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## **Affirmative Action After Grutter and Gratz**

Mark W. Cordes

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# Affirmative Action After *Grutter* and *Gratz*

MARK W. CORDES\*

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## INTRODUCTION

Going into last term, affirmative action in university admissions appeared to be in some trouble. The emergence of a conservative Supreme

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Court majority on the issue of affirmative action indicated that all racial classifications, even those designed to benefit traditionally disadvantaged groups, would be subject to strict scrutiny.<sup>1</sup> More importantly, recognition of educational diversity as a compelling state interest, the foundation on which university affirmative action was first approved in *Regents of the University of California v. Bakke*,<sup>2</sup> had arguably been undermined by recent Supreme Court decisions.<sup>3</sup> As a result, several federal circuits had declared race-conscious admission practices unconstitutional, saying that *Bakke*, tenuous to begin with, had been effectively overruled.<sup>4</sup> Other circuits disagreed, but in a more cautious manner, saying that *Bakke* remained binding precedent until the Supreme Court itself explicitly said otherwise.<sup>5</sup>

It was therefore with some trepidation that supporters of affirmative action, and with some hope that its detractors, anticipated the Court's dual decisions in *Grutter v. Bollinger*<sup>6</sup> and *Gratz v. Bollinger*,<sup>7</sup> involving challenges to race-conscious admission practices at the University of Michigan's law school and undergraduate college. To the surprise of many, the Supreme Court reaffirmed the basic holding of *Bakke*, that institutions of higher education have a compelling interest in educational diversity, justifying narrowly tailored race-conscious admission programs.<sup>8</sup> Although the final result was a split decision, with the Court approving the law school's admission program in *Grutter* but striking down the undergraduate admissions program in *Gratz*, there is no doubt that taken together *Grutter* and *Gratz* signify a big win for affirmative action. Not only did the Court recognize that schools have a compelling interest in educational diversity that permits consideration of race in admissions decisions, but schools can seek a critical mass in doing so.<sup>9</sup> At the same

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1. See *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

2. 438 U.S. 265 (1978).

3. Language in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) suggested that the only state interest compelling enough to meet strict scrutiny was efforts to remedy identified, past discrimination. See *id.* at 499-500. Moreover, many people saw the Court's decision in *Adarand Contractors v. Peña*, 515 U.S. 200 (1995) as vindicating Justice O'Connor's dissent in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), in which four justices rejected diversity as a compelling interest in the issuance of broadcasting licenses.

4. See *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1249 (11th Cir. 2001); *Hopwood v. Texas*, 78 F.3d 932, 944-45 (5th Cir. 1996).

5. See *Grutter v. Bollinger*, 288 F.3d 732, 743-44 (6th Cir. 2002); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1189, 2000 (9th Cir. 2000).

6. 539 U.S. 306 (2003).

7. 539 U.S. 244 (2003).

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

9. See *id.* at 335-36.

time, however, the Court sent a clear message in *Gratz* that the use of race must be narrowly tailored to the state's interest in educational diversity, and not all uses of race will pass constitutional muster.

After *Grutter* and *Gratz*, the question is no longer whether institutions of higher education can engage in race-conscious admission practices, but rather what type of race-conscious practices are constitutionally permissible. In this regard the key requirement that emerges from *Grutter* and *Gratz* is the need for individualized review of applicants whenever race is used as a factor in decisions.<sup>10</sup> The Court held the law school admissions program in *Grutter* met this standard, emphasizing that applicants were considered as individuals, with race being only one of a variety of factors.<sup>11</sup> In contrast, the Court held the undergraduate program unconstitutional, stating the mechanical assignment of points based on race was inconsistent with the individualized review mandated by the Constitution when race is considered.<sup>12</sup>

As might be expected, *Grutter* and *Gratz* did not clarify all the questions that surround race-conscious admissions programs, and even raised a few new questions of their own. Yet from a big picture perspective, the Court succeeded fairly well in giving direction to colleges and universities on what can and cannot be done. Most fundamentally, schools can use race as a plus factor in admissions as long as it is only one component of a broader diversity sought by the school, is considered as part of an individualized evaluation of applicants, and is not the defining feature of an application. Importantly, race can be given more weight than other "soft variables" as long as it does not become the defining feature of an application, and schools can seek to attain a critical mass of underrepresented minorities as long as it does not have the rigidity of a quota. Conversely, schools cannot seek racial diversity for its own sake or make race the only soft variable, cannot automatically allocate points based on racial status, cannot impose racial quotas, and cannot have separate treatment of minority applicants in the admissions process.

This article will examine the state of race-conscious admissions program at institutions of higher education after *Grutter* and *Gratz*. Part

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10. When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.  
*Id.* at 336.

11. See *Grutter v. Bollinger*, 539 U.S. 306, 336-37 (2003).

12. See *Gratz v. Bollinger*, 539 U.S. 244, 269-274 (2003).

one first briefly reviews the Court's affirmative action jurisprudence prior to *Grutter* and *Gratz*, examining the *Bakke* decision, the Supreme Court affirmative action decisions between *Bakke* and *Grutter*, and the recent split in lower court decisions on the continuing viability of race-conscious admissions. Part two will then examine the *Grutter* and *Gratz* decisions themselves.

Part three will then discuss the big picture of race-conscious admissions programs. Section A will analyze the general parameters established in *Grutter* and *Gratz* in terms of what is clearly permitted and clearly prohibited under the decisions. Part B will then discuss three lingering questions after the decisions: when might permissible goals for a critical mass become impermissible quotas, how much weight can be given to race as a factor in admissions, and to what extent can schools treat classes of underrepresented minorities differently.

Finally, part four of the article will briefly examine the most curious, and potentially one of the most significant aspects of *Grutter*: the Court's requirement that race-conscious admissions have a logical endpoint to be constitutional and the Court's expectation that race-conscious admissions will no longer be necessary in twenty-five years. The actual meaning of this twenty-five year sunset discussion, made at the very end of the opinion, is less than clear, with Justice Ginsburg suggesting it expressed only a hope by the Court while Justice Thomas interpreted it as making race-conscious admissions unconstitutional in twenty-five years. This article will argue that the truth falls somewhere between the two, and that the Court's discussion is best seen not as a sunset on the constitutionality of race-conscious admissions, but rather as a sunset on the precedential value of *Grutter* itself.

## I. BACKGROUND

### A. BAKKE

The Supreme Court first addressed the issue of affirmative action in university admissions programs in *Regents of the University of California v. Bakke*,<sup>13</sup> a decision that would have a profound impact on the direction of affirmative action in ensuing years. In *Bakke* the Court reviewed the constitutionality of a two-track admissions system used to fill 100 available seats at the University of California at Davis medical school. Eighty-four seats were filled by a regular admissions program, while sixteen seats were

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13. 438 U.S. 265 (1978).

filled by a special admissions program designed to increase the number of "disadvantaged" students in each class.<sup>14</sup> Minority applications were typically included as part of the special admissions program, and, although white applicants who considered themselves disadvantaged could be considered under the program, only minority applicants were admitted through the special admissions program during the years reviewed by the Court.<sup>15</sup> Applicants in the special admissions program went through the same review process as applicants in the regular admissions program, but those admitted through special admissions had lower test scores and grade point averages than those admitted through the regular admissions process.<sup>16</sup> Allan Bakke, a white male who was twice rejected for admission, challenged the two-track admissions process as violating both the Equal Protection Clause and Title VI of the Civil Rights Act of 1965.<sup>17</sup>

The Supreme Court, in a deeply divided decision that yielded no majority opinion, found that the medical school's program was unconstitutional, but held that race could still be a factor in admissions decisions. Justice Powell announced the judgment of the Court in an opinion that has come to represent the holding of the Court, yet in which no other justice joined.<sup>18</sup> Instead, four justices, for separate reasons, concurred in the judgment that the two-track system was invalid,<sup>19</sup> while four other members of the Court, for separate reasons, concurred that race could be a factor in admissions decisions.<sup>20</sup> Justice Powell's opinion came to represent *Bakke*, but the failure of any other justice to agree with his analysis presented on-going concerns about *Bakke's* precedential strength.

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14. *Id.* at 273-74 (Powell, J.).

15. *Id.* at 275-76 (Powell, J.).

16. Under the regular admissions program, any applicant with a GPA below 2.5 was summarily rejected. Overall about one in six applicants were invited for a personal interview, and then applicants were rated on a scale of 1 to 100 by members of the admissions committee, scoring applicants on a variety of factors, including GPA, GPA in science courses, test scores, letters of recommendation and extracurricular activities. The full committee then reviewed the ratings and made offers of recommendation. Under the special admissions process there was no automatic cut-off, and about one in five applicants had an interview. The special admissions committee then assigned a rating score and the top applicants were referred to the general admissions committee. These applicants were not compared to those ranked under the regular admissions applicants for deficiencies in their academic record. *See id.* at 273-75 (Powell, J.).

17. *Id.* at 275-78.

18. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978) (Powell, J.).

19. *Id.* at 408 (Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ).

20. Justice Brennan wrote a concurring opinion, joined by Justices White, Marshall, and Blackmun, which would have found the medical school's two track admission program constitutional. *Id.* at 324. Justices White, Marshall, and Blackmun each also wrote separate opinions.

Justice Powell began his constitutional review<sup>21</sup> of the Davis admissions program by noting that the special admissions program clearly involved a racial classification and thus was subject to strict scrutiny.<sup>22</sup> He rejected an argument that strict scrutiny should not apply when a racial preference is benign and designed to help traditionally disadvantaged groups, stating "that the guarantee of equal protections to *all* persons" prohibits affording different degrees of protection based upon race.<sup>23</sup> He further noted that any attempt to vary judicial scrutiny depending upon the "preferred" status of a particular racial or ethnic minority presented "intracable" problems, including the transitory nature of any analysis, concerns that preferential programs might enforce social stereotypes, and the unfairness of forcing people to remedy problems not of their own making.<sup>24</sup> To the extent race had been a permissible classification, as in the school desegregation cases, it was only to remedy clearly established constitutional violations, which had not been shown to exist in this case.<sup>25</sup> For these reasons strict scrutiny was to apply.

Having established strict scrutiny as the appropriate standard of review, Powell next addressed whether a compelling interest existed to justify the racial classification. The school said the special admissions program served four purported purposes:

- (i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools;' . . . (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining educational benefits that flow from an ethnically diverse student body.<sup>26</sup>

Powell rejected the first three as insufficient. He stated that the first rationale amounted to nothing more than preferring race for race sake, which was clearly unconstitutional.<sup>27</sup> The second rationale, concerning

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21. Before reviewing the constitutional question, Justice Powell briefly discussed the Title VI issue, concluding that Title VI only prohibits actions that would violate the Equal Protection Clause. *See id.* at 281-87.

22. *Id.* at 290-91.

23. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294-95 (1978).

24. *See id.* at 295-99.

25. *See id.* at 300.

26. *Id.* at 305-06.

27. *Id.* at 307.



remedying past discrimination, was also insufficient because it concerned societal discrimination in general, rather than remedying a specific discriminatory act. Powell said that the use of racial classifications to remedy past discrimination can only occur pursuant to "judicial, legislative, or administrative findings" of discrimination. The existence of specific violations provides a substantial interest in vindicating the rights of those harmed, and also permits oversight to ensure minimal harm is done to innocent parties.<sup>28</sup> In contrast, Powell characterized the purpose of addressing the effects of societal discrimination as "an amorphous concept of injury" insufficient to justify racial classifications.<sup>29</sup>

Powell also rejected the school's asserted interest in increasing the number of physicians in underserved communities as not being adequately supported in the record. He assumed that a state might in some situations have a compelling interest in facilitating health care to such communities, but there was no evidence the special admissions program was designed for that purpose.<sup>30</sup> The university had acknowledged that there was no guarantee that minority doctors would serve such communities. Moreover, more precise ways existed to ensure such increased representation in minority communities, including using an expressed interest in serving underserved communities as a factor in the admissions process.<sup>31</sup>

However, Justice Powell, in what is perhaps the heart of his opinion, said that the school's fourth asserted interest, "to obtain the educational benefits" of a diverse student body, was a compelling interest sufficient to justify race as a factor in admissions decisions.<sup>32</sup> In recognizing this, Powell stressed that universities have academic freedom and related First Amendment interests in selecting their own student bodies.<sup>33</sup> He noted that the intellectual engagement of ideas central to higher education is commonly believed to be promoted by a diverse student body. He also recognized the benefits of exposing our nation's leaders and future

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28. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-08 (1978).

29. *Id.* at 307.

30. *Id.* at 310.

31. Justice Powell quoted the California Supreme Court, which noted that a more precise way to use medical school admissions to increase the number of physicians would be to identify, through the admissions process, applicants that had demonstrated a concern for such groups in the past and who indicate an intention to serve such communities upon graduation. *See id.* at 310-11.

32. *See id.* at 311-14.

33. "Academic freedom though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978).

physicians to a wide range of ideas and that a diverse student body would bring "experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates."<sup>34</sup>

However, although Justice Powell recognized that educational diversity is a compelling state interest that might justify racial classifications in admissions, he found that the special admissions program was an inappropriate means of furthering that interest. The two-track system indicated that the university misunderstood the nature of the compelling diversity interest, which, according to Powell was

not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.<sup>35</sup>

Powell then discussed the Harvard admissions program as an example of a program that properly used race as a factor in developing a diverse student body. The Harvard program did not set "target-quotas" for the number of racial minorities, or any other identified group, but instead considered race as one of a number of factors in admissions. As such, an applicant's race may "tip the balance" in some decisions, "just as geographic origin or life on a farm may tip the balance" in decisions. The Harvard admissions process was cognizant of having more than a "token number" of minorities, but otherwise did not set minimum numbers for any group, instead seeking a distribution among various types of admissible students.<sup>36</sup>

Powell essentially rubber-stamped the Harvard admissions program as being constitutional. In such a program race is a "plus factor," but is considered along with various other factors in a way that does not insulate the applicant from comparison with other applicants for available seats.<sup>37</sup> Powell noted that such an approach "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration,

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34. See *id.* at 314.

35. *Id.* at 315.

36. *Id.* at 316-17.

37. *Id.* at 317.

although not necessarily according them the same weight.”<sup>38</sup> The clear implication is that race can be weighed more heavily than other factors, but it can still only be one component of a broader examination of diversity factors designed to attain an educationally diverse student body.

Therefore, Justice Powell’s opinion struck down the special admissions program as constituting an unconstitutional quota, but at the same time reversed the California Supreme Court’s decision to the extent it enjoined the medical school from considering race as a factor, holding that race could be used as a factor in admissions decisions.<sup>39</sup> As noted above, no other justice joined Justice Powell’s opinion. Four justices, in an opinion by Justice Stevens, would have held the special admissions program illegal under Title VI of the Civil Rights Act of 1964.<sup>40</sup> That statute states that no person shall be excluded from participation in any program receiving federal financial assistance because of race. Justice Stevens stated that Bakke was denied admission because of his race to a university receiving federal assistance, and therefore the “plain language” of the statute shows a violation. He further noted that nothing in the statute’s legislative history suggested any interpretation other than what the plain language stated - a person cannot be excluded from a federally funded program on account of race. Four other justices, Brennan, White, Marshall, and Blackmun, wrote opinions stating that race may be used in university admission decisions and that the medical school’s special admissions program was a constitutional means of using race.<sup>41</sup> They viewed the special admissions program as remedial in nature, designed to address past societal discrimination against racial minorities, and thus could be justified on that basis.<sup>42</sup> Importantly, these justices rejected the use of strict scrutiny to test racial classifications designed to benefit racial minorities, instead arguing that intermediate scrutiny should apply.<sup>43</sup> These four justices therefore supported Justice Powell’s position that race can be a factor in university admissions decisions, but did not address whether there was a compelling state interest in educational diversity.

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38. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978).

39. *See id.* at 319-20.

40. *Id.* at 421 (Stevens, J., joined by Burger, C.J., and Stewart & Rehnquist, JJ.).

41. *See id.* at 324-79 (Brennan, J.); 379-87 (White, J.), 387-402 (Marshall, J.); 402-08 (Blackmun, J.).

42. *See id.* at 362-69 (Brennan, J.).

43. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, J.). Justice Brennan concluded that the proper level of scrutiny should be the same as that used in gender discrimination cases, which would require that “racial classifications designed to further remedial purposes ‘must serve important governmental objectives and must be substantially related to achievement of those objectives.’” *Id.* (citations omitted).

The highly fractured nature of the *Bakke* decision created concerns about its precedential value. Most problematic was that, although Justice Powell announced the judgment of the Court, no other justice joined his opinion, nor did any other justice even address whether educational diversity constituted a compelling state interest. Despite these limitations, Justice Powell's opinion soon came to represent the narrowest decisional basis and therefore the essential holding of the Court. It stood for the proposition that although racial quotas are unconstitutional, race could be used as a plus factor in admissions decisions designed to create an educationally diverse student body. Race could not be the sole factor in seeking diversity, but it could be given more weight than other factors, if needed. Importantly, some "attention could be paid to the numbers" to ensure a critical mass of minority students. In response, a number of colleges and universities structured their own affirmative action programs on these principles.

#### B. OTHER AFFIRMATIVE ACTION CASES

The Supreme Court did not address another affirmative action case involving higher education until the *Grutter* and *Gratz* decisions. However, in a series of five cases it did address affirmative action programs in other contexts. These cases were characterized by continued deep divisions within the Court, disagreements about the level of scrutiny to be applied, and uncertainty about what state interests could justify affirmative action programs. In these cases the Court began to more thoroughly address the constitutional parameters of affirmative action programs, and in particular the state interests sufficient to justify such programs. Although *Bakke* remained untouched, and at times even affirmed, the Court became increasingly restrictive when reviewing affirmative action programs. The Court's increasing scrutiny in this area led to concerns that the already tenuous basis of *Bakke* was eroded.

The first two cases, *Fullilove v. Klutznick*<sup>44</sup> and *Wygant v. Jackson Board of Education*<sup>45</sup>, did little to resolve the confusion surrounding the constitutionality of affirmative action programs. In *Fullilove* the Court upheld the constitutionality of a federal grant program for state and local government public works that required that ten percent of the monies go to minority businesses,<sup>46</sup> but failed to agree on a rationale. Three justices

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44. 448 U.S. 448 (1980).

45. 476 U.S. 267 (1986).

46. The requirement was imposed as part of the Public Works Employment Act of

found the program valid under intermediate scrutiny,<sup>47</sup> three found it invalid under strict scrutiny,<sup>48</sup> and three justices, in an opinion that announced the judgment of the Court, held it constitutional under a analysis that failed to specify a level of scrutiny but spoke both in terms of deference to Congress and the need for "a most searching examination."<sup>49</sup> Despite this confusion, *Fullilove* affirmed what *Bakke* had established: that at least in some circumstances affirmative action programs were constitutional. The decision also appeared to establish some greater deference to congressional use of race-conscious programs than might be allowed by states, and recognized that addressing the present effects of past discrimination might be a sufficient interest to support such programs.

In the next case, *Wygant*, the Court held that a school district's race-conscious layoff policy was unconstitutional,<sup>50</sup> but again failed to yield a majority opinion. Four justices applied strict scrutiny<sup>51</sup> and said the district's asserted interest of remedying past societal discrimination by providing minority teachers as role models was insufficient, in part because there was no logical stopping point for that type of remedial action.<sup>52</sup> The

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1977, a four billion dollar appropriation bill for federal public works grants to state and local governments. The Act stated that "[e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under this Act . . . unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." *Fullilove*, 448 U.S. at 454.

47. See *id.* at 519 (Marshall, J., concurring in the judgment). Justice Marshall's opinion, joined by Justices Brennan and Blackmun, essentially reiterated Justice Brennan's analysis from *Bakke* on why intermediate scrutiny was a more appropriate standard of review than either strict scrutiny or mere rationality when affirmative action programs are involved. See *id.* at 517-19. He concluded that judged under that standard the case was not even close, finding that "remedying these present effects of past racial discrimination is a sufficiently important governmental interest to justify the use of racial classifications." *Id.* at 520.

48. See *id.* at 522-32 (Stewart, J., dissenting); *id.* at 532-55 (Stevens, J., dissenting).

49. See *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (Burger, C.J.).

50. The policy adopted by the school board provided that in the event of layoffs teachers with the most seniority would be retained, but in no event could the percentage of minority teachers laid off exceed the percentage of minority teachers in the district. The policy resulted in several white teachers being laid off while several minority teachers, with less seniority, were retained. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 270-71 (1986).

51. *Id.* at 273. In saying that the layoff policy was subject to strict scrutiny, the plurality stated that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Id.*

52. As he did in *Bakke*, Justice Powell labeled societal discrimination "too amorphous a basis for imposing a racially classified remedy," *id.* at 276, stating that prior caselaw required actual discrimination by the governmental unit in question. *Id.* at 274. The plurality also stated:

plurality also noted that the role model theory, if tied to the percentage of minority students in the district, would require a "year-to-year calibration" that would lack a logical end point.<sup>53</sup> The plurality also noted that even if a compelling interest existed, the layoff policy was an unconstitutional means of furthering the interest, since it placed the full remedial burden on just a few people,<sup>54</sup> a point Justice White's opinion concurring in the judgment agreed with.<sup>55</sup> Four justices dissented, arguing that the record indicated the policy was in response to past discriminatory practices within the district and the Court should defer to the judgments made by the district in that context.<sup>56</sup> Therefore, the only clear holding of *Wygant* was that layoffs are an inappropriate way of achieving a diverse work force.

The Court's next affirmative action case, *City of Richmond v. J.A. Croson Co.*,<sup>57</sup> again reflected a highly divided Court, but for the first time a majority was formed on at least several important issues. In *Croson* the Court held that a city ordinance that required prime contractors awarded city contracts to subcontract at least thirty percent of the work to minority owned businesses was unconstitutional. Justice O'Connor wrote an opinion which, while not gaining a majority as to all its analysis, did have a majority as to why the program was invalid, with five justices holding that the program suffered several constitutional defects. First, the majority held that a "generalized assertion" of past societal discrimination in the construction industry was insufficient to justify the thirty percent set-aside, since it failed to provide adequate guidance as to the scope of any remedy.<sup>58</sup> Instead, any race-conscious remedy needed to be predicated

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No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

*Id.* at 276.

53. *See id.* at 275.

54. The plurality stated that hiring preferences might be a proper means of remedying past discrimination, since "the burden to be borne by innocent individuals is diffused," but layoffs place the entire burden on a few innocent people. *See id.* at 282-84.

55. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 294-95 (1986).

56. *See id.* at 295-312 (Marshall, J., joined by Brennan & Blackmun, JJ.). Justice Stevens also wrote a dissenting opinion, primarily emphasizing "that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty." *See id.* at 315.

57. 488 U.S. 469 (1989).

58. *See id.* at 497. The Court said such a generalized assertion of past discrimination in the construction industry suffered the same defect as the role model theory in *Wygant*, in that it failed to provide any logical stopping point. *Id.*

upon a showing of discrimination in the Richmond construction industry, which the city failed to establish.<sup>59</sup> The Court said that “[n]one of these ‘findings,’ singly or together,” were sufficient to justify a race based remedy.<sup>60</sup> It emphasized that to impose a race-based remedy there must be “identified discrimination in the Richmond construction industry,” which the city failed to establish.<sup>61</sup> Second, the majority stated that even if past discrimination had been established, the thirty percent set-aside was not narrowly tailored, in part because race-neutral alternatives had not been explored<sup>62</sup> and because the thirty percent set-aside represented more of a quota aimed at racial balancing than an attempt to rectify any effects of past discrimination.<sup>63</sup> The Court suggested that an individualized procedure assessing whether a particular minority owned business that would benefit from the set-aside had itself suffered from previous discrimination would be more proper.<sup>64</sup>

Only three other justices, however, joined that portion of O’Conner’s opinion establishing strict scrutiny review for any racial classification program, including affirmative action programs.<sup>65</sup> The three dissenting justices again argued for intermediate scrutiny for affirmative action programs,<sup>66</sup> while Justice Stevens’ concurrence declined to elaborate on the proper level of scrutiny.<sup>67</sup> However, Justice Scalia’s concurrence clearly

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59. See *id.* at 499-500. The District Court had relied on five “predicate facts” to conclude the thirty percent set-aside was justified:

(1) the ordinance declare[d] itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city’s population; (4) there were very few minority contractors in local and state contractors’ associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

*Id.* at 499.

60. *Id.* at 500.

61. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

62. See *id.* at 507. The Court noted that many of the barriers to minorities successfully competing in the construction industry were financial, yet the city had not considered race-neutral alternatives such as a program providing financial assistance to small firms. See *id.*

63. See *id.* at 507-08.

64. See *id.* at 508.

65. See *id.* at 493-98 (O’Connor, J.). Chief Justice Rehnquist and Justices White and Kennedy joined this portion of O’Connor’s opinion.

66. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 535-36 (1989) (Marshall, J., dissenting, joined by Brennan & Blackmun, JJ.).

67. See *id.* at 514-15 (Stevens, J., concurring) (“instead of engaging in a debate over the proper standard of review to apply in affirmative action litigation, I believe it is

articulated a standard of strict scrutiny,<sup>68</sup> making five justices articulating that standard. A portion of Justice O'Connor's opinion, joined by two justices, also suggested that section five of the Fourteenth Amendment gave Congress greater power to redress past societal discrimination than states had,<sup>69</sup> a position rejected by the other justices.<sup>70</sup>

Despite the continued divisions on the Court evident in *Croson*, a majority emerged for the first time on some important issues. First, a majority held that general assertions of addressing past societal discrimination in the construction industry was an insufficient basis to support a race-conscious set-aside program, at least at the state level. Second, when Justice Scalia is counted, for the first time five justices clearly stated that strict scrutiny applies to any racial classification, even those intended to benefit racial minorities. Third, the decision pointed to allowing Congress greater leeway in using affirmative action programs to address past discrimination than would be given to states. Although only three justices specifically stated this, the three dissenting justices would apply a more lenient standard to both state and federal governments. Thus, six justices appeared willing to accord federal affirmative action programs more leeway than the majority in *Croson* imposed on the state program there.

This distinction between state and federal affirmative action programs became the focus of analysis in the Court's next decision, *Metro Broadcasting, Inc. v. FCC*.<sup>71</sup> That case concerned the constitutionality of two FCC policies that gave preferences to racial minorities in awarding licenses for radio stations.<sup>72</sup> The Court, in a 5-4 decision, held the preference policies constitutional. In doing so, it built upon *Fullilove* and

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more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment").

68. See *id.* at 520 (Scalia, J., concurring in the judgment). Justice Scalia began his opinion concurring in the judgment by saying "I agree with much of the Court's opinion, and, in particular, with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'" *Id.*

69. See *id.* at 489-93 (O'Connor, J., joined by Rehnquist, C.J., & White, J.).

70. See *id.* at 546-58 (Marshall, J., dissenting). On the other hand, Justice Kennedy agreed with Justice O'Connor's summary of prior cases on the issue, but declined to join that portion of her opinion because the issue was not before the Court. See *id.* at 518-20.

71. 497 U.S. 547 (1990).

72. In a policy statement, the FCC said it would consider minority ownership as a "plus" factor when issuing media licenses. It also said it would allow "a broadcaster whose license [was] designated for a revocation hearing" to sell the license to a minority owned company, an exception to the rule prohibiting such sale pending the outcome of the hearing. See *id.* at 556-58.



*Croson* to state that different levels of review apply to federal and state affirmative action programs.<sup>73</sup> The Court then proceeded to state a level of scrutiny typically associated with intermediate scrutiny, stating that a federal affirmative action program will be constitutional if the racial preferences serve important government objectives and are substantially related to those objectives.<sup>74</sup> This, of course, is the standard argued for in several dissents,<sup>75</sup> and in *Metro Broadcasting* a majority emerged for that standard, at least when reviewing federal programs. The Court then proceeded to find the test easily met, stating that the preference policies served important objectives of diversity in programming,<sup>76</sup> and substantially related to that purpose considering the scarcity of broadcast frequency and the barriers historically encountered by minorities in entering the broadcast industry.<sup>77</sup>

Four justices dissented, arguing that strict rather than intermediate scrutiny should apply to all racial classifications, including those in federal programs.<sup>78</sup> They rejected the idea that *Fullilove* supported use of intermediate scrutiny for federal affirmative action programs, arguing that *Fullilove* itself concerned an exercise of section five enforcement power.<sup>79</sup> The dissent also specifically rejected diversity of broadcast viewpoints as a compelling interest to justify a racial preference, stating that prior decisions indicated that the only compelling interest to justify racial classifications were efforts to remedy past discrimination.<sup>80</sup>

The Court's final and most significant post-*Bakke* affirmative action case was *Adarand Contractors, Inc. v. Pena*,<sup>81</sup> a 1995 decision. *Adarand*

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73. See *id.* at 563-66.

74. *Id.* at 566.

75. See *Croson*, 488 U.S. at 535-36 (Marshall, J., dissenting); *Wygant*, 476 U.S. at 301 (Marshall, J.).

76. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 567-68 (1990). In recognizing broadcast diversity as an important government interest, the Court made a comparison to Justice Powell's *Bakke* opinion recognizing student body diversity as a "constitutionally permissible goal." *Id.* at 568.

77. See *id.* at 569-89.

78. See *id.* at 602-03 (O'Connor, J., dissenting).

79. See *id.* at 605-09 (O'Connor, J., dissenting).

80. See *id.* at 612 (O'Connor, J., dissenting). O'Connor's dissenting opinion stated: Modern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.

*Id.* (O'Connor, J., dissenting).

81. 515 U.S. 200 (1995).

involved a challenge to a federal program which had the practical effect of providing general contractors on federal projects with financial incentives to hire "socially and economically disadvantaged" subcontractors, which by federal law were presumed to include racial minorities.<sup>82</sup> The presumption constituted a racial classification.<sup>83</sup> The primary issue before the Court was the standard of review to be applied to federal affirmative action programs. The Tenth Circuit, relying upon both *Fullilove* and *Metro Broadcasting*, held that federal programs were subject to only intermediate scrutiny and found the incentive program constitutional.<sup>84</sup> The Supreme Court reversed, holding that all race-conscious programs, whether at the state or federal level, are subject to strict scrutiny.<sup>85</sup> In doing so the Court specifically overruled *Metro Broadcasting*, stating all use of racial classifications in affirmative action programs, both federal and state, are subject to strict scrutiny.<sup>86</sup>

Justice O'Connor's majority opinion acknowledged the Court's frequent inability to form a majority in affirmative action cases, but stated that previous decisions through *Croson* had established three principles regarding any government use of racial classifications: skepticism, consistency, and congruence. Skepticism recognized that classifications based on race are inherently suspect and are subject to "a most searching examination." Consistency stated that the standard of review for racial classifications is not based on the race burdened, and thus racial classifications designed to benefit racial minorities receive the same scrutiny as those designed to burden them. Finally, congruence required that the same review apply to both federal and state use of racial classifications.<sup>87</sup> Taken together, these principles meant that all racial classifications, no matter what race is benefited or burdened, and no matter what level of government is involved, are subject to "the strictest judicial scrutiny."<sup>88</sup>

*Adarand* solidified the Supreme Court's affirmative action jurisprudence in several important respects, effectively ending what had been a continual state of confusion. Particularly significant was a clear majority recognizing that strict scrutiny applied to all racial classifications, no matter what race was affected and no matter what level of government

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82. See *id.* at 206-10.

83. See *id.* at 212-13.

84. See *id.* at 210.

85. *Id.* at 224.

86. *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

87. *Id.* at 223-24.

88. *Id.* at 224.

was involved. The status of *Bakke*, however, remained uncertain. Although the Court in the intervening years had at times mentioned *Bakke*, often with approval, it was unclear to what extent its premises might have been eroded. In particular, the Court's emphasis in several cases, such as *Croson*, that racial classifications can only be used to remedy past identified discrimination raised questions about whether educational diversity was a compelling state interest. *Adarand's* overruling of *Metro Broadcasting*, which had been predicated on a diversity rationale, further supported the idea that educational diversity was not a compelling interest.

As a result, lower courts became divided on the issue of whether race could be a factor in university admissions, with some saying *Bakke* had been undermined by subsequent Supreme Court cases and others saying it remained good law. Those cases will be briefly discussed in the next subsection.

### C. LOWER COURT RESPONSES

The first lower court case to consider race-conscious admissions after *Adarand*, and the one gaining the most attention, was *Hopwood v. Texas*,<sup>89</sup> in which the Fifth Circuit Court of Appeals held that *Bakke* was no longer good law and struck down an affirmative action program at the University of Texas law school. The court began its analysis by stating that the Supreme Court had established strict scrutiny review for any racial classification,<sup>90</sup> and then proceeded to examine whether educational diversity was a compelling interest to satisfy strict scrutiny. The Fifth Circuit said no for two reasons. First, it questioned the precedential value of Justice Powell's opinion in *Bakke* in recognizing diversity as a compelling interest, noting that no other justice joined his opinion or even discussed the issue of diversity.<sup>91</sup> Second, the court interpreted subsequent Supreme Court decisions, in particular *Croson* and *Adarand*, as indicating that the only government interest compelling enough to meet strict scrutiny is remedying the effects of past discrimination. It read *Croson* as saying as much, and noted that *Adarand* vindicated Justice O'Connor's dissent in *Metro Broadcasting*, in which four justices specifically rejected diversity as a compelling interest.<sup>92</sup>

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89. 78 F.3d 932 (5th Cir. 1996).

90. *Id.* at 940.

91. *See id.* at 944.

92. *See id.* at 944-45. The Fifth Circuit also rejected the argument that the law school could use racial classifications in admissions "to remedy the present effects of past discrimination in [Texas's] primary and secondary schools." The court acknowledged that

More recently, the Eleventh Circuit in *Johnson v. Board of Regents of the University of Georgia*<sup>93</sup> expressed similar reservations about whether diversity was a compelling interest to justify a race-conscious admissions program. That case involved a race conscious admissions program for the University of Georgia that was similar to that used in *Gratz*, in which points were automatically assigned for certain diversity factors, including race.<sup>94</sup> Using an analysis very similar to what the Supreme Court later applied in *Gratz*, the Eleventh Circuit held the program unconstitutional because the mechanical assignment of points for race failed to provide the flexible evaluation of each individual applicant required of a narrowly tailored program.<sup>95</sup> The court did not rule on whether diversity was a compelling interest to satisfy strict scrutiny, but in a portion of the opinion that was dictum, discussed the issue at some length. Like the Fifth Circuit in *Hopwood*, the Eleventh Circuit emphasized that *Bakke* did not establish diversity as a compelling interest, since Justice Powell was the only justice to even address the issue.<sup>96</sup> It also noted that subsequent Supreme Court decisions had language suggesting, though not necessarily holding, that the only interest sufficiently compelling to justify racial classifications were efforts to remedy past discrimination.<sup>97</sup> The court concluded that whether diversity was a compelling interest was an open issue, and thus stopped short of the Fifth Circuit, but noted that the weight of recent Supreme Court precedent pointed in the direction of diversity not being a compelling interest.<sup>98</sup>

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remedying the present effects of past discrimination was the one instance in which racial classifications could be used, but said the law itself had been the discriminator. Reliance on prior discrimination elsewhere in the Texas education system was too general to meet the Supreme Court requirements of carefully limited remedial efforts with logical end points. *See id.* at 950-55.

93. 263 F.3d 1234 (11th Cir. 2001).

94. *See id.* at 1240-42.

95. *See id.* at 1252-54.

96. *See id.* at 1246-47. The Eleventh Circuit also analyzed whether Justice Powell's opinion in *Bakke* was the holding of the Court under the test from *Marks v. United States*, 430 U.S. 188, 193 (1977), which provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." The court concluded that Powell's opinion did not constitute the court's holding in *Bakke* under that approach. *See Johnson*, 263 F.3d at 1247-49.

97. *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1249 (11th Cir. 2001).

98. *Id.* at 1250-51.

In contrast to *Hopwood* and *Johnson*, the Ninth Circuit in *Smith v. University of Washington Law School*<sup>99</sup> held that Justice Powell's *Bakke* opinion was binding Supreme Court precedent recognizing diversity as a compelling state interest in university admissions. The court acknowledged the highly fractured nature of *Bakke*, and that no other justice joined Powell's analysis, but said that Powell's opinion was the "narrowest footing" for permitting race-conscious admissions decisions and thus represented a holding of the Court.<sup>100</sup> In coming to this conclusion, the Ninth Circuit closely analyzed Justice Brennan's opinion in *Bakke*, which represented four justices, stating that in arguing for broader permissible uses of racial classifications in affirmative action, Brennan implicitly accepted Powell's more limited use of racial classifications.<sup>101</sup> The Ninth Circuit acknowledged that the Supreme Court in recent years had not viewed affirmative action programs with much favor, but neither had it clearly repudiated Justice Powell's *Bakke* opinion. As such, it said Powell's *Bakke* opinion remained good law until the Supreme Court itself said otherwise.<sup>102</sup>

The final federal Circuit Court of Appeals to weigh in on the use of race in university admissions was in *Grutter* itself, where in a 5-4 decision *en banc* the Sixth Circuit held that diversity was a compelling interest permitting narrowly tailored use of race in university admissions.<sup>103</sup> Like the Ninth Circuit in *Smith*, the Sixth Circuit said that Justice Powell's opinion in *Bakke* represented the holding of the Supreme Court in that case, under the standard established in *Marks v. United States*,<sup>104</sup> and was binding precedent until overruled by the Supreme Court.<sup>105</sup> It also said that Justice Brennan's opinion in *Bakke* implicitly accepted Justice Powell's conclusion that diversity was a compelling interest.<sup>106</sup> The majority further declined to infer an intent in subsequent Supreme Court decisions to overrule *Bakke*, saying only the Supreme Court itself could declare an

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99. 233 F.3d 1189 (9th Cir. 2000).

100. See *id.* at 1189-1200 (applying the analysis from *Marks v. United States*, 430 U.S. 188, 193 (1977) for determining the holding of a fragmented Supreme Court decision).

101. See 233 F.3d at 1199-2000.

102. See *id.* at 1200.

103. 288 F.3d 732 (6th Cir. 2002).

104. 430 U.S. 188 (1977). The *Mark's* test states: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193.

105. See *Grutter*, 288 F.3d at 739-42.

106. See *id.* at 742-43.

earlier decision effectively overruled by subsequent decisions.<sup>107</sup> Finally, the majority concluded that the law school's use of race was narrowly tailored to achieve its interest in diversity, finding its program "virtually indistinguishable from the Harvard plan Justice Powell approved in *Bakke*."<sup>108</sup>

Four justices dissented, with three stating that educational diversity was not a compelling interest and that the law school's use of race in admissions was not narrowly tailored. They disagreed that the *Marks* analysis made Powell's opinion in *Bakke* the holding of the Court, instead concluding that it had no precedential value on the precise question of whether diversity constituted a compelling state interest. Those justices then reviewed the issue on the merits, concluding that diversity failed to rise to the level of a compelling interest. Those justices also said the law school's use of race was not narrowly tailored for a number of reasons, including what they perceived to be disproportionate weight given to race and because the law school's seeking a critical mass of minority students constituted a quota.<sup>109</sup> A fourth justice also dissented on the grounds the use of race was not narrowly tailored, and therefore declined to address whether Justice Powell's opinion in *Bakke* was binding precedent.<sup>110</sup>

## II. *GRUTTER AND GRATZ*

### A. *GRUTTER V. BOLLINGER*

#### 1. *Facts*

*Grutter* involved a challenge to a race-conscious admissions program at the University of Michigan law school. The program, which the school adopted in the early 1990s, was designed to comply with Justice Powell's opinion in *Bakke* and was in part patterned after the Harvard program approved by Powell. As described by the Court, the program both focused on academic ability, as judged by undergraduate record and LSAT score, together with "applicants' talents, experiences and 'potential to contribute to the learning of those around them.'" No applicant was automatically accepted or rejected based on grades and LSAT score, but instead each

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107. See *id.* at 743-44.

108. See *id.* at 747.

109. See *id.* at 773-814 (Boggs, J., dissenting).

110. See *Grutter v. Bollinger*, 288 F.3d 732, 815-18 (6th Cir. 2002) (Gilman, J., dissenting).

application was individually reviewed to include consideration of what were characterized as “soft variables,” including letters of recommendation, the undergraduate institution, a personal essay, and difficulty of undergraduate courses.<sup>111</sup>

The admissions policy also specifically stated it was seeking to achieve a diverse student body that would enrich every student’s education.” “Substantial weight” was therefore given for any ways an applicant would contribute to the law school’s diversity. Although not limiting the types of diversity that might be considered, the policy did specify its continuing commitment to “racial and ethnic diversity,” with special attention to African-American, Hispanic, and Native-American applicants.<sup>112</sup> The school testified at trial there was no set weight given to race, but it varied from applicant to applicant. In some cases it played no role and in others it was “determinative.”<sup>113</sup>

The law school acknowledged that without some consideration to race in the admissions process, students from those racial groups would not likely be “represented in the student body in meaningful numbers.” As a consequence, the school not only considered race as one component in seeking a diverse student body, but also sought to enroll a critical mass of underrepresented minority students. At trial the school testified there was “no number, percentage, or range of numbers or percentages that constitutes a critical mass.” Instead, the concept of critical mass meant a “meaningful representation” such that underrepresented minorities would not feel isolated and would participate in classroom discussion.<sup>114</sup>

The law school’s use of race in making admissions decisions was challenged by a white applicant who had been put on the school’s wait list and ultimately rejected. She claimed that the law school’s admission process violated the Equal Protection Clause by making race a “predominant factor” in admissions, giving minority applicants a “significantly greater chance of admission” than similarly credentialed white applicants.<sup>115</sup> The District Court, applying strict scrutiny, held the law school’s use of race unconstitutional for two reasons. First, it rejected educational diversity as a compelling interest.<sup>116</sup> Second, it said the law

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111. *Grutter v. Bollinger*, 539 U.S. 306, 313-16 (2003).

112. *Id.* at 316.

113. *Id.* at 319.

114. *Id.* at 318.

115. *See id.* at 317.

116. *See Grutter v. Bollinger*, 137 F. Supp. 2d 821, 847-49 (E.D. Mich. 2001). The District Court said that Powell’s *Bakke* opinion was not binding precedent, and that in recent years the Supreme Court had indicated that racial classifications can only be used to remedy identified past discrimination. *Id.*

school's use of race was not narrowly tailored for several reasons, including the lack of clarity on the meaning of critical mass, its similarity to a quota system, the lack of an ending point on the use of race in admissions decisions, and the failure of the law school to consider race-neutral alternatives.<sup>117</sup>

As noted earlier,<sup>118</sup> the Sixth Circuit, en banc, reversed by a 5-4 margin. The majority believed that Justice Powell's decision constituted binding precedent under the Supreme Court's analysis in *Marks v. United States*, thus establishing educational diversity as a compelling interest for strict scrutiny.<sup>119</sup> It also stated that the school's use of race was narrowly tailored, since it avoided the problematic two-track quota system struck down in *Bakke* and closely tracked the Harvard plan approved by the Court in *Bakke*, evaluating each applicant as an individual.<sup>120</sup>

## 2. *Supreme Court Analysis*

The Supreme Court, in a 5-4 decision, held that the law school's use of race in admissions was constitutional. Justice O'Connor's majority opinion was in many respects Justice Powell's *Bakke* opinion redux. She cited Powell's opinion frequently, adopting his analytical framework and concurring in his judgments. Like Powell, the *Grutter* majority concluded that educational diversity was a compelling government interest that permitted narrowly tailored use of race in admissions.<sup>121</sup> It further concluded that the law school's use of race as a factor in an individualized assessment of each student was narrowly tailored, avoiding the problem of quotas in *Bakke* and the problem of a mechanical awarding of points present in the companion *Gratz* case.<sup>122</sup>

After briefly summarizing Powell's opinion in *Bakke*, Justice O'Connor began her analysis by addressing the issue of standard of review. Citing *Adarand*, she stated that all racial classifications, including those involving affirmative action programs, are subject to strict scrutiny, requiring that they serve a compelling interest in a narrowly tailored way.<sup>123</sup> She emphasized, however, quoting *Adarand*, that "strict scrutiny is

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117. *Id.* at 850-53.

118. *See supra* note 104 and accompanying text.

119. *Grutter v. Bollinger*, 288 F.3d 732, 739-42 (6th Cir. 2002).

120. *See id.* at 745-47.

121. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

122. *Id.* at 334-37.

123. *Id.* at 326.



not 'strict in theory, but fatal in fact.'"<sup>124</sup> The Court stated that "[c]ontext matters" in reviewing government racial classifications, "[n]ot every decision influenced by race is equally objectionable," and race-based action is permitted when truly necessary to advance a compelling government interest.<sup>125</sup>

The Court then proceeded to address what most considered the central issue in *Grutter*: whether educational diversity constitutes a compelling state interest.<sup>126</sup> The Court began by "dispelling the notion" that the Court, in post-*Bakke* cases, had rejected diversity as a compelling state interest. The Court acknowledged that language in some cases "might be read to suggest that remedying past discrimination is the only permissible justification for race-based action." But the Court said it had never held that, nor had it in the intervening years revisited racial classifications in higher education. The Court then expressly held that the law school had a compelling interest in a diverse student body.<sup>127</sup>

The Court supported the recognition of educational diversity as a compelling interest in two ways. First, it followed the lead of Justice Powell's *Bakke* opinion and grounded its analysis in free speech and academic freedom concerns, saying that universities occupied "a special niche in our constitutional tradition" because of the "expansive freedoms of speech and thought" with which they are associated.<sup>128</sup> As such, the Court gave deference to the law school's own judgment that "diversity is essential to its educational mission." Quoting Justice Powell, it stated that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."<sup>129</sup> The Court further noted that the critical mass of underrepresented minority students was not just to ensure a particular percentage of a particular racial group, which would constitute

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124. *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)). This statement is an allusion to Professor Gerald Gunther's famous line that strict scrutiny is "'strict' in theory, but fatal in fact." Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

125. *Grutter*, 539 U.S. at 327.

126. *Id.* A number of proponents of race-conscious admissions believe it furthers other interests at least as compelling as educational diversity, such as increasing minority representation in the legal profession. *See, e.g.*, Paul Brest, *Some Comments on Grutter v. Bollinger*, 51 DRAKE L. REV. 683, 685 (2003). However, Justice Powell's opinion in *Bakke* essentially eliminates all other grounds on which to support race-conscious admissions, making educational diversity the only possible interest. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305-311 (1978).

127. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

128. *Id.* at 329.

129. *Id.* (quoting *Bakke*, 438 U.S. at 312 (Powell, J.)).

unconstitutional racial balancing, but was “defined by reference to the educational benefits that diversity is designed to produce.”<sup>130</sup>

Second, the Court also took care to note the “substantial” educational benefits produced by a diverse student body, including promotion of “cross-racial understanding” and creating a livelier and more enlightening classroom discussion.<sup>131</sup> The Court also emphasized the way in which various *amici* bolstered the law school’s assertion of a compelling interest. These include exposing students to “diverse people, culture, ideas, and viewpoints” to help develop skills necessary to compete in today’s global marketplace.<sup>132</sup> Moreover, the Court stressed the critical role that a racially diverse officer corps plays in the military’s task of national defense.<sup>133</sup>

Having decided that educational diversity constitutes a compelling state interest, the Court next addressed whether the law school’s use of race was narrowly tailored to achieve that interest. The Court again looked to Justice Powell’s *Bakke* opinion in articulating what the narrowly tailored requirement requires in a university admissions setting. Quota systems are prohibited, since they insulate certain applicants from comparison with the other applicants.<sup>134</sup> Instead, race can only be a “plus” factor in which all applicants are compared with all other candidates for available seats. Quoting Justice Powell, the Court said that “[a]n admissions program must be ‘flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.’”<sup>135</sup>

The Court then addressed one of the central and most difficult issues presented in the case, whether the law school’s “goal of attaining a critical mass of underrepresented minority students” constituted an unconstitutional quota. It defined a quota as where a fixed number of seats would be “reserved exclusively for minority groups,” which must be attained or cannot be exceeded. In contrast, it made clear that universities could have “permissible goals,” which are simply “a good-faith effort . . .

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

131. *Id.*

132. “These benefits 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.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

133. *Id.*

134. *Id.* at 334-35.

135. *Id.* at 334 (quoting *Bakke*, 438 U.S. at 317 (Powell, J.)).

to come within a range demarcated by the goal itself,” as long as all applicants are compared with one another.<sup>136</sup>

Based on these considerations, the Court concluded that the law school’s providing a critical mass of underrepresented minorities did not constitute an unconstitutional quota. The Court stated that the Harvard plan approved by Justice Powell in *Bakke* recognized that a sufficient number of minority students were necessary to achieve the educational benefits of a diverse student body and that Justice Powell himself had said that paying “some attention to numbers” does not make an otherwise flexible admissions evaluation into a quota. The law school’s attention to critical mass was thus the type of “attention to the numbers” permitted in *Bakke* in order to achieve the benefits of a diverse student body.<sup>137</sup> To support this conclusion, the Court noted that the number of underrepresented minorities that actually enrolled in the law school between 1993 and 2000 varied from 13.5 to 20.1 percent, indicating there was no established quota.<sup>138</sup>

The Court emphasized, however, that just because the use of race does not constitute a quota does not mean it meets the ultimate requirement of “individualized consideration.” In what might be the two most important sentences of the opinion, the Court said:

When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.<sup>139</sup>

The Court found that the law school’s use of race met this requirement of an individualized consideration, emphasizing three points. First, unlike the race-conscious program in *Gratz*, the law school had no “mechanical, predetermined” bonus based on race. Such an approach is inconsistent with a truly individualized assessment because it automatically assumes “a

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136. *Id.* at 335 (quoting Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC, 478 U.S. 421, 495 (1986) (O’Connor, J., concurring in part and dissenting in part)) (alteration in original).

137. *See* Grutter v. Bollinger, 539 U.S. 306, 335-36 (2003).

138. *Id.* at 336.

139. *Id.* at 336-37.

specific and identifiable contribution" to diversity from a single characteristic.<sup>140</sup> Second, the law school's approach to a diverse student body went well beyond race and included a broad range of potential diversity factors. As noted by the Court, all applicants were given the opportunity to highlight how their unique background, talents, and experiences might contribute to the school's diversity.<sup>141</sup> Third, the Court noted that the school in fact gave substantial weight to factors beside race, as demonstrated by the fact that "[t]he Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants . . . who are rejected."<sup>142</sup> Taken together, these aspects of the law school's admission program demonstrated a flexible, individualized evaluation of each applicant in which race was not the defining feature of any applicant, although it might be outcome determinative in some instances when combined with other factors.

The Court then quickly dispensed with the argument, primarily advanced by the United States, that the law school's use of race was not narrowly tailored because race-neutral methods of obtaining diversity existed. The Court stated that strict scrutiny "does not require exhaustion of every conceivable race-neutral alternative," but rather only "good faith consideration of workable race-neutral alternatives."<sup>143</sup> The record showed the law school had done just that, and that no workable race-neutral alternatives existed. A lottery system would eliminate all evaluation of candidates, thus sacrificing a host of educational values, including any attempt for a truly diverse student body.<sup>144</sup> The suggestion that the school simply lower its admissions standards for all students would require that it become a different institution with a different mission.<sup>145</sup> And the "percentage-plans" adopted in several states would be unworkable for

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140. *Id.* at 337 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003)).

141. *Grutter*, 539 U.S. at 337.

142. *Id.* at 338 (2003).

143. *Id.* at 339-40.

144. *Id.* at 340.

145. *Id.* Justice Thomas, in his concurring and dissenting opinion in *Grutter*, argued that Michigan had no compelling interest in having an elite law school, and therefore the problem of lacking a diverse student body if race is not considered in admissions decisions was of its own making. *Id.* at 357-60 (Thomas, J., dissenting). He argued that the law school could have a diverse class, including racial diversity, without resort to a race-conscious admissions process, if it just chose to lower its standards. *See id.* at 361-62 (Thomas, J., dissenting).

graduate schools and would eliminate the very individualized evaluations necessary to build a diverse student body.<sup>146</sup>

Finally, the Court concluded with a discussion of the need for some logical end point to the use of race-conscious admissions programs in universities. In what was perhaps the most curious part of the entire opinion, the Court stated that “race-conscious admissions policies must be limited in time.”<sup>147</sup> The Court had previously established the requirement that permanent use of racial classifications is unconstitutional and stated that “[w]e see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.”<sup>148</sup> It further noted that the law school conceded its use of race in admissions must have a logical end point.

The Court then said that this “durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>149</sup> In terms of a sunset provision, it said it would take the law school “at its word” that it wanted to find a race-neutral alternative and will discontinue use of race as a factor “as soon as practical.” The Court then noted that twenty-five years had elapsed since *Bakke* first approved race-conscious admissions practices, and that during that time the grades and test scores of minorities had improved. It then concluded its discussion with what will undoubtedly prove to be a much debated sentence, stating that “[w]e expect that [twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>150</sup>

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146. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003). The United States, as *amicus curiae*, had argued that the existence of “percentage plans” in Texas, Florida, and California, demonstrated that race-neutral alternatives existed and must be pursued before using the type of race-conscious program that the law school had. *Id.* Those plans, designed to help maintain diversity at public colleges and universities in those states, guaranteed admission to all students above a certain class rank percentile at high schools in those states. As noted by the majority, it is unclear how such plans would work at the graduate level, and they also preclude the very individualized assessment central to the majority’s analysis. It is also questionable whether such plans are truly race-neutral, since they were designed for the specific purpose of maintaining racial diversity within higher education. The success of such plans is also predicated on maintaining racially segregated high schools, itself somewhat problematic.

147. *Id.* at 342.

148. *Id.* The Court had consistently noted cases involving affirmative action or remedial use of racial classifications and requiring that to be constitutional such race-conscious action must have a logical endpoint.

149. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

150. *Id.* at 343.

### 3. *Dissents*

Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas dissented.<sup>151</sup> The Rehnquist and Kennedy dissenting opinions focused exclusively on the unconstitutional means used to further the diversity goal, both saying that it in effect amounted to unconstitutional racial balancing. Rehnquist was silent on the issue of whether educational diversity was a compelling interest, and Kennedy appeared to accept educational diversity as compelling, allowing the use of race as a "modest factor" in a narrowly drawn method.<sup>152</sup> Justices Thomas and Scalia, both of whom also joined the Rehnquist opinion along with Kennedy, also said that the law school had no compelling interest that permitted a race-conscious admissions program.<sup>153</sup> Thus, only two justices clearly rejected diversity as a compelling interest, one appeared to accept it if used in a very limited context, and one did not address the issue. All four agreed, however, that the law school's use of race was not narrowly tailored, and, indeed, constituted impermissible racial balancing.

The primary dissenting opinion was Rehnquist's, which was joined by the other three dissenting justices. As noted, Rehnquist did not address the compelling interest issue, but instead focused entirely on whether the law school's use of race was narrowly tailored. He did not attack the idea of seeking a critical mass as such, but instead argued that in practice the law school's program bore "little or no relation to its asserted goal of achieving 'critical mass.'"<sup>154</sup> Rehnquist stated that the law school represented itself as seeking to obtain "a 'critical mass' for each underrepresented minority group." Yet, according to Rehnquist, the record showed that the law school treated these groups differently in that respect, and instead the school engaged in a fine tuned attempt to racially balance the composition of the law school.<sup>155</sup>

Rehnquist attempted to substantiate that assertion in two ways. First, he noted that the actual number of admitted students varied significantly

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151. Justices Scalia and Thomas wrote opinions concurring in part and dissenting in part, although both opinions were almost completely dissents. Chief Justice Rehnquist and Justice Kennedy's opinions were dissents.

152. *Grutter v. Bollinger*, 539 U.S. 306, 392-93 (2003) (Kennedy, J., dissenting). Justice Kennedy affirmed Justice Powell's *Bakke* opinion as the correct one in resolving race-conscious university admissions practices, but said that the majority in *Grutter* failed to apply strict scrutiny as Justice Powell's opinion required. *See id.* at 387.

153. *See id.* at 347 (Scalia, J., concurring in part and dissenting in part); *id.* at 361-62 (Thomas, J., concurring in part and dissenting in part).

154. *Id.* at 380-81 (Rehnquist, C. J., dissenting).

155. *Id.*

within each underrepresented racial group, with significantly larger numbers of African-Americans admitted than either Hispanics or Native-Americans. He said the law school completely failed to explain how critical mass is achieved with only one-half as many Hispanics and one-sixth as many Native-Americans.<sup>156</sup> Moreover, he said the widely different numbers were achieved only by substantially different treatment of different underrepresented minorities by group. Particularly problematic to Rehnquist was what appeared to be significantly more rigorous admissions requirements being applied to Hispanic than to African-American candidates, leading to twice as many offers of admission to African-Americans and what Rehnquist characterized as “capping out” of Hispanic admissions. He said the school’s disparate treatment of different underrepresented minority groups showed the “alleged goal of ‘critical mass’ is simply a sham.”<sup>157</sup>

Second, Rehnquist found further support for this assertion by closely examining the admission numbers themselves. Although he acknowledged that the percentage of underrepresented minorities who actually enrolled varied over a range, he said the more relevant number were offers of admission, which is something the school had complete control over. He provided charts which showed that, from 1995-2000, there was an extremely “tight correlation between the percentage of applicants and admittees” from each of the African-American, Hispanic, and Native-American racial groups. He said this suggested an approach in which “the proportion of each group admitted should be the same as the proportion of that group in the applicant pool,” an approach inconsistent with an individualized assessment of applicants.<sup>158</sup> Together with the disparate

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156. See *id.* at 381.

157. *Grutter v. Bollinger*, 539 U.S. 306, 383 (2003). Rehnquist showed that within certain LSAT/GPA ranges there were strikingly different admissions decisions for African-Americans and for Hispanics. He stated:

For example, in 2000, 12 Hispanics who scored between a 159-160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted. Likewise, that same year, 16 Hispanics who scored between a 151-53 on the LSAT and earned a 3.00 or higher applied for admission and only 1 of those applicants was admitted. Twenty-three similarly qualified African-Americans applied for admission and 14 were admitted.

*Id.* at 382 (citations omitted).

158. *Id.* at 385. Rehnquist provided a detailed chart for the years 1995-2000 showing the number of applicants to the law school, the number of applicants from each of the underrepresented minority groups, the number of applicants admitted, the number of applicants from each minority group admitted, and respective percentages. *Id.* at 383-85.

treatment of similarly qualified applicants from different underrepresented groups, Rehnquist argued this clearly indicated the school was not seeking a critical mass but instead engaged in racial balancing.<sup>159</sup>

B. *GRATZ V. BOLLINGER*

1. *Facts*

*Gratz v. Bollinger*,<sup>160</sup> decided the same day as *Grutter*, involved a challenge to the University of Michigan's use of racial preferences in undergraduate admissions. Although the school initially had an admissions process in which underrepresented minorities received distinct treatment in several respects, in 1998 the school instituted a "selection index" system to guide admission decisions. A maximum of 150 points were available, and applicants were admitted, rejected, or placed in several "delay" categories depending on the applicant's point total under the index. Points were awarded on the basis of "high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership." There was also a miscellaneous category, under which applicants were automatically awarded twenty points if they were an underrepresented racial minority.<sup>161</sup>

Two white applicants rejected for admission as undergraduate students sued, alleging the school's use of race in selecting students violated the

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The table showed that the percentage of applicants who were from a particular underrepresented minority closely tracked the percentage of admitted applicants who were from that group. For example, in 2000, African-Americans comprised 7.5% of the applicant pool and 7.3% of the admission offers, Hispanics comprised 4.9% of the applicant pool and 4.2% of the admission offers, and Native-Americans comprised 1.0% of the applicant pool and 1.15% of the admission offers. *Id.*

159. *See id.* at 385-86.

160. 539 U.S. 244 (2003).

161. *See id.* at 251, 254-56. Starting in 1999, the school also added an additional level of review for some applicants, where admission counselors could, in their discretion, "flag" an application for review by an Admissions Review Committee (ARC). To be flagged, an application needed to have a minimum index score, to indicate the applicant was academically prepared for the school, and to indicate that the applicant possessed a characteristic important to the school, such as life experiences, unique talents, socioeconomic disadvantage, or underrepresented minority status. The ARC could admit, defer, or deny applicants it personally reviewed. *Id.* at 256-57.



Equal Protection Clause.<sup>162</sup> The district court held the program constitutional. It held that attaining a diverse student body constituted a compelling interest under strict scrutiny, noting that post-*Bakke* decisions had not precluded that conclusion. It also said the process was narrowly tailored to achieve that interest, since no quota was used and automatic awarding of points for being an underrepresented minority did not insulate an applicant from review.<sup>163</sup> The case was appealed to and argued before the Sixth Circuit, but no opinion had been issued as of the time certiorari was sought from the Supreme Court in *Grutter*. The petitioners in *Gratz* then sought a writ of certiorari from the Supreme Court, even though the Court of Appeals had not issued a judgment, so that the case could be heard along with *Grutter*. The Supreme Court granted certiorari.<sup>164</sup>

## 2. Court's Analysis

The Supreme Court held the University's undergraduate admissions program unconstitutional by a vote of six-three, with Justices O'Connor and Breyer joining the four *Grutter* dissenters. The majority opinion, written by Chief Justice Rehnquist, began by recognizing that the university's asserted interest of seeking educational diversity was compelling under the Court's holding in *Grutter*.<sup>165</sup> It held, however, that the automatic granting of twenty points to underrepresented minorities based on their race was not a narrowly tailored means of achieving diversity, and was therefore unconstitutional.<sup>166</sup>

The Court, relying upon Justice Powell's *Bakke* opinion, stated that the essence of a narrowly tailored use of race was that applicants be evaluated as individuals, considering all of the ways an individual might contribute to a school's diversity. The automatic granting of twenty points to each underrepresented minority precludes such an individual assessment, since it assumes the same contribution to the university no matter who the person is. As noted by the Court, there is no consideration of the applicant as an individual, but instead only a look at the application to see if the applicant is an underrepresented minority.<sup>167</sup> Moreover, the Court noted that the practical effect of automatically granting twenty points was to

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162. *Id.* at 252.

163. *See Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

164. *Gratz*, 539 U.S. at 260.

165. *Id.* at 268.

166. *Id.* at 269-70.

167. *Id.* at 271-72.

guarantee admission to "every minimally qualified underrepresented minority applicant," making race a singularly decisive factor.<sup>168</sup>

The Court further noted that the automatic granting of points based on race lacked the individualized assessment contemplated in the Harvard program approved by Justice Powell's *Bakke* opinion. It pointed to an example given in the Harvard program, where applicant A was "the child of a successful black physician . . . with promise of superior academic performance," applicant B "a black who grew up in an inner-city ghetto," and C a white applicant with "extraordinary artistic talent." The Harvard program made clear that which of these applicants might be chosen to fill one of a few remaining seats would depend on an individual assessment of what the person could add to the student body, with B being preferred over A in some situations, and A over B in others. Moreover, C might prevail over both A and B, depending on his or her talent. Thus, though race was a factor, it was always considered in light of what an individual might bring to the university, with race being only one component of that analysis.<sup>169</sup>

In contrast, the Court stated that the University of Michigan's admissions process lacked the consideration of applicants as individuals clearly emphasized in the Harvard program. As noted by the Court:

Instead of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing [undergraduate] applications would simply award both A and B 20 points because their applications indicate that they are African-American, and student C would receive up to 5 points for his "extraordinary talent."<sup>170</sup>

The Court also rejected the University's argument that the large volume of applications made individual evaluation of applicants impractical, stating that the presence of "administrative challenges" was not a sufficient reason to avoid the constitutional requirement of individualized evaluation when a race-conscious admissions process is used.<sup>171</sup>

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168. *Id.* at 272.

169. *See id.*

170. *Gratz v. Bollinger*, 539 U.S. 244, 273 (2003).

171. *Id.* at 275. Justice O'Connor wrote a concurring opinion, joined by Justice Breyer, that takes on particular importance because of Justice O'Connor's being a crucial swing vote on the use of race in university admissions. Like the majority opinion, Justice

### 3. *Dissents*

Justices Stevens, Souter, and Ginsburg each wrote dissenting opinions. Justice Stevens, in an opinion joined by Justice Souter, argued that the two petitioners lacked standing, since both had already enrolled at other colleges prior to filing the class-action in this case.<sup>172</sup> Justice Souter similarly argued that the petitioners lacked standing and therefore the Court should have dismissed the case.<sup>173</sup> Nevertheless, he proceeded to address the case on the merits, arguing that the undergraduate admissions process was narrowly tailored because it avoided the two-track, quota problem of *Bakke*, but instead had all applicants compete for the same seats based on a wide variety of factors, of which race was only one. He said this met the basic requirements of a constitutional plan contemplated by Powell's *Bakke* opinion, since the process considered all pertinent elements of diversity and placed them "on the same footing for consideration, although not necessarily according them the same weight."<sup>174</sup> The automatic granting of points to "quantify and compare characteristics" did not deny anyone "individualized consideration or a 'fair chance to compete.'" Indeed, Souter thought that the undergraduate admissions process in assigning points was essentially accomplishing the same thing as the law school did in its "holistic review."<sup>175</sup>

Unlike Stevens and Souter, Justice Ginsburg did not question the petitioners' standing, but instead thought the undergraduate admissions process was constitutional. As she also did in a concurring opinion in *Grutter*, she questioned the use of strict scrutiny when racial classifications are used to benefit minorities who have historically suffered discrimination, and continue to feel the effects of such discrimination.<sup>176</sup> To help make

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O'Connor emphasized that the undergraduate admissions process was not narrowly tailored because it failed to provide "a meaningful individualized review of applicants." *Id.* at 276 (O'Connor, J., concurring). In contrast to the law school program upheld in *Grutter*, which evaluated all the diversity attributes of applicants in an individualized, case-by-case basis, the undergraduate admissions program used a "mechanized selection index score," which essentially determined the outcome for almost all applicants. *Id.* at 276-77 (O'Connor, J., concurring). The automatic granting of predetermined points for "soft variables" such as race precluded any individualized assessment of applicants. *Id.* at 279 (O'Connor, J., concurring). What she characterized as "a nonindividualized, mechanical" system failed the demands of strict scrutiny and is unconstitutional. *See id.* at 280 (O'Connor, J. concurring).

172. *See id.* at 282 (Stevens, J., dissenting).

173. *See id.* at 291 (Souter, J., dissenting).

174. *Id.* at 294 (Souter, J., dissenting) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J.)).

175. *Gratz v. Bollinger*, 539 U.S. 244, 295 (2003) (Souter, J., dissenting).

176. *See id.* at 301-02 (Ginsburg, J., dissenting).

this point, she discussed in some detail continuing effects of discrimination experienced in the African-American and Hispanic communities in particular.<sup>177</sup> “Examin[ed] in this light,” Ginsburg found no constitutional infirmity with the challenged program. She noted that it was undisputed that all admitted applicants were qualified to attend college, that the racial groups accorded preferential treatment have historically suffered and continue to suffer discrimination, that no seats were reserved on the basis of race, and the program did not “unduly constrict” opportunities for applicants not receiving the twenty points based on race.<sup>178</sup>

### III. THE BIG PICTURE: WHAT CAN AND CAN'T BE DONE

#### A. GENERAL SUMMARY

In *Grutter* and *Gratz* the Court sent a two-fold message on the use of race-conscious admissions practices in higher education. On the one hand, the Court recognized a compelling interest in educational diversity that permits consideration of race as a factor in admissions decisions. At the same time the Court sent a clear message that any such use of race will be closely scrutinized and must be narrowly tailored to the state's interest in educational diversity. This message was not only articulated in the Court's analysis in both cases, but was also evident in the contrasting results. In this sense *Gratz* can be seen as the Court's statement that it was serious about what it said in *Grutter*: any use of race in university admissions must meet the demanding requirements of strict scrutiny.

As expected, the cases themselves were closely decided, reflecting the Court's continuing divisions regarding affirmative action. Yet, it is important to recognize that the divisions were not quite as great as might at first appear. For example, on what was perhaps the most significant issue presented by the cases, whether seeking a diverse student body constitutes a compelling state interest for purposes of strict scrutiny, six justices said that it did, and only two justices said that it did not, with one justice not addressing the issue.<sup>179</sup> Similarly, six justices found the mechanical

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177. *Id.* at 298-301 (Ginsburg, J., dissenting).

178. *Id.* at 302-303 (Ginsburg, J., dissenting).

179. In addition to the majority opinion in *Grutter* which held diversity was a compelling state interest, see 539 U.S. 306, 328 (2003), Justice Kennedy's dissenting opinion acknowledged diversity was a compelling interest that permitted some race-conscious admissions practices. *Id.* at 387-88. Only Justices Scalia and Thomas rejected diversity as a compelling interest. See *id.* at 347 (Scalia, J., concurring in part and dissenting in part); *id.* at 355-60 (Thomas, J., concurring in part and dissenting in part).

application of points for race unconstitutional in *Gratz*, while only two said it was valid, and one did not address the issue.<sup>180</sup> This reflects more agreement than some anticipated. The only issue at this point is not whether race can be used in university admissions, but how to use it in a constitutionally permissible way.

The basic constitutional requirement imposed by *Grutter* and *Gratz* is that any race-conscious admissions program must insure an individualized evaluation of applicants, in which race is only one of several factors in seeking diversity. Race cannot be the only soft variable in such a program, nor can racial diversity be a goal in and of itself. Instead, race can only be one component of a broader diversity, which must necessarily include a broad range of considerations.<sup>181</sup> Moreover, the individualized evaluation contemplated by *Grutter* and *Gratz* would appear to require an actual reading of the file as a whole, where race can be evaluated in light of an applicant's other qualifications, with no predetermined weight given. Race can be weighed more heavily than other factors, but it still must be assessed relative to the entirety of an applicant's overall qualifications.<sup>182</sup> Moreover, all applicants must be able to compete for all available seats.<sup>183</sup>

If this is what *Grutter* and *Gratz* require, then it is equally clear what they prohibit. First, race cannot be the single diversity factor nor can a school seek racial diversity for its own sake. In both *Bakke* and *Grutter* the Court was clear that it is not racial diversity as such, but rather educational diversity, of which race is one component, that constitutes a compelling state interest.<sup>184</sup> Racial diversity for its own sake, although not technically

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Chief Justice Rehnquist did not address the issue. *See id.* at 378-387.

180. In addition to the majority opinion, see *Gratz*, where Justice Breyer joined Justice O'Connor's concurring opinion that found the undergraduate program unconstitutional. 539 U.S. at 275-76. Only Justices Souter and Ginsburg said the undergraduate program was constitutional. *See id.* at 293 (Souter, J., dissenting); *id.* at 302-03 (Ginsburg, J., dissenting). Justice Stevens did not address the issue, since he stated that the student petitioners did not have standing. *See id.* at 282 (Stevens, J., dissenting).

181. *See Grutter*, 539 U.S. at 336-37.

182. *See id.* at 334-35.

183. The requirement that a race-conscious program cannot "insulate the individual from comparison with all other candidates for the available seats" was central to Justice Powell's analysis in *Bakke*, see 438 U.S. 265, 317 (1978), and was reiterated by the Court in *Grutter*. *See* 539 U.S. at 335.

184. Justice Powell in *Bakke* made it very clear that the diversity interest that justified a race-conscious admissions program was a broad educational diversity, not simply racial diversity. Powell said that the nature of a compelling diversity interest was: not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a

the same as racial balancing, is nevertheless close enough to it to make it invalid. The Court has consistently stated that racial preferences for the sake of racial preferences are unconstitutional.<sup>185</sup>

Second, the mechanical assignment of points of the type used in *Gratz* is unconstitutional, even when part of a broader set of diversity factors. As noted by the Court, any mechanical and automatic granting of points precludes consideration of the applicant as an individual.<sup>186</sup> It might be argued that what was fatal in *Gratz* was the near determinative point total given to race, resulting in any minimally qualified underrepresented minority being admitted, and thus a more modest point system might be permitted. Although there is language in *Gratz* that might support this position,<sup>187</sup> the broader context of the Court's analysis in *Grutter* and *Gratz* indicates any automatic, mechanical point system is constitutionally infirm. In *Grutter* the Court stressed that the importance of an individualized evaluation "is paramount" when a race-conscious admissions program is used.<sup>188</sup> The essence of an individualized evaluation is that an applicant is treated as an individual, in which all of the qualities that the person possesses are considered together and then evaluated in terms of the contribution the applicant can make to the university's diversity.<sup>189</sup> The Court made clear that this precludes "any single characteristic automatically ensur[ing] a specific and identifiable contribution to the

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compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.

438 U.S. at 315. The Court in *Grutter*, in approving the law school's use of race to help attain a diverse student body, also emphasized that race was only one component of a much broader concept of diversity. See 539 U.S. at 337-38.

185. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (stating that "outright racial balancing" is "patently unconstitutional"); *Bakke*, 348 U.S. at 307 (Powell, J.).

186. See *Gratz*, 123 S. Ct. at 271-72; *id.* at 279 (O'Connor, J., concurring) ("[T]he selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed").

187. For example, the majority opinion, after noting that the automatic point allocation precluded individualized evaluation of applicants, stated, "[m]oreover, unlike Justice Powell's example, where the race of a 'particular black applicant' could be considered without being decisive, . . . 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant." *Id.* at 272. Justice O'Connor, in her concurrence, also noted this effect. See *id.* at 539 U.S. at 276-77 (O'Connor, J., concurring).

188. *Grutter*, 539 U.S. at 337.

189. See *Gratz*, 539 U.S. at 271 (noting "the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education").

university's diversity," which a mechanical point assignment system does.<sup>190</sup>

The third clear prohibition from *Grutter* and *Gratz* is the use of any quota system, in which seats are reserved for underrepresented minorities. This, of course, was established by *Bakke* and no one has seriously questioned it since. In *Grutter*, the Court affirmed the principle in no uncertain terms.<sup>191</sup> However, it held that a school can seek to attain a critical mass as long as it is not done in a manner so as to constitute a quota.<sup>192</sup>

Fourth, *Grutter* and *Gratz* clearly prohibit any separate treatment of minority applicants in the admissions process, even if it falls short of a quota. For example, a system that automatically admitted applicants at the top end based on test scores and high school rank/GPAs, but had a separate automatic admission point for underrepresented minorities would be invalid. Although automatic admissions based on test scores and high school records would be valid if done without reference to race, it is invalid if done with reference to race. Similarly, a program that automatically admitted high end applicants based without reference to race, but automatically rejected only low end white applicants, with minority applicants being held for individualized determinations, would be invalid.

The problem with any separate treatment of underrepresented minorities, as in the above examples or other possible scenarios, is that they preclude all applicants from competing for the same seats. Both Justice Powell in *Bakke* and the Court in *Grutter* stressed that to be valid a race-conscious admissions program cannot insulate any applicants "from comparison with all other candidates for the available seats."<sup>193</sup> This indicates that although race may be a "plus factor," individualized evaluation requires that, at least when race is considered, all applicants compete for the same seats. Any distinct treatment of racial minorities violates this principle to some degree by excluding some applicants from competing for the seats. For example, a program that automatically rejects applicants at the low end with certain test scores and academic records, but

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190. See *id.*

191. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

192. See *id.* at 335-36.

193. See *id.* at 335 ("a university may consider race or ethnicity only as a 'plus factor' in a particular applicants file," without "insulat[ing] the individual from comparison with all other candidates for the available seats") (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 315, 317 (1978)). Justice Powell in particular stressed that racial minorities cannot be insulated from comparison to other applicants and must compete with all other applicants for all seats. This was a natural consequence of treating race as a 'plus' factor within a broad concept for diversity. *Bakke*, 438 U.S. at 317 (Powell, J.).

exempts underrepresented minorities and gives them individualized consideration, precludes those white applicants who are automatically rejected from competing for remaining seats.

Finally, it should be noted that the above discussion of what is required and what is prohibited applies only to the extent that race is involved in admissions decisions. Individualized evaluation of applicants is not necessarily required when race is not considered, nor are mechanical point systems or even quotas prohibited. This is true not only when an admissions program is race neutral in its entirety, but also when a program incorporates race as a factor at some points in the decision making process but not in others. In such a situation the above requirements and prohibitions apply to those aspects of the program that involve race, but would not apply outside of that context.

For example, *Grutter* and *Gratz* do not preclude automatic admission and rejection practices devoid of the type of individualized consideration of applicants discussed in those cases. They only preclude it when race is involved in such automatic decisions. Thus, a program that automatically grants admission based on test scores and GPA/rank alone, with no individualized review of applicants' records, is clearly permissible. This is true even if the program includes a middle group of applicants, who are neither automatically admitted nor rejected, but instead individually reviewed with consideration of a number of variables, including race. Although inclusion of race as a factor mandates individualized reviews for those in the middle group, the absence of race in the automatic admission decisions negates the requirement of individualized review.

For similar reasons, schools can use mechanical point assignments for various factors to assist in admissions decisions, as long as race (and perhaps some other categories, such as gender) are not part of that system. For example, automatic points could be granted for in-state applicants, or for applicants from geographically underrepresented areas, for student leadership, for achievements in sports or the arts, or for a number of other factors. Again, this is true even if race becomes a factor at another point in the process, at which point individualized evaluation is required. Indeed, even quotas can be part of an admissions program, as long as they do not involve race, or other suspect and quasi-suspect classes. The most obvious example would be quotas for in-state applicants, a common occurrence at many public universities.

The reason that universities can engage in such practices, such as automatic cutoffs, automatic assignment of points, and quotas, when race is not involved is that strict scrutiny is not triggered in those situations. The Court's requirement of individualized consideration, which precludes practices such as quotas and mechanical assignment of points, is predicated



on requiring that the use of race be narrowly tailored to the state's interest in a diverse student body.<sup>194</sup> In the absence of such a precision requirement universities are free to engage in a variety of admissions practices as long as they reasonably relate to some legitimate state interest. This very deferential approach to a state university's admissions decisions when race is not involved certainly accommodates the need for administrative convenience and a pursuit of variety of interests.

The above discussion sets out the general parameters of what *Grutter* and *Gratz* require and what is prohibited when race is used as a factor in admissions decisions. Although *Grutter* and *Gratz* supply some degree of clarity and certainty on what universities can and cannot do, there are some inevitable gray areas that remain after the decisions.<sup>195</sup> The next subsection will briefly review a few of the lingering questions that remain after *Grutter* and *Gratz*.

## B. SOME LINGERING QUESTIONS

### 1. *When Do Permissible Goals Become Impermissible Quotas?*

As noted above, the Court in *Grutter* affirmed Justice Powell's prohibition on racial quotas, but at the same time held that schools can seek a critical mass of underrepresented minorities and set "permissible goals" for racial diversity. An initial question under *Grutter*, voiced both by Court justices and commentators, is when might permissible goals used to attain a critical mass become unconstitutional quotas.<sup>196</sup>

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194. The Court in *Grutter* was quite clear that the requirement of individualized decisions and prohibition of quotas was predicated on strict scrutiny being applied, which requires that any race-conscious program be narrowly tailored. Stressing the rigors of the narrowly tailored requirement, the Court stated:

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.” Instead, a university may consider race or ethnicity only as a “‘plus’ in a particular applicants file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.”

539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317) (citations omitted).

195. The possibility of continuing litigation over the lack of clear guidance on some issues was a point emphasized by Justice Scalia. See *Grutter*, 539 U.S. at 348-49 (Scalia, J., concurring in part and dissenting in part).

196. See *id.* at 348 (Scalia, J., concurring in part and dissenting in part) (stating that *Grutter* will generate lawsuits, including “whether a university . . . has so zealously pursued its ‘critical mass’ as to make it an unconstitutional *de facto* quota system”); David

The answer to that question would appear to be that a permissible goal crosses the unconstitutional threshold and becomes a quota only when it becomes rigid, clearly setting aside seats that must be filled by underrepresented minorities, as in *Bakke*. The Court in *Grutter* defined a quota as an inflexible program in which a fixed number or percentage of seats are reserved for a group, and which must be attained.<sup>197</sup> In contrast, permissible goals are “good faith effort[s] . . . to come within a range demarcated by the goal itself.”<sup>198</sup> Importantly, with permissible goals underrepresented minorities continue to compete against other applicants for available seats, whereas with quotas seats are reserved exclusively for minorities.

This analysis suggests that as long as seats are not reserved based on race, meaning that all applicants compete for all seats, and that any goals in terms of critical mass remain flexible, then the program falls short of being an unconstitutional quota. Indeed, the Court in *Grutter* relied on those two considerations to conclude that the law school’s seeking a critical mass did not constitute a quota. In particular, the Court noted that over a seven-year period the percentage of underrepresented minorities in the entering class ranged from 13.5 to 20.1 percent, a range the Court characterized as being “inconsistent with a quota.”<sup>199</sup>

Chief Justice Rehnquist’s dissenting opinion was especially critical of the majority on this point, arguing that the admissions data in fact clearly demonstrated that the law school was engaged in outright racial balancing of its entering class, rather than merely seeking to attain a critical mass of underrepresented minorities.<sup>200</sup> To Rehnquist, the most relevant numbers were not those who actually enroll, since the law school “cannot precisely control” which admitted students choose to attend, but instead the actual offers of admissions made, which are completely under the school’s control.<sup>201</sup> Rehnquist argued, with some force, that the admissions data showed that over a six year period, from 1995 to 2000, the percentage of

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Schimmel, *Affirming Affirmative Action: Supreme Court Holds Diversity to be a Compelling Interest in University Admissions*, 180 W. EDUC. L. REP. 401, 411 (2003).

197. “Properly understood, a quota is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded.” *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (internal quotations and citations omitted).

198. *Id.* (quoting *Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 495 (1986) (O’Connor, J., concurring in part and dissenting in part)).

199. *Id.* at 336.

200. *Id.* at 383 (Rehnquist, C.J., dissenting).

201. *Id.* at 385-86 (Rehnquist, C.J., dissenting).

admitted minority applicants very closely tracked their respective percentage in the overall applicant pool. For example, in 1995 African-Americans constituted 9.7% of the applicant pool and 9.4% of the admission offers, Hispanics constituted 5.1% of the applicant pool and 5.0% of the admission offers, and Native-Americans constituted 1.1% of the applicant pool and 1.2% of the admission offers.<sup>202</sup> The close correlation continued throughout this entire period. To Rehnquist, this was clear evidence that the school was engaging in racial balancing.<sup>203</sup>

There is considerable force to Rehnquist's argument, and the majority does little to address it other than to state that the number of students who actually enrolled reflected a greater range.<sup>204</sup> Yet, upon further reflection, the distinction between admission offers and students who actually enroll is a critical one in evaluating whether a program constitutes a quota. Although Rehnquist is certainly correct that a school cannot "precisely control" which admitted students decide to enroll at a school, schools do have considerable control, through wait lists and other mechanisms, over the percentage of any particular group that might enroll. Moreover, by its very nature a quota concerns questions of actual enrollment, rather than merely offers of admissions, since by definition a quota involves reserving seats exclusively for some group.<sup>205</sup>

For this reason the majority opinion appears to be correct on whether the law school's actions in seeking a critical mass constituted a quota. Even if the law school was engaged in a degree of racial balancing when making offers of admission, the school fell one critical step short of making it a quota. As noted, the law school certainly had within its power, through wait lists, to ensure that a precise or near-precise percentage or number of underrepresented minorities actually enrolled, a step it apparently did not take. This is not to suggest that racial balancing in admissions offers is not problematic, since it is inconsistent with the concept of individualized consideration mandated by *Grutter*. But it helps illustrate why the majority looked to the range of enrolled underrepresented minorities as an indication that the law school's search of a critical mass fell short of an unconstitutional quota.

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202. *Grutter v. Bollinger*, 539 U.S. 306, 384 (2003) (Rehnquist, C.J., dissenting).

203. *Id.* at 382-85 (Rehnquist, C.J., dissenting).

204. *See id.* at 336.

205. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (describing the racial quota in *Bakke* as a program where seats "were reserved exclusively for certain minority groups").

## 2. *How Much Weight Can Be Given to Race?*

A second issue after *Grutter* is how heavily can race be weighed, relative to other considerations, in making admissions decisions. Although the Court is clear that race can only be one of several factors to be considered in an individualized assessment of an applicant, it also stated that it need not be given the same weight as other diversity factors. Justice Powell made this point in *Bakke*, stating that a race-conscious admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”<sup>206</sup> The *Grutter* majority quoted this language twice, making clear that, although race must be considered along with other factors, schools are free to accord it greater weight than other concerns.<sup>207</sup>

Beyond recognizing that race does not necessarily need to be given the same weight as other factors, the Court does not give clear guidance on how much weight it can actually be given. The closest thing to a standard that emerges is the Court’s statement that to be constitutional, the use of race must be “flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”<sup>208</sup> Thus, the test, if there is one, is whether race becomes the “defining feature” of the application.

Although the Court appears to establish this as the constitutional breaking point, it gives little guidance on what this might mean. On the one hand, it is clear that race is not the defining feature of an application simply because it is outcome determinative in some instances. To allow it to be a factor means that it will at times be the difference between admission and rejection; otherwise, it is not truly a factor. This point was recognized in Justice Powell’s *Bakke* opinion and affirmed in *Grutter*, both of which made clear that race can at times be outcome determinative.<sup>209</sup> This, of course, doesn’t make race the defining feature of an application. It only means that, when considered together with the rest of the applicant’s

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206. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J.).

207. See *Grutter v. Bollinger*, 539 U.S. 306 at 334, 337 (2003).

208. See *id.* at 337.

209. In response to Justice Kennedy, who said that “race is likely outcome determinative” for many underrepresented minorities who are not in “the upper range of LSAT scores and grades,” the Court said “[b]ut the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as one of many factors.” *Id.* at 339.

qualifications, including academic record and test scores, race tips the balance in favor of admission.<sup>210</sup>

On the other hand, it seems implicit in the Court's analysis that the weight given race might become so great, relative to other considerations, that it becomes the defining feature of the application and unconstitutional. The Court in *Grutter* was careful to emphasize that race was only one of a broad range of diversity factors, and that the law school gave substantial weight to other factors. In the Court's mind this was established by the fact that the "[l]aw School frequently accept[ed] nonminority applicants with grades and test scores lower than underrepresented minority applicants . . . who are rejected."<sup>211</sup> To the Court this clearly demonstrated that other factors can be dispositive, and even trump race as a consideration. As such, it is difficult to say that race was the "defining feature" of underrepresented minorities' applications.

This suggests that one possible benchmark on which to judge whether race is the defining feature of applications is the extent to which white applicants are accepted who have lower test scores and academic credentials than underrepresented minority applicants who are rejected. As long as to some appreciable degree a school accepts whites with lower academic records and test scores than some rejected minorities, it seems to negate the idea that race is the defining feature of minority applications. Race might still be given more weight than any other "soft variable," and might determine the outcome more often than any other diversity factor, yet it would not be the defining feature, since other concerns can outweigh it in appropriate circumstances.<sup>212</sup>

Importantly, it also seems apparent from *Grutter* that the amount of weight given to race can be that which is necessary to ensure a critical mass of underrepresented minorities as long as race does not become the defining feature of applications. In other words, schools can weigh race

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210. See *Bakke*, 438 U.S. at 316 (Powell, J.) (quoting Harvard plan stating race "may tip the balance" in some cases).

211. See 539 U.S. at 338.

212. To recognize the above scenario as sufficient to negate a finding that race is given too dominant a weight is not to say it is a necessary requirement for a constitutional program. It is certainly possible that a school may not accept any appreciable number of white applicants with lower test scores than rejected minorities and still not make race the defining feature of minority applications. This would most likely occur where there is not a broad range where white applicants are typically rejected but minorities are consistently admitted. Although there might well be a "tipping point" in the test score and academic record profiles, where whites are rejected and underrepresented minorities accepted, it will be a more limited range. In such situations it can be fairly said that race was simply a factor that tipped the balance for admission to the underrepresented minority applicant.

more or less heavily in the individualized consideration of candidates depending on what is necessary to attain a critical mass. If this were not the case, then the Court's stating that attention could be paid to the numbers in establishing a critical mass would make little sense.<sup>213</sup> Having permission to seek a critical mass only makes sense if it affects how decisions are made, and in particular how much weight is given to race.

Adjusting the weight given to race to that necessary to attain a critical mass should not be a problem as long as it occurs within the individualized evaluation of each applicant and does not dictate outcomes. This means that applicants are still evaluated by the totality of their qualifications, but the weight given to race will be that which will likely be required to obtain a critical mass, most likely based on past admissions data. Under this approach the judgment of how much weight to give race would be generally made at the front end of the process, although some reasonable adjustments might be made during the year.<sup>214</sup>

Adjusting weight to attain a critical mass might become a problem, however, if the adjustment is done with the idea of guaranteeing, rather than helping to obtain, a critical mass. The Court suggested such a concern in *Grutter*, when it discussed the significance of the law school's daily reports during the summer, which tracked the racial and ethnic composition of the entering class, along with gender and residency. The Court rejected Justice Kennedy's argument that the daily reports indicated that there was a further review based on race alone to guarantee a critical mass, stating there was uncontradicted testimony that the school's admissions officers "never gave race any more or less weight based on the information contained in the reports."<sup>215</sup> This would seem to suggest that too fine an adjustment in

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213. See *Grutter v. Bollinger*, 539 U.S. 306, 334-36 (2003).

214. This would essentially mean that, based on past admissions data, there would be a sense of how much weight would be necessary to give to race to ensure a critical mass of underrepresented minorities. The decision whether to admit any particular underrepresented minority, however, would still be based on the totality of the record. Thus, although race would be an important factor in whether to admit someone, it would not be outcome determinative. This would also mean that the critical mass being sought would only be a "permissible goal," rather than a quota, since there would be no guarantee, based on such a weighting, that an individual review of applicant files would result in any specific number of underrepresented minorities.

215. The former Dean of Admissions at the law school, Dennis Shields, had testified at trial that "at the height of the admissions season, he would frequently consult the so-called 'daily reports' that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender)." *Id.* at 318. When setting out the facts of the case, the Court said that this consulting of the 'daily reports' was done "to ensure that a critical mass of underrepresented minorities would be reached." *Id.* However, when later discussing in its analysis whether this daily consulting of admissions data meant

the weight given race, especially near the end of the process, in order to guarantee a certain number or percentage of underrepresented minorities, would be unconstitutional. On the other hand, having a sense of how much weight to give race near the front end of the process in order to attain a critical mass is constitutional, as long as the degree of weight is not so great as to dominate all other considerations.

### 3. *To What Extent Can Schools Treat Classes of Underrepresented Minorities Differently?*

This is one of the most perplexing issues to emerge from *Grutter* and *Gratz*, in part because of what might be perceived as different messages sent by the Court. On the one hand, the majority in *Grutter* reiterated that schools cannot engage in racial balancing and treat racial groups differently in order to achieve a particular balance.<sup>216</sup> On the other hand, the challenged law school program not only used underrepresented minority status as a factor in admissions decisions, but treated the underrepresented minority groups different from each other in two respects. First, in seeking a critical mass, the law school admitted and enrolled substantially more African-Americans than either Hispanics or Native-Americans. Second, at certain LSAT/GPA profiles almost all African-Americans were admitted while only a small percentage of Latinos were admitted, suggesting that one underrepresented minority status was weighed more heavily than the other.<sup>217</sup> This suggested that the enrollment of greater number of African-American applicants was partly at the expense of other underrepresented minorities.

Chief Justice Rehnquist's and Justice Kennedy's dissenting opinions made much of this disparate treatment among underrepresented minorities, starting that it unequivocally demonstrated that the Court was engaged in unconstitutional racial balancing.<sup>218</sup> As noted above, the majority responded to the racial balancing argument by noting that the actual percentage of enrolled underrepresented minorities, as a combined group, ranged from 13.5% to 20.1%, negating questions of a quota. However, the

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the law school had a quota, the Court stressed that the uncontradicted testimony indicated that the admissions officers "never gave race any more or less weight based on the information contained in these reports." *Id.* at 336. It is unclear how consulting the reports could help ensure a critical mass but still not change the weight given race.

216. *Id.* at 375 (racial balancing "patently unconstitutional").

217. *See id.* at 381-82 (Rehnquist, C.J., dissenting).

218. *See Grutter v. Bollinger*, 539 U.S. 306, 385 (2003) (Rehnquist, C.J., dissenting); *id.* at 389-90 (Kennedy, J., dissenting).

majority failed to address the differing treatment of the groups within the broad category of underrepresented minorities, either in terms of critical mass or in terms of possible different standards for admissions. Instead, the majority's analysis consistently treated underrepresented minorities as a single group. Its only response to the issue of discrimination within the underrepresented groups was the following two sentences:

THE CHIEF JUSTICE believes that the law School's policy conceals an attempt to achieve racial balancing, and cites admissions data to contend that the Law School discriminates among different groups within the critical mass. But, as THE CHIEF JUSTICE concedes, the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year.<sup>219</sup>

Justices Thomas, in an opinion joined by Justice Scalia, took a different approach, emphasizing that the issue of discrimination among underrepresented minority groups was not presented in the case, and therefore was not addressed in the majority's analysis. He argued, however, that the majority's analysis implicitly indicated that such distinct treatment would be unconstitutional, since it would fail strict scrutiny.<sup>220</sup> Thomas argued that the only use of race approved in the majority opinion was "between underrepresented minority applicants and those of other races," since the majority consistently treated underrepresented minorities as a group in its analysis. On that basis he argued that any distinct treatment among underrepresented minorities, such as preferring African-American applicants over Hispanic applicants, was unconstitutional, since it did not further the state's interest in attaining a critical mass of underrepresented minorities. Thomas stated that such preferences do "not lead to the enrollment of even one more underrepresented minority student, but only balances the races within the 'critical mass.'"<sup>221</sup>

What to make of all this is not completely clear. It certainly might be argued that the Court implicitly held such distinct treatment among different groups is constitutional, since it approved the law school program, which seemed to apply differing standards to African-American and Latino

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219. *Id.* at 336 (citation omitted).

220. *See id.* at 374-75 (Thomas, J., dissenting).

221. *Id.* at 375 n.12 (Thomas, J., dissenting).



applicants. However, as noted by Justice Thomas, the case itself did not present the issue of whether distinct treatment among minority groups was constitutional. Instead, the only issue addressed by the Court was whether underrepresented minorities as a collective group can be treated as distinct from other applicants.<sup>222</sup>

On the other hand, it is hard to read the majority opinion as necessarily prohibiting distinct treatment of different underrepresented minority groups, as argued by Justice Thomas. The problem with Justice Thomas' analysis is that he equates distinct treatment of different racial groups with racial balancing. Certainly he is correct that racial balancing is unconstitutional, and to the extent that distinct treatment of racial minorities is designed to achieve a particular racial balance, the distinct treatment is invalid. Justice Powell emphasized this in *Bakke* and the Court reiterated it in *Grutter*.<sup>223</sup> As noted in both opinions, race for the sake of race is not a compelling interest.

Yet distinct treatment of different underrepresented minority groups is arguably valid if it serves the state's compelling interest in diversity. Although underrepresented minority groups share some common characteristics, they are hardly fungible. In the same way that geographical diversity might include applicants from distinct geographical reasons, so too considerations of racial diversity might seek distinct underrepresented minorities. The experiences of African-Americans, Latinos, and Native-Americans are not necessarily interchangeable, and each can add to and enrich the overall educational diversity of a school. To the extent that different weight might be necessary to ensure such diversity within underrepresented minorities, it would seem justified in order to further the state's interest in a diverse student body.

Similarly, distinct treatment of different underrepresented minorities might be justified in order to ensure a critical mass for each such group. In *Grutter* the Court indicated that the weight given to the "plus factor" of underrepresented minorities can be that necessary to help attain a critical mass of underrepresented minorities.<sup>224</sup> Certainly the presence of underrepresented minorities from other racial groups is of some importance in a critical mass, but it is not necessarily the same as having other students from one's own racial minority group. As noted above, African-Americans, Latinos, and Native-Americans are not interchangeable, and the presence of Latinos does not necessarily address the feelings of isolation

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222. *Grutter v. Bollinger*, 539 U.S. 306, 374 (2003) (Thomas, J., dissenting).

223. See *Grutter*, 539 U.S. at 334-36; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J.).

224. See *supra* note 140 and accompanying discussion.

that a single or small number of African-Americans might experience. Therefore, it makes sense when seeking a critical mass of underrepresented minorities that schools not only "pay attention to the numbers" in gross, but also pay attention to the numbers within each distinct underrepresented racial group.

The above analysis suggests that different weights might be given to different minority class status in order to attain a critical mass for each particular group. For example, in order to achieve both a richer diversity and adequate critical mass for a particular racial minority group, applicants with similar test scores and academic records might be generally admitted from one underrepresented minority group, while those from another underrepresented minority group might be generally rejected. Of course, in both instances the decisions would need to be made subject to individualized review to see what applicants, as individuals, would add to a school's diversity, yet the weight accorded to African-American applicants might be different than accorded to Latino applicants, leading to different results in otherwise comparable records.

Distinct treatment among underrepresented minorities becomes troublesome, however, when greater weight is given to one group over another in order to admit larger numbers of that group, which is what arguably occurred in *Grutter*. As noted earlier, the numbers offered by Chief Justice Rehnquist strongly suggest that differing standards were being applied to African-American applicants and to Latinos:

For example, in 2000, 12 Hispanics who scored between a 159-160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted. Likewise, that same year, 16 Hispanics who scored between a 151-153 on the LSAT and earned a 3.00 or higher applied for admission and only 1 of those applicants was admitted. Twenty-three similarly qualified African-Americans applied for admission and 14 were admitted.<sup>225</sup>

As noted above, such distinct treatment might be justified at times to ensure a fuller diversity within the student body and a critical mass for African-Americans. What makes the distinct treatment troubling is that it

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225. *Grutter*, 539 U.S. at 382 (Rehnquist, C.J., dissenting) (citations omitted).

resulted in almost twice as many African-Americans as Latinos being admitted to the law school, and more African-Americans than Latinos actually enrolling. Any different treatment based on race must be justified by a compelling interest, such as diversity or the need for critical mass, but none appeared to be offered.<sup>226</sup> Specifically, it is unclear how either educational diversity or critical mass concerns are served by such distinct treatment when it results in substantially greater numbers of the favored group. Nor can the distinct treatment be justified by an interest in greater numbers of African-Americans because of their greater presence in society, since that would equate with racial balancing.<sup>227</sup>

This suggests that distinct treatment of different underrepresented minority groups is justified when tailored to a richer student body diversity and critical mass for certain racial groups. It is problematic, however, if greater weight is given to a particular racial status simply to attain substantially larger numbers of students from one underrepresented minority group than from other underrepresented groups. As noted above, however, the issue was not directly presented in *Grutter*.<sup>228</sup>

#### IV. LOOKING TO THE FUTURE: SUNSETTING AFFIRMATIVE ACTION

Perhaps the most curious part of the Court's opinion in *Grutter*, and one with significant long-term impact, came at the end when it stated that the use of affirmative action in university admissions must have a logical end point. Prior affirmative action decisions had established that to be narrowly drawn the use of racial classifications must have a logical end point, and the Court in *Grutter* affirmed that this applied to university admissions, stating:

Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are

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226. See *id.* at 382 (Rehnquist, C.J., dissenting) (stating that the majority opinion in *Grutter* failed to offer a rationale for the distinct treatment).

227. See *Bakke*, 438 U.S. at 307 (Powell, J.) (racial balancing is unconstitutional).

228. It is of course important to recognize that there might be a number of legitimate explanations for the distinct treatment between the groups in *Grutter*, including different undergraduate colleges and courses of study, geographical considerations, and unique experiences and backgrounds that individual applicants offered. A mere comparison of LSAT and GPA profiles of the type offered by Rehnquist does not necessarily mean that different standards are being applied to African-Americans and Latinos. However, to the extent that they are, it would be problematic under strict scrutiny review.

potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits."<sup>229</sup>

The above passage makes clear that the requirement of a logical end point, previously developed in other affirmative action contexts, also applies to university admissions. The Court is less than clear, however, on what the logical end point might be. The Court stated that "[i]n the context of higher education, the durational requirements can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."<sup>230</sup> This suggests that schools need to combine periodic review of the continuing necessity of race-conscious admissions to attain a diverse student body with some ultimate goal of phasing out altogether use of racial classifications, a requirement imposed in other contexts.<sup>231</sup>

Finally, the Court said that it would "take the Law School at its word that it would . . . terminate its race-conscious admissions program as soon as practicable."<sup>232</sup> It then concluded with the following observation:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from

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229. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

230. *Id.*

231. The Court has frequently stated that use of racial classifications to eliminate past discrimination must be temporary in nature. *See Johnson v. Transp. Agency*, 480 U.S. 616, 639-40 (1987); *United States v. Paradise*, 480 U.S. 149, 177-79 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-75 (1986) (plurality opinion). Courts have at times said this also includes a requirement of periodic review. *See Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993).

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

now, the use of racial preferences will no longer be necessary to further the interest approved today.<sup>233</sup>

It is not altogether clear what to make of the above language, and especially the reference to the need for racial preferences in admissions ending in twenty-five years. Not surprisingly, the twenty-five year language drew reactions from several other justices. On the one hand, Justice Ginsburg viewed the majority's discussion as hopeful speculation rather than a firm requirement that affirmative action be ended within a quarter century. She observed that, although some progress had been made in recent years toward educational equality, discrimination continues in our society and that many minorities continue to suffer from inferior educational opportunities at the lower levels.<sup>234</sup> To Ginsburg, race-conscious admissions will be necessary as long as racial disparities continue at the lower levels. Therefore, the twenty-five year reference is simply the majority's hope that educational opportunities will have improved enough by that time that affirmative action will no longer be necessary.<sup>235</sup> Any actual sunset requirement, however, would be predicated on equal educational opportunities, and not a specific time frame.

In contrast, both Justices Thomas and Scalia treated the twenty-five year language as a holding of the Court that in twenty-five years race-conscious admissions practices for colleges will be unconstitutional.<sup>236</sup> Indeed, it was partly for that reason that both justices concurred in part as well as dissented from the majority opinion. Unlike Ginsburg, Thomas said the twenty-five year sunset is not contingent on the gap between white and minority credentials closing, but rather is an absolute limit.<sup>237</sup>

Arguably, neither of these interpretations, between mere wishful thinking on the one hand, and constitutional mandate on the other, best explains the Court's discussion of the twenty-five year sunset. On the one hand, it is hard to read the majority opinion as do Justices Thomas and

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233. *Id.* (citation omitted).

234. *See id.* at 345 (Ginsburg, J., concurring).

235. *See id.* (Ginsburg, J., concurring) ("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.").

236. *See id.* at 351 (Thomas, J., concurring in part and dissenting in part) ("I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years."); *id.* at 375 (Thomas, J., concurring in part and dissenting in part) (agreeing with what he says is the Court's holding that the law school's practices will be illegal in 25 years).

237. *See id.* at 375-76 (Thomas, J., concurring in part and dissenting in part).

Scalia, in which affirmative action in university admissions becomes unconstitutional at the end of twenty-five years. This is making too much of the language, which on its face does not clearly state affirmative action is unconstitutional in twenty-five years. Although the Court is unequivocal in requiring a logical end point, its language regarding twenty-five years is less certain, stating that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary. . . .”<sup>238</sup>

On the other hand, Justice Ginsburg’s interpretation, which amounts to little more than wishful thinking on the part of the majority, arguably makes too little of it. Justice Ginsburg is undoubtedly right that success in eliminating the need for race-conscious admissions is predicated on equalizing educational opportunities at lower levels, a point ignored by the majority. Yet the Court’s discussion certainly goes beyond merely “hoping” that certain changes will occur. In discussing the requirement of a logical end point, the Court twice stated that there “must” be an end point, and three times described it as a “requirement.”<sup>239</sup> Thus, although Justice Ginsburg’s interpretation is more reasonable than Justice Thomas’, it fails to capture the sense of a mandate evidenced in the majority opinion.

The best understanding of the majority’s twenty-five year sunset arguably falls somewhere between that of Justice Ginsburg and Justices Thomas and Scalia. As a practical matter, the twenty-five year sunset does not refer to the constitutionality of race-conscious university admissions as such, but rather to the precedential value of *Grutter* itself. The Court clearly signals that universities cannot rely on *Grutter* indefinitely to support racial classifications in pursuit of educational diversity, and largely builds a self-destruct mechanism into the decision. Affirmative action in admissions does not become unconstitutional at that point, but universities will need to explain in convincing terms why they are still employing it. This essentially holds colleges’ feet to the fire, prodding them to explore race-neutral avenues of attaining diverse student bodies. At the same time it acknowledges the unique context of higher education and the interest in student body diversity, which might not as easily lend themselves to logical end points as race-conscious actions in a remedial setting.

The next two subsections of this article will briefly examine the logical end point requirement in the Court’s affirmative action jurisprudence, looking at both its importance and limitations in the context of race-conscious admissions. It will then briefly examine the Court’s considerations in following or overturning precedent, suggesting that

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238. *Grutter v. Bollinger*, 123 S. Ct. 2325, 343 (2003).

239. *Id.* at 342.

*Grutter* is internally designed so as to limit its precedential value. Taken together, these two analyses suggest that it is *Grutter* itself, rather than race-conscious admissions, that is being given a twenty-five year sunset.

#### A. THE LOGICAL END POINT REQUIREMENT

As stated in *Grutter*, the Supreme Court has required that any race-conscious action, in order to be narrowly tailored, must have a logical end point. This requirement has its genesis in the school desegregation cases, but first appeared in an affirmative action context in Justice Powell's concurring opinion in *Fullilove v. Klutznick*, where he stated that the planned duration of a remedy is one of several factors appellate courts rely on in assessing the constitutionality of race-based remedial action.<sup>240</sup> Justice Powell again stated this requirement in his plurality opinion in *Wygant v. Jackson Board of Education*,<sup>241</sup> where he rejected the role model theory as a basis for race-based action because it had "no logical stopping point" and would be potentially "timeless" in duration.<sup>242</sup> In contrast, in two cases decided shortly after *Wygant*, *Sheet Metal Workers v. EEOC*<sup>243</sup> and *United States v. Paradise*,<sup>244</sup> a plurality found race-conscious remedies to remedy past discriminating employment practices was constitutional, with both cases noting the limited durational nature of the remedy as a factor in its constitutionality.<sup>245</sup>

Thus, despite the lack of a majority in these early cases, there was an emerging focus on the need for a logical ending point for any constitutional race-based remedial action. This was confirmed in *City of Richmond v. J.A. Croson Co.*,<sup>246</sup> where a majority emerged for the first time in an affirmative action case, including in its analysis a requirement that to be narrowly tailored a race-conscious program must have a logical ending point.<sup>247</sup> In *Croson* the Court used this requirement to reject a "generalized assertion" of past discrimination in the construction industry as sufficient to justify race-based remedial actions, stating it would have no "logical

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240. 448 U.S. 448, 510 (1980) (listing five factors, including "the planned duration of the remedy").

241. 476 U.S. 267 (1986).

242. *Id.* at 275-76.

243. 478 U.S. 421 (1986).

244. 480 U.S. 149 (1987).

245. *Paradise*, 480 U.S. at 171, 182 (plurality opinion) (describing the remedy as "temporary and extremely limited").

246. 488 U.S. 469 (1989).

247. *See id.* at 498.

stopping point."<sup>248</sup> In contrast, the Court suggested that use of racial classifications to remedy identified discrimination within the local construction industry would be permissible, since it would provide guidance as to the scope and duration of remedial relief needed to remedy the past discriminatory acts.<sup>249</sup>

As developed in *Croson* and other opinions, the logical end point analysis is a component of the narrowly tailored requirement and has two purposes. First, it helps ensure that any race-conscious program will not be broader than necessary to meet the compelling state interest. The earlier cases that imposed the requirement all involved race-conscious programs designed to address the on-going effects of prior discrimination, and in this context its application is clear. In a remedial context race-conscious programs are a type of corrective action, designed to enable those adversely affected by prior racial discrimination to be where they would have been absent such discrimination. The logical end point requirement is a way of measuring when that point has been reached and assuring that race-conscious actions are not used beyond the point they are necessary to rectify past wrongs.<sup>250</sup>

The logical end point requirement serves a second, broader purpose, however, that closely relates to the Court's long stated belief that the ultimate goal of the Fourteenth Amendment is a society where people are treated as individuals rather than as members of a racial group.<sup>251</sup> By requiring a logical end point the Court avoids the problem that race-conscious actions, initially designed to address a specific concern, become permanently entrenched. It helps ensure that all racial classifications are temporary and in service of the ultimate goal of a society where people are treated as individuals. As stated in *Croson*, the requirement of a logical end point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."<sup>252</sup>

Although this requirement makes sense in the context of remedying past identified discrimination, which is the typical case in which it has arisen, the idea of a logical end point requirement presents some tension

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248. *Croson*, 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 275).

249. *See id.* at 499-500, 509.

250. *See Paradise*, 480 U.S. at 180 (stating that a court order that required that fifty percent of promotions to corporal be awarded to blacks until twenty-five percent of corporals are black, and no longer, was "temporary and extremely limited" in nature).

251. *See, e.g., Grutter*, 539 U.S. at 341; *Adarand*, 515 U.S. at 224-27; *Bakke*, 438 U.S. at 299 (Powell, J.).

252. *Croson*, 488 U.S. at 510.



when applied to university efforts to attract a diverse student body. When race-conscious actions are designed to remedy the effects of past discrimination, the logical end point is when those effects have been eliminated. There is no comparable logical end point with the diversity rationale, since by its very nature the interest in educational diversity is an on-going interest. Moreover, when remedying the effects of past discrimination the race-conscious actions can directly remedy the past discrimination. For example, imposing a hiring quota to remedy past hiring discrimination addresses the basic problem, directly working toward the point when the racial quota is no longer necessary.<sup>253</sup>

This is not the case with race-conscious admissions programs designed to achieve a diverse student body. As suggested by Justice Ginsburg, the real problem concerns unequal educational opportunities at the lower educational levels, which leads to some racial minorities being underrepresented when decisions are based on test scores and academic record. The use of race-conscious admissions does very little, or perhaps nothing, to address that underlying problem. Thus, unlike the remedial context, a university's use of race in admissions does not naturally lead to a phasing out of the race-conscious practice. Instead, it can potentially go on indefinitely unless some action is taken independent of the race-based action itself.

Of course, it might be argued that despite these distinctions, or even because of them, the only logical end point actually imposed by the Court in *Grutter* is where educational opportunities are equal enough that race-conscious admissions are no longer necessary to ensure a diverse student body. This is essentially the position taken by Justice Ginsburg, which states that race can be taken into account as long as it is necessary to ensure racial diversity, but no longer.<sup>254</sup> The Court itself arguably alluded to this as the logical end point when it noted improving test scores for racial minorities, and then stated that it expected that twenty-five years from now race-conscious admissions would no longer be needed.<sup>255</sup> Thus, the sunset is not twenty-five years, but the attainment of equal educational

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253. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987), where the Court upheld a requirement that fifty percent of promotions to the rank of corporal in the Alabama state troopers be given to blacks in order to remedy past discrimination against blacks within that department. This promotion quota directly led to the logical end point of twenty-five percent of the corporals being black, at which point the quota would end.

254. See *Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring).

255. See *id.* at 343.

opportunities and consequent improving test scores and academic records, eliminating the need for any further racial classifications.<sup>256</sup>

This is certainly a possible interpretation of the sunset requirement in *Grutter*, but it poses several problems. First, if the only sunset on the use of race in admissions is that point when race-conscious admissions is no longer necessary to ensure a diverse student body, then the Court should have just said that instead of speaking about twenty-five years. It would have been quite easy to say that race can be used as a factor in university admissions until minority test scores and academic records are such that diversity can be achieved without racial considerations. Yet the Court seemed to require something more, stating that "the durational requirement can be met by sunset provisions in race-conscious admissions programs and periodic reviews."<sup>257</sup> The twenty-five year language seems designed to prod universities into creating such sunsets.

Second, as suggested earlier, limiting the sunset to when test scores and academic records have been equalized largely removes from universities any control over ending the need for any racial classifications. Yet in other contexts the entity using race-based actions also had control over its termination, and the Court seemed to make the same assumption in *Grutter*. As noted, the Court said that universities could meet the durational requirement by "sunset provisions in race-conscious admissions policies,"<sup>258</sup> placing an obligation on universities to move toward eliminating the need for race as a factor in admissions.

Third, and most important, interpreting the sunset to only mean that racial considerations must stop only when test scores and academic records have sufficiently improved to ensure diversity with race-neutral admissions is arguably so general as to be in tension with the Court's goal of avoiding permanent entrenchment of racial classifications. The Court has been adamant that race-conscious programs can only be temporary and has been quick to disapprove racial classifications that might be indefinite in

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256. Such an interpretation is also supported by the "narrowly tailored" requirement itself, which is the basis for the logical end point requirement. The "narrowly tailored" requirement provides that race can be used only to the extent it is necessary to meet a compelling state interest, and no further. Interpreting the *Grutter* "sunset" requirements to be that point where race does not have to be taken into account to ensure a diverse student body seems to, by definition, meet this requirement. This does not relieve universities of their obligation to periodically review whether race-neutral alternatives might exist to achieve diversity, but would make the sunset requirement the point at which racial minorities have equal educational opportunities allowing them to compete on a race-neutral basis with others.

257. *Grutter*, 123 S. Ct. at 342.

258. *Id.*

duration.<sup>259</sup> That has been one reason the Court has rejected general societal discrimination as a sufficient basis for racial classifications, noting that such a generalized interest failed to provide limits on the scope and duration of possible remedies.<sup>260</sup> A sunset that permits universities to use race in admissions until educational opportunities have been equalized, resulting in comparable test scores and academic records, might be seen as too indefinite in duration. Indeed, it is probably this concern more than any other that suggests the Court intended to convey something significant with the twenty-five year reference.

One is left with the distinct impression in *Grutter* that the logical end point requirement is one that does not quite fit with the Court's recognized interest of attaining a diverse student body, yet it is a requirement the Court was unwilling to dispense with because of broader concerns, most notably the idea that any use of race must be temporary in nature. The result is substantial uncertainty in terms of what the Court is demanding. Whether deliberate or not, this uncertainty helps the Court avoid, for the time being, two equally unacceptable results. First, the Court did not put a definite end point on affirmative action in university admissions, avoiding the elimination of a valuable tool. Second, the Court did not lead universities to believe they could be satisfied with the status quo, instead sending a clear signal that at some point race-conscious admissions practices must end. This tension is best understood as a clear message from the Court that universities' reliance on *Grutter* as justifying race-conscious admissions has a definite end point in a quarter-century, which will be the focus of the next subsection.

#### B. SUNSETTING *GRUTTER* AS PRECEDENT

Whatever "sunset" the Court had in mind for race-conscious admissions itself, it seems relatively clear that the precedential value of *Grutter*, in terms of establishing the constitutionality of race-conscious admissions, faces a twenty-five year sunset. Indeed, this might be the primary purpose of affirming the need for a logical end point and sunset provision, sending a message to colleges and universities that they cannot rely on *Grutter* indefinitely to support race-conscious admissions. This does not mean that such practices are automatically unconstitutional in twenty-five years, but does mean the issue is essentially examined anew. This "self-destruct" dimension to the decision's precedential value serves

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259. See *Croson*, 488 U.S. at 497-98; *Wygant*, 476 U.S. at 275 (plurality opinion).

260. See *Croson*, 488 U.S. at 497-98; *Wygant*, 476 U.S. at 275 (plurality opinion).

to advance the Court's core concern that all racial classifications eventually end, while at the same time not putting unrealistic restraints on institutions of higher education.

*Grutter's* sunseting of its own precedential value is apparent when compared to the Court's typical analysis when deciding to follow or disregard precedent. Perhaps the two most significant decisions in recent years to engage in such analysis were *Planned Parenthood v. Casey*,<sup>261</sup> where the Court declined to overrule *Roe v. Wade*,<sup>262</sup> and *Lawrence v. Texas*,<sup>263</sup> where the Court overruled *Bowers v. Hardwick*.<sup>264</sup> Among the concerns identified by the Court in those cases on whether to follow or reject relevant precedent were the degree of societal reliance on the precedent,<sup>265</sup> the extent to which a case's legal foundations have been eroded by subsequent decisions,<sup>266</sup> and whether the earlier rule had proved workable.<sup>267</sup> All three factors demonstrate *Grutter's* limited duration.

Among the most significant rationales for adhering to precedent is the extent to which there is strong societal reliance on the decision. This has been recognized not only in the area of commercial and property transactions,<sup>268</sup> but also with regard to personal liberties, as in *Casey* and *Lawrence*. One reason the Court in *Casey* declined to overrule *Roe* was what it perceived to be substantial reliance on *Roe* by women in ordering their life choices.<sup>269</sup> In contrast, the Court in *Lawrence* perceived virtually no individual or societal reliance on *Bowers*, making it easy for the Court to overrule *Bowers*.<sup>270</sup>

By its very terms, *Grutter* is designed to negate any possible long-term reliance on it for use of race-conscious admissions. Although in the short-term colleges and universities can rely on *Grutter* to justify race-conscious admissions, the Court clearly states it must have an end point and schools must sunset it. The Court's statement that it expects in twenty-five years racial classifications in admissions will no longer be necessary clearly signals that universities cannot rely on *Grutter* to justify it at that time. Thus, concerns about following precedent because of substantial

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261. 505 U.S. 833 (1992).

262. 410 U.S. 113 (1973).

263. 123 S. Ct. 2472 (2003).

264. 478 U.S. 186 (1986).

265. *Lawrence*, 123 S. Ct. at 2483; *Casey*, 505 U.S. at 855-56.

266. *Lawrence*, 123 S. Ct. at 2481-83; *Casey*, 505 U.S. at 857-59.

267. *Casey*, 505 U.S. at 854-55.

268. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991); *United States v. Title Ins. & Trust*, 265 U.S. 472 (1924).

269. *Casey*, 505 U.S. at 855-56.

270. *Lawrence*, 123 S. Ct. at 2483.

societal reliance point in the opposite direction in *Grutter* -- the Court is specifically and directly telling schools they cannot so rely on *Grutter* in the long term.

A second factor for consideration in following or overruling precedent is the extent to which subsequent Court decisions might have eroded the earlier precedent. The Court in *Casey* believed that subsequent cases had not eroded, but in fact had affirmed the doctrinal premises of *Roe*.<sup>271</sup> In contrast, *Lawrence* believed that the underpinnings of *Bowers*, initially weak, had been further eroded by Court decisions.<sup>272</sup> In the case of *Grutter*, it is the case's own internal reasoning, rather than subsequent decisions, that erode its precedential value, but the effect is the same. The logical end point requirement is perhaps best viewed as a phasing out, rather than an eroding, of the permissibility of racial classifications, but it brings you to the same place—what had been a constitutionally valid action no longer is. *Grutter*, though, anticipates and incorporates this shift in advance, and makes it a part of the doctrine itself.

Third, in assessing whether to follow precedent, the Court will examine the workability of the prior rule.<sup>273</sup> In the case of race-conscious admissions, the question is not so much whether such practices have proven workable in the short-term; they almost certainly have. Rather, the Court's affirmative action doctrine defines workability as including a logical end point, since any use of racial classification must be temporary. Thus, the Court has consistently stated that any use of race is unworkable, and thus impermissible, if it might continue indefinitely.<sup>274</sup> The Court in *Grutter* emphasized this point, stating, in regard to race-conscious admissions programs, "the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all."<sup>275</sup> To tweak this just a little, *Grutter* itself becomes an unworkable affirmative action precedent if it can be relied on to justify race-conscious admissions indefinitely into the future.

These three factors in evaluating the value of precedent affirm what should be apparent from *Grutter* itself: its value as precedent to justify race-conscious affirmative action programs is of limited duration. To be

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271. *Casey*, 505 U.S. at 857-58.

272. *Lawrence*, 123 S. Ct. at 2481-82 (discussing how the doctrinal underpinnings of *Bowers* had been eroded by *Casey* and by *Romer v. Evans*, 517 U.S. 620 (1996)).

273. See *Casey*, 505 U.S. at 854-56 (discussing whether *Roe* had proven workable).

274. See, e.g., *Croson*, 488 U.S. at 497; *Wygant*, 476 U.S. at 275 (plurality opinion).

275. *Grutter*, 539 U.S. at 343 (quoting Nathaniel L. Nathanson & Casimir J. Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 CHI. BAR REC. 282, 293 (May-June 1977)).

more direct, twenty-five years from now colleges and universities cannot point to *Grutter* as justifying their continued use of race as a factor in admissions decisions. *Grutter* is designed to preclude that from happening. If affirmative action in university admissions is going to continue at that time, it has to be on some basis other than simply asserting *Grutter* as precedent.

As stated earlier, this does not necessarily mean that race-conscious admissions automatically become unconstitutional in twenty-five years, as Justice Thomas asserts. What it means is that if affirmative action in university admissions is going to continue at that time, it has to be on some basis other than simply asserting *Grutter* as precedent. Any precedential value of *Grutter* would have self-destructed at that point, requiring that the value of continued use of race-conscious admissions must be evaluated on its own terms. Part of that analysis, however, will be recognition that fifty years would have elapsed since *Bakke* first affirmed that race could be used in making admission decisions.<sup>276</sup>

To be realistic, of course, a lot can and undoubtedly will happen between now and then, including shifts in constitutional doctrine and changes in the make-up of the Court. How *Grutter* will be viewed at that time is anyone's guess. But from today's perspective it is quite clear that, although affirmative action in university admissions is not being sunsetted in twenty-five years, the use of *Grutter* to justify such practices is being sunsetted. If nothing else, that should be an on-going reminder and incentive to colleges and universities to explore alternatives to race-based admissions.

## CONCLUSION

For at least the time being, affirmative action in university admissions is constitutionally alive and well. For the past quarter century institutions of higher education had relied on the opinion of Justice Powell in *Bakke* to pursue a variety of race-conscious admissions practices, a position that had become more tenuous in recent years. Yet the much anticipated Supreme Court opinions in *Grutter* and *Gratz* affirmed and set on solid ground the central point of *Bakke*: universities have a compelling interest in educational diversity, permitting the narrowly tailored use of race in admissions decisions. In doing so, the Court grounded its analysis in first amendment and academic freedom concerns emphasizing that universities

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276. See *Grutter*, 123 S. Ct. at 343 (noting that twenty-five years had elapsed since *Bakke* first permitted race-conscious admissions).

have freedom to make educational judgments about the selection of students. Importantly, the Court also held that universities can seek a critical mass of underrepresented minorities in their student bodies, as long as critical mass remains a flexible goal and not a rigid quota.

The primary question after *Grutter* and *Gratz* is not whether universities can engage in race-conscious admissions, but rather what types of race-conscious programs are constitutionally permissible. Here the Court was quite clear: to be narrowly tailored a race-conscious admissions program must ensure an individualized evaluation of each applicant, in which race is only one factor for consideration, and is not the defining feature of an application. Under this approach, schools cannot seek racial diversity for its own sake or make race the only factor for consideration, cannot automatically allocate points based on racial status, cannot impose racial quotas, and cannot have separate treatment of minority applicants in the admissions process.

The long range outlook for affirmative action is less certain. *Grutter* made clear that use of race-conscious admissions programs must have a logical end point, a requirement previously recognized in other contexts, and then ended by speculating such programs will no longer be necessary in twenty-five years. Although far from clear, this language is best interpreted not as making affirmative action unconstitutional in twenty-five years, but instead as a sunset on *Grutter's* own value as precedent. It is a self-destruct mechanism built into the decision, effectively telling universities that they cannot indefinitely rely on *Grutter* to justify race-conscious admissions programs. As such, it is an on-going reminder and incentive to schools to explore and develop alternatives to race-based admissions.

