal] racial discrimination”).

160. *Id.* at 761. The impermissible collateral attack doctrine precludes litigants from “circumvent[ing] an earlier ruling of one court by filing a subsequent action in another court.” *Pratt v. Ventas, Inc.*, 365 F.3d 514 (6th Cir. 2004) (citations omitted).

161. *In re Birmingham*, 833 F.2d at 1498.

162. *Wilks*, 490 U.S. at 761 (emphasis and citations omitted).

163. *Jefferson Cnty.*, 720 F.2d at 1516. *See also* Brief of Petitioners Richard Arrington, Jr. and the City of Birmingham, *Wilks*, 490 U.S. 755 (1989) (No. 87-1668), 1988 WL 1026075 at \*3 (“The [original] lawsuits and the relief sought received local notoriety. . . . Not surprisingly, the City’s white employees were aware of the relief sought at ‘an early stage’ . . . and they monitored the litigation closely from its inception.”) (citations omitted).

164. Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071 (1991). The bill had two purposes: “(1) [to] respond to the Supreme Court’s recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and (2) [to] strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.” H.R. Rep. No. 102-40(II), at 1 (1991). *See also* Andrea Catania & Charles A. Sullivan, *Judging Judgments: The 1991 Civil Rights Act and the Lingering Ghost of Martin v. Wilks*, 57 BROOK. L. REV. 995, 1031–1032 (1992) (“The Civil Rights Act of 1991 was intended to overrule *Martin v. Wilks* insofar as employment discrimination is concerned.”).

proposed judgment or order” and have a “reasonable opportunity to present objections to such judgment or order.”<sup>165</sup> The statute also proscribes collateral challenges when a person’s “interests were adequately represented” in the original litigation.<sup>166</sup> In effect, section 108 overruled the Court’s opinion in *Wilks* by “protect[ing] employers who have made employment decisions based, in good faith, on valid consent decrees . . . from conflicting obligations which could result from collateral attacks of affirmative action plans they are bound to implement pursuant to a . . . decree.”<sup>167</sup>

*B. Ricci v. DeStefano’s Legacy: Transforming Intervention into a Requirement*

*Ricci v. DeStefano* provides a valuable opportunity to track the application of the Civil Rights Act of 1991 in the courts. At issue in *Ricci* was a civil service test for promotions in the New Haven, Connecticut fire department (“NHFD”).<sup>168</sup> In 2003, the NHFD administered an examination seeking to fill captain and lieutenant positions.<sup>169</sup> Pursuant to the City’s contract with the New Haven firefighters’ union, “applicants for lieutenant and captain positions were . . . screened using written and oral examinations, with the written exam accounting for 60 percent and the oral exam 40 percent of an applicant’s total score.”<sup>170</sup> Under the “rule of three,” the NHFD would promote one of the top three overall scorers on the exam to fill each vacancy.<sup>171</sup>

However, the overall test scores showed that white candidates had outperformed minority candidates.<sup>172</sup> If the exams were certified, no black firefighters would be promoted.<sup>173</sup> Fearful of potential liability for discrimination based on the test’s disparate impact, the City decided not to certify the results.<sup>174</sup>

In response, a group of seventeen white firefighters and one Hispanic firefighter, all of whom passed the examination, filed suit in federal court,

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165. Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071.

166. *Id.*

167. Cynthia L. Fountaine, *Due Process and the Impermissible Collateral Attack Rule in Employment Discrimination Cases: An Analysis of Section 108 of the Civil Rights Act of 1991*, 58 U. PITT. L. REV. 435, 442 (1997).

168. *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658, 2664 (2009).

169. *Id.* at 2666.

170. *Id.* at 2665.

171. *Id.* At the time the exams were administered, eight lieutenant and seven captain positions were vacant. *Id.* at 2666. Under the rule of three, the top ten scorers were eligible for promotion to lieutenant and the top nine scorers were eligible for promotion to captain. *Id.*

172. *Id.* at 2678 (“The pass rates of minorities . . . were approximately one-half the pass rates for white candidates . . .”).

173. *Id.* at 2666 (“Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. . . . Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.”).

174. *Id.* at 2671.

alleging that by discarding the test results, the City had unlawfully discriminated against them based on race.<sup>175</sup> The district court granted summary judgment for the City.<sup>176</sup> The Second Circuit affirmed, concluding that the City could not be held liable because it was “simply trying to fulfill its obligations under Title VII.”<sup>177</sup> In 2009, the Supreme Court reversed the lower courts, finding that such race-based action was impermissible “unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”<sup>178</sup> Based on the record, the Court concluded that the City could not meet this threshold standard, rendering its actions a violation of Title VII.<sup>179</sup> The case was remanded for further proceedings consistent with the Court’s opinion.<sup>180</sup>

On remand, two parties filed motions to intervene with the federal district court: a group of eight black NHFD firefighters (“the Tinney Intervenors”) and Michael Briscoe, a black firefighter who received the highest score on the oral portion of the NHFD’s lieutenant exam.<sup>181</sup> The Tinney Intervenors sought to halt promotions pending further review of the test, arguing that the exam was invalid because of its disparate impact on blacks.<sup>182</sup> However, the Supreme Court’s decision in *Ricci* required the district court to order the City to promote the *Ricci* plaintiffs.<sup>183</sup> Judge Arterton complied on November 24, 2009,<sup>184</sup> and shortly after she certified the exam results, the Tinney Intervenors moved to

175. *Ricci v. DeStefano (Ricci I)*, 554 F. Supp. 2d 142, 144 (D. Conn. 2006).

176. *Id.* at 145.

177. *Ricci v. DeStefano (Ricci II)*, 530 F.3d 87 (2d Cir. 2008) (per curiam).

178. *Ricci III*, 129 S. Ct. at 2664. Under this standard, an “employer must make a ‘strong’ showing that (1) its selection method was ‘not job related and consistent with business necessity,’ or (2) that it refused to adopt an ‘equally less valid, less-discriminatory alternative.’” *Id.* at 2701 (Ginsburg, J., dissenting).

179. *Id.* at 2681.

180. *Id.*

181. Ruling and Order on Motion to Stay at 1, *Ricci v. DeStefano (Ricci IV)*, No. 3:04-cv-01109-JBA (D. Conn. Dec. 2, 2009); Amended Complaint for Damages and Injunctive Relief ¶¶ 3, 16, 17, *Briscoe v. City of New Haven*, No. 3:09-cv-1642 (CSH) (D. Conn. Nov. 2, 2009) (“On the oral exam, [Briscoe] scored the highest of the 77 lieutenant candidates; yet because he did not score well on the written test he will be ranked 24th on the eligibility list and will not be eligible to be promoted. . . . If the oral exam were weighted [differently] . . . the plaintiff would be . . . promotable.”).

182. Ruling and Order on Motion to Stay at 1, *Ricci IV*, No. 3:04-cv-01109-JBA.

183. *Ricci III*, 129 S. Ct. at 2681 (“Petitioners are entitled to summary judgment on their Title VII claims.”); see also Ruling and Order on Motion to Stay at 3, *Ricci IV*, No. 3:04-cv-01109-JBA (“[T]he Supreme Court’s decision has effectively removed [the plaintiff’s] remedial promotions from challenge.”).

184. *Briscoe v. City of New Haven*, No. 3:09-cv-1642 (CSH), 2010 WL 2794212, at \*2 (D. Conn. July 12, 2010) (“Judge Arterton issued an order on November 24, 2009 (1) directing the entry of judgment against the City on the *Ricci* plaintiffs’ Title VII disparate-treatment claim; (2) directing the CSB to “certify the results of the 2003 promotional examinations for the positions of Lieutenant and Captain in the New Haven Fire Department,” and to “certify the promotional lists for each position derived from those examination results”; and (3) directing the City to promote 8 named individuals to the rank of lieutenant and 6 named individuals to the rank of captain.”).

withdraw their request to intervene.”<sup>185</sup> However, they were not done fighting: their counsel, Dennis Thompson, filed a disparate impact claim with the Equal Employment Opportunity Commission to challenge the validity of the City’s civil service test and to seek promotions for his clients.<sup>186</sup>

The other putative intervenor, Michael Briscoe, attempted to join the litigation on December 1, 2009, “in order to forestall any argument by the City that the resolution of his underlying claim should be dictated by the choice to file a separate suit rather than moving to intervene here.”<sup>187</sup> Two months earlier, he had filed suit against the City of New Haven challenging the same 2003 NHFD promotion exam because the decision “to weight the written test 60 percent and the oral exam 40 percent . . . had a disparate impact on African-American candidates,” in violation of Title VII.<sup>188</sup> Realizing that the *Ricci* suit and his own case might inform one another, he moved to intervene in *Ricci* to ensure his participation in all relevant proceedings.<sup>189</sup> Judge Arterton denied Briscoe’s motion to intervene as untimely on May 12, 2010.<sup>190</sup>

185. Thomas MacMillan, “*Tinney Intervenors*” *Step Down in Ricci Case*, NEW HAVEN INDEP. (Jan. 15, 2010, 7:58AM), [http://newhavenindependent.org/index.php/archives/entry/tinney\\_intervenors\\_step\\_down](http://newhavenindependent.org/index.php/archives/entry/tinney_intervenors_step_down).

186. John C. Brittain, *Does Ricci v. DeStefano Bar New Title VII Claims by Minority Firefighters in New Haven?* SCOTUSBLOG (Feb. 26, 2010, 9:26PM), <http://www.scotusblog.com/2010/02/does-ricci-v-destefano-bar-new-title-vii-claims-by-minority-firefighters-in-new-haven/> (“[T]he minority firefighters voluntarily dropped their efforts to intervene in the original lawsuit. . . . They have filed charges of employment discrimination with the Equal Employment Opportunity Commission . . .”). Thompson believes this suit is not subject to issue preclusion because the “question of test validity and disparate impact was not addressed by the high court.” MacMillan, *supra* note 185. He asserts that “the city argued that it would have been sued if it had not tossed out the promotions test[; however] [t]he issue of [test] validity has never been litigated.” *Id.* But see *Briscoe*, 2010 WL 2794212 at \*8 (“[T]he Supreme Court in *Ricci* specifically anticipated and explicitly foreclosed subsequent disparate impact suits . . . conclud[ing] that . . . no strong basis in evidence had been established to support the City’s decision to throw out the exams . . . and preclud[ing] any further expansion of that record, either on remand in *Ricci* or in some subsequent disparate impact suit . . .”).

187. Ruling and Order on Motion to Intervene at 3, *Ricci IV*, No. 3:04-cv-01109-JBA (D. Conn. May 12, 2010) (citing Memorandum in Support of Michael Briscoe’s Motion to Intervene as a Party Plaintiff at 1 *Ricci IV*, No. 3:04-cv-01109-JBA (D. Conn. Dec. 1, 2009)).

188. See Complaint for Damages and Injunctive Relief ¶¶ 1, 19, *Briscoe*, No. 3:09-cv-1642 (CSH) (D. Conn. Oct. 15, 2009).

189. In his Memorandum in Support of the Motion to Intervene, Briscoe’s counsel explained:

The City gives every indication that it will seek to use the proceedings on remand in [*Ricci*] to foreclose Mr. Briscoe’s claims. For example, after seeking a stay of the Briscoe action until the conclusion of this case, the City then sought an order in this case that appeared intended in part to address the merits of the Briscoe action. Intervention in this action may, therefore, be prudent and is authorized either by Rule 24(a) . . . or, because Mr. Briscoe’s discrimination claims arise out of one of the tests that is a subject of this action, by Rule 24(b).

Memorandum in Support of Michael Briscoe’s Motion to Intervene as a Party Plaintiff, *Ricci IV*, No. 3:04-cv-01109-JBA, at 2 (D. Conn. Dec. 1, 2009) (citations omitted).

190. Ruling and Order on Motion to Intervene, *Ricci IV*, *supra* note 187, at 1.

Pursuant to the Supreme Court's holding in *Ricci*, Briscoe's separate suit was also dismissed on April 21, 2010.<sup>191</sup> In his Memorandum of Opinion, Senior District Judge Haight of the U.S. District Court of Connecticut explained that "the Supreme Court in *Ricci* specifically anticipated and explicitly foreclosed subsequent disparate impact suits, such as Briscoe's, against the City based on the 2003 exams."<sup>192</sup> The Court concluded that "no strong basis in evidence had been established to support the City's decision to throw out the exams . . . [and] precluded any further expansion of the record, either on remand in *Ricci* or in some subsequent disparate impact suit . . . ."<sup>193</sup>

### III.

#### LESSONS ON INTERVENTION

*Ricci* and its progeny offer three valuable lessons on the impermissible collateral attack doctrine and the need to intervene in the wake of the Civil Rights Act of 1991: (1) intervention can be a meaningful and beneficial procedural device; (2) intervention may be procedurally imperative to protect minority interests; and (3) to maximize the potential value of intervention, affected minorities must move to intervene in reverse discrimination litigation as soon as the original complaint is filed.

First, *Ricci* highlights the potential of Rule 24 to serve as a tool for third party minorities. Time and again, the Supreme Court's majority opinion emphasized that a pivotal consideration in its decision-making process was the deficiency of the City's evidence. The Court noted, for instance, that if the record had shown that "the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less discriminatory alternative that served the City's needs but that the City refused to adopt," then the defendants would have provided the strong evidentiary basis necessary to justify their refusal to certify the tests.<sup>194</sup> However, because the Court found "no evidence[—]let alone the required strong basis in evidence[—]that the tests were flawed" in this manner, the City's defense was unpersuasive and ultimately unsuccessful.<sup>195</sup>

Of course, this result is relatively unsurprising given that the City had a strong incentive to avoid producing the evidence the Court deemed necessary

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191. See *Briscoe*, 2010 WL 2794212 at \*1, \*10.

192. *Id.* at \*14.

193. *Id.*

194. *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658, 2678 (2009).

195. *Id.* at 2681; see also *id.* at 2678 ("We conclude there is no strong basis in evidence to establish that the test was deficient in either of these respects."); *id.* at 2681 ("On the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results"); *id.* at 2679 ("[Respondents, the City] . . . produced no evidence to show that the 60/40 weighting was indeed arbitrary" or that "the 30/70 weighting would be an equally valid way to determine whether candidates possess the proper mix of job knowledge and situational skills to earn promotions.").

to succeed in the litigation.<sup>196</sup> From the start, the City's primary goal was to avoid subjecting itself to disparate impact liability.<sup>197</sup> It could hardly be expected then to defend itself in a reverse discrimination lawsuit by revealing the flaws of its exams or the extent of their disparate impact on minority test takers.

However, had the putative intervenors joined the litigation early and participated in discovery and at trial, the record would have undoubtedly looked different. Briscoe's complaint in the subsequent litigation suggests that he would have emphasized the arbitrary and irrational nature of the City's weighting scale, and that he would have offered evidence of other, more typical testing systems that would have "better served the goal of public safety . . . [with] much less, if any, exclusionary effect."<sup>198</sup> Similarly, based on their Motion to Intervene as Plaintiffs, the Tinney Intervenors would likely have challenged the tests,<sup>199</sup> at the very least "hir[ing] an expert or attempt[ing] an injunction forcing the City to validate or invalidate the examinations."<sup>200</sup> Adding to the record in these ways would have helped fill in the holes in the City's case and created a much more complete and nuanced picture of the problem at hand.

Granted, there is no guarantee that these contributions would have substantively affected the outcome of *Ricci*. However, by failing to intervene, Briscoe, Tinney, and other black firefighters forfeited their opportunity to try. *Ricci* sends a clear reminder that, as in *Bakke* and *Grutter*, defendant public institutions cannot be relied on to advance or protect minority interests with unending commitment, particularly when those interests conflict with the City's. Rule 24(a)(2), however, opens an important doorway into the litigation.

Second, the recent ruling in *Briscoe* suggests that intervention may actually be procedurally imperative for minorities affected by reverse discrimination litigation. Therefore, heeding Holley's advice of abandoning FRCP 24(a)(2) as a procedural device could translate into being shut out of court altogether.<sup>201</sup> This was the case in *Briscoe*, where a black firefighter

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196. See *id.* at 2701 (Ginsburg, J., dissenting) (opining that the majority's strong-basis-in-evidence standard essentially required an employer to "establish a 'provable, actual violation' against itself") (citations omitted).

197. *Id.* at 2671 (noting that the City chose not to certify the exam results based on its belief that doing so would have violated Title VII's disparate-impact prohibition and therefore left the City vulnerable to lawsuits).

198. Amended Complaint for Damages and Injunctive Relief, *supra* note 181, ¶¶ 7, 18.

199. Many firefighters questioned the validity of the tests and were opposed to the City certifying the results. "They described the test questions as outdated or not relevant to firefighting practices in New Haven." *Ricci III*, 129 S. Ct. at 2667. Gary Tinney, for instance, "stated that source materials [for the exams] 'came out of New York . . . [although t]heir makeup of their city and everything is totally different than ours.'" *Id.* (citations omitted).

200. Motion to Intervene as Plaintiffs at 16, *Ricci IV*, No. 3:04-cv-01109-JBA (D. Conn. Nov. 16, 2009), 2009 WL 5802561.

201. Holley, *supra* note 3, at 109 ("minority students should abandon further efforts at intervention").

simply stood by “while the case progressed to the Supreme Court and back, before seeking to assert his interest, through filing [a new, separate] lawsuit.”<sup>202</sup> In a strongly worded opinion, the district court dismissed the case, refusing to allow Briscoe to “circumvent [the *Ricci*] decision by filing another lawsuit with respect to the same exams.”<sup>203</sup>

Briscoe relied on the familiar argument from *Wilks* that he could not be bound by a decision in a case to which he was not a party.<sup>204</sup> However, his argument was unconvincing for two reasons. First, the high court had already anticipated and foreclosed this type of follow-up disparate impact suit, and the lower courts were bound by that decision.<sup>205</sup> Second, the logic from *Wilks* had been replaced by the new standard set forth in section 108 of the Civil Rights Act of 1991. Although the Act only governs employment practices implemented pursuant to “litigated or consent judgment[s] or order[s]” resolving employment discrimination claims, Judge Haight’s opinion in *Briscoe* suggests that courts may actually be applying the Act’s standards more broadly.<sup>206</sup> Judge Haight noted that Briscoe “was aware of the pendency of the *Ricci* litigation, and knew that its result would directly impact him in that it would determine whether the exam results would be certified and who stood to be promoted as a result.”<sup>207</sup> Consequently, if he wanted to advance new arguments or protect his unique interests, he was required to intervene.<sup>208</sup>

In an ironic twist, section 108 transformed from a shield that helped minorities retain compensation from employment discrimination suits into a privileged plaintiff’s sword that prevents minorities from challenging the results of reverse discrimination litigation. To avoid that fate in the future, *Briscoe* cautions against sitting on the sidelines and suggests that intervention should be considered a procedural requirement for qualifying third parties interested in protecting their rights.

Third, *Ricci* and its progeny create a strong incentive for interested third parties to intervene early in pending litigation. After all, as Briscoe and the Tinney Intervenors’ stories demonstrate, failing to do so could have serious

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202. *Briscoe v. City of New Haven*, No. 3:09-cv-1642 (CSH), 2010 WL 2794212, at \*9 (D. Conn. July 12, 2010).

203. *Id.* at \*8.

204. *Id.*

205. *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658, 2681 (2009) (“If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.”); *Briscoe*, 2010 WL 2794212, at \*8. (“[T]his [district] court is bound by the decisions of the high court.”).

206. Civil Rights Act of 1991, Pub. L. No. 102-166 § 108, 105 Stat. 1071. The Act prohibits collateral attack where a party had (a) actual notice that a judgment might adversely affect his interests and (b) a reasonable opportunity to present objections to the judgment. *Id.*

207. *Briscoe*, 2010 WL 2794212, at \*9.

208. *See id.*

consequences. The Court took an unusual stance in *Ricci*: rather than remanding for further evidentiary proceedings, it independently determined that the fact-based strong-basis-in-evidence standard had not been met and ordered summary judgment for the plaintiffs.<sup>209</sup> Black firefighters moved to intervene only after the Supreme Court had ruled that “[i]f, after it certifies the test results, the City faces a disparate-impact suit . . . it should . . . avoid . . . liability.”<sup>210</sup>

The intervenors wrongly assumed that they could not join the litigation earlier and, as a result, they never joined it at all.<sup>211</sup> But the district courts’ rulings following the Supreme Court’s decision indicate that the standard for intervention is more relaxed than the putative intervenors envisioned.<sup>212</sup> Intervention is appropriate where a party has “actual or constructive notice of the litigation,”<sup>213</sup> “kn[ows] that its result would directly impact him,”<sup>214</sup> and “wishes to advance or emphasize an argument different than that relied upon by the [original parties]” or believes the original parties’ interests “diverged from his own.”<sup>215</sup> Unfortunately, by the time the minority firefighters moved to intervene, it was too late to influence the evidentiary record or the outcome of the case; the Court had already ruled for the *Ricci* plaintiffs and foreclosed future disparate impact suits.<sup>216</sup>

*Ricci* sends a clear message that nonparty minorities should take advantage of liberal procedural rules to join litigation in its initial stages when there is still an opportunity to enter evidence into the record and frame the discussion before the court. For modern civil rights activists and defenders of

209. *Ricci III*, 129 S. Ct. at 2681. As Justice Ginsburg notes in her dissent, typically, when the “Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance.” *Id.* at 2702 (citations omitted). In *Ricci*, however, the majority issued a preemptory ruling, thereby “denying [the City] any chance to satisfy the newly announced strong-basis-in-evidence standard.” *Id.*

210. *Id.* at 2681.

211. See Motion to Intervene as Plaintiffs, *supra* note 200, at 7 (“[I]t was only when the City recently publicly announced its intention to certify the examinations and promote Plaintiffs that the Intervenors even had *standing* in which to intervene in any disparate impact lawsuit. . . . [They] had no basis prior to the present in which to intervene. No direct adverse action had befallen them.”); Ruling and Order on Motion to Intervene, *supra* note 187, at 7 (“[B]ecause the examination results were kept under seal and protective order, [Briscoe] did not learn his score until ‘recently,’ and thus ‘had no way to know that he had been harmed by the City’s weighting scheme—or even that he was not one of the African American firefighters who would be promoted from the list that the [P]laintiffs in this action want to certify.’”).

212. See Ruling and Order on Motion to Intervene, *supra* note 187, at 4–6, 9–17 (describing the standards for timely intervention).

213. *Id.* at 10 (citations omitted).

214. *Briscoe v. City of New Haven*, No. 3:09-cv-1642 (CSH), 2010 WL 2794212, at \*9 (D. Conn. July 12, 2010).

215. *Id.*

216. This problem has been a recurring theme. Recall that in *Bakke*, a similar situation occurred: minority students only sought to intervene after the University had already stipulated that it could not meet its burden of proof. And by then, “even if the request for intervention had been granted, the advantages of intervention would have been limited because of the state of the record and other litigation decisions already made by the University.” Jones, *supra* note 3, at 80.

minority interests, *Ricci* must be a powerful reminder not only of the importance of intervention as a procedural device, but also of the need to intervene sooner rather than later.

#### CONCLUSION

Regardless of where one stands in the debate on the efficacy of intervention in the Supreme Court's affirmative action jurisprudence, in light of recent case law and legislation, intervention must be recognized as an important—indeed, an imperative—weapon in the procedural toolbox of minorities affected by reverse discrimination litigation. According to *Ricci*, when such cases are filed, the choice boils down to either intervening in a timely fashion or risking being precluded from raising related claims in pending or future litigation.

I hope that this Comment informs and inspires practitioners and defenders of minority rights to choose intervention. It is no longer adequate for those concerned with racial justice simply to wait for cases with the perfect plaintiffs with the perfect facts. With no end in sight to the growing trend in reverse discrimination lawsuits,<sup>217</sup> legal activists must face the reality that cases affecting communities of color are being filed. To protect minority rights, attorneys and activists must use procedural tools like intervention to join in these proceedings whenever feasible. Although resources are often very limited, particularly among civil rights and other public interest organizations committed to racial justice, it is critical to begin dedicating time and funding to intervention efforts. With so much at stake, insisting on being in the courtroom must become an obvious and fundamental demand.

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217. See, e.g., *Fisher v. Univ. of Tex. at Austin*, No. 09-50822, 2011 WL 135813 (5th Cir. Jan. 18, 2011); *Finch v. Peterson*, 622 F.3d 725 (7th Cir. 2010); *H.B. Rowe Co., Inc. v. Tippet*, 615 F.3d 233 (4th Cir. 2010).

