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Grutter v. Bollinger 123 S. Ct. 2325 (2003)

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GRUTTER V. BOLLINGER 123 S. CT. 2325 (2003)

INTRODUCTION

Twenty-five years ago the Supreme Court broke new ground when it considered the topic of race classifications benefiting minorities in university admissions. The Court made its most critical decision regarding affirmative action when it decided *Regents of the University of California v. Bakke*.¹ Although it struck down the particular admissions policies implemented at the University of California, Davis School of Medicine, the Court held that race and ethnicity could be considered as a factor in higher education admissions policies.² Since 1978, a myriad of affirmative action cases reaching the Supreme Court has confused the issue and resulted in pluralities that have left the law unsettled.³

On June 23, 2003, the Supreme Court visited the issue again, affirming a 2002 ruling of the Sixth Circuit Court of Appeals, and upholding its decision in *Bakke* when it decided *Grutter v. Bollinger*.⁴ In May 2002, the Circuit Court held that seeking the educational benefits that flow from a diverse student body was a compelling state interest and that the University of Michigan's Law School admissions policy of taking race into consideration was narrowly tailored to serve its purpose.⁵ This Circuit Court's holding was contrary to that of the

1. 438 U.S. 265 (1978). *Bakke* involved a Constitutional challenge to the admission procedures of the University of California at Davis Medical School. *Id.* The petitioners claimed the policies, which set-aside 16 out of 100 seats for minority applicants, were discriminatory toward non-minority candidates and that they violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. *Id.* at 275-278.

2. *Id.* at 271-72.

3. See, e.g., *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *Tuttle v. Arlington City Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

4. 123 S. Ct. 2325 (2003).

5. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2001), *aff'd*, 123 S. Ct. 2335 (2003).

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Fifth Circuit in *Hopwood v. Texas*,⁶ which held that enhancing diversity was an invalid reason for race classifications, leaving a lower court split.⁷

I. LEGAL BACKGROUND

Legal precedent for affirmative action within the higher education context has been limited, but the resulting principles from affirmative action cases in employment and contract contexts apply to affirmative action in education.

First, the Supreme Court considered a number of cases involving racial classifications that benefit minorities before it decided that the appropriate level of scrutiny for future cases is strict scrutiny.⁸ When the Court first considered race in *Bakke*, it did not reach a majority opinion, leaving the issue of scrutiny undecided.⁹ In that case, four justices analyzed the constitutionality of the program applying intermediate scrutiny,¹⁰ while Justice Powell, writing only for himself, advocated using strict scrutiny.¹¹ The same type of split occurred in 1980 when the Court considered the constitutionality of a program to reserve federal public works funds for minority-owned businesses in *Fullilove v. Klutznick*;¹² three Justices applied strict scrutiny while three opted for intermediate scrutiny.¹³ For several more years, the Court wavered on the proper level of scrutiny.¹⁴ Not until 1995, in

6. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

7. *See id.* at 934-35 (holding that the Law School admission program favoring diversifying the ethnicity of the student body at the University of Texas was invalid).

8. *See id.* at 941-42 (noting that for over a decade, the Supreme Court struggled to decide the proper level of scrutiny in evaluating race classifications benefiting minorities).

9. 438 U.S. at 320.

10. *See id.* at 357 (noting that Justices Brennan, White, Marshall, and Blackmun argued that the intermediate level of scrutiny was proper in determining the constitutionality of race classifications benefiting minorities).

11. *See id.* at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

12. 448 U.S. 448 (1980) (holding that a federal law mandating that 10% of federal public works funds go to minority owned businesses is justified based on the need to remedy past discrimination).

13. *See id.* at 525-26 (noting that three Justices, Marshall, Brennan, and Blackmun concurred in the judgment arguing that intermediate scrutiny should be used for racial classifications serving a remedial purpose). However, dissenting Justices, Stewart, Rehnquist, and Stevens argued that strict scrutiny was the appropriate test. *See id.* "Under our Constitution, the government may never act to the detriment of a person solely because of that person's race . . . The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority." *Id.*

14. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that strict scrutiny should be used in evaluating affirmative action programs). The Court found

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Adarand Constructors, Inc. v. Peña,¹⁵ did the Supreme Court finally decide to use strict scrutiny in analyzing affirmative action cases.¹⁶

Secondly, before *Grutter*, the Supreme Court determined that remedying past discrimination is a compelling state interest that is permissible under strict scrutiny; however, the Court remained undecided about whether other goals are compelling state interests. Institutions may use affirmative action for the purpose of remedying past discrimination because preventing current discrimination does not adequately resolve the effects of past discrimination.¹⁷ In *Bakke*, Justices Brennan, White, Marshall, and Blackmun concluded that the University of California, Davis School of Medicine, could justify a policy of race consideration to remedy the effects of past discrimination.¹⁸ The Supreme Court also ruled in *Fullilove v. Klutznick* that using an affirmative action program was appropriate to correct a long-standing history of discrimination against minorities in a particular industry.¹⁹ However, the Supreme Court may have implicitly overturned *Fullilove* when it decided in *Croson* that set-asides cannot be the means for facilitating a remedy for past discrimination in a specific industry.²⁰

Justice Powell's opinion in *Bakke* suggested that enhancing diversity is a valid purpose for affirmative action under the Constitution, but that objective was not definitively decided until the present case.²¹ In

a Richmond, Virginia plan to set aside 30% of public works funding for minority-owned businesses unconstitutional. *Id.* See also *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (ruling that only intermediate scrutiny must be met in order to find an affirmative action program constitutional). The Court here upheld FCC policies that gave preference to minority-owned businesses in broadcast licensing. *Id.*

15. 515 U.S. 200 (1995).

16. See *id.* at 227 (stating that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

17. See *id.* (acknowledging that advocates of affirmative action argue that stopping current discrimination is not enough to remedy past discrimination).

18. *Bakke*, 438 U.S. at 325.

19. See *Fullilove*, 448 U.S. at 486 (holding that a federal law setting aside public funds for minority-owned businesses was valid where Congress found a long history of discrimination in the construction industry).

20. See *Croson*, 488 U.S. at 499 (holding that affirmative action cannot have the purpose of remedying societal discrimination). Further, the Supreme Court held in *Adarand* that it must evaluate federal affirmative action programs in the same way as state and local efforts. See *Adarand*, 515 U.S. at 235.

21. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 592 (1997) (noting that this objective is most often considered in the educational context and is based on the notion that a diverse group of people bring different perspectives and experiences to the table, which in turn enhances the learning process for all); see also *Bakke*, 438 U.S. at 314 (acknowledging that diversity is a permissible goal for affirmative action programs in higher education). A diverse student body brings perspectives, experiences and ideas from all walks of life, which helps foster a rich

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Bakke, Justice Powell emphasized the importance of a broad-ranging education, claiming that students require diverse educational experiences for success in a diverse society like that of the United States.²² According to Justice Powell, diverse educational experiences were not limited to the undergraduate level.²³

Finally, the Supreme Court evaluated whether the means of carrying out affirmative action goals are narrowly tailored to pass constitutional scrutiny.²⁴ In *Bakke*, the Supreme Court demonstrated that numerical set-asides are unconstitutional unless they are necessary to remedy clearly proven past discrimination.²⁵ In that case, the University did not use its admissions policy to redress specific past discrimination in its program, so the numerical set-asides were unconstitutional.²⁶ However, the Supreme Court found numerical

learning atmosphere complete with "speculation, experiment and creation." *Id.* at 312; see also *Metro Broadcasting*, 497 U.S. at 554 (emphasizing the value of diversity of perspectives and programming in broadcast media). *Contra Hopwood*, 78 F.3d at 932 (holding that enhancing diversity was not a valid goal for employing affirmative action and thus, the Law School admission program at the University of Texas was invalid).

22. See *Bakke*, 438 U.S. at 311-13 (noting that it is constitutionally permissible to purposefully select a diverse student body in an institution of higher education).

23. *Id.* at 313 (explaining that "even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial."); see, e.g., Brief of Amicus Curiae Current Law Students at Accredited American Law Schools, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241) (explaining why a diversity of viewpoints in a law school is crucial). "Legal analysis" is considerably improved by the viewpoints of students who have a particular experience or understanding of laws that treat or affect people differently based on race or ethnicity. *Id.* at 4. For instance, in a criminal law class, the discussion of racial profiling would be incomplete without the viewpoint of someone who has experienced racial profiling first-hand. *Id.* at 4-5. Further, "[g]iven that our country and legal system are composed of a racially diverse population, education in a homogenous racial environment would deprive us of the interactions necessary for a successful career in the law." *Id.* at 6.

24. See CHEMERINSKY, *supra* note 21, at 594-95 (noting that approaches to achieving affirmative action objectives range from minority recruitment to using race as a factor to numerical set-asides for minorities).

25. *Id.* at 594; see also *United States v. Paradise*, 480 U.S. 149 (1987) (demonstrating the use of affirmative action as a remedy to past intentional discrimination). Here, the Court held that a qualified black person should be hired or promoted every time a white person is as a remedy to the past intentional discrimination against blacks by the Alabama Department of Public Safety. *Id.* at 150.

26. See *Bakke*, 438 U.S. at 315-16 (asserting that segregated, dual-track admissions systems utilizing quotas for under-represented minorities are unconstitutional). Powell reasoned that the Davis system was unconstitutional because it was not narrowly tailored to serve its purposes of achieving diversity and remedying past discrimination. See *id.* at 315. He argued that there were alternatives, like using race as a factor in decision-making to the quota system used at Davis Medical School that could achieve the same goals of diversity and remedy past effect of discrimination. See *id.*

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set-asides appropriate to remedy past discrimination in a specific industry.²⁷

Although set-asides are not usually narrowly tailored to a goal, the Court upheld the constitutionality of using race as one factor in decision-making.²⁸ Again, in *Bakke*, the Court held that the University could use race as one factor among several in admissions decisions to enhance diversity.²⁹ In his opinion, Justice Powell stated that an applicant's qualifications, including race or ethnic background, do not require equal weight in decisions regarding admissions.³⁰ Thus, although *Bakke* does hold that universities can consider race in admissions decisions, it does not set clear boundaries on how much weight race and ethnicity should receive.³¹

II. FACTS

In 1992, The University of Michigan Law School adopted an admissions policy closely adhering to the Supreme Court's prescriptions in *Bakke*.³² According to the policy, the Law School seeks to admit students who show "substantial promise for success in law school," in the practice of law, and who are likely to contribute "in diverse ways to the well-being of others."³³ Significantly, the Law School defines diversity broadly in its policy; it "seeks a mix of students with varying backgrounds and experiences who will respect and learn from each other."³⁴ The admissions policy also attests to a "commitment to racial and ethnic diversity" and makes a specific

27. CHEMERINSKY, *supra* note 21, at 594 ("The Supreme Court has made it clear that numerical set-asides will be allowed, if at all, only if needed to remedy clearly proven past discrimination.").

28. *See id.* at 265; *see also Metro Broadcasting*, 497 U.S. at 547 (holding that using race as a factor in decisions was permissible). *Contra Pena*, 515 U.S. at 201-02 (describing how although *Adarand* later overturned *Metro Broadcasting's* determination that intermediate scrutiny is the proper level of scrutiny, it did not discuss whether race could be used as a factor in decision-making to enhance diversity).

29. *Bakke*, 438 U.S. at 316-18 (asserting that an admissions policy modeled on the Harvard University plan, where race and ethnicity are considered a "plus" in a particular applicant's file, and 'tips the balance' in an applicant's favor, does not offend the Equal Protection Clause). However, the total qualification of an applicant should be measured by all factors that he or she brings to the table. *See id.* at 318.

30. *See id.* at 317.

31. *See id.* (suggesting that an admissions program should 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").

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

33. *Id.*

34. *Id.* at 2332.

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reference to particular groups who are not represented in Michigan's student body in meaningful numbers without such a commitment.³⁵ This portion of the policy was not meant to remedy past discrimination, but rather to include students who are likely to bring a different perspective to the law school.³⁶

To achieve its objective of enhancing diversity, the Law School seeks to enroll a meaningful number, or "critical mass," of underrepresented minority students.³⁷ The Law School does not, however, set aside or reserve a certain number of seats for underrepresented minority students; conversely each applicant competes with all other applicants for admission.³⁸

The Law School's admissions assessment is flexible and focuses on the applicant's talents, experiences, and potential "to contribute to the learning of those around them."³⁹ In particular, the Law School considers each applicant based on his or her whole file, which includes recommendations, personal essays, residency, the quality of the undergraduate institution he or she attended, the areas and difficulty of undergraduate coursework, as well as the applicant's Law School Admissions Test [LSAT] score and undergraduate grade point average [GPA].⁴⁰ The admissions policy indicates that high LSAT scores or GPAs do not result in automatic admission just as low scores do not equate to automatic rejection.⁴¹ The policy requires the Law School to look beyond scores in assessing one's ability to contribute to

35. See *Grutter v. Bollinger*, 288 F.3d 732, 737 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003) (noting that specific reference was made to African-Americans, Hispanics and Native Americans).

36. See *Grutter*, 123 S. Ct. at 2332 (requiring the admissions program to consider criteria that are important to the Law School's educational objectives, including diversity).

37. See *id.* at 2334 (noting that Professor Richard Lempert, the chair of the faculty committee that drafted the admissions policy, testified about the importance of including minority students). Faculty at the Law School claim a critical mass would be achieved if enough minority students were admitted such that they could contribute to the class discussion without feeling isolated or uncomfortable about disclosing their viewpoints). *Id.*

38. See *id.* at 2332 (discussing how applications are not separated into groups according to the applicant's race or ethnicity, and how there are no seats set aside or reserved for applicants of particular races or ethnicities).

39. *Id.* at 2331.

40. See *id.* at 2331-32 (explaining that consideration of an applicant's entire file is instrumental in ensuring that an applicant will be able to graduate from law school without any serious academic problems).

41. *Id.* at 2332.

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the “intellectual and social life of the institution.”⁴² Such a student body makes the Law School class stronger than the sum of its parts.⁴³

In June 1997, Barbara Grutter was denied admission to the University of Michigan Law School.⁴⁴ She subsequently filed a claim in the Michigan District Court maintaining that the Law School’s policies, specifically its efforts to achieve a diverse student body through the consideration of race and ethnic origin, are discriminatory and offend the Fourteenth Amendment of the U.S. Constitution as well as Title VI of the Civil Rights Act.⁴⁵ She alleged that the Law School uses race as a “predominant” factor in admitting students, and that the Law School has no compelling interest to justify its use.⁴⁶

III. HOLDING

The United States District Court for the Eastern District of Michigan agreed with Grutter that the Law School admissions policy violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act.⁴⁷ It found that obtaining the educational benefits that flow from a diverse student body is not a compelling interest because it was not recognized in *Bakke*, and the admissions policy did not attempt to remedy specific instances of past discrimination.⁴⁸ The Law School appealed the District Court’s decision, arguing that, based upon Justice Powell’s opinion in *Bakke*, obtaining a diverse student body is a compelling state interest and

42. *Id.*

43. *See Grutter*, 288 F.3d at 736 (noting that the Law School’s admissions policy is structured thusly so that accepted applicants will have the potential to make unique contributions to the student body).

44. *See Grutter v. Bollinger*, 137 F. Supp. 2d 821, 823 (E.D. Mich. 2001) (noting that she was placed first on a waiting list before her application was rejected).

45. *See id.* at 824 (explaining that the basis for Grutter’s claim was that the Law School discriminated against her because she was Caucasian). The University of Michigan is a state school receiving public money and therefore, is subject to Title VI requirements. *Id.* Title VI of the 1964 Civil Rights Act provides that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000 (1994).

46. *See Grutter*, 123 S. Ct. at 2332-33 (detailing Grutter’s argument, which was that using a racial factor in the admissions process gave certain minority groups an advantage over others from “disfavored” racial groups).

47. *See Grutter*, 137 F. Supp. 2d at 872 (concluding that “all racial distinctions are inherently suspect and presumptively invalid”).

48. *See id.* at 850 (noting also that “[e]ven if racial diversity were a compelling state interest, defendants’ use of race as an admissions factor would be constitutional only if ‘narrowly tailored’ to serve that interest.”).

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that its admissions policy is narrowly tailored to achieve this purpose.⁴⁹

In May 2002, the Sixth Circuit Court of Appeals issued a 5-4 decision reversing the District Court's ruling and holding Justice Powell's opinion was binding with respect to diversity.⁵⁰ The opinion stated that the Law School admissions policy is valid because creating a diverse student body is a compelling state interest and the policy is narrowly tailored to achieve its interest.⁵¹ The Circuit Court based its reasoning on precedents set by *Bakke* and subsequent affirmative action cases.⁵² In December 2002, the Supreme Court granted certiorari to resolve whether diversity is a compelling interest that "can justify the narrowly tailored use of race" in admissions policies of public universities.⁵³

IV. ANALYSIS

To pass constitutional muster under strict scrutiny, the Law School's consideration of race must (1) serve a compelling state interest, and (2) be narrowly tailored to carry out that interest.

A. WHETHER THE LAW SCHOOL'S INTEREST IN ACHIEVING A DIVERSE STUDENT BODY IS COMPELLING

The Supreme Court's decision in *Grutter* upheld the Circuit Court's ruling that achieving diversity is a compelling state interest, but it did so for different reasons. While the Circuit Court found Justice Powell's opinion constituted *Bakke's* narrowest rationale and, therefore, provides the governing standard according to the rule set forth in *Marks v. United States*,⁵⁴ the Supreme Court declined this

49. *Grutter*, 288 F.3d at 736 (noting that the Law School's statistical expert testified that an elimination of race as an admissions factor would lead to a much lower number for minority admissions).

50. See also *id.* at 753 nn.1-2 (revealing internal dispute over whether oral arguments in the case were timed by the majority to exclude conservative judges who took senior status while the case was pending).

51. See *id.* at 746 (asserting that race was merely a "plus" factor and the policy is similar to the Harvard policy described in *Bakke*).

52. *Id.*

53. See Tony Mauro, *High Court to Hear Affirmative, Gay Rights Cases*, FULTON COUNTY DAILY REP., Dec. 3, 2002 (noting that the Supreme Court has authority to do this under Rule 11 when parties demonstrate that the case is "of such imperative public importance" that a deviation from normal procedure is necessary).

54. See *Grutter*, 123 S. Ct. at 2337 (discussing how the Supreme Court, in *Marks v. United States*, 430 U.S. 188 (1977), determined that when the members of the Court do not agree, the holding is the position taken by those who concurred most narrowly).

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rationale and endorsed Justice Powell's opinion on other grounds.⁵⁵ The Court, citing *Adarand*, asserted that it must apply strict scrutiny to any situation in which the government treats people differently on the basis of race because without such analysis there is no way of knowing if a classification is 'benign' or "motivated by illegitimate notions of racial inferiority or simple race politics."⁵⁶

Once the Court established the criteria for scrutinizing the Law School's policy, it determined that the Law School's goal of obtaining diversity is a compelling state interest.⁵⁷ Cases since *Bakke* do not preclude student body diversity as a compelling state interest because the Court has never held that the only use of race that passes strict scrutiny is remedying past discrimination.⁵⁸ The Court deferred to universities' decisions that attaining diversity is "essential to [their] educational mission,"⁵⁹ while maintaining that it applied strict scrutiny.⁶⁰

Agreeing with Justice Powell's concurrence in *Bakke*, the Court found that the Law School's interest in attaining a diverse student body "is at the heart of the Law School's proper institutional mission."⁶¹ Among the benefits it produces, diversity "break[s] down racial stereotypes," encourages "cross-racial understanding," and creates "more enlightening" discussion in the classroom.⁶² The Court relied on *amicus* briefs filed by universities, corporations, and the military as well as the results of studies to bolster its finding that to develop skills for success in a global society, students must have experiences with "widely diverse people, cultures, ideas, and viewpoints."⁶³

55. *Id.*

56. *See id.* at 2338 (asserting that the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by making sure the goal is important enough to use a highly suspect tool).

57. *Id.* (choosing not to rule on the question of whether Justice Powell's opinion was binding under *Marks*).

58. *See id.* at 2338 (suggesting that the Court has identified remedying specific past discrimination as a compelling interest for instituting a race-conscious program, and that remedying societal discrimination is not a compelling interest). However, the Court did not limit a compelling interest to this goal; silence as to the permissibility of other interests does not make them invalid. *Id.*

59. *See id.* at 2339 (noting that *amici* briefs validated the claim that diversity results in educational benefits).

60. *See id.* (supporting the reasoning with precedent that gives deference to educational institutions in making educational decisions). Justice O'Connor seeks to validate further the notion that scrutiny can be strict without being fatal in fact. *Id.*

61. *Id.*

62. *Id.* at 2339-40.

63. *See, e.g., id.* at 2340 (relying on the *amicus* brief submitted by the U.S. military that asserted it needs a diverse corps of officers to fulfill its mission and so the

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In addressing the importance of education to “maintaining the fabric of society,”⁶⁴ the Court called education the foundation for citizenship, harkening to *Brown v. Board of Education*.⁶⁵ Therefore, because of educational institutions’ responsibilities, they must be available to people of all races and ethnicities.⁶⁶ Precisely, Justice O’Connor wrote, “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”⁶⁷

The Court narrowed its reasoning for declaring diversity a compelling interest to the arena of graduate education claiming that law schools, particularly, train many of the nation’s leaders.⁶⁸ Citing *Sweatt v. Painter*,⁶⁹ the Court agreed that “law schools ‘cannot be effective in isolation from the individuals and institutions with which the law interacts.’”⁷⁰ Essentially, since the United States is a diverse population, effective leaders must reflect the views and experiences of those citizens. In assembling a critical mass at the Law School, the institution seeks to encourage many views, not one representative opinion from its minority students.

B. WHETHER THE LAW SCHOOL’S ADMISSION POLICIES ARE NARROWLY TAILORED TO SERVE THE COMPELLING INTEREST

In finding that the Law School’s admissions program is narrowly tailored to the state’s compelling interest in attaining the educational benefits that flow from a diverse student body, the Court addressed each area that Justice Powell defined in his concurrence as necessary for narrow tailoring. It also addressed some concerns not discussed in *Bakke*, but which the District and Circuit Courts ruled on. Based on Justice Powell’s reasoning in *Bakke*, the Supreme Court, affirming the Circuit Court, held that the Law School’s consideration of race and ethnicity is constitutional because it does not employ quotas, is

institutions that train those officers must also be diverse). Without limited race-conscious recruiting and admissions policies, the military could not gain an officer corps that is “both highly qualified and racially diverse.” *Id.*

64. See *id.* (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982)) (noting that teachers and institutions have the task of educating students for “work and citizenship,” which is “pivotal to ‘sustaining our political and cultural heritage.’”).

65. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

66. See *Grutter*, 123 S. Ct. at 2340 (noting the importance of knowledge and open access to higher education).

67. *Id.* at 2340-41.

68. See *id.* at 2341 (noting that many governmental leaders such as governors, senators, and representatives hold law degrees).

69. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

70. See *Grutter*, 123 S. Ct. at 2341.

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flexible, and closely follows the Harvard plan.⁷¹ According to the Law School's admissions policy, race is one factor among many in determining whether an applicant is admitted.⁷² In response to the lower courts, the Supreme Court discussed the definition of "critical mass," the ability to distinguish the admissions policy from a quota system, the possibility of placing time limits on consideration of race and ethnicity, and the use of "alternative means for increasing minority enrollment."⁷³

The Law School's admissions policy satisfies Justice Powell's requirement that applicants must receive individual, flexible consideration for an admissions program to be narrowly tailored to its interest in obtaining diversity. There is no automatic acceptance or mechanical way of determining admission: the Law School places all applicants on the same footing and considers each applicant based on his or her whole file.⁷⁴ Additionally, like the Harvard plan in *Bakke*, the Law School considers a variety of factors in addition to race, such as whether an applicant has work experience, traveled broadly, performed community service, fluently speaks other languages, and overcome adversity.⁷⁵ Those added factors are valuable contributions to diversity. The Law School frequently admits non-minority students with lower grades and test scores than minority students who are rejected.⁷⁶

The Supreme Court followed the Circuit Court's understanding that critical mass has a clear definition and is distinguishable from a rigid quota.⁷⁷ According to the Circuit Court, the District Court's insistence that the phrase "critical mass" coincide with a more definite percentage offends the epitome of the *Bakke* restriction of fixed

71. *Id.* at 2342 ("[The Supreme Court] find[s] that the Law School's admissions program bears the hallmarks of a narrowly tailored plan.").

72. *See id.* at 2343 (noting that the Law School takes into consideration all the ways an applicant can contribute to diversity, and does not focus solely on race and ethnicity).

73. *Grutter*, 288 F.3d at 749.

74. *See Grutter*, 123 S. Ct. at 2343 (adding that such consideration is in contrast to the policy of the undergraduate admissions office in *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), where students automatically received twenty points for race).

75. *Id.* at 2344.

76. *Id.*

77. *Grutter*, 288 F.3d at 747 (noting that Director Munzel defined "critical mass" as "a number sufficient so that under-represented minority students can contribute to classroom dialogue and not feel isolated."). Dean Lehman defined "critical mass" as having "sufficient numbers to ensure under-represented minority students do not feel isolated or like spokespersons for their race, and feel comfortable discussing issues freely based on their personal experiences." *Id.*

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quotas.⁷⁸ Barbara Grutter argued that the admissions program to obtain a diverse student body serves as a “functional equivalent of a quota” because the effort to recruit a “critical mass” resulted in a specific percentage range of minority enrollment.⁷⁹ The Circuit Court responded that a “critical mass” is distinct from a quota because the Law School has no fixed goal or target of how many minority students to admit.⁸⁰

The Supreme Court upheld the view that the Law School’s admissions program is not a set-aside or quota system.⁸¹ In asserting that the Law School closely follows the Harvard plan, the Court accepts Justice Powell’s acknowledgement that there is “some relationship between numbers” and creating a diverse school.⁸² However, some attention to numbers does not make a flexible admissions system the equivalent of a rigid quota, and it does not prevent the Law School from making individual assessments.⁸³

Case law subsequent to *Bakke* suggests that consideration of race-neutral alternatives is necessary to satisfy the narrowly tailored component of strict scrutiny.⁸⁴ Race-neutral factors include socioeconomic background and geography, which tie in closely with race and could benefit racial minorities.⁸⁵ However, the Supreme Court agreed with the Circuit Court’s majority that the Law School

78. See *id.* at 751 (criticizing the District Court’s conclusion that the Law School did not sufficiently define the term “critical mass” when there was evidence in the record to suggest that it was sufficiently defined, and anchoring “critical mass” to a more definite percentage would contract *Bakke*’s “prohibition on fixed quotas”).

79. *Id.* at 747 (arguing that “critical mass” efforts resulted in a range of minority enrollment from 10% to 17%).

80. See *id.* at 747-48 (noting that the range of minority students accepted into Michigan law school has varied from 13.5% to 20.1% between the years of 1993 and 1998).

81. See *Grutter*, 123 S. Ct. at 2343 (explaining that aiming for a range of minority enrollment does not equate a critical mass with a quota). Also, each applicant competes with others for admission because the policy is flexible and looks at an application as a whole. *Id.* at 2342.

82. *Id.* at 2343.

83. *Id.* (citing Justice Powell’s acknowledgement that Harvard University also had to consider numbers to attain its goals for minority enrollment even though it did not seek to admit a specific number, and concluding that the Law School’s consultation of daily reports, which track the racial and ethnic composition of the class, did not preclude individual review during the admissions process); *contra id.* at 2372 (Kennedy, J., dissenting).

84. See, e.g., *Croson* 488 U.S. at 507 (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987) (“[I]n determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies.”)).

85. See Amy Goldstein & Dana Milbank, *Bush Joins Admissions Case Fight*, THE WASH. POST, Jan. 16, 2003, at A01 (reporting the Bush administration’s suggestion that schools consider these “race neutral” factors in lieu of race in admissions).

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considered race-neutral alternatives such as active recruitment, a percentage plan, and a lottery and found that that a “critical mass” of minority students could not be achieved through such methods.⁸⁶ Those alternatives would result in a “dramatic sacrifice of diversity, the academic quality of all admitted students, or both.”⁸⁷ Alternatives would prevent the Law School from creating a class of students that is diverse in more ways than racially.⁸⁸ The alternatives would compromise academic values by keeping the Law School from selecting a student who has specific experiences or grades.⁸⁹ “Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”⁹⁰ While Justice O’Connor suggests that states “can and should” experiment with alternatives for race admissions,⁹¹ the Law School does not have to exhaust all race-neutral alternatives to achieve narrow tailoring.⁹²

The Court also considered whether the Law School’s program worked to create the least harm possible to members of racial groups that are not preferred.⁹³ Justice O’Connor’s dissent in *Metro Broadcasting* suggested that a narrowly tailored program cannot “unduly burden” people who are not members of the preferred group.⁹⁴ The Court found that the Law School does not burden

86. *Grutter*, 123 S. Ct. at 2345; see also *Grutter*, 288 F.3d at 750 (discussing Michigan’s active recruitment of minority students and its failure to acquire a ‘critical mass’ using this method alone.). *Contra* Tony Mauro, *What Will Court Think of SG’s Position? After Week of Political Suspense, Government’s Briefs in Michigan Affirmative Action Cases Show Restraint*, LEGAL TIMES, Jan. 20, 2003, at 1 (noting that the Government’s brief asserts that the Law School ignored race-neutral alternatives when creating its admissions policy). The administration brief points to the race-neutral policies of other programs, like Texas, Florida, and California, as examples. *Id.* See, e.g., Dana Milbank, *Bush Aides Split on Bias Case at U-Mich*, THE WASH. POST, Dec. 18, 2002, at A01 (explaining that when the *Hopwood* case deemed affirmative action policies unconstitutional in Texas, the state came up with an “affirmative access” program that admits the top ten percent of students in each Texas high school regardless of race).

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

88. *Id.*

89. See *id.* (observing that such plans have been considered in states such as Texas, Florida, and California for undergraduate admissions; however, they have not been considered for professional or graduate schools).

90. *Id.*

91. *Id.* at 2346.

92. *Id.* at 2344.

93. *Id.* at 2345.

94. *Metro Broadcasting*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting).

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groups because it considers all pertinent diversity, and it also selects non-minorities with a greater potential to “enhance student body diversity.”⁹⁵ The Law School does not turn down applicants because of their color; rather, it weighs an applicant’s qualities fairly so there is no basis for a complaint under the Equal Protection clause of the Fourteenth Amendment.⁹⁶

Finally, contrary to the opinion of the Circuit Court, the Court reasoned that since the purpose of the Fourteenth Amendment was to rid the nation of intentional race discrimination, race-conscious admissions policies should be limited in time.⁹⁷ The Court supported the District Court’s view that the Law School should impose time limits on its use of race in admissions decisions; writing that since race classifications are potentially dangerous, they cannot be used “more broadly than the interest” requires.⁹⁸

Answering the question that logically follows the Court’s assertion, Justice O’Connor continues by saying that universities will know when race preferences in admissions should end by using “sunset” provisions and conducting reviews to determine whether the policy is still necessary.⁹⁹ The requirement of a time limit ensures that the policies are only temporarily “taken in the service of the goal of equality itself.”¹⁰⁰ Surprisingly, Justice O’Connor quantifies the use of race in admissions, writing that the Court “expects that twenty-five years from now, the use of racial preferences will no longer be necessary.”¹⁰¹

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

96. *Id.* at 2345-46, (citing *Bakke*, 438 U.S. at 318 (opinion of Powell, J.)).

97. *See id.* at 2346 (indicating that when there is no need for a race-conscious policy, it does not meet the requirements of the Fourteenth Amendment, which prohibits different treatment on the basis of race); *Grutter*, 288 F.3d at 752 (quoting *Adarand*, 515 U.S. at 270).

98. *See Grutter*, 123 S. Ct. at 2346 (upholding the District Court’s decision and its reliance on *Adarand* to assert that use of race in admissions should be limited. However, the Circuit Court disagreed and held that subsequent case law does not require time limits).

99. *See id.* (explaining that programs that consider race in admissions should only last as long as they are needed).

100. *Grutter*, 123 S. Ct. at 2346 (citing *Croson*, 488 U.S. at 510 (plurality opinion)).

101. *See id.* at 2347 (noting the increase of minority applicants with high grades and scores since *Bakke* was decided 25 years ago).

V. IMPLICATIONS

While Court held that institutions of higher education can continue to consider race and ethnicity as a factor in admissions to achieve the educational benefits that flow from diversity, its decision leaves many questions unanswered and raises new questions about the boundaries of a narrowly contoured admissions program. Based on a comparison of the Court's reasoning in *Grutter* and *Gratz*, the decisions narrow the scope of and clarify what constitutes a permissible program, while allowing institutions to fill in the details of a race-conscious admissions program.¹⁰² For example, in *Grutter*, the Law School's flexible and independent evaluation of several factors, including race, met Justice Powell's narrow tailoring; while in *Gratz*, the undergraduate university's automatic award of a large amount of points based on race did not have the flexibility necessary for narrow tailoring.¹⁰³

Institutions have some guidance as to how to form their policies, but the details are still vague, and the narrowly divided Court is most likely not done with the issue.¹⁰⁴ The decision to affirm the Circuit Court's judgment has already led to challenges of policies at universities around the nation. In the Ninth Circuit, the Court of Appeals will determine whether a "tie-breaker," considering race in admissions to over-subscribed secondary schools, violates the Fourteenth Amendment.¹⁰⁵ In another case, a student in Hawaii alleged that he was denied admission to the Kamehameha Schools because he is not of Hawaiian ancestry.¹⁰⁶ Even for Michigan, the affirmative action debate is not over: Ward Connerly, of the American Civil Rights Institute, is advocating the introduction of an amendment

102. Joint Statement of Constitutional Law Scholars, REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 13 (The Civil Rights Project at Harvard University 2003) [hereinafter REAFFIRMING DIVERSITY] (remarking that the Court is silent as to whether a lesser or non-automatic point award would ever be flexible enough for narrow tailoring and providing an example of a point system that does not make race or ethnicity a determinative factor, and which is flexible).

103. Compare *Grutter*, 123 S. Ct. 2325, with *Gratz* 123 S. Ct. 2427-28 (suggesting that while in *Grutter*, race was one among many factors, in *Gratz*, race was a determinative factor in admission making the former acceptable to narrow tailoring, and the latter an impermissible use of race).

104. See John Leo, *Sins of Admission*, U.S. NEWS & WORLD REPORT, Jan. 27- Feb. 3, 2003, at 16 (concluding "even if the Supreme Court strikes down both Michigan plans, there will still be a lot of anti-preference work to do.").

105. *Parents Involved in Community Schools v. Seattle Sch. Dist., No. 1*, No. 72712 (9th Cir. June 26, 2003), available at www.courts.wa.gov/opinions/?fa=opinions.opindisp&docid=727121MAJ.

106. Rita Beamish, *Native Hawaiians Reclaim Heritage; Group Seeks Rights as Indigenous People*, WASH. POST, July 20, 2003, at A03.

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in Michigan that will prohibit race preferences in public education, employment, and contracting.¹⁰⁷ Connerly hopes to expand his campaign to several other states.¹⁰⁸

The ruling also has significant implications for many university programs related to admissions such as recruitment and retention of minority students and selection for scholarships. Many universities have created summer programs designed to attract minority high school students to their institutions; the future of these programs is in question since, for many, enrollment is solely based on race.¹⁰⁹ Universities will most likely have to modify these programs so that race is only one factor considered in enrollment. To some, the question of how to distribute scholarship funds is less pressing since many sources of funding are available for non-minority students; there is less of a burden on those students who do not receive money earmarked for minority students.¹¹⁰ On the other hand, for many students, the interest in financial aid is strong because the possibility of receiving aid determines whether a student can attend a university at all.¹¹¹ One method of resolving these questions is to distinguish the interests involved in recruitment, retention, and financial aid programs for minorities from race-conscious admissions policies. Making distinctions enables institutions to treat those programs differently from an admissions program.¹¹² By analyzing the benefits and burdens imposed by each program, universities can justify the use of such programs.¹¹³

One wonders if the Court's determination of a twenty-five year limit on race admissions will be fulfilled. As Justice Ginsburg writes in her concurrence, the decision places pressure on the nation's K-12 public school system, which has battled an achievement gap between white or Asian and African-American or Hispanic students as well as between poor and wealthy students.¹¹⁴ Much of the assertion that racial preferences will no longer be needed rests on the progress of

107. Peter Schmidt, *Foes of Affirmative Action in Michigan Plan to Take Their Battle to the Ballot*, THE CHRONICLE OF HIGHER EDUCATION. (July 9, 2003), at <http://chronicle.com/daily/2003/07/200307901n.htm>.

108. *Id.*

109. See REAFFIRMING DIVERSITY, *supra* note 102, at 22.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 21-22.

114. See *Grutter*, 123 S. Ct. at 2348 (Ginsburg, J., concurring) (noting that many minority students currently receive inadequate and unequal educational opportunities).

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the elementary and secondary schools.¹¹⁵ For example, Nashville, Tennessee is considering focusing on economic diversity in its schools as a race neutral means to increase student achievement.¹¹⁶ Rather than focus on racial integration, the schools would limit the percentage of low-income children that attend a school.¹¹⁷ Wake County, North Carolina has already adopted a program that prevents a school from having more than 40% low-income students, but it has experienced legal challenges as well.¹¹⁸ As the nation's elementary and secondary schools improve, Justice Ginsburg writes that students will be better prepared for a collegiate education, and "progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."¹¹⁹ Additionally, the end of affirmative action lies in changing Americans' social views. Michael Klarman, a professor of law at the University of Virginia, suggests that despite the *Grutter* decision universities can find ways to evade the law, and the decision will not compel people to think differently.¹²⁰

Although the Supreme Court decision resolved some confusion in the lower courts, which were split on the issue of racial and ethnic preferences in the higher education context,¹²¹ in his dissent, Justice Scalia maps out potential future litigation of an affirmative action case and defines a case against certain policies.¹²² He suggests that affirmative action lawsuits will focus on whether programs are

115. See *id.* (explaining that an improvement in the quality of education provided to minority communities may increase the number of minority students that apply to higher educational institutions).

116. Jay Hamburg, *Schools' Focus May Shift to Economic Diversity*, THE TENNESSEAN, July 15, 2003, available at <http://www.tennessean.com/special/resegregation/archives/03/07/35980548.shtml> (last visited Nov. 4, 2003).

117. See *id.* (explaining the results of an analysis done on Nashville, Tennessee's test scores). The analysis showed that students from low-income backgrounds tended to score higher when they attended school with students from more affluent backgrounds. *Id.*

118. See *id.* (noting that although the school board's policy has met with some success, it has also created challenges over busing students to achieve more economically diverse schools).

119. *Grutter*, 123 S. Ct. at 2348 (Ginsburg, J., concurring).

120. Michael Klarman, *Are Landmark Court Decisions All that Important?*, THE CHRON. OF HIGHER EDUC., Aug. 8, 2003, at B10 (suggesting that *Brown v. Board of Education* (1954) was not immediately effective in desegregating schools and forcing "whites to abandon white supremacy."). Similarly, *Grutter* may have little effect on admissions policies or the attitudes of many Americans. *Id.*

121. See Roger Clegg, *Twist the Law as You Will, Discrimination is Still Wrong*, LEGAL TIMES, Dec. 9, 2002 (explaining that the Supreme Court's granting of review of *Grutter v. Bollinger* is good news for the lower courts because the courts are currently split on the issue of racial and ethnic preferences in college admissions).

122. See *Grutter*, 123 S. Ct. at 2340-50 (Scalia, J., concurring in part and dissenting in part).

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individual and “avoid separate admissions tracks,” and whether institutions “so zealously pursued [a] ‘critical mass’” that it has a *de facto* quota system.¹²³ Other lawsuits may consider whether any educational benefits flow from racial diversity, while still more suits will challenge the university’s “expressed commitment to the educational benefits of diversity.”¹²⁴ He questions “universities who talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations” and housing, student centers, and graduation ceremonies for minority students.¹²⁵ While some of Justice Scalia’s suggestions alert universities to the care they must take to narrowly tailor their admissions programs, minority student groups do not detract from promoting diversity through admissions and, based on support in the majority opinion, benefits that flow from racial diversity are applicable in every setting.¹²⁶

CONCLUSION

The decision of *Grutter v. Bollinger* will significantly affect graduate schools around the nation. The Supreme Court decided that the affirmative action program at Michigan Law School passes constitutional scrutiny under the Equal Protection Clause of the Fourteenth Amendment because enhancing diversity in a graduate school setting is a compelling state interest, and the Law School’s use of race and ethnic background in the admissions process is narrowly tailored to serve its purpose. Based on the Court’s holding, graduate schools can continue the affirmative action tradition set forth in *Bakke*, but the institutions must also consider race-neutral alternatives that reach the same goals, set time limits for use, and, more importantly, institutions must employ flexible consideration of race as one factor among many others.

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123. *Id.* (Scalia, J., concurring in part and dissenting in part).

124. *Id.* (Scalia, J., concurring in part and dissenting in part).

125. *Id.* (Scalia, J., concurring in part and dissenting in part).

126. *Id.* (Scalia, J., concurring in part and dissenting in part).