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**Grutter and Gratz: A Critical Analysis**

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ARTICLE

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I. INTRODUCTION

*Grutter v. Bollinger*¹ and *Gratz v. Bollinger*,² last term's racial preference decisions, are among the most important civil rights cases decided since *Brown v. Board of Education.*³ Not only did these decisions clear up much of the confusion that had surrounded the permissible use of racial preferences since the Court's decision in *Regents of the University of California v. Bakke,*⁴ decided a quarter of a century earlier, but also they placed a judicial stamp of approval on a relatively broad use of racial preferences by institutions of higher education. As such, the decisions were a major victory for the proponents of the use of racial preferences and a stunning defeat for the opponents. Beyond any symbolic importance, these are decisions that will be studied by university counsel and admissions officers throughout the land and will almost certainly provide the blueprint for university admissions processes for decades to come.

This Article will analyze the *Grutter* and *Gratz* opinions, especially Justice O'Connor's important opinion for the majority in *Grutter,* and will consider the significance of these decisions in terms of university admissions policy, justifications for racial preferences, and equal protection doctrine. The Article will conclude that the Court's defense of the use of racial preferences does not square well with the Powell opinion in *Bakke* on which it relied so heavily. It will suggest that the Court could have offered a more persuasive explanation for the result it reached but probably felt precluded by precedent from doing so.

II. BACKGROUND

At some point during the late 1960s or early 1970s, many universities and graduate schools began to grant preferences in admission to various racial minority groups, apparently because minority applicants did not have the grades or test scores to gain admission in significant numbers absent such preferences.⁵ A constitutional challenge to a preference program of this type was

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⁵. See generally Claire Andre et al., *Affirmative Action: Twenty-Five Years of Controversy,* 5 ISSUES IN ETHICS (Summer 1992) (discussing the history of affirmative action and differing views on the topic), http://www.scu.edu/ethics/publications/iie/v5n2/affirmative.html.
first brought to the Supreme Court in 1974 in *Defunis v. Odegaard*,
but the challenge was dismissed as moot when it became clear that the plaintiff would graduate regardless of what the Court held.\(^7\) Four years later in *Bakke*, a sixteen seat set-aside for minorities enacted by the Medical School of the University of California at Davis was invalidated by the Supreme Court; however, five Justices agreed that race could be used as a factor in the admissions process, though not as a quota or set-aside.\(^8\) In an opinion that no other Justice joined, Justice Powell rejected three justifications for racial preferences offered by the state: increasing the number of minority students, providing more doctors to underserved minority communities, and providing a remedy for past societal discrimination.\(^9\) Justice Powell endorsed a fourth justification as a compelling state interest—using race as one of many factors to create diversity in the class for purposes of improving the learning environment.\(^10\) Although Justice Powell was not speaking for any other Justice, his diversity rationale, modeled after a plan employed by Harvard College,\(^11\) was adopted by educational institutions nationwide as the constitutionally appropriate method for using racial preferences in university admissions processes.\(^12\) Over time, several Supreme Court cases, including *Wygant v. Jackson Board of Education*,\(^13\) *City of Richmond v. J.A. Croson Co.*,\(^14\) and *Adarand Constructors, Inc. v. Pena*,\(^15\) as well as Justice O'Connor's dissenting opinion in *Metro Broadcasting, Inc. v. FCC*,\(^16\) raised questions as to whether the Powell opinion in *Bakke* was consistent with the Court's equal protection jurisprudence.\(^17\)

In 1996, in *Hopwood v. Texas*, the Fifth Circuit struck down a racial preference policy that clearly did not comport with even a generous reading of the Powell opinion in *Bakke*.\(^18\) In addition,

\(^6\) 416 U.S. 312 (1974).
\(^7\) *Id.* at 319–20.
\(^8\) *Bakke*, 438 U.S. at 271–72, 279, 289–90, 319 (opinion of Powell, J.).
\(^9\) *Id.* at 271–72, 305–10 (opinion of Powell, J.).
\(^10\) *Id.* at 311–15 (opinion of Powell, J.).
\(^11\) *Id.* at 321–24 (opinion of Powell, J.).
\(^12\) Grutter v. Bollinger, 123 S. Ct. 2325, 2336 (2003).
\(^13\) 476 U.S. 267 (1986).
\(^18\) *Hopwood*, 78 F.3d at 940–44.
the Court held that the Powell diversity justification was not the law and never had been. The Court of Appeals for the Ninth Circuit, in a case involving a University of Washington Law School preference program, disagreed with the Fifth Circuit's conclusion that Bakke was not good law. The Court of Appeals for the Eleventh Circuit, affirming the invalidation of a racial preference program employed by the University of Georgia, largely agreed with the Fifth Circuit.

Around that time, separate challenges to the racial preference policies of the College of Literature, Science, and the Arts at the University of Michigan and the University of Michigan Law School (the "Law School") were brought in the United States District Court for the Eastern District of Michigan. The undergraduate admissions policy went through several changes during the course of the litigation. The version ultimately upheld by the district court and invalidated by the Supreme Court assigned points for a variety of diversifying factors in addition to points assigned for traditional academic indicators. Twenty points were assigned for membership in certain specified underrepresented racial groups. The record indicated that, as a practical matter, the assignment of twenty additional points was sufficient to lead to the admission of all minimally qualified applicants from these groups. The district court sustained the constitutionality of this program.

The Law School considered a wide variety of diversifying factors, including membership in one of three underrepresented racial groups, in a nonmechanical, individualized manner. It attempted to admit a "critical mass" of students from each of these groups, although the size of the critical mass varied significantly among the groups. The percentage of admitted

19. See id. at 944.
20. Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1191, 1200 & n.9 (9th Cir. 2000).
21. See Johnson v. Bd. of Regents, 263 F.3d 1234, 1244-45 (11th Cir. 2001) (explaining that there was no Supreme Court majority in Bakke in support of the proposition that diversity is a compelling state interest).
24. Id. at 2419-21, 2430-31.
25. Id. at 2419-20.
26. See id. at 2419.
29. Id. at 2366-67 (Rehnquist, C.J., dissenting).
minorities remained relatively consistent from year to year, although the percentage of those who actually attended did vary somewhat. The district court held that this program was unconstitutional.

Both of these decisions were appealed to the Sixth Circuit. Sitting en banc, it upheld the validity of the Law School’s racial preference program. It concluded that the Powell diversity approach was good law and that the Law School had not established an implicit quota. Writing for three additional judges, Judge Boggs dissented, arguing that the Powell diversity approach did not have the status of precedent and was not in fact a compelling state interest, and that the Law School policy failed strict scrutiny for lack of narrow tailoring. The undergraduate admissions case was argued to the Sixth Circuit, but an opinion was not issued. The Supreme Court granted certiorari in the Law School case, and at the urging of the plaintiff granted certiorari to the district court in the undergraduate case as well. Because these decisions had the potential to put to rest the confusion surrounding the legality of racial preferences in university admissions, they attracted a great deal of attention; over one hundred amicus briefs were filed.

Near the end of the term, the Court issued its opinions in Grutter and Gratz, upholding the Michigan Law School policy by a vote of 5-4 in an opinion written by Justice O’Connor and invalidating the Michigan undergraduate program by a 6-3 vote in an opinion written by Chief Justice Rehnquist. In Grutter, the Court found that the educational benefits derived from diversity qualified as a compelling state interest and proceeded to grant educational institutions a significant degree of deference with respect to the fashioning of diversity-based admissions policies that consider race as a factor. Because the O’Connor opinion for the majority in Grutter and the Rehnquist opinion for the majority in Gratz will have a controlling effect on university admissions policies, and because these opinions will have a

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30. Id. at 2368–69 & 2368 tbls.1–3 (Rehnquist, C.J., dissenting).
33. Id. at 746–49.
34. Id. at 773, 776–808 (Boggs, J., dissenting).
36. See, e.g., Grutter, 123 S. Ct. at 2339–42 (discussing some of the arguments presented in the numerous amicus briefs).
37. Id. at 2330–31, 2347; Gratz, 123 S. Ct. at 2416, 2430–31.
38. Grutter, 123 S. Ct. at 2337, 2339, 2345.
significant impact on equal protection doctrine, they are worthy of close analysis. In working through these opinions, I will consider the critiques of the dissenters at relevant points rather than separately at the end.

III. GRUTTER V. BOLLINGER

A. The Legal Significance of the Powell Opinion in Bakke

It was all but inevitable that the Michigan cases would shed some light on the precedential significance of Bakke, especially Justice Powell's opinion endorsing diversity as a compelling state interest. Indeed, as Judge Wiener wrote in his concurrence in Hopwood, eventually the Supreme Court would need "to go with, over, around, or through Justice Powell's Bakke opinion" in order to decide whether racial preferences in higher education were constitutionally permissible. At the outset, the Court summarized the Powell opinion in Bakke. It noted that Justice Powell had both read the Equal Protection Clause as focusing on the individual and, to ensure that individual rights would be protected in light of a government classification on the basis of race, applied a strict standard of review. The Grutter Court then noted that Justice Powell had rejected three rationales for the use of racial preferences tendered by the Regents in Bakke, accepting only the fourth—achievement of a diverse student body. The Court then briefly summarized Justice Powell's explanation of a constitutionally valid approach for achieving such diversity, including that the university must consider all facets of relevant diversity in a competitive admissions process and not simply race.

Next, the Court explicitly endorsed Justice Powell's diversity approach. However, it remains somewhat unclear exactly what weight the Powell opinion carries as legal authority. The Grutter majority recognized that none of the opinions in Bakke

40. Grutter, 123 S. Ct. at 2336-37 (endorsing "Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions").
41. Id. at 2336.
42. See id.
43. Id.
44. See id. at 2337.
45. Id.
"commanded a majority of the Court." Wisely, however, it refused to be drawn into the difficult task of attempting to discern, under the analysis of Marks v. United States, exactly what was the rationale of a majority of the Court. The Court of Appeals opinion in Grutter had demonstrated that this was certainly an issue on which "reasonable minds can and do differ." A lower court was required to determine to what extent Bakke was a valid precedent that had to be followed; the Supreme Court, however, could simply decide whether and to what extent Justice Powell's reasoning was persuasive and adopt it anew regardless of whether it was technically binding. That is what the Court seemed to do as it conceded that the short paragraph in section III.C of Justice Powell's opinion was the only place in which he spoke for a majority of the Court.

The Grutter Court purported to take the Powell opinion on diversity quite seriously, noting that "[p]ublic and private universities across the Nation" have placed heavy reliance on it in developing their own policies. There is no question that this is true. Still, it tells little about Bakke's status as legal precedent, unless the Court means to say that widespread reliance on the opinion of a single Justice over a lengthy period of time can significantly enhance its status as legal authority. All the Court really did was simply incorporate Justice Powell's opinion by reference. The Powell opinion is far richer, more comprehensive, and more nuanced than the opinion of the Court in Grutter.

The question arises whether those aspects of the Powell opinion that the Court did not discuss or refer to should be taken as

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46. Id. at 2335.
47. 430 U.S. 188 (1977).
48. See Grutter, 123 S. Ct. at 2337.
49. Compare Grutter v. Bollinger, 288 F.3d 732, 739–42 (6th Cir. 2001) (en banc) (applying Marks and determining that Justice Powell's opinion was "Bakke's narrowest rationale"), aff'd, 123 S. Ct. 2325 (2003), with id. at 778–85 (Boggs, J., dissenting) (arguing that the application of Marks to Bakke is inapt because Justice Powell's opinion was on different (not narrower) grounds). Applying Marks leads to two possible outcomes, and the Court has already recognized that Bakke does not contain a useful holding regarding constitutionally permissible uses of race. Id. at 778–85 (Boggs, J., dissenting). I have taken the position in the past that the Marks analysis cannot produce a coherent majority rationale in Bakke. Bloom, supra note 17, at 23–34.
50. See Grutter, 288 F.3d at 739 (explaining and rejecting the district court's view that Bakke was not binding).
51. See Grutter, 123 S. Ct. at 2336.
52. Id.
53. Compare Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978) (opinion of Powell, J.), with Grutter, 123 S. Ct. at 2336–47 (discussing Justice Powell's Bakke opinion and, under its own reasoning, endorsing Justice Powell's position that diversity is a compelling state interest capable of justifying the use of race as a factor in university admissions).
implicitly endorsed by a majority of the Court, or whether they simply remain the observations of one Justice. In the future, it is certainly possible that courts may be forced to wrestle with this issue.

Justice Kennedy, dissenting, accepted Justice Powell's opinion as the correct approach, presumably for its persuasive force as opposed to its binding status, but argued that the majority had failed to apply it properly. Chief Justice Rehnquist, dissenting, seemed to treat the Powell opinion as the law of the land (although perhaps only for sake of argument), but like Justice Kennedy, he argued that the majority misapplied it. Simply counting heads, it appears that seven members of the Court were willing to accept a limited use of race to achieve diversity in a university student body and to recognize diversity in this setting as a compelling state interest. This, in itself, is somewhat surprising.

B. The Standard of Review

No issue in Grutter more clearly divided the majority from the dissenters than the question of the appropriate standard of review. On its face, the Court was unanimous that, pursuant to the Powell opinion in Bakke as well as the Court's opinions in Crosan and Adarand, strict scrutiny must apply. In beginning her analysis of the Law School's admissions process, Justice O'Connor emphasized the need for strict scrutiny but repeated her cautionary observation from Adarand that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'" She also noted that "[c]ontext matters when reviewing race-based governmental action" and that "[n]ot 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

54. See Grutter, 123 S. Ct. at 2370 (Kennedy, J., dissenting) (arguing that the majority failed to properly apply the strict scrutiny standard).
55. See id. at 2365–66 (Rehnquist, C.J., dissenting) (quoting and citing Bakke numerous times but finding that the majority had not followed Bakke's lead). Chief Justice Rehnquist did not join Justice Thomas's opinion, which argued that diversity was not a compelling state interest. Id. at 2350–65 (Thomas, J., concurring in part and dissenting in part).
56. See id. at 2337–38 (stating that the Justices agree that "all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny" (internal quotation marks omitted)).
57. Id. at 2337.
58. Id. at 2338 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).
59. Id.
decisionmaker for the use of race in that particular context." As a practical matter, these qualifications signaled that the Court was preparing to apply the strict standard of review in a manner that would prove to be wholly unacceptable to the dissenting Justices and difficult to square with the Powell opinion itself—although Justice Powell himself seemed to apply strict scrutiny more leniently to a racial classification two years after Bakke in Fullilove v. Klutznick. The strict standard of review, as often described by the Court, requires that the state demonstrate a compelling state interest and show that the classification in question is narrowly tailored to achieve that interest. If not fatal in fact, the standard is certainly demanding and difficult to satisfy.

1. Is Diversity a Compelling State Interest? The first question that the majority needed to confront in Grutter was whether the Law School had put forth a compelling state interest to justify the explicit use of race in its admissions process. Presumably, before determining whether an interest is compelling, the Court should define that interest clearly. The majority opinion in Grutter suffers from an inability or unwillingness to define the state’s purported state interest with precision. As such, it is difficult to assess whether the state interest is compelling given that the state’s interest is not always clear.

a. What Is the State Interest and Why Is It Compelling? At the outset of its application of strict scrutiny, the Court stated that the only interest the Law School relied upon throughout the litigation was “the educational benefits that flow from a diverse student body.” A paragraph later, the Court declared that the Law School had a compelling state interest in attaining a diverse

60. Id.
61. 448 U.S. 448, 507-16 (1980) (Powell, J., concurring) (approving Congress’s remedy for discrimination in the construction industry by allowing a set-aside of federal money for minority contractors). Justices Stewart and Stevens made a persuasive case that the program in Fullilove could not satisfy the strict standard as traditionally understood. See id. at 528-30 (Stewart, J. dissenting); id. at 551-54 (Stevens, J., dissenting).
63. See Grutter, 123 S. Ct. at 2335 (stating that the reason for granting certiorari was to determine if diversity was a compelling state interest and that could justify the narrowly tailored use of race in university admissions).
64. Id. at 2338-41 (failing to clarify whether the compelling interest was a “diverse student body” or the “educational benefits” that flow from such diversity).
65. Id. at 2338 (internal quotation marks omitted).
student body. The difference between these two statements led Justice Thomas to conclude that, contrary to the second statement, the interest alleged to be compelling was not "a diverse student body" but rather the "educational benefits" that presumably flow from such a diverse student body. According to Justice Thomas, diversity in and of itself is a means, not an end, thus raising the questions concerning what these compelling educational benefits are, whether they in fact flow from diversity, and whether they could be achieved in some other less discriminatory manner.

In the very next sentence after proclaiming that diversity is a compelling state interest, the majority declared that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." Was the Court stating that diversity is a compelling state interest because the Michigan Law School says it is? Surely not. If so, then the Court has effectively dropped the standard of review from strict scrutiny to rational basis review. Ultimately, the question of whether an interest is compelling must be a question of constitutional law, not educational need. Presumably, the Court meant to say: "The Law School believes that a diverse student body is educationally important and who are we, the Court, to disagree with that assessment? However, it remains our obligation, as the Court, to determine whether the use of race in achieving such diversity is constitutionally compelling." That in

66. Id. at 2338–39.
67. Id. at 2352–53 (Thomas, J., concurring in part and dissenting in part). Justice Thomas also argued that, because a state need not maintain a law school at all—and certainly not an elite law school—maintaining diversity in its law school, if it does in fact choose to maintain one, can hardly be a compelling state interest because having the law school itself is not a compelling interest. Id. at 2354–55 (Thomas, J., concurring in part and dissenting in part). This argument may have some superficial appeal, but on reflection it is not persuasive. A municipality need not appropriate funds for public works projects either, but if it chooses to do so, providing a remedy for proven past discrimination either by the government or by private contractors would presumably be a compelling state interest. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989). This is an example of the principle in constitutional law that the greater does not always subsume the lesser.
68. Grutter, 123 S. Ct. at 2339.
69. See id. at 2365–69 (Thomas, J., concurring in part and dissenting in part) (criticizing the deference the Court showed the Law School in defining the compelling interest question); see also Robert C. Post, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 Harv. L. Rev. 4, 65–67 (2003) (observing that the Court protected its dominion over constitutional law in its analysis of the "narrowly tailored" prong of the strict scrutiny test). But see Lani Guinier, Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals, 117 Harv. L. Rev. 113, 180–82 (2003) (supporting the deference shown to the university because it allows the school the flexibility needed to judge the individual merits of applicants and to adapt to changing times).
turn leads back to the question of what diversity accomplishes. After accepting the Law School’s judgment, the Court asserted that “[t]he Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici.”\footnote{Grutter, 123 S. Ct. at 2339.} If anything, deferring to the conclusions of amici wholly untested by the adversarial process seems even more troublesome than deferring to the conclusions of a party to the litigation.

The Court stated, somewhat defensively, “Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.”\footnote{Id.} It then cited and briefly discussed the line of academic freedom cases relied on by Justice Powell in his \textit{Bakke} opinion for the proposition that the Court should defer to academic judgments, especially with respect to the selection of students.\footnote{Id.} In \textit{Bakke}, Justice Powell could not exactly contend that the First Amendment, in and of itself, supplied the compelling state interest because the line of academic freedom cases on which he relied was concerned with protecting the individual against the state rather than, as in \textit{Bakke}, the state against the individual.\footnote{Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–14 (1978) (opinion of Powell, J.) (reiterating that academic freedom has long been viewed as a “special concern of the First Amendment”). To support his statements, Justice Powell cited to \textit{Sweezy v. New Hampshire}, 354 U.S. 234 (1957) (holding that a professor’s arrest for refusal to answer questions from the attorney general about lectures was an invasion of his liberties in the areas of academic freedom and political expression) and \textit{Keyishian v. Board of Regents}, 385 U.S. 589 (1967) (protecting public school teachers from state action that infringed on their academic freedom). \textit{Id.} at 311–14 (opinion of Powell, J.).} As such, the most that Justice Powell or the \textit{Grutter} majority could legitimately claim is that the admissions decisions of a public university fall within the general vicinity of First Amendment concern.\footnote{See \textit{id.} at 312 (opinion of Powell, J.); \textit{Grutter}, 123 S. Ct. at 2339 (recognizing academic freedom as emanating from the First Amendment).} Justice Thomas argues convincingly that neither Justice Powell nor the \textit{Grutter} majority have explained how a few statements in dicta by Justice Frankfurter, taken wholly out of context, are capable of giving rise to an academic freedom principle that justifies near complete judicial deference to educational judgments involving the use of racial classifications.\footnote{\textit{Grutter}, 123 S. Ct. at 2357 (Thomas, J., concurring in part and dissenting in part).}
Asserting that universities have a First Amendment-based right of autonomy in selecting their student bodies was a tricky move for Justice Powell and the Grutter Court to make. If universities have this right, then arguably they should have the right to choose whatever degree or mix of diversity, including racial diversity, they believe appropriate. Thus, if universities truly have such First Amendment-based autonomy of decisionmaking, they can easily determine that the only type of diversity that really matters is racial diversity (which is in fact probably the case for many universities). However, neither Justice Powell nor the Grutter Court was willing to follow this logic to that conclusion. Rather, once racial diversity entered the equation, universities were told that they could exercise their academic freedom based autonomy not as they thought appropriate, but only in the manner that Justice Powell found appropriate, that is, through the "plus-in-the-file" Harvard-type approach. Apparently, this thought is dictated by the fact that race is constitutionally different than any other diversifying factor. Still, the decisionmaking autonomy that Justice Powell, and now the Grutter Court, is prepared to recognize in academic institutions is a highly qualified autonomy to be sure.

Having briefly discussed the First Amendment, academic freedom background of the institution's decisionmaking autonomy, the majority then reemphasized, "Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission." However, the majority had not identified any reason for so believing aside from pure deference to the assertions of the Law School itself and the various amici. It then quoted Justice Powell's observation in Bakke that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" Four paragraphs into the analytical section of the opinion, the continuous drumbeat of deference, deference, deference rings out loud and clear. It is fair to say that no other opinion purporting to apply the strict standard of review has ever projected such a tone.

76. See Bakke, 438 U.S. at 315–17 (opinion of Powell, J.) (forbidding racial quotas in admissions, but allowing race to be used as a factor in these decisions).

77. See, e.g., Grutter, 123 S. Ct. at 2359–60 (Thomas, J., concurring in part and dissenting in part) (noting that the Constitution does not prohibit discrimination based on "legacy" preferences although it does prohibit discrimination based on race).

78. Id. at 2339.

79. Id. (quoting Bakke, 438 U.S at 318–19 (opinion of Powell, J.)).
At this point, the Court confronted the issue of "critical mass," which was the most serious constitutional obstacle in the path of the Law School. The primary argument against the Law School's admissions policy was that its emphasis on admitting a critical mass of minority students, particularly black students, is functionally indistinguishable from a quota. In addressing the issue of critical mass, the Court noted that the Law School was not pursuing critical mass for purposes of racial proportionality, which would be per se illegal, but rather for the purpose of attaining "the educational benefits that diversity is designed to produce." It is only at this point that the Court mentioned these seemingly crucial educational benefits, noting that the district court "emphasized [that] the Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.' Actually, the district court did not "emphasize" that the racial diversity yielded these positive benefits. Rather, it simply observed that those were the benefits that the Law School "asserted" and "argued" that diversity produced and assumed that diversity did produce. Still, the district court viewed the Law School's claims about the benefits of racial diversity far more skeptically than the Supreme Court's opinion would suggest. In addressing the question of the benefits of diversity, the district court said that

a distinction should be drawn between viewpoint diversity and racial diversity. While the educational benefits of the former are clear, those of the latter are less so. The defendants' witnesses emphasized repeatedly that it is a diversity of viewpoints, experiences, interests, perspectives, and backgrounds which creates an atmosphere most conducive to learning. As Dean Lehman testified, it is primarily a "diversity of views" that the law school seeks.

The connection between race and viewpoint is tenuous, at best.

In any event, the Court's quotation from the district court does not fully capture the Law School's theory of critical mass.

80. Id.
81. See id. at 2348 (Scalia, J., dissenting); id. at 2365 (Rehnquist, C.J., dissenting); id. at 2371–72 (Kennedy, J., dissenting).
82. Id. at 2339.
83. Id. at 2339–40 (second alteration in original) (quoting App. to Pet. for Cert. 246a).
85. Id. at 849.
The Law School argued that having a critical mass of minority students was crucial because it prevented minority students from feeling isolated and feeling as though they must be the spokespersons for their races, ensured that there would be a sufficient number of minority students to interact with nonminority students in small groups, and provided a sufficient number of minority students to illustrate that there is a diversity of viewpoints within minority communities.\textsuperscript{6} Ironically, Chief Justice Rehnquist captured the flavor of the Law School's argument better in his dissent than the majority did in its opinion.\textsuperscript{7}

The Court did not bother to describe the educational benefits that flow from broad-based, plus-in-the-file diversity, as had Justice Powell when discussing the Harvard plan in \textit{Bakke}.\textsuperscript{8} Instead, it focused exclusively on the benefits to be derived from race-based diversity, especially as promoted by the use of critical mass.\textsuperscript{9} Perhaps the Court assumed that we all have read \textit{Bakke} and are familiar with Justice Powell's justifications for plus-in-the-file-type diversity, so why bother to go over all of that again. Or maybe it simply concluded that this case was really about a use of race that is arguably more pronounced and vigorous than anything contemplated by Justice Powell, so why not go straight to the heart of the matter. Whatever the reason, the Court's failure to reiterate why broad-based diversity is important leaves the impression that it viewed it as nothing more than a fig leaf to cover an aggressive use of racial preferences. As far as the reader can tell from the Court's opinion, the educational benefits that result in a compelling state interest flow all but exclusively from racial as opposed to viewpoint-oriented diversity. This seems to be in tension, if not in outright conflict, with Justice Powell's opinion in \textit{Bakke}.\textsuperscript{9} It seems as though the Court has implicitly

\begin{footnotesize}
\begin{enumerate}
\item Brief for Respondents at 2–3, \textit{Grutter} (No. 02-241) [hereinafter \textit{Grutter Respondents' Brief}].
\item \textit{See} \textit{Grutter}, 123 S. Ct. at 2366 (Rehnquist, C.J., dissenting).
\item \textit{Grutter}, 123 S. Ct. at 2339–41 (listing cross-racial understanding, more enlightening and interesting class discussion, better preparation for a diverse workforce and society, a strong military, and the creation of respected national leaders as benefits derived from racially diverse institutions).
\item See \textit{Bakke}, 438 U.S. at 315 (opinion of Powell, J.) (finding that the diversity that gives rise to a compelling state interest cannot be merely racial or ethnic diversity). Justice Powell quoted William Bowen, president of Princeton University, who described the broad scope of educational benefits that flow from a student body that is diverse.
\begin{quote}
\begin{flushleft}
[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a
\end{flushleft}
\end{quote}
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\end{footnotesize}
altered the nature of the compelling state interest involved. Apparently, it has taken the position that the Law School has a compelling state interest in seeking the educational benefits of a diverse student body that contains a critical mass of minority students.

To "bolster" the Law School's claim regarding the significance of racial diversity, the majority referred to "expert studies and reports entered into evidence at trial." The district court only referred to these studies in passing. If these reports and studies did support the claim that diversity—especially racial diversity—provided significant educational benefits, it would have been useful for the Court to summarize the reports and studies in detail so that the reader would have had some idea why the Court was convinced of the educational value of critical mass racial diversity. The Court also cited one amicus brief and three secondary sources for proof of the benefits of racial diversity. Although this material may well be informative and useful, it was apparently not record evidence that had been tested by the adversary process. It certainly would have been helpful, however, for the Court to describe some of the findings of this research, as they presumably provided the basis for the recognition of the educational benefits of racial diversity as a compelling state interest.

To demonstrate that "[t]hese benefits are not theoretical but real," the Court cited the briefs filed by major American businesses, as well as an apparently highly influential brief

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Id. at 312 n.48 (opinion of Powell, J.) (alteration in original).
91. Grutter, 123 S. Ct. at 2340.
93. Grutter, 123 S. Ct. at 2340 (citing Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents at 3, Grutter (No. 02-241); William Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions (1998); Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities (Mitchell Chang et al. eds., 2003); Diversity Challenged: Evidence on the Impact of Affirmative Action (Gary Orfield & Michale Kurlaender eds., 2001)).
94. See Grutter, 288 F.3d at 767 (mentioning the Bowen-Bok book in a concurring opinion only); Grutter, 137 F. Supp. at 821 (failing to mention any of the sources on which the Supreme Court relied).
95. Grutter, 123 S. Ct. at 2340.
96. Id. (citing Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 5, Grutter (No. 02-241), Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516) [hereinafter 3M Brief]; Brief of General Motors Corporation as Amicus Curiae in
filed by a group of retired high-ranking military leaders. Simply as a matter of advocacy, the Court should have noted that the brief that it referred to as the “3M brief” was in fact filed on behalf of many of the most prominent companies in the country, including American Express, Coca-Cola, General Electric, Microsoft, and sixty-one others, and that the military leaders included Generals Wesley K. Clark, H. Norman Schwarzkopf, and John M.D. Shalikashvili and Admiral William J. Crowe. These were impressive groups of companies and retired officers. The prestige of these amici may well have influenced the Court and presumably would have impressed the reader of the opinion as well if the Court had elaborated.

The 3M Brief’s focus on the challenges of a global marketplace and multicultural competence seemed to express an interest in a far broader and internationally oriented form of diversity than that which Michigan was defending. The gist of the Military Officers’ Brief, at least the portion that the Court quoted, was essentially that the military needs a great many capable minority students to participate in ROTC, and that if colleges may not employ racial preferences in admissions, there simply will not be a large enough pool of minority officer candidates. Although the retired military officers were concerned with the educational benefits to be gained from diverse perspectives in the classroom, they seemed even more concerned that the conveyor belt of qualified minority officer candidates keeps moving. This may well be a compelling interest, but it is not exactly the interest that Michigan purported to be attempting to achieve, nor was it the interest that Justice Powell blessed in Bakke.

The Court also quoted the Military Officers’ Brief for the proposition that “the military must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a

Support of Respondents at 3–4, Grutter (No. 02-241), Gratz (No. 02-516)).

97. Grutter, 123 S. Ct. at 2340 (citing Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents at 27, Grutter (No. 02-241), Gratz (No. 02-516) [hereinafter Military Officers’ Brief]).

98. 3M Brief, supra note 96; Military Officers’ Brief, supra note 97, at 2–4.

99. See 3M Brief, supra note 96, at 5–7 (outlining the need for a diverse workforce to continue and expand their current global reach).

100. See Grutter, 123 S. Ct. at 2340.

101. See Military Officers’ Brief, supra note 97, at 18–30.

racially diverse setting."\textsuperscript{103} It also quoted this brief for the proposition that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."\textsuperscript{104}

Perhaps recognizing the outcome-based nature of the retired military officers' argument, the Court shifted its focus from the internal educational benefits of diversity to the significance of education in "sustaining our political and cultural heritage" and its "fundamental role in maintaining the fabric of society."\textsuperscript{105} This led the majority to conclude that it is crucial that institutions of higher learning are "open and available to all segments of American society, including people of all races and ethnicities."\textsuperscript{106} The Court seemed to be shifting the focus away from the compelling interest in the educational benefits of diversity in the classroom, racial or otherwise, and toward a need for or a right of access to higher education by members of all racial and ethnic groups. This reaches dangerously close to the interest in racial balancing that, as the Court noted, was declared unconstitutional per se by Justice Powell in \textit{Bakke}.\textsuperscript{107}

The Court then explained that a high percentage of governors and U.S. Senators and Representatives have law degrees, and that a small number of schools have produced a large percentage of Senators and federal judges.\textsuperscript{108} This led the Court to conclude that if the country is to "cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race."\textsuperscript{109} Here the Court introduced two more interests that may be served by racially preferential admissions policies and that might very well be compelling in their own rights—the need to ensure that leaders from every racial group are produced and the need to assure the public that paths to leadership are open to all. However significant these interests may be, they are not the same as the classroom benefits generally claimed for diversity of perspective. Instead, the Court seemed to be focusing more on the output of the educational process rather than on the process itself.

\textsuperscript{103} \textit{Grutter}, 123 S. Ct. at 2340 (quoting Military Officers' Brief, \textit{supra} note 97, at 29).
\textsuperscript{104} \textit{Id.} (internal quotation marks omitted) (alteration in original).
\textsuperscript{105} \textit{Id.} (internal quotation marks omitted).
\textsuperscript{106} \textit{Id.} at 2340 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 13, \textit{Grutter} (No. 02-241) [hereinafter Brief for the United States]).
\textsuperscript{107} \textit{Id.} at 2336.
\textsuperscript{108} \textit{Id.} at 2341.
\textsuperscript{109} \textit{Id.}
In a nutshell, the Court seemed to be saying that racial preferences in admission are a compelling interest because they help assure the continued production of minority leaders as well as the perception that minorities have a fair chance to receive leadership training. This is essentially the retired military officers’ argument transplanted into a civilian context, the “small step” that the Military Officers’ Brief urged the Court to take.\textsuperscript{110} Once again, it is not the traditional diversity argument and is in fact more closely related to the argument that both Justice Powell and the \textit{Grutter} majority have elsewhere purported to reject.\textsuperscript{111}

The majority then observed that the Law School was not proceeding on the assumption that there is a “characteristic minority viewpoint,”\textsuperscript{112} but rather that there is not, and that only a critical mass of minority students can dispel this belief.\textsuperscript{113} This position seems to be designed to diffuse any contention that the Law School is simply perpetuating racial stereotypes, a practice that would presumably be unconstitutional as argued by Justice O’Connor at length in her dissent in \textit{Metro Broadcasting, Inc. v. FCC}.\textsuperscript{114} The Court concluded the section of its opinion discussing compelling state interests not by stating that all of the evidence had convinced the Court that there was such an interest, but rather by stating that the Law School had so determined “based on its experience and expertise.”\textsuperscript{115} As far as the Court seemed to be concerned, that unquestionably self-serving conclusion sufficed as a matter of constitutional law, therefore needing little if any independent judicial review.

b. Where Do Compelling Interests Come From? In \textit{Grutter}, the Court recognized a new compelling state interest, at least if Justice Powell’s opinion in \textit{Bakke} was not controlling precedent (and perhaps even if it was). The Court described the interest as either diversity in the student body or,\textsuperscript{116} more frequently, as the

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 2340 (internal quotation marks omitted); Military Officers’ Brief, \textit{supra} note 97, at 29.
\item \textsuperscript{111} See \textit{id.} at 2336; see also Post, \textit{supra} note 69, at 60–61 (explaining how the \textit{Grutter} opinion appears to expand the compelling interest of diversity beyond higher education to include protection of our “political and cultural heritage” and to provide a training ground for tomorrow’s leaders (internal quotation marks omitted)).
\item \textsuperscript{112} \textit{Grutter}, 123 S. Ct. at 2341 (internal quotation marks omitted).
\item \textsuperscript{113} See \textit{id.}
\item \textsuperscript{115} \textit{Grutter}, 123 S. Ct. at 2341.
\item \textsuperscript{116} See \textit{id.} at 2338.
\end{itemize}
educational benefits derived from such diversity. Those benefits seem to go far beyond the benefits of classroom interchange and out-of-class learning emphasized by Justice Powell and the Harvard plan. Unlike the Powell opinion, Grutter focused almost exclusively on the benefits derived from racial diversity—more specifically, critical mass racial diversity as opposed to broad-based diversity—of perspective and experience. Indeed, the Grutter Court seemed highly concerned with the larger societal benefits of racial diversity, such as keeping American businesses competitive, producing a stream of minority students capable of military leadership, and assuring society that persons from all races have access to the paths to civilian leadership. The Court cited these societal benefits but made no effort to describe their significance to its conclusion. Thus, there is no way to tell whether they were crucial elements in the decision that diversity is compelling or whether they were simply useful byproducts. The Court's emphasis on societal benefits would certainly suggest the former.

In the years leading up to Grutter, and as racial preferences in higher education came under increased attack, proponents of the diversity justification believed that the Court would demand convincing empirical proof that racial diversity was indeed highly beneficial to the educational process. The Law School attempted to do just that in Grutter and certainly was met with some skepticism by the district court as well as by Judge Boggs's dissent in the Sixth Circuit. The Supreme Court made no effort to examine evidence on the issue of whether broad-based experiential diversity, or racial diversity in particular, significantly enhance classroom interchange or the educational process in general. Rather, the Court seemed to say that the Law

117. See id. at 2341.
118. See id. at 2339–41.
119. See id. at 2340–41.
120. See id. at 2339–41.
121. See, e.g., CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 113, 170–72 (1996) (citing the Supreme Court's statement in Adarand that "[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system" (internal quotation marks omitted)).
123. See Grutter, 137 F. Supp. 2d at 849–50 (expressing doubt that the Law School's evidence supported a finding of a compelling state interest).
School believes that diversity is valuable, and that is good enough.  

Presumably, a "compelling state interest," taken literally, is a state interest of the highest order. Prior to Grutter, national security and the provision of a remedy for past discrimination were the only interests recognized as compelling under the Equal Protection Clause in the context of racial discrimination—at least by a majority of the Court. These seem like easy cases. Protecting the security of the nation is essential to the very survival of the Constitution and the American people. It is compelling by nature. Providing a remedy for past discrimination is also of great constitutional importance. If a primary objective of the Equal Protection Clause is to prohibit racial discrimination, then providing a remedy for past discrimination must be of equal constitutional significance. Presumably, few other state interests are powerful enough to prevail over the prohibition against racial discrimination, given its constitutional primacy. In his dissent, Justice Thomas pointed out that several other interests, including protecting the best interests of a child, providing a remedy for societal discrimination, and providing role models for minority students, have all been rejected as compelling interests where racial classifications are involved. With respect to the role model theory rejected in Wygant, Justice Thomas asked why the school district in that case was undeserving of the same type of deference to its educational judgment that the Law School received in Grutter. The question was a good one, and the majority failed to address it, much less provide an answer.

It is likely that in the course of defending legislation or regulations, states will be willing to argue that whatever interest they may happen to be trying to promote is compelling, especially if that is the only way to prevail in litigation. If a sincere belief by the state will suffice to make it compelling, then compelling interests will be the rule rather than the rare exception. Certainly the Court does not intend for that to happen. There is no reason to believe that this one decision was designed to overturn fifty years of equal protection precedent. Consequently, there needs to be some objective legal means by which the Court can distinguish true compelling interests from pretenders.

125. See Grutter, 123 S. Ct. at 2339–40.
126. Id. at 2351–52 (Thomas, J., concurring in part and dissenting in part).
129. Grutter, 123 S. Ct. at 2351–52 (Thomas, J., concurring in part and dissenting in part).
130. Id. at 2351 n.2 (Thomas, J., concurring in part and dissenting in part).
Perhaps there is no reliable gauge of constitutional importance, but it would not be too much to expect the Court to attempt to make some assessment of the significance of the state interest before declaring it compelling. Otherwise, there would seem to be little separating the compelling state interest of strict scrutiny from the important state interest of intermediate scrutiny and the legitimate state interest of rational basis review.

Apparently, the Court's position is that educational institutions are constitutionally entitled to this extreme degree of deference because of the First Amendment-related interest in academic freedom.\textsuperscript{131} No other government institution is constitutionally worthy of such trust. As noted above,\textsuperscript{132} and as developed by Justice Thomas in dissent,\textsuperscript{133} the academic freedom argument is simply too contrived to bear this weight. Certainly other institutions of government could assert that they too are entitled to a constitutionally based autonomy of decisionmaking. For instance, Congress could claim that it has a First Amendment-based compelling interest in regulating all facets of electoral speech or broadcast communications. States could claim a constitutionally based compelling interest in regulating every aspect of state elections. If these claims were recognized, and if the Court granted these governmental branches the degree of deference shown in \textit{Grutter}, it would cut a wide and deep swath through well-established free speech and equal protection jurisprudence. But that is highly unlikely to happen. Rather, the Court will probably continue to treat the deference shown to educational institutions as constitutionally unique, even if its position is difficult to defend logically.

Based on the evidence in the record developed at trial, reasonable people could disagree whether Michigan had established that its interest in racial diversity was constitutionally compelling. But if the Court was inclined to so conclude, as obviously it was, it did have a record from which it could have built an argument—one that would have allowed it to reach an independent judgment rather than simply deferring to the Law School's expertise.\textsuperscript{134} The failure to do so will almost certainly come back to haunt the Court in the future as it

\begin{itemize}
\item \textsuperscript{131} See \textit{id.} at 2339 (recognizing that because of both public education's importance and the freedoms of speech and thought related to the university setting, universities function in a "special niche in our constitutional tradition").
\item \textsuperscript{132} Refer to notes 72-74 \textit{supra} and accompanying text.
\item \textsuperscript{133} See \textit{Grutter}, 123 S. Ct. at 2357 (Thomas, J., concurring in part and dissenting in part) (criticizing the Court's creation of an academic freedom exception).
\item \textsuperscript{134} See \textit{id.} at 2339-41 (describing the evidence of the benefits of a diverse student body on which the Court could have made an independent judgment).
\end{itemize}
struggles to explain why similar deference is not warranted in other contexts.

2. **Narrow Tailoring.**

   a. The Quest for Critical Mass. The Court began its discussion of narrow tailoring by denying Justice Kennedy's claim that it had abandoned the narrow tailoring element of strict scrutiny while noting that it is proper to take relevant differences in application into account.\(^{135}\) Then, quoting from the Powell opinion in *Bakke*, the Court acknowledged that an admissions program may not use a quota that insulates minority students from competition, but that it may use race as a plus-in-the-file, considering "all pertinent elements of diversity."\(^{136}\) The majority concluded that the Michigan process followed the model of the Harvard plan and was not a quota or set-aside.\(^{137}\) The record indicated that Michigan purported to consider a wide range of diversifying factors, as Justice Powell had required.\(^{138}\) The Court noted that the Law School did not use the type of mechanical criteria struck down in the companion *Gratz* case\(^{139}\) and did admit nonminority candidates who had diversifying characteristics, even though they had academic indicators lower than rejected minority applicants.\(^{140}\)

   The question was whether Michigan's quest for a critical mass of underrepresented minority students, along with its close attention to the "daily reports" detailing the up-to-date, precise number of minorities admitted and accepting, showed that in fact Michigan was striving to fill a quota of minority students.\(^{141}\) The Court noted that Justice Powell in *Bakke* had recognized that under the Harvard plan, a "goal" for minority admissions was permissible and that an acceptable diversity plan did not require that every factor be accorded the same weight.\(^{142}\) It then concluded that in light of the testimony of the Michigan admissions officers, there was no evidence that the Law School had ventured beyond what was permissible under the Powell

\(^{135}\) *Id.* at 2341–42.

\(^{136}\) *Id.* at 2342 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)).

\(^{137}\) *Id.*

\(^{138}\) *Id.* at 2344.

\(^{139}\) *Id.* at 2343.

\(^{140}\) *Id.* at 2344.

\(^{141}\) *Id.* at 2343.

\(^{142}\) *Id.* at 2342 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317–18, 323 (1978) (opinion of Powell, J.)).
approach in *Bakke*.\textsuperscript{143} In his dissent, Chief Justice Rehnquist pointed out that the critical mass of each of the three underrepresented minority groups varied significantly and seemed generally to approximate the percentages of each group in the applicant pool.\textsuperscript{144} If the point of critical mass was to admit a sufficient number of underrepresented minorities to encourage uninhibited expression, it is unclear why the critical mass for African-American students was so much larger than that for Hispanic or Native American students, or why as few as three Native American students constituted a critical mass.\textsuperscript{145} The majority neither acknowledged nor attempted to respond to this argument, even though it seems to go straight to the heart of the Law School's narrow tailoring defense.

In responding to the dissenting opinions of Justice Kennedy and Chief Justice Rehnquist, the majority pointed out that, at least during certain time periods, the percentage of minorities who chose to attend the Law School had varied from year to year.\textsuperscript{146} This seems to ignore Chief Justice Rehnquist's demonstration that the percentage of minorities in each of the three preferred groups admitted each year carefully tracked the percentage of students from each of the three groups applying each year.\textsuperscript{147} Justice Kennedy made a similar showing in his dissent.\textsuperscript{148} As Chief Justice Rehnquist pointed out, the admissions statistics are far more relevant than the enrollment statistics because the school has complete control over who is admitted and far less control over who actually accepts the offers and attends.\textsuperscript{149} In the absence of an explanation from the Law School, Chief Justice Rehnquist concluded that the statistics demonstrated that the Law School had in fact engaged in a longstanding practice of engaging in prohibited racial balancing, that is, creating a class each year in which the percentage of underrepresented minorities in each of the preferred racial groups closely approximated the percentage of such minorities in the applicant pool.\textsuperscript{150} Perhaps there is another explanation for this statistical consistency; however, it is certainly striking enough to raise serious questions about the Law School's good faith and demand some explanation. The Court's failure to seek such an explanation, and to even accurately acknowledge Chief

\begin{itemize}
  \item \textsuperscript{143} *Id.* at 2343–45.
  \item \textsuperscript{144} *Id.* at 2366–68 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{145} *Id.* at 2366–67 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{146} *Id.* at 2343.
  \item \textsuperscript{147} *Id.* at 2367–69 & 2368 tbls.1–3 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{148} See *id.* at 2371–72 (Kennedy, J., dissenting).
  \item \textsuperscript{149} *Id.* at 2369 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{150} *Id.* (Rehnquist, C.J., dissenting).
\end{itemize}
Justice Rehnquist's argument, suggests both that the majority was not applying strict scrutiny as it has been traditionally understood and that the Court had no adequate answer to Chief Justice Rehnquist's argument.

Certainly one response to Chief Justice Rehnquist's argument is that it is not at all obvious why the Michigan Law School would want to engage in precise racial balancing, especially when it had every reason to know that to do so would clearly be illegal. It seems more likely, given the nearly universal academic desire for racial diversity, that the Law School wanted to maximize racial diversity to the extent that it could without taking students who were academically risky, and without taking so many lower-scoring minority students that its median LSAT score would decline to an unacceptable level. Quite possibly, the reason why the percentage of admitted minority students closely tracked the percentage of minority students in the applicant pool is because the percentage of qualified minority students in the pool tracked the overall percentage as well. If so, Michigan was not attempting to engage in prohibited racial balancing but was simply playing the hand it was dealt. It is unclear from the record whether this hypothesis explains the relationship between the percentage of minorities admitted and the percentage of minorities in the pool, but it would seem to be as plausible as the conclusion drawn by Chief Justice Rehnquist. By suggesting such an alternative explanation, the Court could have shown that there was a possibility that Chief Justice Rehnquist's conclusions were flawed and, more importantly, that it took the narrow tailoring requirement seriously. Instead, by failing to address the issue, it left the impression that under its version of strict scrutiny, potentially troublesome evidence can simply be ignored.

b. Race Neutral Alternatives. As the Grutter Court acknowledged, the narrow tailoring element of strict scrutiny contains a requirement that the state consider less discriminatory means. This issue arose in oral argument with Justice Scalia, in particular, pressing the Law School on why lowering admissions standards was not a less discriminatory alternative given that the Law School’s high standards, driven by its desire to remain an “elite” law school, had the foreseeable effect of excluding a disproportionate percentage of underrepresented minority applicants. By failing to lower its

151. Id. at 2344–45.
152. United States Supreme Court Transcript at 30–31, Grutter (No. 02-241) (Oral Argument of Maureen E. Mahoney for Respondents Lee Bollinger et al.) [hereinafter Grutter Transcript]. Justice Scalia asked Ms. Mahoney, “Now, if Michigan really cares
standards, the Law School was arguably valuing its elite status more than diversity and essentially attempting to shift the cost of its diversity goals from itself to the shoulders of rejected nonminority applicants.

The majority summarily rejected this argument, stating that the less discriminatory means requirement does not “require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups,” citing a statement from a prior case that such alternatives must serve the interest of the state “about as well.” However, as Justice Thomas pointed out in dissent, this fails to explain why Michigan’s elite status is treated as part of the landscape immune from alteration, especially given that Michigan clearly made a deliberate choice in designing its admissions program to preserve its elite admissions policy—knowing full well that this would make it harder, if not impossible, to achieve a racially diverse student body without employing significant racial preferences. The obvious inference is that, for a Court made up of nine Justices, not to mention the law clerks who are all graduates of elite, selective law schools, requiring a law school to sacrifice any of its hard-earned status is all but unthinkable. To an outsider this may have the smell of a tightly knit guild protecting its privilege.

Justice Thomas asked in dissent why the Law School’s reputation would in fact decline if it used another method of selection if the educational benefits from diversity really are as great as it contends. Why would it not be recognized as an excellent law school providing important educational benefits? The answer, as Justice Thomas obviously knows, is that law schools are in fact evaluated and ranked to a very large extent by the objective academic indicators of their student bodies and that any decline in median LSAT scores or GPAs would be a fate that few, if any, law school deans would care to confront. Had the dissenters prevailed and law schools been forced to choose between test score driven elitism and diversity, the world of legal

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154. Id. at 2350, 2353 (Thomas, J., concurring in part and dissenting in part). Justice Thomas also pointed out that the Court certainly showed no deference to the Virginia Military Institute’s (VMI) claim that admitting women would radically alter the nature of the institution and the type of education it provided. Id. at 2358–59 (Thomas, J., concurring in part and dissenting in part).

155. Id. at 2353 n.4 (Thomas, J., concurring in part and dissenting in part).
education might have been better off—at least if law schools faced with such a decision chose diversity. This is not to suggest that qualifications do not matter, but rather that law schools have been forced to use overly narrow and mechanical methods of measuring qualifications thanks to the current rankings system. The sad reality, however—as Justices Scalia and Thomas no doubt knew and as Michigan itself admitted—^5 is that the elite law schools, if forced to choose, would reflexively choose to maintain their test score driven reputations. Racial diversity would fall by the wayside and the LSAT would continue to reign supreme.

By concluding that a school need not sacrifice any admissions-based prestige in order to satisfy the less discriminatory means test, the Court has in effect amended its definition of the compelling state interest, as Justice Thomas recognized. As a practical matter, the Court has held that a law school has a compelling state interest in obtaining the educational benefits that flow from diversity without having to sacrifice selective admissions-based prestige. On a broader doctrinal level, this illustrates that one way to avoid having to adopt a less discriminatory alternative is to define the compelling interest in a manner that eliminates the less discriminatory alternative as an option.

Ironically, the Military Officers’ Brief that the majority quoted favorably in parts of its opinion presented a very strong argument in favor of not sacrificing quality for diversity. The brief argued that applicants simply are not fungible and that while the service academies need racial diversity, they also desperately need the best applicants they can find in terms of intellect, physical ability, and leadership potential if they are to fulfill their mission of preparing top quality officers. The need


No honestly colorblind alternative could produce educationally meaningful racial diversity at present without substantially abandoning reliance on traditional academic criteria, and hence abandoning academic excellence as well. The Law School, having struggled for more than a century to build a great institution dedicated to excellence in the advancement of human knowledge, will not willingly do that.

*Id.*

157.  *Grutter*, 123 S. Ct. at 2353 (Thomas, J., concurring in part and dissenting in part). As Justice Thomas put it, “The proffered interest that the majority vindicates today, then, is not simply ‘diversity.’ Instead the Court upholds the use of racial discrimination as a tool to advance the Law School’s interest in offering a marginally superior education while maintaining an elite institution.” *Id.* (Thomas, J., concurring in part and dissenting in part).

158.  See *id.* at 2356 (Thomas, J., concurring in part and dissenting in part).

for quality control is arguably stronger—indeed much stronger—in the context of officer training, given the mental and physical demands placed on officers and the obvious need for leadership ability. Nonetheless, the need for quality control does transfer to the elite law school context. In one part of the opinion, the majority quoted the Military Officers' Brief for the proposition that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." The Court took that step but failed to explain or defend it clearly. Had the majority returned to this argument in the portion of the opinion discussing race neutral means and emphasized the importance of academic selectivity to the creation of leaders in all groups of society, the Court would have made great advances in explaining why the Law School is really pursuing a very significant social interest and not simply protecting its own elitist reputation. The Military Officers' Brief seems to have seriously influenced the result in Grutter. It is unfortunate that it did not have a greater influence over the drafting of the opinion as well.

The amicus brief of the United States cited similar plans put into effect in Texas, Florida, and California under which a certain percentage—for example, the top ten percent of the graduating class—of each high school in the state would be admitted to the state's flagship public university. This approach tends to produce racial diversity without explicitly relying on race, given the racially segregated nature of housing and thus of public high schools. The Court summarily dismissed this alternative as unworkable at the graduate and professional levels, and it rightly did so, for undergraduate institutions for the most part are not nearly as racially segregated as high schools; consequently, a percentage plan for higher education probably would not yield significant racial diversity.

160. But see Bryan W. Leach, Note, Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond, 113 YALE L.J. 1093, 1128–33 (2004), for the argument that the need for racial diversity, while compelling in the military context, does not easily translate to law and business.

161. Grutter, 123 S. Ct. at 2340 (alteration original) (quoting Military Officers' Brief, supra note 97, at 29).


163. See id. at 13–17 (arguing that diversity has been achieved in Texas, Florida, and California under race-neutral programs offering admission to the top ranking percentages of high school students).

164. Grutter, 123 S. Ct. at 2345 (observing that the United States failed to explain how such a plan could work at the graduate level and that such a plan would preclude individualized assessments of applicants necessary for assembling a student body that is
As with the issues of whether there was a compelling state interest and whether the admissions policy was narrowly tailored, the Court's conclusion that there were no race neutral alternatives was based largely on its uncritical acceptance of the assertions of the Law School. The Court was probably correct in concluding that none of the race neutral alternatives were workable and that perhaps the Law School had a compelling interest in maintaining diversity and high academic standards, but it certainly could have done a better job of explaining why.

c. Burden and Termination. Quoting again from Justice Powell in *Bakke*, the Court acknowledged that racial preferences create a serious problem of fairness in that they inevitably burden nonminority applicants. It maintained that narrow tailoring prohibits unduly burdening others on account of race. This position is, of course, subject to the criticism raised by Justice Kennedy in his dissent that the majority did not apply the narrow tailoring requirement with sufficient rigor to guard against unfairness and burden. The majority concluded that a diversity program that considers a wide range of diversifying factors not only refrains from burdening nonminority students, but often positively benefits them by resulting in the admission of nonminorities who would not have been admitted on the basis of objective academic indicators alone. The short answer to that assertion, however, is that the Equal Protection Clause does not concern the use of nonracial, soft variables. The university could have continued to extend such benefits to all students whether or not it employed racial preferences. Moreover, the Court implicitly seemed to recognize that, if at some point the plus for racial diversity is overwhelmingly greater than the plus for any other diversifying factor, then one cannot reasonably maintain that the system does not unduly burden nonminorities. Likewise, if the number of diversifying factors other than race is quite limited, the burden might well be undue. This is not to suggest that all diversifying factors must be equal. The Court's opinion and Law School's policy are predicated on the

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165. See id. at 2345–46.
166. Id. at 2345.
167. Id.
168. Id. at 2370 (Kennedy, J., dissenting).
169. See id. at 2339–41, 2346 (describing the benefits of diversity in education and later concluding that the "race-conscious admissions program does not unduly harm nonminority applicants").
170. See *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (identifying the purpose of the Fourteenth Amendment as eliminating racial discrimination).
assumption that they need not be. But if the nonracial factors are a mere facade intended to provide cover for racial preferences and little else, then presumably such programs must fail the fairness criterion.

In Croson, Justice O'Connor indicated that racial preferences should be temporary measures and that to be constitutional, they must have some logical end point. She raised this concern again in oral argument in the Michigan cases because the diversity justification does not seem to have such a stopping point. In response to Justice O'Connor's concern, Ms. Mahoney, counsel for the Law School, noted that the need for racial preferences could terminate either when race no longer has the social significance in American society that it has today or when the grade and score gap between minorities and nonminorities is significantly narrowed or erased. Given that it is highly unlikely that either of these conditions will be met in the remotely foreseeable future, there was some question as to whether Justice O'Connor could accept diversity as a compelling state interest. In deciding to do so, she clearly concluded that some termination point must be identified. The Court observed that the Law School had declared "that it would 'like nothing better than to find a race neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." Once again, the Court showed total deference to the Law School when explaining, "We take the Law School at its word." The Court then indicated that schools should impose sunset provisions on racial preference programs, conduct periodic reviews of their effectiveness, and search for race neutral alternatives, though it did not specifically impose any of these limitations on the Michigan Law School. As Justice Kennedy

171. Grutter, 123 S. Ct. at 2342 ("[A]n admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'" (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)).

172. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989) (stating that a finding of some discrimination is required "to assure all citizens that the deviation from the norm . . . is a temporary matter").

173. Grutter Transcript, supra note 152, at 41 (questioning Maureen Mahoney about a termination point for giving groups preferences).

174. Id. at 41–42 (answering Justice O'Connor's question).

175. Grutter, 123 S. Ct. at 2346 (quoting Grutter Respondents' Brief, supra note 86, at 34).

176. Id.

177. Id.

178. See id. (encouraging other schools to adopt the aforementioned measures, but saying nothing about the Michigan Law School's adoption, or lack thereof, of such
noted in dissent, however, the Michigan Law School and other law schools seem to have little incentive to abandon their racial preference programs in light of the almost conclusive deference accorded to them by the Court.\footnote{179}

The Court concluded by noting that \textit{Bakke} was decided twenty-five years ago, that the record indicates that minority grades and test scores have increased since then, and that "'[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.'\footnote{180} Justice Thomas interpreted this statement as a commitment to definitively end the use of racial preferences in twenty-five years.\footnote{181} That seems to be an overly optimistic reading of the sentence. The Court did not say that racial preference programs must end in twenty-five years, but rather that it "expects" that they will no longer be needed.\footnote{182} Justice Ginsburg seems closer to the mark in her concurrence when she opined that the Court's statement is more of a hope than a forecast.\footnote{183} Although the evidence is disputed, there is no reason to believe that the test score gap will have vanished or will even have significantly narrowed in twenty-five years.\footnote{184} If it has not, then presumably schools will be able to say, contrary to the Court's hope, that the need for racial preferences still exists and that they must continue. If the Court at that time exhibits the same degree of deference to educational institutions as the \textit{Grutter} Court did, then continue they will. It seems likely that Chief Justice Rehnquist is probably correct in his conclusion that the Court, "'[i]n truth,... permit[s] the Law School's use of racial preferences on a seemingly permanent basis.'\footnote{185}

Like the Court's consideration of compelling state interests, its review of narrow tailoring also seemed to be a watered down version of strict scrutiny. The Court's analysis of the means-ends relationship did not show the customary rigor associated with strict scrutiny, and its treatment of less discriminatory means seemed designed to minimize the role of that requirement.\footnote{186} The heart of Justice Kennedy's dissent was devoted to the argument
that the majority accepted half of Justice Powell's opinion in Bakke—that race may be used as one factor in a competitive individualized admissions process—but not the other—that an institution using race as a factor must erect safeguards at every stage of the admissions process and that the Court must rigorously review such a school's policies and procedures to ensure that they are not abusing or compromising the individualized use of race. The two halves of Powell's opinion constitute the Powell compromise: Race may be used somewhat, but only with the protection of rigorous judicial review. Justice Kennedy demonstrated that the majority abandoned the compromise by substituting extreme deference for strict scrutiny. As such, Justice Kennedy's opinion is the true heir to the Powell Bakke approach, while the majority opinion is little more than a pale shadow of it.

Justice Thomas speculated that the Court might have been differentiating between what it perceived to be benign rather than invidious discrimination. This seems unlikely because such a distinction would reject the principle of consistency recently articulated in Adarand. Moreover, the distinction would result in different outcomes in both Croson and Adarand, for both programs were presumably adopted for benign rather than invidious reasons. It seems highly unlikely that Justice O'Connor, writing for the Grutter majority, had any intention of undermining Croson and Adarand, considering that she wrote the majority opinions in both of those cases. Rather, it seems as though she probably followed the truism that if a court is determined to apply a standard of review more leniently or more strictly than usual, it will do so. One of the advantages of strict scrutiny, however, is that when the court does apply it more leniently, it is readily apparent and will be noted by the Court's critics, as was the case with the dissenters in Grutter.

187. Id. at 2370 (Kennedy, J., dissenting).
188. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291, 320 (1978) (opinion of Powell, J.) (holding that race can be used as a factor, but stating that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").
189. Grutter, 123 S. Ct. at 2361 (Thomas, J., concurring in part and dissenting in part).
190. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (stating that consistency requires that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized").
191. See id. at 206–08 (identifying the "benign" purpose of the Small Business Act as the increased participation of socially and economically disadvantaged individuals); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 470 (1989) (noting that the program declared itself to be remedial, or "benign," in nature).
IV. GRATZ V. BOLLINGER

A. The Majority Opinion

Grutter cannot be fully understood without contrasting it with the companion case of Gratzi. Bollinger. As noted above, Gratzi involved a challenge to the undergraduate admissions policy of the College of Literature, Science, and the Arts (LSA) of the University of Michigan. Chief Justice Rehnquist wrote an opinion for the Court invalidating this policy. Justice O'Connor, the author of the Court's opinion in Grutter, joined the Rehnquist opinion. Justice Breyer concurred in the judgment, resulting in six Justices voting to invalidate the policy. Relying on the Powell opinion in Bakke, not on Grutter, the Court assumed that race can be used as a factor in the admissions process as long as each application is given individualized consideration and no single factor is allowed to dominate the process. Under such an approach, which would seem to be a fair reading of the Powell opinion in Bakke, the Michigan undergraduate policy was easily invalidated. The Michigan policy gave points for a variety of diversity factors, including twenty points for every underrepresented minority, virtually guaranteeing admission to every otherwise-qualified minority applicant. With such an admissions policy in place, effective consideration of qualified minority applicants on an individual basis had no impact on the outcome. The single factor of race controlled the process. The majority illustrated how, under this process, race overwhelmed virtually every other factor, no matter how strong the application file of the competing nonminority. Thus, the Court rejected the policy for lack of narrow tailoring. The result seems correct either under the Powell approach in Bakke or the majority approach in Grutter.
The opinion concluded by confronting Justice Ginsburg's statement in her dissent that the Court's holding would simply encourage the schools that are intent on maintaining their minority enrollment at current levels to adopt more secretive policies. The majority noted that her statement seemed to contradict the presumption of good faith indulged by the Grutter Court. If Justice Ginsburg is correct, then the deference accorded universities by the Grutter Court may be unwarranted. Moreover, Justice Ginsburg's statement seems to suggest that the Court should tailor its constitutional principles to avoid potential disobedience by recalcitrant institutions, which flies in the face of the Court's proper role in the constitutional system. In any event, in light of the broad leeway Grutter gives to educational institutions in designing racial preference policies, it is difficult to see why they would need to be secretive. Most, if not all, schools should be able to maintain their racial diversity in a perfectly open and legal manner.

B. The Concurrences and Dissents

Justice O'Connor joined the Court's opinion but wrote a short concurrence emphasizing that "the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed." She emphasized that this was "in sharp contrast" with the system used by the Michigan Law School. She noted that the review committee, which had some authority to reconsider files, did not have the power to ameliorate the unconstitutional characteristics of the program. Justice Breyer concurred in the judgment of the Court and joined Justice O'Connor's concurrence, but did not join Chief Justice Rehnquist's opinion for the Court. Justice O'Connor's and Chief Justice Rehnquist's opinions take largely the same approach, though Chief Justice Rehnquist relied all but exclusively on Bakke rather than Grutter, making it

203. Id. at 2446 (Ginsburg, J., dissenting); see also id. at 2430 n.22.
204. Id. at 2430 n.22.
205. Id. at 2432 (O'Connor, J., concurring).
206. Id. (O'Connor, J., concurring).
207. Id. at 2432–33 (O'Connor, J., concurring) (discussing the committee's limitations).
208. Id. at 2433 (Breyer, J., concurring in the judgment).
209. Compare id. at 2427–31 (analyzing the LSA's admissions program and concluding that "[n]othing in Justice Powell's opinion in Bakke signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis"), with id. at 2431–33 (O'Connor, J., concurring) (discussing the mechanical nature of the undergraduate admissions program and finding that
unclear why Justice Breyer concurred in one but not the other.210

Justice Souter dissented, arguing that the undergraduate admissions process was closer to that which had been upheld in Grutter than that which was condemned in Bakke.211 First, Justice Souter maintained that there was nothing inconsistent with the Bakke plus-in-the-file approach in the undergraduate method of assigning predetermined point values to the various diversifying factors.212 This contention turns on how “nuanced” the individualized review in Bakke must be. Arguably, the review would be individualized enough if each factor carried a predetermined weight and in each case the points were simply added up and ranked. Such a system might be an efficient process for a large school overwhelmed with applications. It would also be fairly transparent, and by minimizing individualized discretion might promote consistency and fairness. So Justice Souter is probably correct in arguing that the mere assignment of points is not necessarily inconsistent with Bakke’s requirement of individualized and competitive review. It does, however, seem to be inconsistent with the Grutter majority’s reading of Bakke, which appears to require the exercise of discretion with respect to all comparisons between applicants, at least with regard to the consideration of “soft variables.”213 The Grutter interpretation of the Bakke approach would seem to maximize the extent to which each applicant is evaluated as a unique individual, at least when considering those factors that the school deems worthy of special consideration. For Justice O’Connor, this is apparently the price of the diversity justification, and as she is the key to the correct constitutional understanding of the use of racial preferences, her views are the law.

Justice Souter also argued that, under Bakke, it should not matter whether race carried a determinative or near-determinative weight in the mix of diversifying factors.214 On this point, Justice Souter is clearly wrong. As explained in Bakke by Justice Powell and illustrated by the Harvard plan, there must

210. Id. at 2433–34 (Breyer, J., concurring in the judgment).
211. Id. at 2440–43 (Souter, J., dissenting).
212. Id. at 2440–41 (Souter, J., dissenting).
213. See id. at 2431 (O’Connor, J., concurring) (citing Grutter v. Bollinger, 123 S. Ct. 2325, 2343–44 (2003)).
214. Id. at 2441 (Souter, J., dissenting) (“The very nature of a college’s permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants’ chances for admission.”).
be real and meaningful individualized consideration and a true competitive process if race is to be utilized at all. Justice Powell made it clear that all diversity factors need not be weighted the same, and presumably that race can be given more weight, as often will be the case. It should be obvious, however, that there must be reasonable limitations on such differential weighting if a true competitive process is to be preserved. Race could be given so much weight that it would trump any combination of other diversifying factors, and if that were the case, then clearly any claim of individualized consideration would be a sham. Justice Souter did not believe this to be the case with the process before the Court, given that it would have been possible to accumulate a score surpassing the racial preference through a combination of other factors. As the Court illustrated, however, such an occurrence would be the rare exception rather than the rule considering the weight of race in the calculus. Although it is true that some nonminorities had the capability of accumulating scores higher than underrepresented minorities, the fact remains that virtually all qualified minorities would have been guaranteed admission under the procedure. Thus, although some nonminorities had the capability to compete with minorities because there were far more seats in the class than there were minority applicants, minimally qualified minorities did not have to compete with anyone at all. They were in. This was not the type of competitive process envisioned by either Justice Powell or the Harvard plan. If Justice Souter believes that it is, then he simply has not read the Powell opinion very carefully.

It appears that the Michigan undergraduate approach was rejected not simply because the weight given to race was so large as to nullify real individualized competition, but also because the approach was simply too mechanical, period. Although the second conclusion does not inevitably flow from Bakke, it now appears to be the law.

216. Id. at 317–18 (opinion of Powell, J.).
218. Id. at 2429.
219. See id. (giving an example of the procedure in action).
220. See id. (stating that every qualified minority applicant “would simply be admitted”).
221. See Bakke, 438 U.S. at 316–18 (opinion of Powell, J.) (noting that the Harvard plan allowed race or ethnic background to be a “plus” for a particular applicant, but did not “insulate the individual from comparison with all other candidates for the available seats”).
V. GRUTTER AND GRATZ SYNTHESIZED

A. What Universities May Do

The combined decisions of Grutter and Gratz are useful because they provide an example of an admissions policy that is constitutionally acceptable alongside one that is not—unlike Bakke, which involved an example of an unacceptable approach but only speculation (by one Justice) about what would be constitutional. The two opinions read together tell us much. The following appears to be settled.

First, the use of racial preferences in admissions processes of institutions of higher education can be constitutional. If an institution chooses to use race as a factor in the evaluation process, strict scrutiny will apply; however, the strict scrutiny employed will be far more deferential to the expertise and judgment of educational institutions than is normally the case. The use of race to achieve either diversity or the educational benefits that flow from diversity will be considered a compelling state interest; however, the concept of diversity remains ill-defined and seems to encompass not simply the benefits that flow from interchange between students with different backgrounds and perspectives, but also the benefits that flow from increased minority representation in business, the military, government, and other positions of leadership. As long as an institution of higher learning purports to be using race to achieve such diversity, the Court will not require the institution to prove further that educational benefits do indeed flow from diversity in general or racial diversity in particular; the existence of such benefits was definitively resolved by the Court in Grutter. A mission statement explaining what the university is attempting to achieve might prove useful in justifying the system that the university employs.

222. See Grutter v. Bollinger, 123 S. Ct. 2325, 2347 (2003) (holding 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").
223. See id. at 2338.
224. See id. at 2339 (citing to prior Supreme Court cases that were also deferential to universities' educational decisions).
225. See id. at 2338–39.
226. See id. at 2339–40.
227. See id. at 2339 (stating that the Court will defer to the Law School's judgment that diversity will assist its "educational mission").
228. See id. at 2339–40 (listing the education benefits diversity produces in all cases).
229. See id. at 2339 ("The Law School's educational judgment that such diversity is
Second, race may only be used as a factor in admissions pursuant to an individualized, competitive process in which all relevant diversifying factors are taken into account.\textsuperscript{230} All factors need not be given the same weight, and presumably race may be given significantly greater weight than other diversifying factors.\textsuperscript{231} Race can be used as a plus-in-the-file, at least as long as the race in question is otherwise underrepresented in the applicant pool—usually as a result of past discrimination.\textsuperscript{232} An educational institution may attempt to achieve a critical mass of minority students for the purpose of ensuring that such students do not feel too isolated to participate in the academic interchange.\textsuperscript{233} Apparently, the institution may create significantly different critical masses for different underrepresented minority groups.\textsuperscript{234} An attempt to achieve such critical mass, including closely monitoring acceptance of offers of admission extended to minority students, will not give rise to an inference that the institution is maintaining a quota.\textsuperscript{235} An institution largely satisfies the requirement of narrow tailoring by taking account of all relevant diversifying factors in an individualized and competitive process.\textsuperscript{236} If challenged, it might be helpful if the institution can show that some nonminorities were admitted with lower academic indicators than those of underrepresented minorities who were rejected, though this is probably not essential.\textsuperscript{237}

Third, the institution is under an obligation to consider race neutral alternatives that serve its overall mission almost as well as the use of racial preferences.\textsuperscript{238} However, it need not significantly sacrifice its academic reputation by lowering admission requirements or instituting a lottery.\textsuperscript{239} Instead, the

\textsuperscript{230} See id. at 2343 (noting that individualized consideration is “paramount”).
\textsuperscript{231} See id. at 2343–44 (citing Regents of the Univ. of Cal. v. Bakke, 483 U.S. 265 (1978) (opinion of Powell, J.)).
\textsuperscript{232} See id. at 2345–46.
\textsuperscript{233} See id. at 2333 (finding a program that used critical mass to avoid isolation constitutional).
\textsuperscript{234} See id. at 2366–68 (Rehnquist, C.J., dissenting) (criticizing the “alleged goal of ‘critical mass’” as a “sham”).
\textsuperscript{235} See id. at 2343.
\textsuperscript{236} See id. (describing the constitutional process used by the Law School as a “highly individualized, holistic review of each applicant’s file”).
\textsuperscript{237} See id. at 2344 (viewing the fact that the Law School “frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants . . . who are rejected” in a positive light).
\textsuperscript{238} See id. at 2345 (holding that narrow tailoring requires “good faith consideration of . . . race-neutral alternatives”).
\textsuperscript{239} See id. (finding such sacrifices to be “drastic” and uncalled for).
institution should build a sunset provision into its racial preference policy, conduct periodic reviews to ensure that the policy is serving its purpose, and work to develop race neutral alternatives that will provide racial diversity without the use of racial preferences. The steps may be necessary in the future, for it is possible that the Court will no longer permit the use of racial preferences twenty-five years from the date of the decision in *Grutter*, that is, in the year 2028.

Finally, on all issues—including whether there is a compelling interest, whether the institution is actually attempting to achieve the compelling interest that it has set forth, whether it is actually attempting to do something it has no right to do, such as employ a quota, whether its admissions program is as individualized and competitive as it purports to be, whether it is misusing the concept of critical mass, whether its admissions policy is producing the results that were intended, and whether it has considered race neutral alternatives—the Court will assume, absent a strong showing to the contrary, that the university is acting in good faith and will defer to its academic judgment.

B. What Universities May Not Do

On the other hand, *Grutter* and *Gratz* combined also recognize that an institution may not employ racial preferences in the form of quotas or set-asides, or employ a two-track admissions program in which minorities are insulated from competition with nonminorities. Likewise, an attempt to use a racial preference simply to create racial balance or proportionality is unconstitutional. This prohibition is confusing, however, in that it seems to be quite permissible to employ a diversity-based racial preference program for the purpose of ensuring that there will be an adequate supply of underrepresented minorities trained to assume positions of leadership throughout society. A diversity-based admissions process that does not include a wide range of seemingly relevant

240. See id. at 2346–47 (suggesting that such measures would satisfy the “durational requirement”).
241. See id. at 2347 (hypothesizing that, in twenty-five years, racial preferences will not longer be necessary to achieve diversity).
242. See id. at 2339, 2341–46.
243. See id. at 2342 (holding that neither a quota nor putting applicants on “separate admissions tracks” will meet the requirement of a narrowly tailored program).
244. See id. at 2339.
245. See id. at 2339–40 (recognizing the need for diverse leaders both within American businesses and military).
nonracial factors would probably be subject to challenge on narrow tailoring grounds.\textsuperscript{246} It appears that an institution may not operate a diversity-based admissions program by assigning predetermined numerical weights to the factors considered.\textsuperscript{247} Rather, it must engage in a careful "holistic" (to use Justice O'Connor's phrase) evaluation of all relevant factors.\textsuperscript{248} A diversity program that places overwhelming weight on race, whether or not reduced to a numerical figure so that as a practical matter race predominates over all other diversity factors, would be unconstitutional.\textsuperscript{249} An institution may not justify the use of racial preferences on the basis of societal discrimination, although the Court's emphasis on the importance of training underrepresented minorities for positions of leadership is arguably based on a societal discrimination theory, as Justice Thomas noted.\textsuperscript{250} Presumably, the use of race for purposes of providing a remedy for identified past discrimination would need to meet the rigorous standards set forth in the Powell opinion in \textit{Bakke} and the \textit{Croson} and \textit{Adarand} opinions.\textsuperscript{251}

Although the Court has imposed some very real restraints on the use of race by educational institutions, it has also given them an exceedingly wide berth to use race in properly constructed diversity programs, and it has sent a clear message that as long as the institutions remain within these relatively generous boundaries, they will not be subject to judicial second guessing. As such, \textit{Grutter} and \textit{Gratz} represent a significant victory for institutions of higher education.

\begin{itemize}
\item \textsuperscript{246} \textit{See id.} at 2345 (finding that the Law School's program satisfied the narrowly tailored program requirement because it "considers 'all pertinent elements of diversity'").
\item \textsuperscript{247} \textit{See Gratz} v. \textit{Bollinger}, 123 S. Ct. 2411, 2429–30 (2003) (finding the University of Michigan's point-based system unconstitutional because it was not narrowly tailored).
\item \textsuperscript{248} \textit{See Grutter}, 123 S. Ct. at 2343.
\item \textsuperscript{249} \textit{See id.} at 2342–44 (approving the Law School's admissions program in part because race and ethnicity were not used as "defining feature[s]" in the application process).
\item \textsuperscript{250} \textit{Id.} at 2361 (Thomas, J., concurring in part and dissenting in part).
\item \textsuperscript{251} \textit{See Adarand Constructors, Inc.} v. \textit{Pena}, 515 U.S. 200, 226 (1995) (agreeing with the Court's prior determination in \textit{Croson} that strict scrutiny should be applied to racial classifications and rejecting the application of intermediate scrutiny to benign racial classifications in \textit{Metro Broadcasting, Inc.} v. \textit{FCC}, 497 U.S. 547 (1990)); City of Richmond v. J.A. \textit{Croson Co.}, 488 U.S. 469, 493 (1989) (stating that racial classifications are "strictly reserved for remedial settings"); Regents of the Univ. of Cal. v. \textit{Bakke}, 438 U.S. 265, 296–99 (1978) (opinion of Powell, J.) (developing the basis for the narrowly tailored standard that is to be used when racial classifications are made).\
\end{itemize}
C. What Was Not Decided (At Least Explicitly)

The use of racial preferences in admissions can be a complicated matter, and the Michigan cases do not, nor did they attempt to, answer every question that might arise. Institutions will structure their admissions programs differently based on their needs, their resources, and their particular educational objectives. Perhaps the safest approach for institutions would be to design their admissions programs as closely to the Michigan Law School’s as possible. This approach will not work for all institutions, however, just as the Harvard plan in *Bakke* is not appropriate for many schools. The typical university or graduate program does not find itself in the same position as Harvard or Michigan. The elite schools are overwhelmed with thousands of applications from highly qualified candidates. Their task is to decide how and why to reject hundreds, if not thousands, of students who could clearly compete academically in their schools. Thus, the issue for the selective schools is as much one of exclusion as inclusion. This simply is not the position in which most schools find themselves. Rather, they are attempting, sometimes struggling, to fill a class with students who are capable of doing the work in a competitive manner. The less selective, or more typical, schools do not have the rich pools of highly diverse applicants, nor could they afford to prefer many diverse students over more academically qualified students even if they did. Consequently, simply attempting to copy the Harvard or Michigan approach will be difficult and costly for many, if not most, institutions. Nevertheless, like Harvard and Michigan, these institutions would almost certainly like to achieve some degree of racial diversity. To do so, they might not be able to practically take account of as many nonracial diversifying factors and, as such, it might be more difficult for them to build a record equivalent to that of the Michigan Law School.

The Michigan approach will be costly for most institutions, including selective institutions, in another way as well. *Gratz* seems to preclude admissions officers from according predetermined numerical weights to the various diversity

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253. See *Grutter*, 123 S. Ct. at 2340 (describing the benefits of a diverse student body).
One, if not the primary, reason for a numerical approach would be to conserve time and resources. A more mechanical approach does not require nearly as many admissions officers as an intuitive holistic process does. For schools with limited applicant pools, reading every file and making individualized comparisons does not pose a great burden.

Many, if not most, such schools have probably engaged in individualized review all along. Schools with larger applicant pools, however, including some highly selective schools and state universities, may need to hire larger admissions staffs if they have been employing the type of mechanical approach struck down in *Gratz*. Presumably, they will be willing to bear the cost in order to maintain racial diversity.

One question of degree that is not definitively settled by the Michigan cases is how many relevant diversity factors the institution must take into account in addition to race. Presumably, the more multi-factored, the better. Should a school determine that it is interested in race plus three or four other factors, but not in the entire gamut of arguably relevant facets of an individual, it is unclear whether the Court will be willing to extend the same degree of deference to its policy as it did to the Michigan Law School's. In the narrow tailoring section of its opinion, the *Grutter* Court emphasized repeatedly that the Law School had considered all conceivable diversifying factors.

In *Grutter*, the Court approved of a policy under which the Michigan Law School gave a significant plus-in-the-file to otherwise qualified applicants from three underrepresented minority groups. Yet it is not clear whether racial preferences may only be employed with respect to “underrepresented” groups. Presumably, few institutions would want to give a preference to a group that was already well represented, but in the event that

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254. *Gratz*, 123 S. Ct. at 2429–31 (discussing University of Michigan's point system and finding it unconstitutional).

255. *See id.* at 2430 (discussing the university's argument that individualized consideration would be impractical).

256. *See Brief for Respondents at 5–6 & 6 n.8, Gratz* (No. 02-516) (stating that the Michigan Law School is an example of a school that can realistically use an individualized admissions process) [hereinafter *Gratz* Respondents' Brief].


258. *See Gratz* Respondents' Brief, supra note 256, at 5–6 (stating that the University of Michigan employs twenty full-time admissions counselors and that even using the mechanical process they work almost year-round reviewing applications).


260. *Id.* at 2332 (describing the Law School's process as using a “plus” factor and holding it constitutional).
one did, it is unclear whether that decision would be entitled to much, if any, deference. Arguably it would not, given the emphasis in Grutter on the need to ensure that the system is open to all races and the implication that racial preference policies must end when they are no longer needed. The concept of underrepresentation is obviously comparative in nature. A group can only be underrepresented if there is some notion of proper or adequate representation, as Chief Justice Rehnquist pointed out during oral argument. Unless we know what is proper representation, there is no way to determine whether a group is underrepresented. There are a variety of benchmarks to choose from, however. Representation might be judged by comparison to the group’s percentage in the national population or its population in the state or city in which the institution is located, to a percentage in the school’s applicant pool or percentage in the national applicant pool, to the percentage admissible without the use of racial preferences, or to the percentage of admitted members who choose to attend if admitted without racial preferences. Each of these might yield a different figure. Arguably, the most appropriate comparison would be between the percentage of a particular minority group’s members in the applicant pool and the percentage of that group admissible in the absence of racial preferences. As Croson indicates, comparison to a nonqualified pool would be of little relevance. On the other hand, the emphasis in the Grutter opinion on ensuring the production of a leadership corps from all segments of society suggests that a focus on the national population may be the appropriate benchmark.

There is little question that the three racial groups favored by the Michigan Law School would probably be underrepresented in most universities and professional schools and, as such, the schools could utilize racial preferences to attempt to admit critical masses of these students. Presumably, there would not be a problem if, in the future, a university determined that other racial or ethnic groups, such as Arabs or Asians, were underrepresented and should be given a preference under a diversity program—as long as there was a record to support the

261. Grutter Transcript, supra note 152, at 34–35 (questioning by Chief Justice Rehnquist of John Payton, attorney for the University of Michigan).
264. See id. at 2345–47 (upholding the Law School’s admissions practice that included some racial preferences).
claim of underrepresentation. *Grutter* suggests that the courts would certainly defer to such a conclusion. The more interesting question is whether an underrepresented minority group that the university chose not to prefer could claim a constitutional right to such a preference. Arguably, the broad deference that the Court seems prepared to accord to universities with respect to admissions decisions would also extend to the question of which groups are worthy of preference. On the other hand, if two racial groups are similarly situated in terms of underrepresentation, as well as in the potential for offering diverse perspectives, the failure to include one while including the other would seem to be a case of unjustified racial discrimination capable of giving rise to a claim for violation of the Equal Protection Clause. It would be wise for admissions officials to think through decisions regarding the creation of racial preferences carefully and to attempt to accord similarly situated groups parity of treatment rather than simply to assume that the courts will defer to whatever the university decides to do.

*Grutter* and *Gratz* probably would not preclude a school from adopting automatic admission and denial lines based on a combination of traditional academic indicators, such as grades and test scores, as long as the lines were the same for all races. Presumably, the automatic denial line would be set at a level below which the school had concluded applicants would be unable to perform in an academically competitive manner. The automatic admission line would be set at a point above which the school had concluded students would be likely to perform very well academically. The use of such an automatic admission-rejection system would not mean that schools could not admit minority students with significantly lower academic indicators than nonminority students, as the very point of *Grutter* was to hold that they could. It would simply have to be done on an individualized and competitive basis. Any automatic screening would need to be done on a race neutral basis.

Nothing in *Grutter* or *Gratz* addresses the important question of racial preferences with respect to scholarships. Is it permissible for a state university to offer scholarships that are available only to members of underrepresented minority groups? Presumably, doing so would not be consistent with the theory of

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265. See id. at 2339 (describing the Court's deference to a school's "educational mission" and judgments).
266. See id. at 2349–50 (Scalia, J., dissenting) (suggesting that such lawsuits will be forthcoming).
267. See id. at 2345 (mentioning automatic admission programs and their potential downfalls but abstaining from attacking their constitutionality).
the Court in the Michigan cases. If it is unconstitutional to operate a set-aside or two-track system with respect to admission, there is no reason why it should be any more constitutional to do so with respect to the important issue of the distribution of financial assistance. The wise course would be to establish diversity-based scholarship aid to be distributed with consideration of all diversity-oriented factors. It would probably not be a problem if a very significant share was distributed to students who added diversity on the basis of race, but it would be important for such aid also to be given to students who contributed to the diversity of the student body in other ways.

Title VI of the Civil Rights Act of 1964 prohibits educational institutions that receive federal funding from discriminating on the basis of race. As a practical matter, this covers almost all institutions of higher learning. In Bakke, five members of the Court held that Congress meant for Title VI to be interpreted in exactly the same way as the Equal Protection Clause with respect to the legality of racial classifications. When a state institution such as the University of Michigan is involved, Title VI has little independent significance, as it merely duplicates equal protection. Title VI is very important with respect to private institutions, however, because state action is rarely present. The plaintiffs in both Michigan cases relied on Title VI as well as equal protection and, given that the right protected by Title VI is coextensive with the equal protection right, the Court in Grutter summarily rejected the Title VI claim, and the Court in Gratz found a violation. An important byproduct of these decisions is that, because of Title VI, private universities are effectively accorded the same protection with respect to the use of racial preferences as the Michigan Law School in Grutter and are placed under the same constraints as the Michigan undergraduate college in Gratz.

270. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); id. at 325 (Blackmun, Brennan, Marshall, & White, JJ., concurring in the judgment in part).
271. Grutter, 123 S. Ct. at 2347.
VI. WERE THERE TWO DIFFERENT COMPELLING STATE INTERESTS?

In analyzing an admissions policy that employs racial preferences, it seems to be important to know why the university is doing what it does. In *Bakke*, the university set forth four justifications—increasing the number of minority students, increasing the number of doctors who practice in underserved communities, providing a remedy for past societal discrimination, and creating diversity in the educational process. All but diversity were rejected by Justice Powell, so diversity became the preferred rationale for institutions desiring to utilize racial preferences in admission. A large number of institutions use racial preferences and will almost certainly continue to do so. But is diversity really the primary reason?

At least some universities, especially those in the Deep South, employ racial preferences as a remedy for their own past discrimination, often pursuant to consent decree; but they are the exception rather than the rule. Most schools talk the talk of diversity and will certainly continue to do so, as *Grutter* has approved the diversity rationale and granted the universities much judicial deference. In *Grutter* itself, however, Justice Kennedy cited various law review articles suggesting that the desire for diversity may not be the main reason for the widespread use of racial preferences in university admissions. There is doubtlessly some truth in this observation. Racial preferences are probably utilized for a number of reasons, including diversity, but the diversity justification may not always be the driving force behind them.

Most academics would probably agree with the conclusions drawn by Harvard and Justice Powell with respect to the value to the academic process, both in classroom and in informal situations as a result of diverse perspectives, viewpoints, and

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273. Refer to notes 9–10 *supra* and accompanying text.
274. *Bakke*, 438 U.S. at 311–12 (opinion of Powell, J.) (describing a diverse student body as "a constitutionally permissible goal for an institution of higher education").
backgrounds. To this extent, diversity is not a sham or a facade. For the most part, academics do believe that a diverse class is a more interesting class and a class better able to contribute to the educations of one another. As Grutter, Gratz, and Hopwood illustrate, the commitment of universities to racial diversity far outstrips their commitment to other forms of diversity. In Grutter, for example, the Michigan Law School had made it clear that it had a special commitment to racial diversity.

By definition, giving a student a plus-in-the-file for diverse characteristics, certainly a significant plus, usually means that a student with lower academic indicators is being preferred over one with higher indicators. Otherwise, the "diverse" student would be admitted based on grades and test scores alone without need of a preference. Thus, although diversity may have benefits, it also has costs. Significant reliance on diversity in admissions can result in a lowering of the institution's mean and median GPA and test scores. In a competitive academic environment, this is a cost that is taken quite seriously. Generally, institutions are willing to drop their academic predictors much farther to achieve racial diversity than to achieve any other type of diversity. To a significant extent, this is attributable to the small size of the pool of highly qualified minority, especially African American, applicants. This is essentially the Achilles' heel of Justice Powell's diversity approach. If relatively selective schools simply treat race as a plus-in-the-file,
worth somewhat more but not too much more than other diversifying factors, they will not achieve very much racial diversity and certainly will not achieve a critical mass of minority students. There simply are not enough highly qualified minority students to satisfy the demand for racial diversity, even with a modest plus-in-the-file. Consequently, institutions such as the University of Texas Law School, the University of Michigan undergraduate program, and arguably the University of Michigan Law School, pushed the envelope beyond what was permissible under a fair reading of *Bakke* in order to achieve the degree of racial diversity they desired. The Law School's critical mass approach in *Grutter* may have been an attempt to admit more minority students than a mere plus-in-the-file approach could yield. It is likely that more litigation would have revealed other universities doing the same.

Perhaps universities are willing to sacrifice academic indicators to a greater extent to achieve racial diversity because they have concluded that, given the history and role of race in America, racial diversity actually adds more to the academic exchange. It may also be true that institutions are willing to sacrifice academic indicators to a greater degree to achieve racial diversity because they are driven by more than the educational benefits of diversity. It is likely that some university administrators believe that racial preferences should be used as a remedy for past societal discrimination, even though that theory has been rejected by the Supreme Court. There is also doubtlessly some truth in Justice Thomas's observation that racial preferences are often adopted for, as he put it, “aesthetic” purposes. That is, many university administrators and faculty members believe that, ideally, racial minorities should be represented in social institutions to some significant extent, and the absence of such representation makes them sufficiently uncomfortable to alter admissions standards to achieve it. In other words, part of the explanation for the use of strong racial preferences is a need to make permanent members of the academic community feel good about themselves and their institutions.

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284. *Id.*

285. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) (opinion of Powell, J.) (describing the California program as “helping certain groups whom the faculty of the Davis Medical School perceived as victims of ‘societal discrimination’”).


287. *See id.* (Thomas, J., concurring in part and dissenting in part) (defining the aesthetic interest as the Law School’s desire for a certain appearance “from the shape of the desks and tables in its classrooms to the color of the students”).

There is reason to believe that at least among selective schools, one, if not the primary, rationale for the use of racial preferences in admissions is a desire to produce a significant number of minority, especially African American, graduates who will contribute to the building of a solid minority middle class and will be able to assume leadership positions throughout society.289 This justification was set forth in detail by former President of Princeton William Bowen and former President of Harvard Derek Bok in their influential book, The Shape of the River, cited by the majority in Grutter.290 The Bowen-Bok rationale seemed particularly important to the business and retired military amici in Grutter.291 And it is especially applicable in the context of law schools, given that lawyers play a pivotal role in protecting legal rights and also tend to hold a disproportionate number of leadership positions, as the Court recognized in Grutter.292 While it is probable that university administrators acted on the Bowen-Bok rationale in designing admissions policies that emphasized racial diversity over other types of diversity, undoubtedly they did not feel free to defend their programs under this rationale given that it bears some similarities to two justifications explicitly rejected by Justice Powell in Bakke—simply increasing the number of minority students and graduates and attempting to provide more doctors likely to serve currently underserved communities.293

Arguably, Justice Powell rejected these rationales, especially the first one, too quickly.294 The first rationale, increasing the number of minority graduates, may be stronger and more
persuasive in the context of selective colleges and law schools than in the context of medical schools. It is unfortunate that by labeling this rational per se unconstitutional, Justice Powell ruled it out of bounds in all circumstances without considering implications outside the Bakke context. It is unlikely that many universities or professional schools would attempt to admit minority students merely for purposes of racial balancing or proportionality with no other goals in mind, knowing that such practices are unconstitutional. Rather, it is more likely that in addition to the benefits of classroom diversity, educators believe that increasing the number of underrepresented minority students would result in the building of a solid minority middle class, which over time would hopefully ensure that the minorities in question would no longer be underrepresented. Consequently, increasing the number of minority students in the medical school class was not an end in itself, but rather a means to another goal that surely need not be unconstitutional per se. But after Bakke, it appeared that diversity and provision of a remedy for the school’s own past discrimination, where applicable, were the only justifications on which schools could rely.

The Grutter majority in a rather clumsy way brought the Bowen-Bok rationale under the tent of diversity. Indeed, the opinion places far more emphasis on the minority leadership rationale than on the traditional theory of academic interchange diversity as emphasized by the Powell opinion. The Grutter Court’s discussion of business’s need for persons with different backgrounds, the military’s need for officers from minority groups, and society’s need for leaders all point in this direction. Yet this rationale does not meld easily with the diversity theory. Indeed, it seems to be in tension with it. Under diversity, race is only one factor, even if it is an important one. However, race is

295. See Bakke, 438 U.S. at 313–14 (opinion of Powell, J.) (admitting that such a rationale may be more persuasive in the undergraduate and legal settings).

296. Sandalow, supra note 290, at 1899 (“Whatever doubts may exist about the significance of college-level minority preference policies in increasing the number of black professionals, Bowen and Bok’s data impressively demonstrate the importance of those policies in augmenting the representation of blacks in the upper reaches of the middle class.”).

297. See Bakke, 438 U.S. at 307, 311–12 (opinion of Powell, J.) (identifying legitimate interests as “ameliorating, or eliminating where feasible, the disabling effects of identified discrimination” and “the attainment of a diverse student body”).


299. Refer to notes 99–110 supra and accompanying text (explaining the Court’s decision).
the driving force behind the leadership rationale. It has the potential of reducing the other diversifying factors to mere window dressing, a dance that institutions must perform in order to be allowed to achieve what they are really seeking—an increase in the number of minority graduates who will hopefully play significant roles in society at large.300

The Court was certainly correct to recognize the importance of permitting institutions to attempt to increase the number of minority graduates for the overall benefit of society.301 The opinion would have been more persuasive, however, if it had recognized increasing the number of minority graduates for leadership purposes as a separate rationale from diversity and held that both were compelling state interests. Such an approach carries with it obvious difficulties of its own, however, that render it legally impracticable. It is arguable that focusing on creating a well-educated and well-trained contingent of minorities throughout society would lead to implicit quotas, but it is hard to see why such an approach would be any more conducive to quotas than the critical mass approach explicitly blessed by the Court. If anything, there would be a more logical stopping point under the minority leadership approach than under the more traditional diversity approach. The point at which a solid core of potential minority leaders has been created seems to be more determinable. Arguably, the value of diversity, including racial diversity, in the academic process will never end. It might be charged that a minority leadership rationale is simply another way of explaining Justice Brennan's societal discrimination approach.302 This is not the case, however. The minority leadership rationale is unconcerned with the reasons for the underrepresentation of minorities in selective educational institutions. Whether it is due to a significant extent to past discrimination, as is probably the case with African Americans, or due largely to language and cultural differences, which may be the case with Latinos and other relatively recent immigrant groups, the problem remains worth addressing.

Perhaps the greatest constitutional drawback to the recognition of creating an educated group of potential minority leaders as a compelling interest is that it does not seem to require the same individualized and competitive evaluation process as the Powell diversity process does. Presumably there is
not nearly as great an interest in ensuring that diverse but nonracial groups also produce an educated middle class, as this probably occurs without preferential treatment. If producing a core group of well-educated minorities was in fact recognized as a compelling interest, then presumably a school would not need to consider a plethora of other diversifying factors. Instead, it could limit its preferences to race if it so chooses. This would cut too deeply into the individualistic approach to equal protection that Powell set forth in *Bakke* and that the Court has emphasized in several other cases and appears committed to retaining, though not without some compromise.\(^{303}\) While it would be possible to recognize that producing a core of potential minority leaders is a compelling interest, but that a school may only pursue this interest through competitive consideration of nonminority candidates with leadership potential, such a requirement would distort the minority leadership rationale as much as the Court’s approach seems to distort the traditional diversity justification.

Given that the Court has provided a means by which selective universities and professional schools can attempt to admit a significant number of underrepresented minority applicants, why should it matter whether the rationale is coherent enough to please a law professor? One response is that there is always a significant value to judicial candor. The area of racial preferences, especially in education, has long been plagued with subterfuge and disingenuousness.\(^{304}\) Given that educational institutions have been given a green light by the Court to use racial preferences in a relatively powerful manner, it would be useful if the legal justification was stated with the utmost clarity and honesty. Combining the interest in classroom diversity with the interest in producing a well-educated minority middle class under the general heading of the “educational benefits of diversity” may ultimately lead some institutions to accord race a weight that will be difficult to justify under the traditional academic diversity rationale on which the Court has largely relied. Perhaps the broad deference to educational institutions articulated by the *Grutter* majority will provide protection in even such a case, but, at some point at least, if an institution appears to be flouting the guidelines of *Grutter* and *Gratz*, it is likely that plaintiffs will be prepared to take up a challenge.

\(^{303}\) *Id.* at 289–90; see also *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218–23 (1995).

Moreover, the minority leadership justification would have increased the decisionmaking autonomy of educational institutions if it were in fact a constitutionally favored interest as the Court indicates. An institution that desires to pursue diversity under Justice Powell's rationale may certainly continue to do so pursuant to the *Grutter* guidelines. On the other hand, a school less interested in broad-based diversity but very interested in producing a class likely to yield a sufficient number of underrepresented minority graduates could do so without taking account of other forms of diversity. Apparently this was not a feasible option for the Court. The compromise that *Bakke* and *Grutter* created to permit a relatively generous use of race in the educational admissions process is the use of individualized holistic file review along with a justification that purports to benefit nonminorities to the same extent as minorities.\textsuperscript{305} This is the means by which the Court's individualistic equal protection jurisprudence is squared with a fairly aggressive use of racial preferences. This approach probably does not accurately reflect what many universities are doing or why they are doing it, but it purports to build on existing precedent and with the degree of deference afforded educational institutions,\textsuperscript{306} provides significant protection against potential liability, and for that matter, even litigation as long as the schools remain within the relatively generous boundaries laid down by *Grutter*. Thus, universities may use racial preferences to create a minority leadership class as long as they call it diversity and do it the Michigan Law School way.

**VII. CONCLUSION**

*Grutter* and *Gratz* were historic decisions. They go a long way toward ending the legal battle over racial preferences in higher education. *Grutter* is not an intellectually pleasing opinion. It is poorly reasoned and disingenuous. It correctly concludes that equal protection principles, as developed over time by the Court, do not prohibit some use of racial preferences by institutions of higher education in admissions. It does not explain as clearly as it could why this is so. Though protesting loudly to the contrary, the Court clearly did not apply anything like strict scrutiny as it has been traditionally understood. The Michigan Law School admissions policy purported to comply with *Bakke* on its face. The plaintiffs, the district court, and the dissenters on

\textsuperscript{305} *Grutter*, 123 S. Ct. at 2333 (pointing out that applicants of all races receive a holistic and individualized review as recommended by *Bakke*).

\textsuperscript{306} See id. at 2339, 2346.
the Sixth Circuit and Supreme Court made a powerful case that circumstantial evidence tended to show that the Law School was in fact applying an implicit quota through the concept of critical mass. The record did not clearly establish who was correct. As such, the case came down to a question of presumptions. The dissenters, especially Justice Kennedy, took the position that it was the duty of the Law School, pursuant to strict scrutiny, to explain suspicious aspects of its program and that it had simply failed to do so.\textsuperscript{307} The majority responded by presuming good faith on the part of the Law School and showing it extraordinary deference with respect to questions concerning the use of racial preferences in university admissions.\textsuperscript{308} Although it is impossible to know, at least from the record, whether the Law School was in fact employing a quota, the majority was willing to presume that it was not while the dissent was prepared to presume that it was.\textsuperscript{309} The dissent's approach was closer to strict scrutiny as traditionally understood.

It is not clear why the majority chose to dilute the strict standard of review in this case; however, there are several possible explanations. Perhaps it believed that the Michigan Law School program was in fact constitutionally designed and implemented but that its constitutionality simply had not been or could not be conclusively shown; hence, the majority was willing to tip the scales in favor of the school through a presumption of good faith and a large dose of deference. Or perhaps the Court recognized that under traditional strict scrutiny, university policies employing race would be constantly subject to legal challenge and perhaps difficult to justify even if honestly designed and implemented. The Court may have concluded that, given that some use of racial preferences was constitutionally permissible, it would be too burdensome and inefficient to require universities to be in the position of constantly having to litigate the matter, and, hence, a buffer zone of deference was needed to protect against this threat. Alternatively, perhaps the Court believed that admitting a critical mass of minority students was a compelling interest but that doing so could rarely, if ever, survive traditionally applied narrow tailoring analysis. For whatever reason, the Court changed the rules of the game.

\textsuperscript{307} See id. at 2371–73 (Kennedy, J., dissenting).
\textsuperscript{308} See id. at 2339, 2346.
\textsuperscript{309} See id. at 2342 (concluding that the Law School's admission program "does not operate as a quota"); id. at 2371 (Kennedy, J., dissenting) (criticizing the critical mass approach as "a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas").
Based on evidence in the record, the Court could have made a more persuasive case for why diversity is a compelling interest, why admission of a critical mass of minority students is a compelling interest, and why pursuing racial diversity without wholly sacrificing academic selectivity is a compelling interest. The Court simply did not bother to make that case in a lawyerlike manner. Instead, it cited or quoted from a few briefs and secondary sources, indicated that useful information had been entered into evidence at trial, and stated over and over again that it deferred to the judgments and good faith of educational institutions.\textsuperscript{310} Perhaps the case was argued too late in the Term (April 1) to allow the Court to write a detailed, well-crafted opinion given the press of other cases, although even at that late date it still had approximately three months remaining. For whatever reason, quite apart from the result, the opinion was a disappointment. It should have been much stronger. Ultimately, however, institutions of higher education can breathe a collective sigh of relief. The Court appears to have given them broad leeway to employ racial preferences without significant risk of liability, although there are still some issues to be resolved. Nevertheless, despite the deference granted by the Court, if the past is a prologue, some institution in quest of racial diversity will overstep these generous boundaries and will be faced with a serious legal challenge.

Whether under a diversity rationale or a minority leadership rationale, educational institutions are provided a significant degree of leeway in employing racial preferences. This offers significant social benefits, but it is hardly cost free. It gives universities little incentive to develop race neutral alternatives.\textsuperscript{311} It may send out the message that all minority students are beneficiaries of racial preferences.\textsuperscript{312} It may provide a disincentive to minority students to strive to fulfill their potential.\textsuperscript{313} It may lead to race-based resentment and hostility.\textsuperscript{314} It may engender a patronizing approach by majoritarian society and culture toward minorities.\textsuperscript{315} It may cement racial preferences into the social

\begin{footnotes}
\item[310] See id. at 2336, 2339, 2340–41.
\item[311] See id. at 2373–74 (Kennedy, J., dissenting).
\item[312] See id. at 2362 (Thomas, J., concurring in part and dissenting in part).
\item[314] See Grutter, 123 S. Ct. at 2374 (Kennedy, J., dissenting).
\item[315] See id. at 2350 (Thomas, J., concurring in part and dissenting in part) (quoting Frederick Douglass, What the Black Man Wants: An Address Delivered in Boston, Massachusetts (Jan. 26, 1865), in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991)).
\end{footnotes}
structure as a fundamental entitlement immune from removal regardless of any change in circumstances.\textsuperscript{316} These are serious costs not to be taken lightly. The Court has apparently concluded, probably correctly, that as a matter of constitutional law these costs are worth the potential reward. It is now for the political branches and the institutions that develop and administer racial preference plans to bear these costs in mind as they move to implement \textit{Grutter} and \textit{Gratz}.

\footnote{316. \textit{See id. at 2370} (Rehnquist, C.J., dissenting).}