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Constitutional Law - Affirmative Action in Higher Education - Strict in Theory, Intermediate in Fact

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CONSTITUTIONAL LAW – Affirmative Action in Higher Education - Strict in Theory, Intermediate in Fact? *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

INTRODUCTION

Barbara Grutter, a Caucasian resident of Michigan, applied to the University of Michigan Law School (Law School) in 1996.[1] Ms. Grutter had a 3.8 undergraduate Grade Point Average (GPA) and a 161 Law School Admissions Test (LSAT) score.[2] After placing her on a waiting list, the Law School ultimately rejected Ms. Grutter's application under its race-conscious admissions program.[3] In December 1997, Ms. Grutter filed suit against the Law School and its affiliates in the United States District Court for the Eastern District of Michigan.[4] She alleged that the Law School racially discriminated against her in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981.[5]

The Law School ranks among America's top law schools and receives over 3,500 applications each year for a class of approximately 350 students.[6] From these applications, the Law School selects the strongest candidates who will make a diverse contribution to the class.[7] The Law School's admissions policy does not define which diversity contributions receive "substantial weight," but it does voice a commitment to racial and ethnic diversity, particularly to underrepresented groups such as African-Americans, Hispanics, and Native-Americans.[8] The Law School seeks to enroll a meaningful number, or "critical mass," of such underrepresented minority students in each entering class.[9] The "critical mass" is not a set number of students; it is any number sufficient to allow minority students to

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1. Grutter v. Bollinger, 123 S. Ct. 2325, 2332 (2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 2331.
7. *Id.* The Law School seeks students with a variety of backgrounds and experience who can learn from each other. *Id.* The Law School recognizes several bases for diversity in admissions, including a "longstanding commitment to racial and ethnic diversity." *Id.* at 2332.
8. *Id.* at 2332.
9. *Id.* In the years 1995 through 1999, the percentages of admitted applicants who were African-American were 9.4%, 9.2%, 8.3%, 7.9%, and 7.1% respectively. *Id.* at 2368 (Rehnquist, J., dissenting). The percentages of admitted applicants who were Hispanic over the same years were 5.0%, 4.6%, 3.9%, 4.2%, 3.8%, and 4.2%. *Id.* (Rehnquist, J., dissenting). The percentages of admitted applicants who were Native-American were 1.2%, 1.1%, 1.6%, 1.4%, 1.0%, and 1.1%. *Id.* (Rehnquist, J., dissenting). These figures roughly represent the percentages of applicants from each of the three underrepresented minority groups over the years in question. *Id.* (Rehnquist, J., dissenting).

feel comfortable discussing issues rather than being "isolated or like spokespersons for their race."[10]

The Law School uses a "flexible assessment" of each applicant to reach its "critical mass" goals.[11] In addition to the LSAT score and GPA, the Law School considers "soft" variables like "the enthusiasm of the recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, residency, leadership and work experience, unique talents or interests, and the areas and difficulty of undergraduate course selection."[12] Any or all of these variables can compensate for an applicant's low academic record or LSAT score, and membership in an underrepresented minority group is viewed as just another positive "soft" variable in an applicant's file.[13]

Despite individualized consideration of numerous variables, race remains a significant factor in admissions decisions.[14] During the peak admissions seasons of the years in question (1995-2000), the Law School's Admissions Director frequently consulted daily reports tracking the racial and ethnic composition of the class.[15] This enabled him "to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body."[16] The desired educational benefits include stimulating classroom discussions, exposure to a variety of viewpoints, and an enhanced educational experience "both inside and outside the classroom."[17]

Applying strict scrutiny to Ms. Grutter's Equal Protection claim, the United States District Court for the Eastern District of Michigan held that the Law School's policy was unlawful because assembling a diverse student body was not a compelling state interest under *Regents of the University of*

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10. Grutter v. Bollinger, 288 F.3d 732, 737 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003).
11. *Grutter*, 123 S. Ct. at 2331.
12. *Grutter*, 288 F.3d at 736.
13. *See Grutter*, 123 S. Ct. at 2331-33.
14. *Id.* at 2334. Dr. Kinley Larntz, the petitioner's expert, statistically analyzed admissions data collected by the Law School from 1995 through 2000 to quantify the extent of the Law School's use of race in admissions decisions. *Id.* He concluded that minority status is an extremely significant, but not the predominant, factor in admissions decisions. *Id.*
15. *Id.* at 2333.
16. *Id.* At trial, Mr. Dennis Shields, the Director of Admissions, maintained that he did not attempt to admit any particular percentage of minority students; however, he confirmed that at least eleven percent of the class was comprised of African-American, Hispanic, and Native-American students during his tenure. Grutter v. Bollinger, 137 F. Supp. 2d 821, 832 (E.D. Mich. 2001), *rev'd en banc*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003).
17. *Grutter*, 123 S. Ct. at 2334. The Law School explained that diversity enhances educational experiences because "when a critical mass of minority students are present, racial stereotypes are dismantled because non-minority students see that there is no 'minority viewpoint;' they see, in other words, that there is a diversity of viewpoints among minority students" and begin to understand one another. *Grutter*, 137 F. Supp. 2d at 836.

California v. Bakke.[18] Moreover, even if it were, the court held that the Law School's admissions policy was not narrowly tailored to achieve its interest in diversity.[19]

The Law School appealed, contending that its interest in assembling a diverse student body was compelling under Justice Powell's plurality opinion in *Bakke,* and that its admissions policy was narrowly tailored to achieve that interest.[20] Sitting en banc, the United States Court of Appeals for the Sixth Circuit agreed with the Law School and reversed the District Court's decision.[21] The Sixth Circuit held that the Law School's policy was narrowly tailored to achieve its compelling state interest of assembling a diverse student body.[22]

The United States Supreme Court granted certiorari to consider whether racial classifications in the Law School's admissions policy were unlawful.[23] In a five-to-four decision, the Court affirmed the Sixth Circuit's decision and held that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[24] Accordingly, Ms. Grutter's statutory claims based on Title VI and 42 U.S.C. § 1981 also failed.[25]

First, this case note will trace the legal development of the law governing affirmative-action prior to *Grutter v. Bollinger*. Second, this note will explain and then analyze the "strict scrutiny" test for affirmative-action as applied by the United States Supreme Court in *Grutter*. As part of this "strict scrutiny" analysis, this case note will argue three points: (1) the *Grutter* Court conceived and applied a more deferential form of strict scrutiny

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18. *Grutter*, 137 F. Supp. 2d at 872. *Bakke* was the first United States Supreme Court case to consider race-conscious admissions programs. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978) (Powell, J., plurality). Justice Powell authored the final judgment, but not the opinion of the Court. *Id.* (Powell, J., plurality). In a portion of his plurality opinion that was joined by no other Justice, Justice Powell found that achieving diversity in university admissions was a compelling state interest. *Id.* at 311-12 (Powell, J., plurality); *see infra* notes 48-86 and accompanying text for an in depth discussion of *Bakke*.

19. *Grutter*, 137 F. Supp. 2d at 872.

20. Grutter v. Bollinger, 288 F.3d 732, 735 (6th Cir. 2002).

21. *Id.* at 752.

22. *Id.*

23. Grutter v. Bollinger, 123 S. Ct. 2325, 2331 (2003).

24. *Id.* at 2346.

25. *Id.* at 2347. Ms. Grutter's Title VI claim failed because Title VI only bars racial classifications that violate the Equal Protection Clause or the Fifth Amendment. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (Powell, J., plurality). Her § 1981 claim failed because the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause. Gen. Bldg. Contractors Assn., Inc. v. Pennsylvania, 458 U.S. 375, 389-391 (1982). Since the Court held that the Law School's program did not violate the Equal Protection Clause, neither of Ms. Grutter's statutory claims could succeed. *Grutter*, 123 S. Ct. at 2347.

than had been used in prior affirmative-action cases; (2) altering the strict scrutiny analysis in this manner served to confuse the decision and undermine the well-established strict scrutiny test; and (3) instead of weakening the strict scrutiny test, the Court should have broken from precedent and explicitly upheld the Law School's program under intermediate scrutiny.

BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[26] One key purpose of the Equal Protection Clause was to protect African-Americans from racial discrimination.[27] Over time, the Equal Protection Clause was steadily extended to apply to all races seeking protection from discrimination.[28] Today, the equal protection guarantees "are universal in their application, to all persons . . . without regard to any differences of race, of color, or of nationality."[29]

Because not all classifications of people are equally abhorrent under the Equal Protection Clause, the United States Supreme Court applies varying levels of judicial scrutiny depending on what type of classification is being made.[30] The lowest level of judicial scrutiny is the rational basis review, under which social and economic legislation is presumed to be valid and will be upheld if it is "rationally related to a legitimate state interest."[31] The rational basis review is a mild judicial standard that "allows the States wide latitude" in enacting legislation incorporating non-suspect classifications of people.[32] A higher level of judicial scrutiny, or intermediate scrutiny, becomes necessary when the government discriminates against a quasi-

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26. U.S. CONST. amend. XIV, § 1.

27. Slaughter-House Cases, 16 Wall 36, 71 (1873) ("[The] one pervading purpose [of the Fourteenth Amendment was] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him.").

28. *Bakke*, 438 U.S. at 292-93 (citing Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (Celtic Irishmen) (dictum); Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886) (Chinese); Truax v. Raich, 239 U.S. 33, 41 (1915) (Austrian resident aliens); Korematsu v. United States, 323 U.S. 214, 215 (1944) (Japanese); Hernandez v. Texas, 347 U.S. 475, 476 (1954) (Mexican-Americans)).

29. *Yick Wo*, 118 U.S. at 369. Today all races must be afforded the equal protection of the laws, as the Equal Protection Clause no longer provides protection only to minority citizens that have been historically discriminated against. *Id.*

30. *See infra* notes 31-37 and accompanying text.

31. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

32. *Id.* at 442 (applying rational basis review to a zoning ordinance excluding group homes for the mentally retarded); N.Y. Transit Authority v. Breazer, 440 U.S. 568, 571 (1979) (applying rational basis review to the New York City Transit Authority's refusal to hire methadone users).

suspect class or classification of people.[33] A classification becomes quasi-suspect when "the [distinguishing characteristic] generally provides no sensible ground for differential treatment."[34] For example, gender classifications are usually considered quasi-suspect because "[r]ather than resting on meaningful considerations, statutes distributing benefits and burdens [based on gender] very likely reflect outmoded notions of the relative capabilities of men and women."[35] Finally, the most searching standard, or strict scrutiny, applies when the government intentionally discriminates against a suspect class or classification of people.[36] Race is considered a suspect classification because historically "[racial classifications are] so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . ."[37]

The United States Supreme Court established the concept of race as a suspect class in *Korematsu v. United States*.[38] In *Korematsu*, the petitioner, Fred Korematsu, appealed a criminal conviction for disobeying Exclusion Order No. 34 by remaining in a military zone that persons of Japanese ancestry had been ordered to vacate to protect the West Coast from espionage and sabotage during World War II.[39] Mr. Korematsu contended that the exclusion order violated his rights to Equal Protection under the Fourteenth Amendment, and the Court considered whether the order, which applied only to persons of Japanese descent, was justified.[40] The *Korematsu* Court held that though all state sanctioned racial distinctions are immediately suspect, they are not all unconstitutional.[41] Instead, the Court must subject such distinctions to the most "rigid scrutiny," or strict scrutiny, to determine whether they violate the Equal Protection Clause of the Fourteenth Amendment.[42] Under this strict scrutiny standard, the Court recognized that certain governmental purposes, such as national security during times of war, can justify the government's use of racial distinctions.[43]

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33. *E.g.*, Craig v. Boren, 429 U.S. 190, 197 (1977) (applying intermediate scrutiny to quasi-suspect gender classifications in Oklahoma statutes prohibiting the sale of 3.2% beer to males under the age of twenty-one and females under the age of eighteen).

34. *Cleburne*, 473 U.S. at 440.

35. *Id.* at 441.

36. Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to suspect racial classifications).

37. *Cleburne*, 473 U.S. at 440.

38. *Korematsu*, 323 U.S. at 216 ("It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

39. *Id.* at 215-17; Executive Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

40. *See Korematsu*, 323 U.S. at 218.

41. *Id.* at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional.").

42. *Id.*

43. *See id.* at 223-24.

Korematsu established race as a suspect classification requiring strict scrutiny in all Equal Protection cases involving racial classifications.[44] Despite this precedent, the appropriate level of scrutiny for affirmative-action cases generated much judicial debate.[45] This is because affirmative-action cases differ from traditional Equal Protection cases like *Korematsu,* which often confront malicious racial classifications or have the purpose of stripping minorities of their constitutional rights.[46] With affirmative-action, the opposite is true; the classifications are benign, and the Court has harbored reservations about applying strict scrutiny, a very harsh test, to racial classifications meant to help, rather than hurt, minorities.[47]

No case demonstrates the affirmative-action scrutiny debate better than *Regents of the University of California v. Bakke*, the first and only United States Supreme Court case to address affirmative-action in university admissions prior to *Grutter*.[48] In *Bakke*, the Medical School of the University of California at Davis used racial classifications in its admissions process with the goals of increasing the number of minorities in the medical profession, remedying societal discrimination against minorities, and "obtaining the educational benefits that flow from an ethnically diverse student body."[49]

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44. *Id.* at 216 ("[C]ourts must subject [all racial classifications] to the most rigid scrutiny.").

45. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J., plurality) (applying strict scrutiny to a university admissions program that considered race); *see also* Fullilove v. Klutznick, 448 U.S. 448, 473 (1980) (applying intermediate scrutiny to a minority set-aside program requiring the grantee of federal funds for local public works projects to reserve at least ten percent of the funds for minority enterprises); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986) (applying strict scrutiny to a school board's policy of laying off non-minority teachers before minority teachers); United States v. Paradise, 480 U.S. 149, 166-67 (1987) (applying strict scrutiny to a temporary "one-black-for-one-white" promotion requirement mandated by an Alabama district court); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (applying strict scrutiny to the city's policy requiring contractors granted city contracts to subcontract at least thirty percent of each dollar to minority businesses); Metro Broad., Inc. v. Fed. Communications Comm'n, 497 U.S. 547, 597 (1990) (applying intermediate scrutiny to the Federal Communications Commission program awarding enhancement for minority ownership), *partially overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all cases of racial distinctions must be reviewed under strict scrutiny and overruling *Metro Broadcasting* to the extent that the Court did not apply strict scrutiny); Gratz v. Bollinger, 123 S. Ct. 2411, 2444 (2003) (Ginsburg, J., dissenting) (implying that the majority should not have applied strict scrutiny to a benign race-conscious undergraduate admissions program designed to help minorities achieve equality).

46. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 4 (1948) (addressing neighborhood restrictive covenants against African-American or Mongolian ownership); Brown v. Board of Education, 347 U.S. 483, 487 (1954) (addressing school segregation); Hills v. Gautreaux, 425 U.S. 284, 287-88 (1976) (addressing racial segregation in public housing projects).

47. *See supra* note 45 and accompanying text.

48. *Bakke*, 438 U.S. at 269 (Powell, J., plurality).

49. *Id.* at 306 (Powell, J., plurality). In addition to race, the University of California considered other factors applicable to both minorities and non-minoritites including the personal interview, recommendations, character, and "matters relating to the needs of the profes-

To reach these goals, the University of California maintained two separate admissions programs: The regular admissions program and the special admissions program.[50] The regular admissions program admitted non-minority applicants, while the special program selected minority or "economically and/or educationally disadvantaged applicants."[51] The special program operated via a separate committee whose goal was to "recommend special applicants until a predetermined number prescribed by faculty vote were admitted."[52] This committee insulated special candidates from the regular program, so special and regular candidates were never compared.[53]

Allan Bakke, a white male applicant, was twice denied admission to the University of California under the regular admissions program.[54] Mr. Bakke filed suit in the Superior Court of California, alleging that the University's special admissions program excluded him from admission on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment.[55] The United States Supreme Court eventually heard his case.[56]

The *Bakke* Supreme Court decision was exceedingly fragmented.[57] Justice Powell's plurality opinion delivered the final judgment, but not the opinion of a majority of the Court.[58] First, Justice Powell found that *Korematsu* applied equally to affirmative-action cases, stating, "The Court has never questioned the validity of [the] pronouncements [made in *Korematsu*]. Racial and ethnic distinctions of any sort are inherently suspect and thus call

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sion and society, such as an applicant's professional goals." *Id.* at 271 n.** (Powell, J., plurality).

50. *Id.* at 265 (Powell, J., plurality).

51. *Id.* at 272-75 (Powell, J., plurality) (internal quotation omitted).

52. *Id.* at 275 (Powell, J., plurality). In 1973 and 1974, the faculty set aside sixteen of the one-hundred available seats for minorities. *Id.* at 275 (Powell, J., plurality). In 1973, the special admissions committee admitted six African-Americans, eight Chicanos, and two Asians. *Id.* at 276 n.6 (Powell, J., plurality). In 1974, the committee admitted six African-Americans, seven Chicanos, and three Asians. *Id.* (Powell, J., plurality).

53. *Id.* (Powell, J., plurality).

54. *Id.* at 276-77 (Powell, J., plurality). Allan Bakke was fully qualified for admission. *Id.* at 277 (Powell, J., plurality). In the years that Mr. Bakke was denied entrance (1973-74), his average GPA and test scores exceeded the averages of those admitted under both the regular admissions program and the special program. *Id.* (Powell, J., plurality). Mr. Bakke had a 3.44 Science GPA (SGPA) and a 3.46 Overall GPA (OGPA). *Id.* (Powell, J., plurality). His Medical College Admission Test (MCAT) scores were 96 Verbal, 94 Quantitative, 97 Science, and 72 General Information. *Id.* (Powell, J., plurality). For comparison value, the averages for regular admittees in 1974 were 3.36 SGPA, 3.29 OGPA, 69 Verbal, 67 Quantitative, 82 Science, and 72 General Information. *Id.* (Powell, J., plurality). During both years, Mr. Bakke made it to the interview stage of the admissions process, but he was never placed on a waiting list and was ultimately twice denied entrance. *Id.* (Powell, J., plurality).

55. *Id.* at 277-78 (Powell, J., plurality).

56. *Id.* at 269 (Powell, J., plurality).

57. *See id.* at 269-421 (Powell, J., plurality); *see infra* text accompanying notes 58-83.

58. *Bakke*, 438 U.S. at 269-421. (Powell, J., plurality).

for the most exacting judicial examination."[59] Thus Justice Powell advocated a strict scrutiny standard.[60]

Strict scrutiny is a two pronged analysis: First, the use of racial classifications must further a compelling state interest.[61] Second, the means by which the compelling goal is achieved must be narrowly tailored to further that goal.[62] If a government program incorporating race does not meet both of these requirements, then the program violates the Equal Protection Clause of the Fourteenth Amendment.[63]

Applying strict scrutiny in *Bakke*, Justice Powell first found that the University of California's interest in diversity was compelling.[64] In a portion of the opinion joined by no other Justice, he stated, "[The attainment of a diverse student body] clearly is a constitutionally permissible goal for an institution of higher education."[65] However, Justice Powell went on to hold that the University's dual admissions program based on predetermined racial quotas was not narrowly tailored to meet its compelling goal.[66] He felt that the University's special admissions program, "[which] focused *solely* on ethnic diversity, would hinder rather than further [the] attainment of genuine diversity," as it was not the least intrusive means of achieving the compelling goal.[67] Justice Powell then described Harvard College's "illuminating example" of a constitutionally permissible, or narrowly tailored, way to achieve diversity in the student body.[68] Harvard did not implement target

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59. *Id.* at 291 (Powell, J., plurality).

60. *See id.* at 291 (Powell, J., plurality). Justice Powell noted that all citizens, even white males like Allan Bakke, are entitled to strict scrutiny. *Id.* at 294-95 (Powell, J., plurality). He stated:

> [The University of California] urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.' [However,] it is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.

Id. (Powell, J., plurality).

61. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

62. *Id.*

63. *Id.*

64. *Bakke*, 438 U.S. at 311-12 (Powell, J., plurality).

65. *Id.* (Powell, J., plurality). In determining that diversity was compelling, Justice Powell relied more on the University's "academic freedom" to choose its own student body than on the actual benefits of diversity. *Id.* at 311 (Powell, J., plurality). He noted that academic freedom, including the freedom of a university to select its own student body, "has long been viewed as a special concern of the First Amendment." *Id.* at 312 (Powell, J., plurality).

66. *See id.* at 315-20 (Powell, J., plurality).

67. *Id.* at 315 (Powell, J., plurality).

68. *Id.* at 316 (Powell, J., plurality).

quotas or separate minority and non-minority applicants.[69] Instead, each applicant was reviewed individually, and race was simply a "plus" in an applicant's file.[70] While Justice Powell refused to condone the University of California's special admissions program, he also refused to enjoin the University from ever considering race in admissions and maintained that it could be done constitutionally via a program similar to the Harvard plan.[71]

Justice Brennan wrote a separate opinion joined by three other justices.[72] He did not agree that "racial classifications are always suspect and, consequently, that [the University's reasons needed to be] compelling."[73] Instead, he concluded that "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives,'" or, in other words, that benign affirmative-action programs should be reviewed under intermediate, rather than strict, scrutiny.[74]

Applying intermediate scrutiny, Justice Brennan would have upheld the University's program because it was benevolent and could have been construed to remedy past "deliberate, purposeful discrimination against minorities in education . . . ."[75] Since the Brennan faction felt that the University's existing policy was constitutional, it followed that they agreed with Justice Powell on the following two issues: First, the University should not

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69. *Id.* at 316-18 (Powell, J., plurality).

70. *Id.* (Powell, J., plurality). Under the Harvard plan, qualities such as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, or an ability to communicate with the poor" were all considered pertinent diversifying factors in addition to race. *Id.* at 317 (Powell, J., plurality).

71. *Id.* at 320 (Powell, J., plurality).

72. *See id.* at 324 (Brennan, J., concurring in part and dissenting in part). Justice Brennan was joined by Justices Marshall, White, and Blackmun. *Id.* (Brennan, J., concurring in part and dissenting in part).

73. *Id.* at 356 (Brennan, J., concurring in part and dissenting in part).

74. *Id.* at 359 (Brennan, J., concurring in part and dissenting in part) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

75. *Id.* at 370 (Brennan, J., concurring in part and dissenting in part). Justice Brennan explained that African-Americans had long been denied access to equal education. *Id.* at 371-72 (Brennan, J., concurring in part and dissenting in part). Under slavery, sanctions were imposed against those educating African-Americans. *Id.* at 371 (Brennan, J., concurring in part and dissenting in part). Later, the Supreme Court itself condoned school segregation as late as 1908. *Id.* at 371 (Brennan, J., concurring in part and dissenting in part) (citing Berea College v. Kentucky, 211 U.S. 45 (1908)). Even though the Court declared such discrimination unconstitutional in *Brown v. Board of Education*, discrimination persisted because "massive social and private resistance prevented the attainment of equal opportunity" for several years. *Id.* at 371-72 (Brennan, J., concurring in part and dissenting in part) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)). Justice Brennan reasoned that most of the minority students who applied to the University of California's medical school since it opened in 1968 were born near the time *Brown v. Board of Education* was decided and clearly suffered from lingering discrimination. *Id.* (Brennan, J., concurring in part and dissenting in part).

be prohibited from establishing future affirmative action programs.[76] Second, the "Harvard plan" was a constitutional example of such a program, "so long as the use of race to achieve an integrated student body [was] necessitated by the lingering effects of past discrimination."[77] Justice Brennan repeatedly stated that remedial purposes were acceptable reasons to consider race in university admissions programs.[78] He did not, however, directly address whether he viewed diversity as a compelling state interest.[79]

Justice Stevens, also joined by three justices, wrote the third major opinion in *Bakke*.[80] Justice Stevens noted that at trial, the University of California admitted that it could not prove that its special admissions program had not excluded Mr. Bakke from admission.[81] Therefore, Justice Stevens held that the Court had improperly addressed the issues of if and when race can ever be used in admissions programs because the issue was properly contained within Section 601 of the Civil Rights Act of 1964.[82] Consequently, Justice Stevens did not address the constitutional issue and held that Allan Bakke was to be admitted to the University because the University's

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76. *Id.* at 325-26 (Brennan, J., concurring in part and dissenting in part).

77. *Id.* at 326 n.1 (Brennan, J., concurring in part and dissenting in part).

78. *Id.* at 325, 326, 369, 370-71, 372 (Brennan, J., concurring in part and dissenting in part).

79. *Id.* (Brennan, J., concurring in part and dissenting in part). Justice Brennan's silence regarding diversity as a compelling state interest has been interpreted inconsistently by lower courts. The Fifth Circuit, in finding that diversity was not compelling, viewed Justice Brennan's silence as an intentional lack of support for the concept. *See* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) ("Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case."). The Sixth Circuit, however, explained that Justice Brennan's concurrence supported Justice Powell's diversity rational:

> Under the Harvard plan, Harvard College justified its race-conscious admissions policy solely on the basis of its efforts to achieve a diverse student body. Harvard's consideration of race could not be constitutional if it did not further a constitutionally permissible goal; therefore, by indicating that the Harvard plan could be constitutional under its approach, the Brennan concurrence implicitly—but unequivocally—signaled its agreement with Justice Powell's conclusion that achieving a diverse student body is a constitutionally permissible goal.

Grutter v. Bollinger, 288 F.3d 732, 742 (6th Cir. 2002) (internal citation omitted). The Sixth Circuit reasoned that if the Brennan faction agreed that diversity was compelling, then the concept had garnered a majority of *Bakke* votes. *Id.*

80. *Bakke*, 438 U.S. at 408 (Stevens, J., concurring in part and dissenting in part).

81. *Id.* at 410 (Stevens, J., concurring in part and dissenting in part).

82. *Id.* at 411 (Stevens, J., concurring in part and dissenting in part). Title VI of the Civil Rights Act of 1964 provided, "No person in the United States shall, on the ground of race . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1970). Since the federally funded University of California excluded Bakke from admission because of his race, the program violated Title VI, and according to Justice Stevens there was no need to address the constitutional issue. *Bakke*, 438 U.S. at 412-13 (Stevens, J., concurring in part and dissenting in part).

special admissions program violated Title VI of the Civil Rights Act of 1964.[83]

Prior to *Grutter*, lower courts struggled valiantly to interpret the divided *Bakke* opinions and often applied what is known as the *Marks* analysis to determine whether Justice Powell's solitary statement regarding diversity was binding.[84] In *Marks v. United States*, the United States Supreme Court held, "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."[85] Unfortunately, courts applied *Marks* inconsistently, so the analysis did not lend any uniformity to the law.[86]

After *Bakke*, the Court addressed affirmative-action in several non-educational contexts.[87] In *Fullilove v. Klutznick*, the Court considered the constitutionality of a minority set-aside program in which ten percent of all federal funds granted for local public works projects had to be reserved for products and services procured from minority businesses.[88] The Court reviewed the program under intermediate scrutiny, stressing that a lower standard of scrutiny was appropriate because the affirmative-action program stemmed from a congressional Act, and therefore, the Court had to show "appropriate deference to the Congress."[89] Under this deferential standard, the Court first held that Congress' interest in eradicating prior discrimination in the nation's local procurement practices was within its Fourteenth

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83. *Id.* at 421 (Stevens, J., concurring in part and dissenting in part).

84. Marks v. United States, 430 U.S. 188, 193 (1977). *Marks* itself dealt with pornography and its relation to the First Amendment freedom of expression. *Id.* at 189-91. *Marks* applies to affirmative-action cases only through a test that the *Marks* Court devised to determine the official holding of a fractured Court. *See infra* text accompanying notes 85-86.

85. *Marks*, 430 U.S. at 193 (1977) (citation and internal punctuation omitted).

86. Grutter v. Bollinger, 288 F.3d 732, 739-42 (6th Cir. 2002) (determining, in the Sixth Circuit, that Justice Powell's strict scrutiny approach, as opposed to Justice Brennan's intermediate scrutiny approach, represented the narrowest grounds under *Marks*, and therefore, Justice Powell's opinion that diversity was compelling comprised the controlling rationale for the Court); Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1247-48 (11th Cir. 2001) (finding that Justice Brennan's implicit determination that diversity was at best "important" and not "compelling" was the narrowest or "less far-reaching common ground" under *Marks*, and holding that Justice Powell's individual opinion simply did not establish diversity as a compelling state interest); Smith v. Univ. of Wash., 233 F.3d 1188, 1200 (9th Cir. 2000) (finding that Justice Powell's diversity rationale was the narrowest footing because every aspect of Justice Brennan's opinion established broader grounds for the use of race in admissions programs, and therefore, diversity was compelling under *Bakke*).

87. *See infra* text accompanying notes 88-136.

88. Fullilove v. Klutznick, 448 U.S. 448, 452 (1980).

89. *Id.* at 472. The set-aside program stemmed from the Public Works Employment Act of 1977. *Id.* at 453.

Amendment powers.[90] Next the Court addressed whether the means Congress used to achieve its constitutional objective of remedying past discrimination was sufficiently tailored to satisfy intermediate scrutiny.[91] As part of this inquiry, the Court held that though non-minority firms were burdened by the program's requirements, "such 'a sharing of the burden' by innocent parties [was] not impermissible."[92] Furthermore, the Court held that the program as a whole was neither underinclusive nor overinclusive.[93] Finally, the Court noted that the program was not defective simply because the requirements could not be waived when minority participation was unavailable.[94] Ultimately, the Court held that the program was sufficiently tailored to survive the deferential intermediate scrutiny standard.[95]

In *Wygant v. Jackson Board of Education*, the United States Supreme Court applied strict scrutiny to the Jackson Board of Education's "role model" program, in which the Board considered race in layoff decisions in an effort to alleviate the effects of societal discrimination by maintaining a stable percentage of minority teachers.[96] The Court first held that under strict scrutiny, societal discrimination was not compelling and insisted upon a showing of prior discrimination by the specific governmental unit involved before allowing limited use of race.[97] Additionally, the Court found that the preferential layoff program was not narrowly tailored because of the burden it imposed on non-minority teachers.[98] The Court noted that the Board could have implemented less intrusive alternatives, such as minority hiring goals, to achieve its purpose.[99]

The Court applied strict scrutiny to a minority promotions requirement in *United States v. Paradise*.[100] In 1972, the United States District

90. *Id.* at 478 ("Insofar as the [Minority Business Enterprise] program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the [congressional powers].").

91. *Id.* at 480.

92. *Id.* at 484 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976)).

93. *Id.* at 485-88. Challengers asserted that the program was underinclusive because it limited its benefits to specified minority groups rather than all business that had been disadvantaged by discrimination. *Id.* at 485. Similarly, they asserted that the program was overinclusive because it benefited minority business that had never been discriminated against. *Id.* at 486. The Court acknowledged that particular applications of the program had such effects, but that the general program was at issue, not the "peculiarities" of it. *Id.*

94. *Id.* at 489.

95. *Id.* at 491-92.

96. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270, 274 (1986).

97. *Id.* at 274.

98. *Id.* at 283-84.

99. *Id.*

100. United States v. Paradise, 480 U.S. 149, 166-67 (1987). The *Paradise* Court noted that it had not yet reached a consensus as to which level of scrutiny was appropriate in affirmative-action cases, but it applied strict scrutiny because the program in question could pass that test. *Id.*

Court for the Middle District of Alabama held that the Alabama Board of Safety (Board) had violated the Fourteenth Amendment by purposely and systematically excluding African-Americans from its upper ranks.[101] After eleven years, the Board had not yet complied with the district court's decree to develop a non-discriminatory promotion procedure, so the district court ordered the Board to remedy its past discrimination by promoting equal numbers of African-Americans and Caucasians until African-American representation reached twenty-five percent or until the Board had developed a promotion procedure that fairly promoted African-Americans.[102] The Board challenged the constitutionality of the order, and *United States v. Paradise* was eventually heard by the United States Supreme Court.[103]

In *Paradise*, the Court reiterated its support for specific remedial purposes as compelling state interests under strict scrutiny and held that the government "unquestionably [had] a compelling interest" in remedying the Alabama Department of Public Safety's blatant pattern of past racial discrimination.[104] Next, the *Paradise* Court set forth the following four factors used to determine whether race-conscious remedies are narrowly tailored: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of the numerical goals to the relevant market; and (4) the impact of the relief on the rights of third parties.[105]

The Court applied the factors to the one-for-one minority promotion requirement and determined that the program was narrowly tailored.[106] First, the Court found that the requirement was necessary to eliminate the effects of the Board's long-term discrimination, ensure compliance with earlier court decrees ordering the Board to design a non-discriminatory promotions procedure, and eliminate further delays with regard to such a procedure.[107] The Court rejected alternatives such as a one-time promotion of four African-Americans and eleven Caucasians or heavy fines against the Board for its lack of compliance, reasoning that one non-discriminatory promotion was not sufficient and that the Board obviously found money no object because it

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101. *Id.* at 153.
102. *Id.*
103. *Id.*
104. *Id.* at 167.
105. *Id.* at 171.
106. *Id.* at 171-173.
107. *Id.* at 171-72. The Board insisted that its delay was a result of the difficulty of developing a non-discriminatory promotions policy. *Id.* at 174 n.21. It asserted that the task was a time-consuming process usually extending over several years. *Id.* The Court found these excuses hollow, which was proven by the fact that the Board made vast improvements to its policy immediately following the district court's mandatory one-black-for-one-white promotions requirement. *Id.*

had not yet complied despite the expenses associated with the long litigation.[108] Second, the Court held that the requirement was flexible, as it could be waived if there were no qualified African-American candidates or if external forces, such a budget cuts, necessitated promotion freezes.[109] The requirement was also temporary; it remained in effect only until the Board implemented non-discriminatory promotion procedures, which occurred before the Supreme Court even heard the case.[110] Third, the Court determined that the goal of twenty-five percent African-American representation in the upper ranks was sufficiently related to the twenty-five percent African-American representation in the local labor market.[111] Finally, the *Paradise* Court found that the one-for-one promotion requirement did not pose an unacceptable burden to third parties because it was temporary, extremely limited, and did not require white employees to carry burdens through layoffs or discharges.[112]

The Court further clarified the bounds of what constitutes a compelling state interest in *City of Richmond v. J.A. Croson Co*mpany.[113] In applying strict scrutiny to Richmond, Virginia's city program requiring general contractors to subcontract at least thirty percent of each dollar to minority businesses, Justice O'Connor avowed, "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics [sic] of racial hostility."[114] The Court went on to hold that while remedying the present effects of agency-specific discrimination was compelling, remedying past societal discrimination was not.[115] Next, the Court proceeded to apply two of the *Paradise* factors to determine that the City's program was not narrowly tailored.[116] First, the City had not considered a single race-neutral alternative to its race-based program.[117] Second, the Court felt that the thirty percent minority set-aside requirement was a "rigid numerical quota" in place for administrative convenience only.[118] The Court found it "obvious that such a program [was] not narrowly tailored."[119]

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108. *Id.* at 172-75.
109. *Id.* at 177-78.
110. *Id.* at 178-79.
111. *Id.* at 179-81.
112. *Id.* at 182.
113. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989) (O'Connor, J., plurality).
114. *Id.* (O'Connor, J., plurality).
115. *Id.* at 505-06 (O'Connor, J., plurality).
116. *Id.* at 507-08 (O'Connor, J., plurality).
117. *Id.* at 507 (O'Connor, J., plurality).
118. *Id.* at 508 (O'Connor, J., plurality). The Court noted that the available waiver process focused solely on whether a Minority Business Enterprise was available to contract rather than whether a particular minority owned business had ever suffered from past discrimination. *Id.* at 508 (O'Connor, J., plurality). Additionally, the city considered bids and waivers indi-

In *Metro Broadcasting v. Federal Communications Commission*, the Court considered whether minority preference policies of the Federal Communications Commission violated the Equal Protection Clause.[120] In order to increase broadcast diversity, the Commission considered minority ownership in new license proceedings and allowed questionable current license holders to assign their licenses to approved minority enterprises via "distress sales."[121] In deciding what level of scrutiny applied, the Court resurrected its *Fullilove* rationale: Benign affirmative-action programs specifically approved by Congress require a certain amount of judicial deference, and therefore, intermediate scrutiny was appropriate.[122] Applying intermediate scrutiny, the Court upheld the FCC's race-conscious program, holding that it furthered an important governmental interest in increasing the diversity of broadcast viewpoints, and that the program was substantially related to the achievement of that interest.[123] The Court went on to chide the dissent, which argued that strict scrutiny applied, for refusing to differentiate between benign and malicious uses of race in determining the appropriate standard of scrutiny.[124] However, the dissent remained strongly opposed to the level of deference in *Metro Broadcasting* and maintained that under the appropriate strict scrutiny standard, diversity was not compelling enough to warrant such distinctions.[125]

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vidually, so the only explanation for an inflexible thirty percent requirement was administrative convenience. *Id.* (O'Connor, J., plurality).

119. *Id.* (O'Connor, J., plurality).

120. Metro Broad. v. Fed. Communications Comm'n, 497 U.S. 547, 552 (1990).

121. *Id.* at 556-58. Normally, a broadcaster whose qualifications to hold a license came into question could not transfer his or her license until the FCC had resolved any doubts in a hearing. *Id.* at 557. The "distress sale" allowed these questionable license holders to transfer their licenses without a hearing, but only to FCC approved minority owned enterprises. *Id.*

122. *Id.* at 563 ("[W]hen a program employing a benign racial classification is adopted . . . at the explicit direction of Congress, we are 'bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to provide for the . . . general welfare of the United States . . . .'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 491 (1980))).

123. *Id.* at 564-65.

124. *Id.* at 565 n.12. The Court stated:

> We fail to understand how Justice Kennedy can pretend that examples of 'benign' race-conscious measures include South African apartheid, the 'separate-but-equal' law at issue in *Plessy v. Ferguson*, and the internment of American citizens of Japanese ancestry upheld in *Korematsu v. United States*. We are confident that an 'examination of the legislative scheme and its history' will separate benign measures from other types of racial classifications.

Id. (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975)) (internal citations omitted).

125. *See Metro Broad.*, 497 U.S. at 612 (O'Connor, J., dissenting) ("Under the appropriate [strict scrutiny standard] equal protection doctrine has recognized [one compelling] interest: remedying the effects of racial discrimination. . . . [I]ncreasing the diversity of broadcast

The dissent's argument in *Metro Broadcasting* was vindicated five years later in *Adarand Constructors, Inc. v. Pena.* The *Adarand* Court considered what standard of review should apply to the federal government's practice of offering financial incentives to general contractors to hire minority owned subcontractors.[126] In *Adarand*, the United States Supreme Court unambiguously declared that "*all* racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[127] In other words, racial classifications are constitutional only if they are narrowly tailored to achieve a compelling state interest.[128] The Supreme Court vacated the Tenth Circuit's judgment applying intermediate scrutiny and remanded the case for further proceedings under strict scrutiny.[129]

Adarand overruled *Metro Broadcasting* to the extent that the *Metro Broadcasting* majority had applied the incorrect level of scrutiny; however, the Court did not address whether the *Metro Broadcasting* diversity rationale would have survived the stricter standard.[130] Despite the sweeping holding, some justices still felt that strict scrutiny was too harsh a standard for benign affirmative-action programs.[131]

Gratz v. Bollinger

The boundaries of the *Grutter* decision cannot be fully understood without a brief discussion of *Gratz v. Bollinger*, a case decided in parallel with *Grutter*. In *Gratz*, the Court considered the legality of the University of Michigan's use of race in undergraduate admissions.[132] The *Gratz* Court struck down the undergraduate school's admissions process, holding that its purpose of increasing diversity was compelling under *Grutter*, but finding that the program was not narrowly tailored to achieve its compelling purpose.[133] The Court differentiated between *Grutter* and *Gratz* by noting that the Law School did not award any particular weight to race, considering it one of many factors during individualized review of every candidate; whereas in *Gratz*, the undergraduate school automatically awarded twenty points to every minority applicant before discretionarily flagging certain

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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.").

126. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204 (1995).

127. *Id.* at 227 (emphasis added).

128. *E.g., id.*

129. *Id.* at 204.

130. *Id.* at 227. ("[W]e hold today that all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny . . . . To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled.").

131. *Id.* at 243 (Stevens, J., dissenting) ("I think it is unfortunate that the majority insists on applying the label 'strict scrutiny' to benign race-based programs.").

132. Gratz v. Bollinger, 123 S. Ct. 2411, 2417 (2003).

133. *Id.* at 2428-29.

applications for individual review.[134] The Court found that the automatic twenty point bonus was nearly always determinative despite the later opportunity for individualized review.[135] The Court held that such inflexibility made the undergraduate program operate as an impermissible quota system, which unlike the more flexible *Grutter* system, was not narrowly tailored under strict scrutiny.[136]

PRINCIPAL CASE

Barbara Grutter brought her Fourteenth Amendment suit against the Law School in the United States District Court for the Eastern District of Michigan.[137] The district court, applying strict scrutiny, determined that the Law School's use of race in admissions decisions was unlawful because the Law School's admissions policy was not narrowly tailored to meet a compelling state interest.[138] The district court granted Ms. Grutter's request for

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134. *Id.* In 1999, the Admissions Review Committee (ARC) modified the undergraduate admissions process to provide additional review for some applications. *Id.* at 2420. Admissions counselors could, in their discretion, "flag" applications for individual review to determine whether the applicant met the following criteria:

> (1) [the applicant was] academically prepared to succeed at the University, (2) [the applicant had] achieved a minimum selection index score, and (3) [the applicant] possesse[d] a quality or characteristic important to the University's composition of its freshman class such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography.

Id.

135. *Id.* at 2429. To demonstrate that the twenty point bonus was nearly always decisive, the Court posed a hypothetical in which three students – students A, B, and C – were considered under the program. *Id.* at 2428-29. Student A was a child of a successful black physician and promised superior academic performance. *Id.* at 2428. Student B was an African-American with lower academic credentials who grew up in the ghetto with semi-literate parents and had an interest in black power. *Id.* at 2428-29. Student C was a white student with extraordinary artistic talent. *Id.* at 2429. Under the undergraduate school's admissions program, student C could only receive five bonus points for his artistic talents, even if they rivaled the great impressionists. *Id.* However, students A and B would each receive twenty points without the school having considered their respective characteristics. *Id.* Student A would always be admitted because "virtually every qualified underrepresented minority applicant [was] admitted," while student C, a person with unique and diverse qualities that could give him an edge over students A and B under individualized review, would not be admitted unless an admissions counselor saw fit to "flag" him. *Id.* Even if student C was "flagged," he would still not be compared with student A because student A would have already been automatically admitted. *Id.* The Court found that the program worked to admit every African-American applicant who met the minimum admissions criteria regardless of his or her potential to increase diversity, which was not the case for non-minority applicants. *Id.*

136. *Id.* at 2430.

137. Grutter v. Bollinger, 123 S. Ct. 2325, 2333 (2003).

138. *Id.* at 2335.

declaratory relief and enjoined the Law School from using race in its admissions process.[139]

Sitting en banc, the United States Court of Appeals for the Sixth Circuit reversed the district court's judgment and vacated the injunction.[140] The Sixth Circuit first held that according to *Marks*, Justice Powell's opinion in *Bakke* established diversity as a compelling state interest.[141] The Sixth Circuit also held that since race was merely a "plus" in each applicant's individual evaluation, the Law School's policy was narrowly tailored to meet its compelling state interest.[142]

Ultimately, the United States Supreme Court granted certiorari and determined that the Law School's policy was indeed narrowly tailored to achieve its compelling state interest of attaining a diverse student body, thereby affirming the Sixth Circuit decision.[143] The Court held, "[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling [state] interest in obtaining the educational benefits that flow from a diverse student body."[144]

United States Supreme Court Decision

The United States Supreme Court granted certiorari "to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in [university admissions]."[145] Justice O'Connor, who delivered the majority opinion, began her analysis with a discussion of *Bakke* since it had "served as the touchstone for constitutional analysis of race-conscious admissions policies."[146] She candidly acknowledged that the *Bakke* opinions were divided and that lower courts had struggled to discern whether Justice Powell's statement regarding diversity, which was joined by no other justice, was binding precedent under *Marks*.[147] Justice O'Connor then quickly dispensed with the baffling *Marks* analysis and stated that the majority endorsed Justice Powell's diversity rational and considered diver-

139. *Id.*
140. Grutter v. Bollinger, 288 F.3d 732, 735 (6th Cir. 2002).
141. *Id.* at 739-42; *see supra* notes 84-86 and accompanying text for a discussion of the *Marks* analysis.
142. *Grutter*, 288 F.3d at 746.
143. *Grutter*, 123 S. Ct. at 2347.
144. *Id.*
145. *Id.* at 2335.
146. *Id.* at 2336.
147. *Id.* at 2337; *see supra* notes 84-86 and accompanying text for an in depth discussion of *Marks*.

sity a "compelling state interest that can justify the use of race in university admissions."[148]

Before detailing the Court's sweeping decision, Justice O'Connor confirmed that strict scrutiny was the appropriate standard of review for *Grutter*, as all racial classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests."[149] With that in mind, she admonished that strict scrutiny is not "strict in theory, fatal in fact."[150] Further, she reminded that under strict scrutiny, the Court understands that not all racial distinctions are equally objectionable and takes these "'relevant differences' into account."[151]

Turning to the strict scrutiny analysis itself, Justice O'Connor first addressed the Court's decision to consider the Law School's use of racial distinctions as a compelling state interest.[152] Her message was clear: Affirmative-action in university admissions is distinguishable from affirmative-action in other contexts, and in the university setting, the Court will defer to universities' "educational judgment" in deciding whether diversity is compelling.[153] Justice O'Connor conceded that post-*Bakke* affirmative-action cases may have implied that the only compelling purposes were remedial, but she reminded that those cases did not deal with university admissions and were inapplicable.[154] The Court had never held that only remedial pur-

148. *Grutter*, 123 S. Ct. at 2337.

149. *Id.* at 2337-38.

150. *Id.* at 2338. Some commentators have accused strict scrutiny of being "strict in theory, fatal in fact," as the only Equal Protection cases to survive strict scrutiny since its inception in *Korematsu* have been *Korematsu* and *Paradise*. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) ("[Strict Scrutiny is] 'strict' in theory and fatal in fact.").

151. *Grutter*, 123 S. Ct. at 2338 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228 (1995)). The term "relevant differences" implied that the Court differentiates between benign and malicious programs under strict scrutiny, and therefore, it was unnecessary to review the Law School's benign program under a lower standard than strict scrutiny. *See id.*

152. *Id.*

153. *Id.*

154. *Compare id.* ("We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke*."), *with* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (holding that even remedying societal discrimination was not compelling and that remedial purposes must be based on past discrimination by the specific government entity in question in order to be compelling), *and* United States v. Paradise, 430 U.S. 149, 167 (1987) (affirming that remedying past specific discrimination was compelling), *and* City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989) (O'Connor, J., plurality) (holding, in a case that addressed the use of race in construction contracts, that racial classifications must be reserved for remedial settings rather than increased diversity to avoid promoting racial stereotypes), *and* Metro Broad. v. Fed. Communications Comm'n, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting) (arguing that increased diversity in the broadcasting industry could never be compelling).

poses were compelling; nor had it directly addressed affirmative-action in higher education since its fractured *Bakke* opinion.[155]

Justice O'Connor went on to explain that the Court's deference was not unprecedented and that it was vitally necessary to ensure success in many sectors of modern society.[156] She emphasized that the benefits of student body diversity are evident not only in the classroom, but also in the workforce, military, and government leadership.[157] She specifically noted that large American corporations, such as 3M and General Motors, have professed a need for their employees to gain "exposure to widely diverse people, cultures, ideas, and viewpoints."[158] Furthermore, she explained that diversity is essential to the military's ability to provide national security, and to fulfill that mission, the military must achieve diversity in the education and training of its officer corps.[159] Finally, Justice O'Connor noted that universities and law schools are the "training ground" for American leaders.[160] She emphasized that "individuals with law degrees occupy roughly half of the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representa-

155. *Grutter*, 123 S. Ct. at 2338.

156. *Id.* at 2339-41. Justice O'Connor cited several cases in which the Court, in recognizing that "universities occupy a special niche in constitutional tradition," deferred to the judgment of university educators. *Id.* at 2339. For example, in *Board of Curators of the University of Missouri v. Horowitz*, the University of Missouri dismissed a student in her final year of medical study for low academic performance. Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 82 (1978). The student filed suit, alleging that the school board did not afford her procedural due process under 42 U.S.C. § 1983. *Id.* at 79. The Court refused to require judicial hearings in academic dismissals, acknowledging that "dismiss[ing] a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making." *Id.* at 90. In *Regents of the University of Michigan v. Ewing*, a student was dismissed from the University of Michigan Inteflex program after failing a qualifying "must pass" examination with the lowest score ever recorded in the program. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 214-16 (1985). The student brought suit alleging that his "arbitrary and capricious" dismissal was a violation of his due process rights under the Fourteenth Amendment and 42 U.S.C. § 1983. *Id.* at 217. The Court held that in order for the student's claim to succeed, the University had to have misjudged his fitness to remain in the program and that, "[the Court] show[s] great respect for the faculty's professional judgment. . . . [The Court] may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate [no] professional judgment." *Id.* at 225. In *Bakke*, Justice Powell noted, "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, 312 (1978) (citation and internal quotes omitted).

157. *Grutter*, 123 S. Ct. at 2339-41.

158. *Id.* at 2340 (citing Brief of General Motors Corp. as Amicus Curiae at 3-4, *Grutter* (Nos. 02-241, 02-516)).

159. *Id.* (citing Brief for Julius W. Becton, Jr. et al. as Amici Curiae at 27, *Grutter* (Nos. 02-241, 02-516)).

160. *Id.* at 2341 (citing Sweatt v. Painter, 339 U.S. 629, 634 (1950)).

tives."[161] For all of these reasons, the Court felt comfortable deferring to the Law School's decision that diversity is indeed compelling.[162]

Next, the Court turned to the narrowly tailored prong of the strict scrutiny analysis to ensure that "'the means chosen [by the Law School] fit . . . the compelling goal [of diversity] so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'"[163] Justice O'Connor again made it clear that university admissions are in a league of their own, and that the narrow tailoring criteria must be specific to the educational setting.[164] She proceeded to "define the contours of the narrow-tailoring inquiry" with respect to racial distinctions in university admissions programs and explain how the Law School's program met each criterion.[165]

First, Justice O'Connor explained that a narrowly tailored admissions program cannot operate as a quota system, which means that a university cannot insulate any category of candidates from competition with all others.[166] A university may consider race as a "plus" in an applicant's record, but it cannot refuse to compare certain candidates to others.[167] The Court found that the Law School's pursuit of a critical mass of underrepresented minority students represented a "permissible goal" rather than a quota because the Law School did not reserve a fixed number of seats exclusively for minorities, but simply made a good faith effort to reach its target goals.[168] Based on Justice Powell's holding in *Bakke*, the Court denied that giving disproportionate weight to race or paying "some attention to numbers" transforms a narrowly tailored program into a quota program.[169] Consequently, the Court held that the Law School was justified in tracking the racial composition of the class via the "daily reports" in its good faith effort to admit a critical mass of minority students.[170]

The Court explained that to avoid a quota, an admissions program considering race must be flexible enough to evaluate each applicant as an individual.[171] In other words, a university must consider all of each appli-

161. *Id.* (citing Brief for the Assoc. of American Law Schools as Amicus Curiae at 5-6, *Grutter* (No. 02-241)).
162. *See id.*
163. *Id.* (quoting City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989) (O'Connor, J., plurality)).
164. *Id.*
165. *Id.* at 2341, 2342-47.
166. *Id.* at 2342.
167. *Id.*
168. *Id.* (quoting Local 28 of Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part)).
169. *Grutter*, 123 S. Ct. at 2343 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317-18, 323 (1978) (Powell, J., plurality)).
170. *Id.*
171. *Id.* at 2342-43.

cant's qualifications, so race does not define an applicant's file.[172] The Court noted that by reviewing each and every application, the Law School performed a "highly individualized, holistic review" of each applicant's record, regardless of the applicant's race.[173] Therefore, this method, like the Harvard plan, was "'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 [undisclosed] weight.'"[174]

The Court explained that the second criterion for a narrowly tailored admissions program is that that a university must give "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[175] However, the Court also stated that a university does not have to "exhaust[] every race-neutral alternative" or sacrifice its reputation for excellence to achieve diversity.[176] The Law School had considered a lottery system or decreasing its emphasis on GPA and LSAT scores for all applicants.[177] The Court agreed that the Law School adequately considered and rejected these alternatives because a lottery would make it impossible to consider each applicant's individual characteristics, and lowering the admissions standards for all students "would require the Law School to become a much different institution and sacrifice a vital component of its educational mission."[178]

To fulfill the third narrow tailoring requirement, a race-conscious admissions program cannot "unduly harm members of any racial group."[179] Justice O'Connor explained that non-minorities were not unduly burdened by the Law School's admissions policy because the Law School evaluated each candidate individually.[180] In considering a range of diversifying factors, non-minority applicants who possessed great potential to enhance diversity could be selected over minority applicants, and thus, applicants of all races were provided equal opportunity.[181]

Finally, the Court stipulated that all race-conscious admissions programs must have a time limit because no matter how compelling the goal, such programs should be employed no longer than the time necessary to sustain the compelling goal.[182] Though the Court technically required

172. *Id.*
173. *Id.* at 2343.
174. *Id.* at 2343-44 (quoting Bakke, 438 U.S. at 317 (Powell, J., plurality)).
175. *Id.* at 2345.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 2345-46.
181. *Id.*
182. *Id.* at 2346.

schools using race-conscious admissions policies to fulfill this criterion, Justice O'Connor explained that universities do not have to meet hard deadlines.[183] Instead, they can use "sunset provisions" and "periodic reviews to determine whether racial preferences are still necessary."[184] The Court trusted the Law School to terminate its race-conscious admissions program "as soon as practicable," and encouraged all universities using race-conscious admissions to draw from the alternate knowledge gained by those universities whose state laws prohibit them from using race.[185] As a final point, the Court predicted that race-conscious admissions programs will be unnecessary in twenty-five years due to the gradual increase in minority applicants with high grades and test scores.[186]

Ultimately, a majority of the United States Supreme Court held that the Law School's race-conscious admissions policy was constitutional, as the "Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[187]

The Dissents

The majority decision met strong opposition from the remaining justices in four separate dissenting opinions.[188] Chief Justice Rehnquist authored the first dissent and was joined by Justices Scalia, Kennedy, and Thomas.[189] Justice Kennedy independently authored the second.[190] Justices Scalia and Thomas authored the third and fourth, respectively, with each joining the other's opinion.[191]

A pervading point among the dissents was that the majority had not applied a true strict scrutiny analysis.[192] Chief Justice Rehnquist stated, "Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."[193] The Chief Justice also pointed out that in *Adarand*, the Court "rejected calls to apply more

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 2346-47.
187. *Id.* at 2347.
188. *Id.* at 2365contd-65. Note that the page numbers of the dissenting opinions appear to be out of sequence. However, the pagination accurately reflects the pagination of the original published document. *Id.* at 2348contd.
189. *Id.* at 2365contd-48contd (Rehnquist, J., dissenting).
190. *Id.* at 2370-73 (Kennedy, J., dissenting).
191. *Id.* at 2348contd-50 (Scalia, J., concurring in part and dissenting in part); *id.* at 2350-65 (Thomas, J., concurring in part and dissenting in part).
192. *Id.* at 2365contd-66 (Rehnquist, J., dissenting); *id.* at 2370 (Kennedy, J., dissenting).
193. *Id.* at 2366 (Rehnquist, J., dissenting).

lenient review" based on whether a program was benign or malicious because more than benign motives should be required when the government allocates its resources via a racial classification system.[194] Therefore, he found that such lenient review in *Grutter* was inappropriate.[195]

Chief Justice Rehnquist explained that under a true strict scrutiny analysis, the Law School's admissions program was obviously not narrowly tailored for two reasons: The Law School's "critical mass" theory concealed a racial quota system, and the program was not limited in duration.[196] To expose quotas within the Law School's "critical mass" theory, Chief Justice Rehnquist focused on statistics which revealed that from 1995 through 2000 the percentage of applicants that were admitted nearly mirrored the percentage of actual applications received from candidates of each underrepresented minority race.[197] For example, in 1995, 9.7% of the applicants were African-American, and 9.4% of the admitted applicants were African-American.[198] Similarly, 5.1% of the applicants were Hispanic, and 5.0% of the admitted applicants were Hispanic.[199] Finally, 1.1% of the applicants were Native-American, and 1.2% of the admitted applicants were Native-American.[200] The Chief Justice reasoned that if a "critical mass" of each underrepresented minority was necessary to prevent students from "feel[ing] isolated or like spokespersons for their race," then a similar number of students would be necessary to accomplish this purpose for each minority.[201] He felt that the disparity in representation demonstrated that the Law School's "'critical mass' [was] simply a sham" to disguise unconstitutional quotas.[202] Chief Justice Rehnquist also pointed out the lack of "any reasonably precise time limit on the Law School's use of race in admissions."[203] He felt that the majority, in simply deferring to the Law School's judgment as to when the program should end, permitted the program on a "seemingly permanent basis" even though prior precedent explicitly required a "limit on the duration of programs such as this because discrimination on the basis of race is invidious."[204]

The dissenters were divided regarding whether diversity could ever be compelling: Justice Kennedy implied that he would have approved of

194. *Id.* (Rehnquist, J., dissenting) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995)).
195. *See id.* at 2365contd-66 (Rehnquist, J., dissenting).
196. *Id.* at 2366-70 (Rehnquist, J., dissenting).
197. *Id.* at 2367-69 (Rehnquist, J., dissenting).
198. *Id.* at 2368 (Rehnquist, J., dissenting).
199. *Id.* (Rehnquist, J., dissenting).
200. *Id.* (Rehnquist, J., dissenting).
201. *Id.* at 2366 (Rehnquist, J., dissenting).
202. *Id.* at 2367 (Rehnquist, J., dissenting).
203. *Id.* at 2369 (Rehnquist, J., dissenting).
204. *Id.* at 2369-70 (Rehnquist, J., dissenting) (citing United States v. Paradise, 480 U.S. 149, 171(1987)).

diversity as a compelling state interest had the majority applied a true strict scrutiny test, while both Justices Scalia and Thomas maintained that diversity could never be compelling under strict scrutiny.[205] Justice Rehnquist remained silent.[206] Justice Scalia, joined by Justice Thomas, suggested that appreciation for diversity can never be taught; it is one of life's lessons that should be learned by "people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School . . . ."[207] Justice Thomas, joined by Justice Scalia, felt that the educational benefits derived from diversity could not be significant, let alone compelling, if the Law School refused to alter its admissions standards to achieve diversity for fear of losing its elite status.[208] He reasoned, "If the Law School is correct that the educational benefits of 'diversity' are so great, then achieving them by altering admissions standards should not compromise its elite status."[209] To Justice Thomas, the Law School's interest in the educational benefits derived from student body diversity did not ring true because these benefits could be accomplished by lowering the Law School's admissions standards, and thus, admitting more minorities.[210] The Law School's refusal to do this implied that its actual purpose was improving racial "aesthetics," or achieving a racially diverse appearance while remaining an elite institution.[211] Justice Thomas found this unacceptable because he felt that Michigan did not have a compelling interest in having a public law school at all, let alone an elite one.[212]

Justices Scalia and Thomas also predicted probable consequences of the majority decision.[213] Justice Scalia noted that the ambiguous "split double header" of *Grutter* and *Gratz* would prolong affirmative-action litigation

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205. *Compare id.* at 2373 (Kennedy, J., dissenting) ("If the Court abdicates its constitutional duty to [apply] strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity."), *with id.* at 2349 (Scalia, J., concurring in part and dissenting in part) ("[Diversity] is a lesson of life rather than law."), *and id.* at 2352 (Thomas, J., concurring in part and dissenting in part) ("Where the Court has accepted only national security and rejected even the best interests of a child, as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a [compelling state interest].").

206. *See id.* at 2365contd-70 (Rehnquist, J., dissenting).

207. *Id.* at 2349 (Scalia, J., concurring in part and dissenting in part).

208. *Id.* at 2353 (Thomas, J., concurring in part and dissenting in part); *id.* at 2348-49 (Scalia, J., concurring in part and dissenting in part).

209. *Id.* at 2353 n.4 (Thomas, J., concurring in part and dissenting in part).

210. *Id.* at 2353 (Thomas, J., concurring in part and dissenting in part).

211. *Id.* (Thomas, J., concurring in part and dissenting in part).

212. *Id.* at 2354 (Thomas, J., concurring in part and dissenting in part). Justice Thomas noted that Alaska, Delaware, Massachusetts, New Hampshire, and Rhode Island do not have public, American Bar Association (ABA) accredited law schools. *Id.* (Thomas, J., concurring in part and dissenting in part). He deduced that if the state had no compelling interest in state sponsored law schools at all, it could not possibly have a compelling interest in diverse or elite law schools. *Id.* (Thomas, J., concurring in part and dissenting in part).

213. *See infra* text accompanying notes 214-16.

because further litigation would be required to define the boundaries of each case's precedent.[214] Justice Thomas predicted that the majority decision would push universities to rely on affirmative-action to achieve diversity rather than encourage them to experiment with non-discriminatory methods of achieving the same goal.[215] In a final caveat, he indicated that minority students aware of their significant racial advantage have no incentive to study to excel on the LSAT, thus the majority decision may cause the numerical disparities between minorities and non-minorities to grow.[216]

ANALYSIS

In *Grutter v. Bollinger*, the United States Supreme Court recited its strict scrutiny analysis but did not apply it.[217] While the Court legitimately found student body diversity to be a compelling state interest, it applied a flexible and deferential narrow tailoring test that bears little resemblance to the standard historically used under the strict scrutiny analysis.[218] This approach enabled the Court to uphold the Law School's program while avoiding an explicit departure from *Adarand*, which required the Court to review all racial classifications under strict scrutiny.[219] Unfortunately, altering the strict scrutiny test in this way confused the decision, undermined the well established strict scrutiny analysis, and invited the interpretive litigation that will surely be necessary to define the boundaries of the modified strict scrutiny test.[220] Rather than further confound an already bewildering line of case law, the Court should have explicitly broke from precedent and upheld the Law School's benign use of racial classifications under intermediate scrutiny.[221]

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214. *Grutter*, 123 S. Ct. at 2349 (Scalia, J., concurring in part and dissenting in part). Justice Scalia pointed to several areas of ambiguity between the *Grutter* and *Gratz* decisions. *Id.* (Scalia, J., concurring in part and dissenting in part). He felt that some of the future litigation would focus on whether the challenged program contained sufficient individual review and avoided separate admission tracks so as to fall under *Grutter* and not *Gratz*. *Id.* (Scalia, J., concurring in part and dissenting in part). He also noted that more definition will be necessary to determine the difference between achieving a "critical mass" through "good faith efforts" under *Grutter* and an outright quota system under *Gratz*. *Id.* (Scalia, J., concurring in part and dissenting in part) (internal quotations omitted). Finally, he noted that the minority groups not traditionally benefited by race-conscious admissions are bound to seek retribution. *Id.* at 2350 (Scalia, J., concurring in part and dissenting in part).

215. *Id.* at 2359 (Thomas, J., concurring in part and dissenting in part) (noting that the University of California, Berkeley did not fall apart after being required by state law to achieve diversity through non-discriminatory means).

216. *See id.* at 2364 (Thomas, J., concurring in part and dissenting in part).

217. *See id.* at 2341-46.

218. *See infra* text accompanying notes 227-71.

219. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); *see supra* text accompanying notes 126-28.

220. *Grutter*, 123 S. Ct. at 2349-50 (Scalia, J., concurring in part and dissenting in part); *see infra* notes 272-90 and accompanying text.

221. *See infra* text accompanying notes 291-305.

Modified Strict Scrutiny

As previously mentioned, a program using racial classifications will withstand strict scrutiny only if it fulfills two requirements: The use of race must further a compelling state interest, and the means by which the compelling goal is achieved must be narrowly tailored to further that goal.[222] In *Grutter*, the Supreme Court justifiably held that diversity in university admissions is a compelling state interest for two reasons: First, this decision did not conflict with any prior precedent.[223] Second, as Justice O'Connor persuasively explained, diversity in university admissions must be considered compelling for various social and economical reasons.[224] Despite moral, ethical, and political opposition, diversity in American education, as a practical matter, remains an essential part of the multi-racial society that we live in.[225] Unfortunately, America has not reached that exalted state where diversity can be consistently achieved without the limited use of race as a factor, thus the Court was bound to consider diversity in education compelling.[226]

While the *Grutter* Court's decision to consider diversity a compelling state interest can be reconciled with its prior precedent applying strict scrutiny, the Court's malleable narrow tailoring test did not comport with its habitually severe narrow tailoring inquiry.[227] Under *United States v. Paradise*, the Court set forth four factors to consider when determining whether a race-conscious program is narrowly tailored.[228] The *Grutter* Court custom-

222. *E.g.*, *Adarand*, 515 U.S. at 227 ("[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

223. *See Grutter*, 123 S. Ct. at 2338-39. As Justice O'Connor noted in *Grutter*, the divided *Bakke* opinions were unintelligible and therefore had little influence on whether or not diversity in university admissions could be compelling. *Id.* at 2337, 2338-39; *see supra* notes 146-48 and accompanying text. Further, the Court never considered affirmative-action in university admissions in its cases between *Bakke* and *Grutter*, so the question went unanswered. *See supra* notes 26-136 and accompanying text. Finally, the Court's post-*Bakke* inferences suggesting that only remedial purposes were compelling were not applicable because of the substantially original character, needs, and rights of universities and their admissions programs. *Grutter*, 123 S. Ct. at 2339; *see supra* notes 153-56 and accompanying text. Essentially, the Supreme Court successfully avoided the issue for twenty-five years between *Bakke* and *Grutter*, leaving the *Grutter* Court free to hold that diversity in university admissions is a compelling state interest without straining the limits of strict scrutiny. *See Grutter*, 123 S. Ct. at 2339.

224. *Grutter*, 123 S. Ct. at 2339-41; *see supra* text accompanying notes 157-62.

225. *See Grutter*, 123 S. Ct. at 2339-41.

226. *See id.*

227. *See id.* at 2341-46; *id.* at 2371 (Kennedy, J., dissenting) ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued . . . . The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns.").

228. United States v. Paradise, 480 U.S. 149, 171 (1987); *see supra* text accompanying note 104-12 for a detailed discussion of the four factors and their traditional application.

ized the *Paradise* factors to fit the educational setting in order to consider the "distinct issues raised by the use of race to achieve student body diversity. . . ."[229] Customizing the factors was reasonably justifiable in light of the unique position that universities inhabit.[230] However, an examination of the *Grutter* Court's application of each customized criterion illustrates that the new narrow tailoring test scarcely resembles the test that the Court had repeatedly applied in prior precedent.

First, the Court held that a race-conscious admissions program cannot use a quota.[231] To meet this criterion, the Court explained that a program cannot reserve a specified number of seats for minorities nor have separate tracks for minorities and non-minorities, and every applicant must be given individual consideration that acknowledges all the defining features of his or her application.[232] The "no quota" requirement initially seemed loyal to strict scrutiny, but the Court went on to explain that while quotas are unconstitutional, "permissible goal[s]" pursued in good faith are acceptable.[233] Therefore, the Law School's good faith quest for a "critical mass" of underrepresented minority students was permissible.[234]

In deciding that the Law School employed a "permissible goal" rather than a quota, the Court glossed over several facts indicating otherwise.[235] First, the Court held that the "critical mass" system itself did not "transform the [Law School's] program into a quota" despite the Law School's incessant monitoring of the "daily reports" tracking the racial and ethnic composition of the class.[236] The Court also downplayed Dr. Kinley Larntz's conclusion that minority status was an "extremely strong" factor in admissions decisions.[237] Finally, the majority neglected to even address Chief Justice Rehnquist's uncanny statistical evidence showing that the Law School's "critical mass" concept masked an outright racial balancing system.[238] These factors were significant because they revealed that, despite the

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229. *Grutter*, 123 S. Ct. at 2341; *id.* at 2341-46. The *Grutter* Court set forth the following four factors to be used in determining whether a race-conscious admissions program is narrowly tailored: (1) the program cannot operate as a quota and must be flexible enough to afford each applicant individual review; (2) a university must give good faith consideration to race-neutral alternatives; (3) a race-conscious admissions program cannot unduly injure non-preferred groups; and (4) all race-conscious admissions programs must have a time limit. *Id.*; *see supra* text accompanying notes 166-86.

230. *See supra* note 156 and accompanying text for a discussion of the unique constitutional position of universities.

231. *Grutter*, 123 S. Ct. at 2342.

232. *Id.* at 2342-43.

233. *Id.* at 2342.

234. *Id.* at 2343.

235. *Id.* at 2342-44.

236. *Id.* at 2343.

237. *Id.* at 2334 (internal quotations omitted).

238. *Id.* at 2367-69 (Rehnquist, J., dissenting) (showing that, during the years in question, the percentage of admitted applicants from each underrepresented minority group consistently

fact that the Law School did not explicitly reserve a number of seats for minorities each year, the Law School's program *operated* as a quota as Justice Powell defined it in *Bakke*.[239] Justice Powell defined a quota as the "purpose [to] assure within its student body some specified percentage of a particular group merely because of its race . . . ."[240] The evidence strongly indicated that the Law School did exactly that by attempting to racially engineer its student body.[241] Yet the Court, under what it termed strict scrutiny, minimized the weight of the evidence, concentrated on the Law School's individualized review, and found that the Law School did not employ a quota.[242] In essence, the *Grutter* Court instructed schools to design affirmative-action programs that enable them to admit predetermined numbers of minorities as blatantly prohibited by *Bakke*, but to vaguely define their "goals" and provide sufficient individualized review so as to avoid the "quota" label.[243] This instruction defied the Court's own quota criterion, which provided that "a race-conscious admissions program cannot use a quota system."[244] The ambiguous instruction also failed to provide schools with the direction necessary to confidently design narrowly tailored affirmative-action programs

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matched the percentage of individuals in the Law School's applicant pool from the same groups); *see supra* text accompanying notes 196-202 for a discussion of Chief Justice Rehnquist's statistical evidence.

239. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 275 (1978) (Powell, J., plurality). In *Bakke*, the University of California reserved a predetermined number of seats for minorities each year, and Justice Powell held that this method constituted an unconstitutional quota because non-minority applicants were not given a chance to compete for those seats. *Id.* at 319-20 (Powell, J., plurality). In *Grutter*, the Law School did not technically reserve a number of seats for minorities, but in reality, the evidence showed that a percentage of seats were reserved for minorities each year. *See Grutter*, 123 S. Ct. at 2367-69 (Rehnquist, J., dissenting). The Court ignored this evidence and declared that the Law School's program was nothing like the University of California's program in *Bakke*. *Id.* at 2342-43.

240. *Bakke*, 438 U.S. at 307 (Powell, J., plurality).

241. *See supra* text accompanying notes 236-40.

242. *See Grutter*, 123 S. Ct. at 2342-44. The true flexibility of the supposedly rigid analysis employed by the Court is demonstrated by the *Grutter-Gratz* split. The undergraduate admissions program considered in *Gratz* was similar to the Law School's program in that it did not reserve a predetermined number of seats for minorities. Gratz v. Bollinger, 123 S. Ct. 2411, 2419 (2003). Instead minority applicants were awarded twenty points out of a possible 150 points for their minority status. *Id.* As in *Grutter*, the advantage given minority students was usually determinative in admittance decisions, but not always. *Id.* at 2427-29. However, the *Gratz* Court distinguished the undergraduate program from the Law School program, finding that it operated as a quota due to a lack of individualized review for every candidate. *Id.* at 2428. Applying the same strict scrutiny standard, the Court upheld the Law School program and struck the undergraduate program when each had the same goal, the same effect, and largely similar logistics. *Compare Grutter*, 123 S. Ct. at 2341-47, *with Gratz*, 123 S. Ct. at 2427-31.

243. *See Grutter*, 123 S. Ct. at 2342-44.

244. *Id.* at 2342.

because it did not define the boundary between a goal and a quota or to what extent individualized review is required.[245]

The Court's second narrow tailoring criterion required the Law School to give "serious, good faith consideration" to alternatives that would achieve diversity, but it did not require the Law School to use them if their use would force the Law School to "abandon the academic selectivity" that maintained its excellent reputation.[246] Thus, the Court held that the Law School reasonably refused to lower its emphasis on GPA and LSAT scores or use a lottery system, two viable and less intrusive alternatives, because such alternatives would threaten its elite status.[247] *United States v. Virginia* illustrates that this approach was atypical of the traditional narrowly tailored analysis.[248] In *United States v. Virginia*, the Court, applying a standard *lower* than strict scrutiny, required the Virginia Military Institute (VMI) to radically reshape its all male admissions process and adversarial character to accommodate female students.[249] Similar to the Law School's argument that lowering its reliance upon GPA and LSAT scores would sacrifice its educational mission to provide an elite education, VMI argued that admitting women would greatly alter its distinctive adversarial character.[250] Nevertheless, the *Virginia* Court, unlike the *Grutter* Court, refused to defer to the school's judgment and held that the radical changes were "manageable" under the lower standard.[251] Requiring VMI to admit women to a school that had carefully designed its educational model around a male student body for over a century arguably involved a dramatically greater sacrifice in academic character than would requiring the Law School to lessen its reliance on numerical scores that, if considered alone, cannot provide the Law School with the caliber of students it seeks.[252] The *Virginia* Court, under a standard

245. *See id.* at 2342-44.
246. *Id.* at 2345.
247. *Id.*
248. United States v. Virginia, 518 U.S. 515, 531 (1996) (reviewing a gender-based government classification under an "exceedingly persuasive justification" standard, a standard lower than strict scrutiny).
249. *Id.* at 540. The Virginia Military Institute (VMI) was a state supported school meant to educate "citizen-soldiers." *Id.* at 520. The all male school employed an adversarial teaching method, which was modeled after military boot camp. *Id.* at 520. The model was characterized by "physical rigor, mental stress, absolute equality of treatment, [and] absence of privacy . . . ." *Id.* at 522 (internal quotations omitted). For over 100 years, VMI refused to accept females because it felt women were less equipped to handle the severe teaching methods and because the single-gender education significantly contributed to the school's distinctive teaching style. *See id.* at 524, 540. Under an "exceedingly persuasive justification" standard, a standard between intermediate and strict scrutiny, the Court held that VMI's use of gender classifications violated the Equal Protection Clause of the Fourteenth Amendment and required VMI to alter its long-established teaching model to accommodate women. *Id.* at 531, 558.
250. *Id.* at 540.
251. *Id.* at 551 n.19.
252. *Compare id.* ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements and to

lower than strict scrutiny, required a university to sacrifice central aspects of its educational mission and character in order to implement the least intrusive means of accomplishing a goal.[253] The *Grutter* Court ignored this prior precedent and allowed the Law School to bypass its viable alternatives simply to maintain its elite status under its narrow tailoring analysis.[254]

The Court's third requirement, that an admissions program cannot unduly burden members of any racial group, was also applied leniently.[255] The Court held that the Law School's program did not unduly burden non-minority students because it evaluated a number of diversifying factors and sometimes selected non-minority applicants with diverse potential over minority applicants.[256] Therefore, the Court found that all students competed on equal footing, and non-minority students did not carry any additional burden.[257] In making this decision, the *Grutter* Court again ignored expert testimony and statistical evidence indicating that race was typically determinative, and that from a practical standpoint, minorities and non-minorities were not on equal footing.[258] For example, if two students had identical "soft" qualifications and were in the lower range of LSAT scores and grades, but one student was an underrepresented minority while the other was not, the minority student would without question be admitted over the non-minority student.[259] This inequality violated strict scrutiny's narrow tailoring analysis as previously applied by the Court.[260]

Finally, and perhaps in its most flagrant disregard for strict scrutiny, the Court held that narrow tailoring does not require the Law School's admissions program to have a time limit.[261] The Court held that universities

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adjust aspects of the physical training programs . . . [which is] manageable [and reasonably required under the exceedingly persuasive justification standard]."), *with Grutter*, 123 S. Ct. at 2332, 2344 (holding that narrow tailoring does not require a law school to jeopardize its reputation for excellence by lowering its emphasis on GPA and LSAT scores when even "the highest possible score[s]" do not guarantee that an applicant has the qualities that the school seeks).

253. *Virginia*, 518 U.S. at 531, 558.

254. *Grutter*, 123 S. Ct. at 2345.

255. *See id.* at 2346; *see infra* text accompanying notes 256-60.

256. *Grutter*, 123 S. Ct. at 2346. The Law School did not offer evidence indicating how often diverse non-minority students were chosen over minority students. *Id.*

257. *Id.*

258. *Id.* at 2334 (indicating that minority status was an "extremely strong factor" or "extremely large allowance" for admission) (internal quotations omitted); *see id.* at 2367-69 (Rehnquist, J., dissenting) (indicating that the program operated as a quota that excluded non-preferred groups from a percentage of seats each year); *see supra* text accompanying notes 11-13 for a discussion of "soft" variables.

259. *See Grutter*, 123 S. Ct. at 2371 (Kennedy, J., dissenting).

260. *See id.* at 2372 (Kennedy, J., dissenting) ("[R]ace [cannot] become a predominant factor in the admissions decisionmaking. The Law School failed to comply with this requirement, and by no means has it carried its burden to show otherwise by the test of strict scrutiny.").

261. *Id.* at 2346.

can meet the narrow tailoring durational requirement through sunset provisions and "periodic reviews to determine whether racial preferences are still necessary . . . ."[262] Prior to *Grutter*, the Court held that racial-classifications in only two cases, *Korematsu* and *Paradise*, were sufficiently tailored to survive strict scrutiny, and both of those programs had time limits.[263] In *Korematsu*, the Japanese exclusion order remained in effect during the United States' war with Japan.[264] In *Paradise*, the one-black-for-one-white promotion requirement remained in effect only until the Board designed a non-discriminatory promotions plan, which occurred before the Supreme Court heard the case.[265] In yet another departure from prior precedent, the *Grutter* Court virtually dispensed with the time limit requirement in the university admissions context and allowed the Law School the discretion to end its race-conscious program "as soon as practicable."[266]

Though the Court has asserted that strict scrutiny does not have to be fatal, strict scrutiny has historically been fatal to affirmative-action programs in all contexts, including higher education.[267] Only once between its 1945 inception in *Korematsu* and its application in *Grutter* has an affirmative-action program survived both prongs of the strict scrutiny analysis.[268] In reality, the test has been "strict in theory, fatal in fact" as acknowledged by scholars and Supreme Court Justices alike.[269] The level of deference shown by the *Grutter* Court in determining that the Law School's admissions policy was narrowly tailored was indeed extraordinary because the Court's analysis

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262. *Id.*

263. *See* Korematsu v. United States, 323 U.S. 214, 219-20 (1944); United States v. Paradise, 480 U.S. 149, 178 (1987).

264. *Korematsu*, 323 U.S. at 219-20.

265. United States v. Paradise, 480 U.S. 149, 178 (1987).

266. *Grutter*, 123 S. Ct. at 2346.

267. *Id.* at 2338 (noting that "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it"); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'") (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

268. *Paradise*, 480 U.S. at 166-67. The *Paradise* Court held that a minority promotion program passed strict scrutiny because it was narrowly tailored to achieve a compelling state interest. *Id.* However, the goal of the *Paradise* program was to remedy past specific discrimination, a goal the Court had previously approved more than once. *Id.* at 167. *Paradise* also presented extenuating circumstances: The plaintiff challenging the government use of race, or the Alabama Board of Safety, had for eleven years refused to obey a federal court order to design a non-discriminatory promotions program, so the district court finally mandated a minority promotions requirement to force the Board into compliance. *Id.* at 153. The Supreme Court was naturally frustrated with the Board's refusal to cooperate with the district court, so it used strict scrutiny to uphold the district court's authority to make the Board comply. *See supra* notes 100-12 and accompanying text. Before *Grutter*, the Court showed no leniency in cases with more reasonable plaintiffs like those in *Bakke*, *Wygant*, and *Croson*. *See supra* text accompanying notes 66-71, 96-99, 113-19.

269. Gunther, *supra* note 150, at 8 (describing strict scrutiny as "strict in theory, fatal in fact"); *Fullilove*, 448 U.S. at 518 (Marshall, J., concurring) ("'[S]trict scrutiny' [is] scrutiny that is strict in theory, but fatal in fact.").

in *Grutter* looked nothing like the Court's prior narrow tailoring analyses.[270] *Grutter* constituted a vast departure from prior precedent that will forever distort the narrow tailoring analysis.[271]

The Consequences

Skewing the narrow tailoring prong of strict scrutiny confused the *Grutter* judgment and undermined the test itself.[272] The *Grutter* decision is unclear due to the above discussed flexibility that the Court integrated into the once rigid narrow tailoring test.[273] Such flexibility creates ambiguities that will "prolong the controversy and the litigation" surrounding affirmative-action because courts must now clear the confusion created by the *Grutter* decision by defining the boundaries of this new narrow tailoring test.[274] Courts will be forced to outline such substantive issues as what exactly constitutes a quota system, how much individualized evaluation is required in light of limited time and resources, how frivolously can race-neutral alternatives be cast aside, how much of the burden are non-minorities expected to shoulder, and how may schools be restrained from operating perpetual affirmative-action programs.[275] These uncertainties abound while American universities scramble to design affirmative-action programs with the hopes that they get it right.[276]

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270. *Grutter*, 123 S. Ct. at 2366 (Rehnquist, J., dissenting) (arguing that the Court's analysis of the narrowly tailored prong of strict scrutiny was "unprecedented in its deference"); *id.* at 2371 (Kennedy, J., dissenting) ("The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's assurances that its admissions process meets with constitutional requirements. The majority fails to confront the reality of how the Law School's admissions policy is implemented.").

271. *See supra* text accompanying notes 231-66 for a discussion detailing how the narrow tailoring criteria were applied in the past as opposed how they were applied in *Grutter*.

272. *See infra* text accompanying notes 273-90.

273. *See supra* text accompanying notes 231-66.

274. *Grutter*, 123 S. Ct. at 2349 (Scalia, J., concurring in part and dissenting in part).

275. *See id.* at 2349-50 (Scalia, J., concurring in part and dissenting in part); Erwin Chemerinsky, *October Term 2002*, 6 GREEN BAG 2D 367, 369 (2003) ("The Michigan affirmative action cases will not end litigation over affirmative action in education. There is a large grey area between allowing race to be used as a factor and prohibiting the assignment of points based on race.").

276. Jonathon R. Alger, Diversity Issues and the Affirmative Action Debate After *Grutter* and *Gratz*, 5-7 (Sept. 13, 2003) (unpublished manuscript, on file with author). The University of Michigan manuscript distributed to law school admissions professionals across the country began by addressing the many issues that schools now face under the *Grutter* Court's narrow tailoring review. *Id.* Mr. Alger presented several questions that schools must now consider when designing constitutional affirmative-action programs: (1) whether the review process is individualized and holistic for each applicant; (2) whether factors considered relate to diversity, aside from race and national origin; (3) how race is considered – e.g., how race is weighted in the process, and which racial and ethnic groups are considered a "plus" factor; (4) how race is considered with regard to students of "mixed race;" (5) whether cut-off scores (for grade-point averages or standardized test scores) are used to make automatic decisions at either end of the spectrum to admit or reject applicants; (6) whether the institution has a guid-

Perhaps more daunting is the fact that the *Grutter* decision diluted the strict scrutiny analysis itself.[277] Before *Grutter*, the Court consistently applied strict scrutiny in every case that required it, but after *Grutter*, the meaning of strict scrutiny is indefinite because the Court opened the door to relaxing the narrow tailoring analysis depending on the merits of the underlying situation, which was education in *Grutter*.[278] No longer is strict scrutiny the enduring, severe test that courts *always* interpret narrowly in favor of those being discriminated against.[279] Instead, courts can discretionarily apply strict scrutiny as rigidly or as moderately as desired, an idea that "undermines both the test and its own controlling precedents."[280] Further, the Court must now craft the flexible narrow tailoring analysis to fit each case.[281] The test will look different each time it is applied, and over time, the single test may morph into several, effectively destroying the concept of strict scrutiny all together.

Diluting the strict scrutiny analysis is a frightening concept because it is a step backwards towards a time when strict scrutiny did not exist, a time when the Court upheld several malicious discrimination policies despite the existence of the Equal Protection Clause.[282] It was the harsh strict scrutiny analysis that finally gave the Court its ability to use the Equal Protection Clause to prevent government entities from making arbitrary rules that diminished minority rights.[283] Under strict scrutiny, the government must prove a significant justification for its actions before it is allowed to take

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ing principle/target for the enrollment of minority students; (7) whether race-neutral alternatives were studied and considered, and if so, whether the reasons behind their rejection were documented; (8) whether the policy includes periodic reexamination and/or a sunset provision to consider changes in the structure and composition of the applicant pool; and (9) whether the consideration of race affects the chances of admissions for non-minority students, and if so, whether that burden is too great. *Id.*; *see also* Memorandum for the Ad Hoc Committee on Post-*Grutter* Issues from Kent Syverud, Dean of Vanderbilt Law School, to the Faculty of Vanderbilt Law School 2-3 (August 20, 2003) (on file with author).

277. *See Grutter*, 123 S. Ct. at 2370 (Kennedy, J., dissenting).

278. *Id.* at 2366 (Rehnquist, J., dissenting) ("Before the Court's decision today, we consistently applied the same strict scrutiny analysis . . . .").

279. *Id.* at 2370 (Kennedy, J., dissenting). Justice Kennedy noted that the majority "abandoned or manipulated" strict scrutiny with the effect of distorting its "real and accepted meaning." *Id.* (Kennedy, J., dissenting).

280. *Id.* (Kennedy, J., dissenting).

281. *See id.* (Kennedy, J., dissenting).

282. *E.g.*, Civil Rights Cases, 109 U.S. 3, 11 (1883) (declaring the 1875 Civil Rights Act, an Act which prohibited racial discrimination in public places such as inns, restaurants, and theaters, unconstitutional because the Fourteenth Amendment did not give Congress the power to regulate rights within the "domain of state legislation"); Plessy v. Ferguson, 163 U.S. 537, 548 (1896) (holding that enforced separation of races did not deny African-Americans equal protection under the Fourteenth Amendment).

283. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (chartering strict scrutiny in the Equal Protection context as a test used to ensure that racial classifications which "curtail" the rights of a single racial group are not arbitrary and antagonistic, but are instead pressing enough to justify such restrictions).

rights away from any racial group.[284] Chief Justice Rehnquist foreshadowed the danger of injecting flexibility into the strict scrutiny analysis in his dissent.[285] He reminded the majority that the purpose of the demanding narrow tailoring inquiry was to ensure that the use of race fits the compelling state interest "'with greater precision than any alternative means.'"[286] This level of precision ensured that programs *requiring* strict scrutiny were not invidious, and that the method used to achieve the compelling state interest was both necessary and the most meticulously tailored means available.[287] If courts can discretionarily apply strict scrutiny with varying degrees of deference depending on the underlying situation being analyzed, then the test loses its power to demand the precise tailoring that effectively protects against malicious discrimination.[288] Essentially, when the next truly malevolent program comes along, the Court may not have the power to strike it down because such a program could legitimately satisfy the newly weakened narrow tailoring test.[289] By inviting judicial deference and discretion into the narrow tailoring prong of the new "strict scrutiny light," the Court can no longer effectively protect Americans against malicious discrimination when called upon to do so.[290]

A Better Solution

In *Grutter v. Bollinger*, the Court found itself bound by two opposing policies. First, the Court recognized that diversity in American universities is crucial to the positive development of our nation.[291] Second, the Court was bound by *stare decisis* to its *Adarand* precedent requiring it to apply strict scrutiny, a usually fatal test, to all programs using racial classifications.[292] Hence, the *Grutter* Court attempted to balance the need for diver-

284. *Id.*

285. *See Grutter*, 123 S. Ct. at 2365contd. (Rehnquist, J., dissenting).

286. *Id.* (Rehnquist, J., dissenting) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J., plurality)).

287. *Bakke*, 438 U.S. at 299 (stating that under strict scrutiny, the challenger is "entitled to a judicial determination that the burden he is asked to bear [on the basis of race] is precisely tailored to serve a compelling governmental interest").

288. *Grutter*, 123 S. Ct. at 2341 ("Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest . . . the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose.") (internal quotation omitted).

289. *See supra* text accompanying notes 277-88.

290. Stephen M. Feldman, Harmonizing the Law and Political Science of Supreme Court Decision Making 9 (2003) (unpublished manuscript, on file with author) ("[T]he Court upheld the University of Michigan Law School's program under strict scrutiny light, a new type of judicial scrutiny.").

291. *Grutter*, 123 S. Ct. at 2338-41; *see supra* notes 157-62 and accompanying text.

292. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); *see supra* text accompanying note 149.

sity in higher education with the requirement that *all* race-conscious government programs be reviewed under the rigid strict scrutiny analysis.[293]

As previously discussed, the United States Supreme Court engaged in a lengthy debate regarding the appropriate standard of review for benign affirmative-action programs before settling on strict scrutiny in *Adarand*.[294] However, the *Adarand* Court got it wrong. The muddled *Grutter-Gratz* results illustrate that the Court was too hasty in confining itself to the same standard of review for both benevolent and malicious Equal Protection cases.[295] Instead of justifying its deference under strict scrutiny with the idea that universities are "special," the Court should have used the same argument to justify the use of a lower standard of scrutiny.[296] In other words,

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293. *Grutter*, 123 S. Ct. at 2339 ("Our scrutiny of the interest asserted by the Law School is no less strict for taking into account the complex educational judgments in an area that lies primarily within the expertise of the university.").

294. *See supra* text accompanying notes 48-131.

295. *See* Gratz v. Bollinger, 123 S. Ct. 2411, 2444-45 (2003) (Ginsburg, J., dissenting). In her *Gratz* dissent, Justice Ginsburg insinuated that strict scrutiny should not encompass benign racial classifications. *Id.* at 2444 (Ginsburg, J., dissenting). She explained that in implementing the Fourteenth Amendment's equality instruction, the government should be allowed to "distinguish between policies of exclusion and inclusion [because] [a]ctions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated." *Id.* (Ginsburg, J., dissenting) (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316 (1986)). She noted a particularly convincing argument explaining that racial classifications are not always in parallel with racial oppression:

> To say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in *Regents of the University of California v. Bakke* was the same as the issue in *Brown v. Board of Education* is to pretend that history never happened and that the present doesn't exist.

Id. (Ginsburg, J., dissenting) (quoting Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L. J. 420, 433-34 (1988)) (internal citations omitted). Justice Ginsburg's central point was that race has been ranked a "suspect" category not because it is necessarily an impermissible classification in and of itself, as is touted in *Adarand* and other Supreme Court jurisprudence, but because racial classifications have typically been made for white supremacy purposes. *Id.* (Ginsburg, J., dissenting). It follows that when racial classifications are not being used to maintain racial inequality, the classifications are not as inherently suspect, and strict scrutiny may not be necessary. *See id.* at 2444-45 (Ginsburg, J., dissenting).

296. *See supra* text accompanying notes 153, 156-62. The Court found that due to the unique qualities of universities, both in the "special niche" that universities occupy in constitutional tradition and in the heightened importance of student body diversity, judicial deference was not merely permissible under strict scrutiny, but instead, exemplified the essence of the test. The *Grutter* Court stated:

> Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context. . . . Our hold-

rather than calling its deferential scrutiny "strict," the *Grutter* Court should have reexamined the arguments supporting a lower standard, expressly broke away from its *Adarand* precedent, and upheld the Law School's program under a lower standard of scrutiny.

Intermediate scrutiny, or a similarly lower standard, was the logical choice for a university affirmative-action program like the Law School's, and the "exceedingly persuasive justification" standard applied to gender classifications in *United States v. Virginia* provided the Court with the prior precedent it needed to credibly apply a lower standard.[297] Benign racial classifications in university admissions are similar to the gender classifications in *Virginia*: Like gender classifications, benign racial classifications are often used for legitimate purposes, such as increasing diversity or remedying past discrimination.[298] Benign racial classifications are not "so seldom relevant to the achievement of any legitimate state interest" that every benign classification should be "deemed to reflect prejudice and antipathy."[299] In fact, just the opposite is true: Benign racial classifications are typically enacted to benefit racial minorities.[300] The Court could and should have used the similarities between benign racial classifications and gender classifications to show that a lower standard of review is better suited to the Law School's benign program and that such benign classifications should not be subject to the most rigorous review.

Intermediate scrutiny also simply "fits" benign racial classifications better than strict scrutiny.[301] This is because intermediate scrutiny does not require the government's purpose to be "compelling."[302] Nor must the means used to achieve the government's purpose be "narrowly tailored."[303] Instead, intermediate scrutiny requires a program using racial classifications to be "substantially related" to the achievement of an "important" government purpose, and therefore, the *Grutter* Court would not have confused and weakened strict scrutiny's narrow tailoring analysis because it would not

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> ing today is in keeping with our tradition of giving a degree of deference to a university's academic decisions . . . [which is necessary because the benefits of student body diversity] are not theoretical but real . . . .").

See Grutter, 123 S. Ct. at 2338-40.

297. United States v. Virginia, 518 U.S. 515, 531 (1996).

298. *E.g., Grutter*, 123 S. Ct. at 2339 (attaining diversity is not only legitimate, but compelling); United States v. Paradise, 480 U.S. 149, 167 (1987) (remedying past and present discrimination by a state actor is "unquestionably" a compelling, and not just legitimate, state interest).

299. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

300. *See supra* text accompanying notes 45-47 for a discussion of the difference between benign and malicious racial classifications.

301. *See infra* text accompanying notes 302-05.

302. *See* Fullilove v. Klutznick, 448 U.S. 448, 519 (Marshall, J., concurring in the judgment).

303. *See id.* (Marshall, J., concurring in the judgment).

have applied it.[304] Moreover, intermediate scrutiny has traditionally been applied with a degree of judicial deference, so the Court could have justifiably deferred to the Law School in its admissions decisions under the lower standard and avoided compromising the strict scrutiny test.[305] By effectively comparing benign racial classifications to gender classifications, the Court could have persuasively reasoned its departure from *Adarand*, upheld the Law School's admissions program under intermediate scrutiny, and at last effectively recognized that not all racial classifications are created equal.

CONCLUSION

The *Grutter* Court had the right goal, but the *Grutter* decision cannot be defined as a step in the right direction. After clearly and affirmatively answering the long-standing question of whether diversity in university admissions is a compelling state interest, the Court distorted its historical strict scrutiny analysis in arguing that the Law School's program was narrowly tailored. The narrow tailoring inquiry confused the Court's decision and called the continuing strength of the strict scrutiny analysis into question. In *Grutter v. Bollinger*, the Court had the opportunity to explain why university affirmative-action programs merit a lower standard of review than other Equal Protection cases and uphold the Law School's program under intermediate scrutiny. Instead, the Court chose to half-heartedly abide by *stare decisis* in reciting its strict scrutiny analysis, but not applying it. The result is that the *Grutter* program survived, the *Gratz* program did not, and the future of all others remains uncertain.

LIBBY HUSKEY

304. Fullilove v. Klutznick, 448 U.S. 448, 519 (Marshall, J., concurring in the judgment); *see supra* text accompanying notes 273-76 detailing the ambiguities contained within the narrow tailoring inquiry of the *Grutter* decision.

305. *See supra* notes 89, 122 and accompanying text.