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# Beyond Bakke: Grutter-Gratz and the Promise of Brown

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**BEYOND BAKKE: GRUTTER–GRATZ AND THE PROMISE OF  
BROWN**

JOEL K. GOLDSTEIN\*

I. INTRODUCTION

The Supreme Court's long-awaited decisions this past summer in the Michigan affirmative action cases provided yet another landmark in the continuing controversy regarding race and education. A quarter century, almost to the day, after the Court handed down its badly splintered decision in *Regents of the University of California v. Bakke*,<sup>1</sup> the Court again concluded that universities may sometimes, but not always, give some preference to racial and ethnic minorities in deciding whom to admit. The Court, in a 5-4 decision in *Grutter v. Bollinger*, upheld the constitutionality of the University of Michigan Law School's admission policy that considered race as one factor among many in achieving a diverse student body.<sup>2</sup> It concluded that student body diversity was a compelling interest that justified using a racial classification and that the Law School's admissions program, which avoided any formulaic approach, was narrowly tailored to that end.<sup>3</sup> In the companion case, *Gratz v. Bollinger*, the Court held that the University of Michigan's undergraduate admission program, which awarded minority applicants twenty percent of the total points needed for admission, violated the Equal Protection Clause.<sup>4</sup> The Court found that, even if diversity was a compelling interest, a conclusion *Grutter* imposed, a twenty percent bump based on race was not

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1. 438 U.S. 265 (1978).
2. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003).
3. *Id.* at 2339.
4. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2417 (2003).

narrowly tailored.<sup>5</sup> The nine justices produced thirteen opinions; only Justice O'Connor joined both majority opinions.<sup>6</sup>

As something of a split decision, *Grutter-Gratz* mirrored, in many respects, the outcome of *Bakke* a generation earlier. There, the nine justices produced six opinions resulting in a decision striking down the admissions program at University of California Davis Medical School, to the extent that it set aside sixteen percent of the places for minority applicants, but allowing Davis to use race or ethnicity to produce a diverse class.<sup>7</sup> Five justices thought the quota invalid, whereas five justices thought race could be considered.<sup>8</sup> Only Justice Powell participated in both majorities. He wrote the decisive opinion for the Court, but it was an opinion that none of his colleagues joined.<sup>9</sup>

*Grutter-Gratz* covered much the same terrain as *Bakke* had twenty-five years earlier. Indeed, in *Grutter*, the University of Michigan School of Law invoked *Bakke* at the beginning of the summary of its argument in its brief:

Twenty-five years ago, this Court resolved a bitter national controversy over the constitutionality of race-conscious admissions policies in its landmark decision in *Bakke*. The essential holding of *Bakke* is that quotas and set-asides are illegal, but that some attention may be paid to race in the context of a competitive review of the ways that each applicant will contribute to the overall diversity of the student body.<sup>10</sup>

The Law School argued that *Bakke* was a direct precedent in support of its plan and urged the Court to rule in its favor on stare decisis grounds.<sup>11</sup>

Barbara Grutter preferred to claim ancestral ties to an earlier case dealing with race in America, *Brown v. Board of Education*.<sup>12</sup> Her counsel began his argument by quoting from the opening argument of Robert J. Carter before the

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5. *Id.* at 2427-28.

6. Six justices wrote opinions in *Grutter*: Justice O'Connor (majority opinion), Justice Ginsburg (concurring), Justice Scalia (concurring in part and dissenting in part), Justice Thomas (concurring in part and dissenting in part), Chief Justice Rehnquist (dissenting), and Justice Kennedy (dissenting). Seven justices wrote opinions in *Gratz*: Chief Justice Rehnquist (majority opinion), Justice O'Connor (concurring), Justice Thomas (concurring), Justice Breyer (concurring), Justice Souter (dissenting), Justice Ginsburg (dissenting), and Justice Stevens (dissenting).

7. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271-72 (1978).

8. Chief Justice Rehnquist and Justices Powell, Stevens, Stewart, and Burger thought the quota was invalid, and Justices Brennan, White, Marshall, Blackmun, and Powell felt that race should be considered.

9. Justices Brennan, White, Marshall, and Blackmun joined sections I and V-C of Justice Powell's opinion, the statement of facts and order reversing the state court decision that race and ethnicity could not be considered. Justice White also joined section III-A, arguing that strict scrutiny was the appropriate standard.

10. Brief for Respondent at 12, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241).

11. *Id.*

12. 347 U.S. 483 (1954).

Court on behalf of the plaintiffs in *Brown* in 1953. “We have one fundamental contention which we will seek to develop in the course of this argument,” he said, “and that contention is that no state has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.”<sup>13</sup> Fifty years later, Grutter “ask[ed] the Court to again vindicate the same principle,” that our Constitution is color-blind.<sup>14</sup>

Were the decisions in *Grutter-Gratz* simply a rehash of *Bakke*? And, does the Court’s rejection of Barbara Grutter’s argument represent abandonment of the principle animating *Brown*?

To each question respectively, the answer is no and no. Even a modest reading of *Grutter-Gratz* discloses them as a triumph for those advocating racial preference in admissions decisions. They averted a disaster that other cases suggested might be in store. At a minimum, *Grutter* placed affirmative action in admissions on much firmer footing than *Bakke* had left it. Although many universities had relied on Justice Powell’s opinion in crafting their policies, some courts questioned its status as a binding precedent.<sup>15</sup> *Grutter* endorsed Justice Powell’s “view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”<sup>16</sup> Whereas no rationale achieved a majority in *Bakke*, five justices embraced the diversity rationale in *Grutter* as articulated in Justice O’Connor’s opinion.<sup>17</sup> Accordingly, institutions of higher education were authorized to continue to use race as a factor in admissions decisions.

Yet *Grutter* went well beyond *Bakke* in critical respects. Justice O’Connor reviewed the law school’s plan more leniently than conventional applications of strict scrutiny would suggest. Although *Gratz* limited the means available for use in admissions plans, *Grutter* provided some important flexibility. Yet Justice O’Connor’s potentially most important contribution was the manner in which she greatly expanded the rationale supporting the use of race in admissions decisions. Her defense was far broader than that Justice Powell had offered a quarter century earlier. She did not confine her discussion to the narrow version of a student diversity rationale that Justice Powell had articulated. Instead, she recognized the value of race-conscious admissions in bringing the United States closer to the dream of a nation of opportunity for all.

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13. Brief for Petitioner at 18, *Grutter*, 123 S. Ct. 2325 (No. 02-241).

14. *Id.*

15. See, e.g., *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1239 (11th Cir. 2001); *Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000); *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996). But see *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200-01 (9th Cir. 2000).

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

17. *Id.* at 2339-41.

Far from repudiating *Brown*, as Barbara Grutter's argument would imply, *Grutter* vindicated *Brown*. *Brown*'s central message was not the impermissibility of using race as a criterion for decisions, as Grutter suggested. Rather, it was that race could not be used to foreclose minorities, particularly blacks, from sharing in the American dream. That chord resonates powerfully in *Grutter* as well.

In many respects, it was *Bakke*, not *Grutter*, which deviated from *Brown*. Justice Powell's *Bakke* opinion saved affirmative action in admissions but did so on a basis that emphasized values of the First, rather than Fourteenth, Amendment. Justice Powell presented race simply as a means to foster diversity needs implicit in the First Amendment, not as a problem that America needed to address. Justice O'Connor's majority opinion in *Grutter* reintroduced the focus on race in significant respects. She linked those plans in important ways to addressing America's racial problems. In doing so, she drew not only from Justice Powell's *Bakke* opinion, but from the quite different opinion of Justice Marshall.

This Article will begin by briefly outlining central principles of *Brown*. Section III will then present *Bakke* and show how it deviated from those tenets. Section IV will outline *Grutter* and *Gratz* and show how *Grutter* stretched doctrine regarding levels of scrutiny and the narrow tailoring of strict scrutiny. Finally, Section V will focus on *Grutter*'s main contribution, the expanded rationale for race preferences.

## II. *BROWN V. BOARD OF EDUCATION*

*Brown v. Board of Education* occupies an unusual position in the American legal canon. On the one hand, *Brown* is "the single most honored opinion in the Supreme Court's corpus,"<sup>18</sup> a decision whose essential rightness is not a subject of controversy or even discussion. No one today asserts that *Brown* was wrongly decided.<sup>19</sup> Indeed, such a position is essentially unimaginable. On the other hand, the opinion has been extensively critiqued. Some complain that Chief Justice Warren failed to articulate a sufficient basis for the ruling,<sup>20</sup> that the rationale offered was "uninspired,"<sup>21</sup> that the decision

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18. Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 3, 4 (Jack M. Balkin ed., 2001).

19. *But see* *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID*, *supra* note 18, at 185-200 (dissent of Derrick A. Bell).

20. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 31-35 (1959) (arguing that the problem with *Brown* is found in the reasoning of the opinion).

21. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 216 (1960).

rested on shaky psychology rather than customary legal principles,<sup>22</sup> that international imperatives or class motives drove the outcome,<sup>23</sup> and that the decision was rich in symbolism but modest in its impact.<sup>24</sup>

In *Brown*, the Court considered whether the doctrine of “separate but equal” was consistent with the promise of equal protection of the laws. The doctrine made its way into constitutional law, of course, in 1896, in *Plessy v. Ferguson*, where the Court upheld Louisiana’s statutes providing for separate rail cars for blacks and whites traveling intrastate.<sup>25</sup> *Plessy* had applied a reasonableness standard against which the Court thought a law authorizing or requiring racial segregation in public conveyances no “more obnoxious to the [F]ourteenth [A]mendment than the acts of [C]ongress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.”<sup>26</sup> Indeed, laws establishing separate schools for white and black children were the “most common instance” of an exercise of state police power to prevent “commingling of the two races upon terms unsatisfactory to either.”<sup>27</sup> The Court rejected as fallacious the argument “that the enforced separation of the two races stamps the colored race with a badge of inferiority.”<sup>28</sup> Justice Henry Billings Brown depicted separate-but-equal as a neutral doctrine that separated, but did not discriminate among, the races. Wrote Justice Brown: “If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>29</sup> Justice Brown’s analysis could have been convincing only in a world hermetically sealed from American history. Quite clearly, separation reflected a conviction that blacks were unequal to whites.

The plaintiffs in *Brown* challenged the separate-but-equal doctrine in public schools—the specific application that Justice Brown had used as the prop for the doctrine he announced. The Court concluded that “in the field of public education the doctrine of ‘separate but equal’ has no place.”<sup>30</sup> The vice of separate schools related entirely to their impact on African-American children. *Brown* removed the issue from a logician’s paradise and returned it

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22. See Earl M. Maltz, *Brown v. Board of Education*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 207 (William N. Eskridge, Jr. & Sanford Levinson eds.) (1998) (criticizing *Brown* as not supported by originalism).

23. See, e.g., MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

24. See, e.g., Michael J. Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 VA. L. REV. 185 (1994).

25. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

26. *Id.* at 551.

27. *Id.* at 544.

28. *Id.* at 551.

29. *Id.*

30. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

to the real world. Far from being neutral in its purpose or effect, segregation enforced by law made clear to African-Americans that they were second-class citizens, not full members of the American community. “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,” Chief Justice Warren wrote in the opinion’s most powerful passage.<sup>31</sup>

In retrospect, *Brown* stands for two distinct, but related, principles with continued relevance to modern constitutional discourse. First, *Brown* represents the idea that educational opportunity should be open to all. One of the few paragraphs in Chief Justice Warren’s brief opinion<sup>32</sup> discusses the significance of education. The punch line of the discussion is that when a state provides education, it “is a right which must be made available to all on equal terms.”<sup>33</sup>

To be sure, what “equal terms” entails is a subject of great controversy, some of which is central to the debate regarding race-sensitive admissions. Moreover, in some respects, the Court has rejected this norm. For instance, the Court has held that states may spend widely disproportionate sums to educate different children depending on whether they live in affluent or distressed areas without offending the Equal Protection Clause.<sup>34</sup> The more instructive inquiry for present purposes is why the Court thought education was a good that needed to be distributed impartially.

In *Brown*, the Court saw education as critical to achieving a “democratic society” in two respects. First, education was instrumental in fostering civic performance. “It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship,” Chief Justice Warren wrote.<sup>35</sup> Second, education was crucial to making real the American dream that the United States was a land of opportunity for all. “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,” he wrote.<sup>36</sup> The reverse implication was that with an education any child could go as far as his ambition and talents would take him. Chief Justice Warren saw

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31. *Id.* at 494.

32. *Brown* covers just fourteen pages of the U.S. Reports. The first three pages list the parties and attorneys, the next three and one-half pages state the facts and procedural history, the next three and one-half pages explain why the original intent of the Fourteenth Amendment is unclear and summarize past doctrine. The last page announces plans for considering remedial issues. Only approximately three pages state and justify the decision.

33. *Brown*, 347 U.S. at 493.

34. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

35. *Brown*, 347 U.S. at 493.

36. *Id.*

the two as related, contributory streams to “our democratic society.”<sup>37</sup> Indeed, the sentence that provided the link between the two ideals began by celebrating education as the key to civic responsibility (“Today it is a principal instrument in awakening the child to cultural values”) but, a comma later, invoked its role in fostering the American dream (“in preparing him for later professional training, and in helping him to adjust normally to his environment.”).<sup>38</sup>

The second principle from *Brown* grows out of the Court’s explanation as to why separate-but-equal schools were “inherently unequal.” The Court thought “intangible considerations,”<sup>39</sup> which the Court had found relevant at the college and graduate level, applied “with added force”<sup>40</sup> to black children: “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>41</sup> Chief Justice Warren endorsed the lower court finding in *Brown* to the effect that legally mandated segregation adversely impacted the development of African-American children, in part by stamping them as inferior.<sup>42</sup> *Brown* suggested that the Equal Protection Clause required America to take account of and remedy the perception blacks reasonably had of being excluded. The Constitution required that America stop subjugating African-Americans. *Brown* embarked America on a journey to undo the vestiges of its history of racial oppression. The “feeling of inferiority” sentence expressed a deeper, communitarian notion of how majority groups should treat those lacking power. It is noteworthy that the Court deemed tangible signs of equality as insufficient to constitute equal protection so long as segregation “generates a feeling of inferiority as to their status in the community.”<sup>43</sup> It was striking that the Court emphasized the messages society conveyed to African-Americans as constitutional harms deserving remedy. The law generally does not recognize “feelings” as subjects of its protection; when it does, it accords such intangibles secondary protection. The Court’s focus on the “feeling of inferiority as to . . . status in the community” was accordingly significant in several respects.

First, the rationale made clear that the Equal Protection Clause speaks not only to formal equality but also to more ephemeral notions of “status in the community.” Implicitly, *Brown* teaches that society should be ordered in such

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Brown*, 347 U.S. at 494.

41. *Id.*

42. *Id.*

43. *Id.* But see Elaine A. Alexander & Lawrence A. Alexander, *The New Racism: An Analysis of the Use of Racial and Ethnic Criteria in Decision-Making*, 9 SAN DIEGO L. REV. 190, 235 (1972) (explaining that *Brown* was inapposite to de facto segregation).



a way that members of no group would reasonably feel like lesser members of the community. As such, stigma becomes a constitutionally significant concept. Second, the rationale suggests that the Equal Protection Clause does not operate symmetrically for whites and blacks. Significantly, Chief Justice Warren did not adopt Mr. Carter's argument regarding the relevancy of race. *Brown* avoids any proclamation that the Constitution is color-blind. On the contrary, its focus is on redressing the impact of the feelings of inferiority from state-imposed segregation. Chief Justice Warren's pivotal "feeling of inferiority" sentence could only have been written about African-American children in 1954. The sentence would have made no sense in America at that time in reference to white children.

### III. THE JOURNEY TO *GRUTTER* AND *GRATZ*

#### A. *Bakke*

In many respects, *Bakke* was an earlier generation's version of *Grutter-Gratz*. *Bakke* had held invalid the medical school admissions program at University of California at Davis that set aside sixteen spots for minority applicants. The four justices<sup>44</sup> who joined Justice Powell in striking down the Davis plan never reached the constitutional issue. Instead, they concluded that the Davis plan violated Title VI of the Civil Rights Act of 1964. Four justices<sup>45</sup> would have upheld the Davis plan that Justice Powell deemed an unconstitutional quota. Although Justice Powell concluded that the Davis plan did serve a compelling need in producing a diverse student body, he found that the University had misconceived "the nature of the state interest that would justify consideration of race or ethnic background."<sup>46</sup> The valued diversity "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."<sup>47</sup> The Davis plan was not narrowly tailored to meet that need. The Court held, however, that admissions programs could consider race as a factor in determining which applicants to accept.<sup>48</sup>

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44. The Justices who joined Justice Powell were Chief Justice Burger, and Justices Stewart, Rehnquist and Stevens.

45. The Justices who would have upheld the Davis plan were Justices Brennan, White, Marshall, and Blackmun.

46. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

47. *Id.*

48. Justice Powell apparently wanted to affirm the use of race in admissions while striking down the Davis plan's set-aside. Nevertheless, he initially intended to cast his decision merely as affirming the California Supreme Court's decision. Justice Brennan persuaded him at conference that the California Supreme Court had also held any use of race invalid and that accordingly, Justice Powell should cast his decision as reversing the state court in part. Justice Powell quickly agreed with Justice Brennan's analysis, thereby allowing *Bakke* to be depicted as a split decision

Justice Powell found two intrinsic characteristics in the Equal Protection Clause. It shielded persons, not groups. And, it applied symmetrically to all individuals. “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”<sup>49</sup> These principles required courts to subject all racial classifications to the same high degree of scrutiny. Justice Powell wrote, “It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.”<sup>50</sup> According to Justice Powell, racial classifications were suspect whether race was used to harm, or to help, African-Americans. As such, all racial classifications should receive strict judicial scrutiny.<sup>51</sup> They could only be upheld if the state could show its purpose was “constitutionally permissible and substantial” and that the classification was necessary to achieve that end.<sup>52</sup>

The University had advanced four rationales to support its set-aside. Justice Powell found that three of the University’s proffered justifications failed to satisfy strict scrutiny. First, the University had argued that its program would reduce “the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession.”<sup>53</sup> Justice Powell rejected this rationale on the grounds that a preference based on race or ethnic grounds alone was facially invalid,<sup>54</sup> at least if it was tied to “some specified percentage of a particular group.”<sup>55</sup>

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rather than as a defeat for use of race in admissions decisions. See BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 96 (1988). Professor Schwartz described Justice Powell’s position as a “crucial concession.” *Id.* In contrast, Justice Powell’s biographer disputes the characterization: “Brennan’s intervention led Powell to do exactly what he wanted to do anyway—split the difference between goals and quotas.” JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* 487 (1994).

49. *Bakke*, 438 U.S. at 289-90.

50. *Id.* at 295.

51. *Id.* at 291. Justice White joined this portion of Justice Powell’s opinion. *Id.* at 387 n.7.

52. *Id.* at 305.

53. *Id.* at 306 (quoting Brief for Petitioner at 32, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (No. 76-811)).

54. *Bakke*, 438 U.S. at 307. Justice Powell wrote:

If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

*Id.* Or, as the Ninth Circuit has put it, “[p]ure (or, if you will, impure) percentages used for their own sake are not proper.” *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1197 (9th Cir. 2000). *But see* Robert M. O’Neil, *Racial Preference and Higher Education: The Larger Context*,

The University's second rationale, "countering the effects of societal discrimination,"<sup>56</sup> addressed a "legitimate and substantial interest" so long as the discrimination in question was "identified."<sup>57</sup> The modifier, however, proved fatal. Justice Powell suggested three procedural requirements that must be met before racial preferences could be used to remedy past societal discrimination. First, there must have been a finding of a constitutional or statutory violation.<sup>58</sup> Second, the finding had to have been made by an authoritative government institution, specifically a judicial, legislative or administrative body.<sup>59</sup> Finally, remedial action based on such a finding usually remained subject to "continuing oversight" to minimize the impact on other innocent persons who were competing for the benefit in question.<sup>60</sup> In Justice Powell's view, "[t]o hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination."<sup>61</sup> A university was incompetent to make such findings because its mission was education, not formulating legislative policy or adjudicating claims.<sup>62</sup>

Justice Powell also rejected the third of the University's rationales, that its program would improve the delivery of medical services to underserved minority communities by providing more minority physicians who presumably would administer to their needs.<sup>63</sup> A better health care delivery system presumably could "in some situations" be a compelling interest, but Justice Powell found "virtually no evidence in the record" suggesting that the Davis plan was needed or was designed to achieve that end.<sup>64</sup> There were other ways to produce physicians inclined to serve disadvantaged communities.<sup>65</sup>

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60 VA. L. REV. 925, 942-43 (1974) (discussing the need for more minorities at campuses and in professions relative to numbers in the population).

55. *Bakke*, 438 U.S. at 307.

56. *Id.* at 306.

57. *Id.* at 307.

58. *Id.*

59. *Id.*

60. *Bakke*, 438 U.S. at 308.

61. *Id.* at 310.

62. *Id.* at 309. Moreover, the University had made no such findings. *Id.* See also *Hopwood v. Texas*, 78 F.3d 932, 942 (5th Cir. 1996) (reasoning that Justice Powell had found societal discrimination was "never [an] appropriate" basis for race preference). But see Kenneth L. Karst & Harold W. Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 967-68 (1974) (defending societal discrimination as a rationale for racial preferences).

63. *Bakke*, 438 U.S. at 310.

64. *Id.*

65. *Id.* at 310-11. Some have misconstrued this rationale as the "role model" justification. See, e.g., *Hopwood*, 78 F.3d at 942. Cf. Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975) (discussing the idea that more minority lawyers are needed to serve minorities).

Justice Powell did recognize the fourth of the University's rationales, "attainment of a diverse student body," as both permissible and compelling.<sup>66</sup> This interest was anchored in the First Amendment, involved decisions within the University's domain and competence, and applied to undergraduate and graduate education.<sup>67</sup> Although the interest was sufficiently weighty to justify a racial classification, the particular approach the Davis plan took was not "necessary to promote this interest."<sup>68</sup> The Davis plan was defective in two respects. First, it misconceived the "nature of the state interest that would justify consideration of race or ethnic background."<sup>69</sup> The proper diversity interest was not focused exclusively on race but recognized it as one characteristic among many relevant traits. Race or ethnicity could constitute a plus factor, but only when measured against a range of other qualities including "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important."<sup>70</sup> Moreover, the two-track Davis plan involved a quota that excluded white applicants from competing for some seats.<sup>71</sup> By contrast, the Harvard College plan avoided these defects. It considered race as one factor in creating a diverse student body. It treated race or ethnicity as plus factors in a competition for all available spots in which other diversity interests were also recognized.<sup>72</sup> Such a plan treated "each applicant as an individual in the admissions process,"<sup>73</sup> not "as a mere stand-in for some favorite group."<sup>74</sup> An unsuccessful candidate would not have been excluded from "all consideration" for a place based on race or nationality, but rather because his or her complete qualifications, including subjective ones, were outweighed by those of others.<sup>75</sup> Justice Powell endorsed the Harvard College plan as a model.<sup>76</sup>

In *Bakke*, Justice Powell defined student body diversity as related entirely to what happened on the campus. Universities should be able to choose students to foster a "robust exchange of ideas."<sup>77</sup> This desired characteristic of universities was implicit in academic freedom, a value Justice Powell anchored

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66. *Bakke*, 438 U.S. at 311.

67. *Id.* at 311-14.

68. *Id.* at 314-15.

69. *Id.* at 315.

70. *Id.* at 317.

71. *See Bakke*, 438 U.S. at 274-76.

72. *Id.* at 317.

73. *Id.* at 318.

74. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1197 (9th Cir. 2000).

75. *Bakke*, 438 U.S. at 318.

76. *Id.* at 316-18.

77. *Id.* at 313.

in the First Amendment. He cited eminent universities, like Harvard and Princeton, which celebrated the value of diversity, racial, ethnic, and other sorts, to create a climate conducive to such an exchange. Ironically, at the Court's conference on *Bakke*, Justice Powell had apparently appreciated a broader purpose in diversity: "Diversity is a necessary goal to assure a broad spectrum of Americans an opportunity for graduate school."<sup>78</sup> If Justice Brennan's conference notes accurately captured Justice Powell's comments, he seemed to be recognizing an instrumental purpose of diversity to develop more minority physicians, not simply to create a pluralistic campus.

In his opinion, however, Justice Powell defended campus diversity solely as a means to allow universities to pursue their educational missions. He did not endorse the use of race in university admissions as a way to produce a diverse pool of professionals and leaders. If anything, his opinion seemed to reject that rationale, at least as presented by the University. On the contrary, it saw the long-term value of a diverse student body as a way to give professionals the benefit of exposure to different people and ideas.<sup>79</sup> Put differently, the University needed minority students not to increase the pool of minority doctors, but rather so that those students otherwise studying there would reap the benefits of a heterogeneous environment.

Justice Brennan, and those who joined his opinion,<sup>80</sup> parted company with Justice Powell in crucial respects. First, they rejected the idea that the Constitution was color-blind, a concept that was aspirational at best but needed to yield to circumstances.<sup>81</sup> Second, they concluded that the concerns that led the Court to categorize malevolent racial classifications as suspect did not apply to those that served a remedial purpose. Justice Brennan recognized that "racial classifications established for ostensibly benign purposes can be misused"<sup>82</sup> and accordingly thought a rational basis standard imposed too

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78. THE SUPREME COURT IN CONFERENCE (1940-1985), at 740 (Del Dickson ed., 2001).

79. See *Bakke*, 438 U.S. at 313 ("the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples") (quoting *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967)); *id.* at 313-14 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), regarding the importance of exposure to diverse viewpoints at law school). According to Justice Powell:

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

*Id.* at 314.

80. Justices White, Marshall and Blackmun joined Justice Brennan's opinion. Each also wrote his own separate statement.

81. *Bakke*, 438 U.S. at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

82. *Id.* at 361.

lenient a filter.<sup>83</sup> Such racial classifications should be subjected to intermediate scrutiny, which would require that a benign racial classification serve an important governmental objective and be substantially related to those goals.<sup>84</sup> Moreover, race classifications must not stigmatize any group.<sup>85</sup> The Court's review should be "strict and searching" but not necessarily as fatal as strict scrutiny was.<sup>86</sup> Further, Justice Brennan thought that the Davis plan's purpose of "remedying the effects of past societal discrimination" passed muster under the Equal Protection Clause.<sup>87</sup> Whereas Justice Powell argued that this rationale required findings by an authoritative governmental body, Justice Brennan articulated the following broad principle:

[A] state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.<sup>88</sup>

The Brennan four joined Justice Powell's more limited conclusion that race could be a factor in admissions decisions, but on altogether different grounds. Indeed, they carefully qualified their endorsement of his rationale. They never mentioned "diversity." Rather, Justice Brennan's opinion, in a single grudging footnote, conceded that the Harvard College plan was "constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."<sup>89</sup> Their approach advanced an altogether different rationale for race-conscious admissions decisions. They saw it as an appropriate remedy to compensate for disadvantages that past discrimination and prejudice imposed on blacks. This compensatory rationale resonates throughout the Brennan opinion.<sup>90</sup>

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83. *Id.* at 358.

84. *Id.* at 359.

85. *Id.* at 361.

86. *Bakke*, 438 U.S. at 361-62.

87. *Id.* at 362. The rationale was "sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School." *Id.*

88. *Id.* at 369.

89. *Id.* at 326 n.1. Justice White did, however, join a paragraph of Justice Powell's opinion that stated "that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320.

90. *See, e.g., id.* at 325 (speaking of the need "to remedy disadvantages cast on minorities by past racial prejudice"); *id.* at 328 (explaining that Title VI does not preclude "preferential treatment of racial minorities as a means of remedying past societal discrimination"); *id.* at 365 (citing the "effects of past discrimination" as the cause of lower minority enrollment); *id.* at 366

It would be a gross understatement to suggest that Justice Marshall's separate statement simply echoed Justice Brennan's emphasis on remedying the effects of past discrimination, for Justice Marshall wrote with a passion and power absent from Justice Brennan's opinion. Justice Brennan was writing to attract a sizeable bloc, an enterprise that probably required pulling a few punches.<sup>91</sup> Justice Marshall had no such ambition,<sup>92</sup> and, accordingly, the inhibitions that writing to obtain a Court generally impose did not restrain his prose. He was free to articulate his individual slant on the issue. He eloquently recounted the sorry American history of oppression of African-Americans that legal equality had not redressed: "The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment."<sup>93</sup> Universities had the power to "remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors."<sup>94</sup> The Fourteenth Amendment did not preclude institutions from addressing societal discrimination, nor did it require identified individual victims because "the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."<sup>95</sup> Although most of his opinion expressed compensatory rhetoric,<sup>96</sup> Justice Marshall sounded a related, but different theme, an instrumental rationale. Abuse of African-Americans had

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(stating that race-preference programs are acceptable to address "substantial, chronic minority underrepresentation" because of "past racial discrimination"); *id.* at 368-70, 372 (stating that race-conscious efforts are justified to remedy "past discrimination").

91. Justice Brennan had prepared a memorandum to try to persuade Justice Powell to uphold the Davis plan. *See* SCHWARTZ, *supra* note 48, at 88. When that quest proved fruitless, Justice Brennan sought to prepare an opinion that would represent not only his views but those of Justices White, Marshall and Blackmun. *Id.* at 139. Based on a letter he sent Justice White on May 30, 1978, he was least sure his opinion would attract Justice Marshall. *Id.* It is, of course, possible that his suggestion to Justice White that Justice Marshall was the least likely to join was a strategic gambit to give the appearance that Brennan's views were closer to White's than to Marshall's and that some move needed to be made toward Justice Marshall to attract his support. *Id.* If that was his purpose, it failed. Justice White responded to Justice Brennan's draft, which "was stronger in its language condemning racial discrimination than the final opinion," by suggesting "I am inclined to keep the decibel level as low as possible. We won't accomplish much by beating a white majority over past ills or by describing what has gone by as a system of apartheid." *Id.* at 139 (quoting Letter from Justice White to Justice Brennan (June 13, 1978)). Implicitly, Justice White was cautioning against adopting the rhetoric of Justices Marshall and Blackmun's opinion.

92. According to Justice Marshall's biographer, he "rarely took part in any personal efforts to affect outcomes." MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW* 128 (1997).

93. *Bakke*, 438 U.S. at 395.

94. *Id.* at 396.

95. *Id.* at 400.

96. *See, e.g., id.* at 401 (for example, stating "where it is necessary to remedy the effects of past discrimination"); *id.* at 402 ("I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.").

kept America from reaching its promise: “The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.”<sup>97</sup> Affirmative action was a strategy to make America a truly pluralistic society: “[B]ringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.”<sup>98</sup> Justice Marshall wrote, “If we are ever to become a fully integrated society, one in which the color of a person’s skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.”<sup>99</sup>

Similarly, Justice Blackmun sounded the instrumental ideal of America.<sup>100</sup> He thought that ways must be found to remedy the lack of minority doctors and lawyers for the country to realize “its professed goal of [being] a society that is not race conscious.”<sup>101</sup> He imagined a time when the United States would “reach a stage of maturity” where race preferences would be unnecessary: “Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.”<sup>102</sup> He saw little difference between the Davis and Harvard College plan.<sup>103</sup> In any event, judges were not competent to design admissions programs for universities and, accordingly, should defer to academicians:<sup>104</sup> “In order to get beyond racism, we must first take account of race.”<sup>105</sup>

#### B. *Bakke Summarized*

Justice Powell’s *Bakke* opinion recognized the ability of institutions to voluntarily use race-conscious admissions plans. As such, he preserved a strategy that was critical to completing *Brown*’s vision of a society without second-class races of citizens. Ironically, he did so in a manner that departed from or ignored *Brown*’s central premises. Where *Brown* celebrated the importance of education as a way to allow African-Americans to participate in democratic society and to share in the American dream, Justice Powell did not

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97. *Id.* at 400-01.

98. *Bakke*, 438 U.S. at 396.

99. *Id.* at 401-02.

100. *See id.* at 403-07. Although Justice Brennan worried that Justice Marshall’s approach might be counter-productive, it seems to have played a role in persuading Justice Brennan. “There is much to be said for Thurgood’s ‘cruellest irony’ approach,” he wrote. Memorandum from Justice Blackmun (May 1, 1978), *quoted in* TUSHNET, *supra* note 92, at 129; *see also* SCHWARTZ, *supra* note 48, at 129.

101. *Bakke*, 438 U.S. at 403.

102. *Id.*

103. *Id.* at 406.

104. *Id.* at 404.

105. *Id.* at 407.



embrace or even recognize those goals. He suggested race preferences were compelling in order to transform campuses from homogeneous to diverse environments. Whereas *Brown* sought to remedy the “feelings of inferiority” of a racial minority, Justice Powell’s opinion articulated no such concern; on the contrary, the beneficiaries of diversity, under his logic, were primarily whites. Whereas *Brown* exhibited special solicitude for the feelings of African-American children, Justice Powell denied that the Equal Protection Clause had any “special wards”<sup>106</sup> and thought racial classifications adverse to whites should receive the same sort of scrutiny as those disparaging blacks. Finally, whereas *Brown* was at its core a case about race in America, Justice Powell’s opinion turned on race only in part. It struck down the Davis plan’s set-aside because of its impact on whites, but held that race could be used as it was in the Harvard College plan based on the First Amendment interests of universities.

### C. *Post-Bakke Jurisprudence*

For almost a quarter century after *Bakke*, the subject of racial preferences in college and university admissions did not return to the Court. The Court did address the constitutionality of racial preferences in other areas. Those decisions took a somewhat meandering path marked often by indecision and division. Much of that story is not directly relevant here. Several features characterized the Court’s jurisprudence which do, however, relate to *Grutter* and *Gratz*.

First, *Bakke* ushered in an era of some uncertainty.<sup>107</sup> Many universities imitated the Harvard College plan that Justice Powell endorsed.<sup>108</sup> Yet, the Court refused to embrace either Justice Powell’s or Justice Brennan’s rationales generally, and *Bakke*’s status as law remained controversial.<sup>109</sup>

Second, the Court ultimately concluded that the Court should apply strict scrutiny to all racial preferences, whether designed to hurt or help racial minorities and whether enacted by federal or state government. The Court reached that destination after some indecision. In cases following soon after *Bakke*, only a plurality favored strict scrutiny, and, as late as 1990, a majority did apply intermediate review in one case involving a federal affirmative

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106. *Bakke*, 438 U.S. at 295. This passage outraged Justice Marshall who regarded it as racist. See TUSHNET, *supra* note 92, at 128.

107. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 304-15 (1985).

108. See *Bakke*, 438 U.S. at 316-18.

109. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (“This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*].”). See generally Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 925, 925 n.192 (1996) (collecting sources questioning *Bakke*’s status).

action plan.<sup>110</sup> The addition of Justice Thomas to the Court in 1992 shifted the balance on this issue and, in 1995, the Court held that strict scrutiny applied to all racial classifications.<sup>111</sup> Although a sizeable bloc on the Court has always contended that the Court should scrutinize classifications that benefit minorities less strictly than those that disparage them,<sup>112</sup> every justice on the Court during the past quarter century has agreed that even benevolent racial classifications require some heightened scrutiny.<sup>113</sup>

Third, the contours of strict scrutiny in this area were drawn largely by Justice O'Connor. Her opinion in *Adarand Constructors, Inc. v. Peña*, which drew upon her jurisprudence of the prior decade, recognized strict scrutiny as the governing standard.<sup>114</sup> The Court, she wrote, had established three general propositions pertinent to the problem. Governmental racial classifications should be viewed: (1) with skepticism; (2) consistently, whether favoring or disadvantaging minorities; and, (3) congruently, whether imposed by federal or state government.<sup>115</sup> Thus, "any person, of whatever race," was entitled to have any governmental racial classification examined "under the strictest judicial scrutiny."<sup>116</sup> Strict scrutiny was designed to consider "relevant differences" between asserted justifications and the necessity of classification used "to distinguish legitimate from illegitimate uses of race in governmental decisionmaking."<sup>117</sup> As such, strict scrutiny was not inevitably fatal to the classification at issue.<sup>118</sup>

Finally, the Court did not easily find that affirmative action plans satisfied strict scrutiny. It had endorsed racial preferences as a remedy for past discrimination attributed to a particular wrongdoer or group of offenders, but had generally rejected other grounds. In *Adarand*, it overturned *Metro Broadcasting Inc. v. FCC*, the one post-*Bakke* case to recognize diversity as a legitimate governmental objective.<sup>119</sup> The Court's rejection of *Metro Broadcasting* rested on other grounds,<sup>120</sup> but, in her *Metro Broadcasting*

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110. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

111. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

112. *See, e.g., id.* at 243-49 (Stevens and Ginsburg, JJ., dissenting); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 535-36 (1989) (Marshall, Brennan, and Blackmun, JJ., dissenting); *Fullilove*, 448 U.S. at 517-19 (Marshall, Brennan, and Blackmun, JJ., concurring).

113. *See, e.g., Gratz v. Bollinger*, 123 S.Ct. 2411, 2442-45 (2003) (Ginsburg, Souter, and Breyer, JJ., dissenting) (applying intermediate scrutiny); *Bakke*, 438 U.S. at 362-63 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (applying intermediate scrutiny).

114. *Adarand*, 515 U.S. at 227.

115. *Id.* at 223-24.

116. *Id.* at 224.

117. *Id.* at 228.

118. *Id.* at 230, 237.

119. *Adarand*, 515 U.S. at 227.

120. *See id.* at 225-27.

dissent, Justice O'Connor demonstrated little respect for a diversity rationale in the context there presented:<sup>121</sup> "The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest,"<sup>122</sup> she wrote. And several justices, including Justice O'Connor, arguably thought racial classifications were only justifiable in "remedial settings."<sup>123</sup> Although some correctly predicted Justice O'Connor would swing different ways in the two cases,<sup>124</sup> some of her affirmative action opinions should have given Michigan Law School some pause. She had consistently held that the Court should strictly scrutinize affirmative action plans<sup>125</sup> and, in a different context, had suggested that diversity was not a compelling interest.<sup>126</sup> Moreover, she had expressed misgivings about the use of goals in affirmative action cases.<sup>127</sup> Finally, Justice O'Connor had previously written that, to survive strict scrutiny, a racial classification had to "fit with greater precision than any alternative remedy"<sup>128</sup> and had criticized a decision-maker for not "expressly evaluat[ing] the available alternative remedies."<sup>129</sup>

#### IV. GRUTTER AND GRATZ

##### A. *The Cases Summarized*

In *Grutter*, the Court reviewed a challenge to the University of Michigan Law School's admission program. The Law School policy articulated a

121. *But see* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1759-67 (1996) (distinguishing university from broadcast diversity).

122. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612 (1990).

123. *See id.* at 613 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (explaining that the remedying effects of racial discrimination was the only compelling interest); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J.). *But see Adarand*, 515 U.S. at 239 (Scalia, J. concurring) (rejecting remedial justification); *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring) (same).

124. *See, e.g.*, Susan Low Bloch, *Affirmative Action: The Aftermath of the University of Michigan Cases*, FEDERAL LAWYER, Oct. 2003, at 22, 25. *Cf.* Evan Caminker, *A Glimpse Behind and Beyond Grutter*, 48 ST. LOUIS U. L.J. 894-95.

125. *See, e.g.*, *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 493-94 (plurality); *United States v. Paradise*, 480 U.S. 149, 196-97 (1987) (O'Connor, J., dissenting) (endorsing strict scrutiny); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285-86 (1986) (O'Connor, J., concurring) (same).

126. *Metro Broad., Inc.*, 497 U.S. at 612 (O'Connor, J., dissenting) ("The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest."); *see also* *Hopwood v. Texas*, 78 F.3d 932, 945 n.27 (5th Cir. 1996) (quoting Justice O'Connor as unreceptive to student diversity).

127. *See, e.g.*, *Paradise*, 480 U.S. at 197; *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 496-97 (1986) (O'Connor, J., concurring in part and dissenting in part).

128. *Paradise*, 480 U.S. at 199.

129. *Id.* at 201.

commitment to achieving a diverse student body to enhance the education offered. To that end, it recognized various bases of diversity admission while reaffirming the Law School's long-standing commitment to racial and ethnic diversity, especially with respect to students who had been "historically discriminated against" including African-Americans, Hispanics and Native Americans.<sup>130</sup> In reviewing approximately thirty-five hundred applications for three hundred places, the Michigan plan considered not only grade point average and Law School Admission Test (LSAT) scores, but other criteria including letters of recommendation, the quality of the undergraduate institution, the applicant's essay, and undergraduate courses taken.<sup>131</sup> It sought to enroll a "critical mass" of under-represented minorities without identifying any prescribed number.<sup>132</sup> Barbara Grutter, a white female applicant, claimed that despite her superior qualifications she was denied admission because the Law School gave preference to other prospective students based on their race.

In *Gratz*, two unsuccessful white applicants challenged the University of Michigan's refusal to admit them as violative of the Equal Protection Clause of the Fourteenth Amendment and of Title VI of the Civil Rights Act of 1964.<sup>133</sup> The University used a variety of measures to assign numerical scores to applicants. Although the approaches varied in different years, the effect was to admit certain minority students whose scores would not have indicated admission had they been Caucasian.<sup>134</sup>

In her opinion for the Court in *Grutter*, Justice O'Connor recounted Justice Powell's *Bakke* opinion at length.<sup>135</sup> Justice O'Connor followed Justice Powell in several of his basic premises. Like Justice Powell, she thought the Fourteenth Amendment protects persons, not groups.<sup>136</sup> She shared his conviction that the Constitution treated racial classifications in a consistent manner regardless of their purpose. She followed him, and intervening precedent as well, in concluding that strict scrutiny applied whenever the Court considered the propriety of a racial classification.<sup>137</sup> Such a classification was not inevitably invalid.<sup>138</sup> Rather, a racial category could be upheld if it served a compelling state interest through a means that was narrowly tailored to achieve that end. Ultimately Justice O'Connor did not rely on *Bakke* as binding precedent, but instead endorsed Justice Powell's conclusion that a

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130. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2332 (2003).

131. *Id.*

132. *Id.* at 2333.

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

134. *Id.* at 2419.

135. *Grutter*, 123 S. Ct. at 2335-37.

136. *Id.* at 2337.

137. *Id.* at 2337-38.

138. *Id.* at 2338.

diverse student body was a compelling enough interest to allow universities to consider race in deciding whom to admit.<sup>139</sup>

Michigan Law School had defended its use of race in admissions based solely upon “the educational benefits that flow from student body diversity,”<sup>140</sup> a strategy *Bakke*, no doubt, influenced. In *Grutter*, Justice O’Connor concluded that Michigan’s diversity rationale constituted a compelling state interest.<sup>141</sup> In part, the Court deferred to the Law School’s academic judgments that were within its particular expertise: “[A]ttaining a diverse student body is at the heart of the Law School’s proper institutional mission.”<sup>142</sup> A diverse student body creates a range of educational benefits, including a richer classroom environment and improved understanding among the races, all of which better prepares students for an increasingly diverse workplace and society.<sup>143</sup> Justice O’Connor also identified other benefits from student body diversity that were independent of its impact on the campus. Citing an amicus brief of civilian and uniformed leaders of America’s military,<sup>144</sup> the Court concluded that the military required a “racially diverse officer corps” to provide for national security.<sup>145</sup> The military could only attract the requisite diverse mix of officers if military academies and universities with Reserve Officer Training Corps (ROTC) used race-conscious admissions criteria.<sup>146</sup> Similarly, American corporations needed a pool of employees capable of interacting successfully in a multicultural global economy.<sup>147</sup> Because education was the foundation of citizenship and civic participation, “public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”<sup>148</sup> Finally, law schools must be open to qualified members of all races so that professional and leadership opportunities will be available to all.<sup>149</sup>

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139. *Id.* at 2337 (“We do not find it necessary to decide whether Justice Powell’s opinion is binding [precedent].”). Michigan Law School had argued, at length, that *Bakke* should be applied under the factors identified in the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Brief for Respondent at 17-21, *Grutter*, 123 S. Ct. 2325 (No. 02-241).

140. *Id.* at 14.

141. *Grutter*, 123 S. Ct. at 2339.

142. *Id.*

143. *Id.* at 2339-40.

144. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. at 27, *Grutter*, 123 S. Ct. 2325 (Nos. 02-241, 02-516).

145. *Grutter*, 123 S. Ct. at 2340 (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. at 27, *Grutter*, 123 S. Ct. 2325 (Nos. 02-241, 02-516)).

146. *Grutter*, 123 S. Ct. at 2340.

147. *Id.*

148. *Id.*

149. *Id.* at 2340-41.

The Court found that Michigan's racial preference was narrowly tailored to its goal of creating a diverse student body. Michigan's program used race in a "flexible, nonmechanical" way.<sup>150</sup> It did not involve a quota system but used race simply as a plus factor in an individualized assessment in which no applicant was insulated from a competition with all other candidates. Race was only one of many diversity factors that Michigan considered in making admissions decisions.<sup>151</sup> Michigan Law School did not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity."<sup>152</sup> On the contrary, "the Law School actually gives substantial weight to diversity factors besides race."<sup>153</sup> Further, the Law School had considered various race-neutral alternatives—a lottery, reducing academic standards, and percentage plans—all of which proved to be inferior approaches. Finally, Justice O'Connor articulated a requirement that the duration of the race preference be limited:<sup>154</sup> "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>155</sup>

In *Gratz*, the Court struck down the University of Michigan's undergraduate admissions program. It varied in different years. In essence, for several years, the program evaluated applicants based on adjusted grade point average and standardized test scores. These scores were then placed on a grid that dictated the admission decision. Different grids were used for minority and nonminority students.<sup>156</sup> Beginning in 1998, applicants were ranked on a one hundred fifty-point index, with one hundred points required for admission. Members of under-represented minorities were given twenty points.<sup>157</sup>

Again applying strict scrutiny and bound by *Grutter's* holding that student body diversity was a compelling interest, the Court held that Michigan's plan

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150. *Id.* at 2342.

151. *Grutter*, 123 S. Ct. at 2344 (stating that "all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions").

152. *Id.*

153. *Id.*

154. The idea of a durational limit was not new. During the *Bakke* conference on December 9, 1977, Justice Stevens remarked that preferences should be temporary devices that would only be needed for a few more years. Justice Marshall replied that they would be needed for another one hundred years. See JEFFRIES, *supra* note 48, at 487; TUSHNET, *supra* note 92, at 127. Justice Blackmun suggested in his opinion that such programs might need to last for a decade. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978). Some court insiders suggested Justice Stevens might have joined an opinion endorsing racial preferences for a limited time but was put off by Justice Marshall's response. See THE SUPREME COURT IN CONFERENCE, *supra* note 78, at 740 n.253.

155. *Grutter*, 123 S. Ct. at 2347.

156. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2418-19 (2003).

157. *Id.* at 2419.

was not narrowly tailored to serve that interest.<sup>158</sup> The plan did not provide for the “individualized consideration” that Justice Powell required in *Bakke*. Instead, the twenty-point bump based simply on race was likely to prove decisive.<sup>159</sup>

#### B. *Grutter-Gratz* Assessed

Cases dealing with race preferences in admissions tend to raise three questions. First, what level of scrutiny is appropriate? Second, what ends can justify such programs? Third, what means can universities use to achieve those ends? *Grutter-Gratz* raised these issues and went beyond *Bakke* in significant ways. Together they flexed the strict scrutiny standard, recognized additional rationales for universities to use race preferences, and redrew the lines *Bakke* had suggested defining permissible and illegal plans. The first and third issues are discussed in this section; the second, addressing justifications, is the subject of Section V.

##### 1. Strict Scrutiny

Courts classically used strict scrutiny to examine racial classifications that discriminated against racial minorities. Strict scrutiny therefore imposed upon those defending a classification a heavy burden of justification.<sup>160</sup> If rigidly applied, the test constrained governmental actions by allowing government to use a suspect classification only to serve a compelling interest when there is no other way to achieve that end. It also smokes out illicit purposes by requiring that such classifications fit closely to the compelling interest.<sup>161</sup> A gap between means and ends suggests that the asserted compelling interest was not the true justification, that the proffered rationale was a subterfuge for some discriminatory purpose. Statutes and practices discriminating against racial minorities have presented the paradigmatic cases in which courts used strict scrutiny. Characteristically, the Court during the last half-century or so struck down such classifications. On the rare occasions when it failed to do so, the Court generally displayed great deference to military authorities, accepted national security as a compelling interest, and misapplied the test by not requiring a very close fit between means and ends.<sup>162</sup> In *Bakke*, Justice Powell

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158. *Id.* at 2426-27.

159. *Id.* at 2428.

160. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (Brennan, J., concurring in the judgment in part and dissenting in part) (“[A] government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”).

161. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2338 (2003).

162. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944).

argued that any classification based on race was suspect and warranted strict scrutiny<sup>163</sup>—a position the Court ultimately adopted.<sup>164</sup>

Whereas Justice Powell alone in *Bakke* advocated the use of strict scrutiny for racial classifications,<sup>165</sup> Justice O'Connor ostensibly carried with her a full Court in agreeing on that standard. Justices Stevens, Souter, Ginsburg, and Breyer joined Justice O'Connor's *Grutter* opinion. The four dissenters<sup>166</sup> also agreed that strict scrutiny should apply.<sup>167</sup> In *Gratz*, the *Grutter* dissenters plus Justice O'Connor again applied strict scrutiny. Indeed, Justice O'Connor in *Grutter*, and Chief Justice Rehnquist in his *Grutter* dissent and *Gratz* majority opinion, used quite similar language and citations to describe the strict scrutiny test. The use of strict scrutiny was not surprising in view of *Adarand* and Justice O'Connor's other affirmative action opinions.

The apparent consensus on strict scrutiny in *Grutter-Gratz* was misleading. The four justices who joined Justice O'Connor's *Grutter* opinion did not share her commitment to strict scrutiny in this context. In *Grutter*, Justice Ginsburg noted in a concurrence that because the Law School's admissions policy survived "review under the standards stated in [*Adarand*]" the Court need not "revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review."<sup>168</sup> In *Gratz*, Justice Ginsburg was more direct. She objected that "the Court once again maintains that the same

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163. Justice Powell offered three rationales to support his conclusion. First, he suggested that distinctions based on race are odious and accordingly "inherently suspect." *Bakke*, 438 U.S. at 290-91. Even preferences designed to help disadvantaged minorities are so tainted. It might not be clear that a preference was benign, as preferences might "reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth" and preferences imposed costs on innocent people like Bakke who bear the cost. *Id.* at 298. Second, he suggested that distinguishing between suspect and permitted racial classifications would engage courts in judgments not conducive to judicial resolution. Many minority groups have some grounds for complaint about their treatment here. How do we construct a constitutional test to decide on some principled basis which racial or ethnic classifications merit strict scrutiny and which do not? Courts would have to decide which minorities had suffered sufficiently to warrant preference. *Id.* at 296-97. Finally, law is supposed to be certain and stable. The determinations involved would be subject to change to accommodate the flow of history, yet "[t]he kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence." *Id.* at 297. A uniform standard would contribute to those ends whereas a discriminatory test would commit the Court to a jurisprudence of perpetual reexamination.

164. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

165. Those who joined Justice Stevens's opinion avoided the question by limiting their decision to statutory grounds. *Bakke*, 438 U.S. at 408-21.

166. The four dissenters are Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas.

167. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2365-66 (2003).

168. *Id.* at 2348 n.1.



standard of review controls judicial inspection of all official race classifications.”<sup>169</sup> Justices Souter and Breyer joined this complaint. “Consistency,” which was Justice O’Connor’s own contribution<sup>170</sup> loses its allure, they suggested, when one considered America’s discriminatory past, which continues to cast its shadow over current distribution of resources.<sup>171</sup> Governmental decision-makers can properly distinguish between racial classifications used to foster equality and those intended to subordinate, Justice Ginsburg contended.<sup>172</sup> Justices Ginsburg, Souter, Breyer, and perhaps Stevens<sup>173</sup> accordingly would prefer to apply different standards to review racial classifications depending upon whether they are used to exclude, or include, minority groups. In this stance, they followed the course that four members of the Court urged in *Bakke*. Although Justice Ginsburg did not explicitly endorse a particular standard, her insistence that not all racial classifications are the same suggested a gentler standard of review than strict scrutiny. To be sure, she would not give a pass to a “mere assertion of a laudable governmental purpose.”<sup>174</sup> Accordingly, she would not apply the forgiving rational basis standard to racial preference. She would subject them to “careful judicial inspection” and to “[c]lose review.”<sup>175</sup> These standards suggest some intermediate level of review tougher than mere rationality, but more flexible than strict scrutiny.

The *Grutter* dissenters were less subtle in their displeasure at the level of scrutiny in *Grutter*. Chief Justice Rehnquist thought the Court’s claim to apply strict scrutiny illusory: “Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.”<sup>176</sup> Justice Kennedy was more harsh, suggesting that the Court had “manipulated [the strict scrutiny test] to distort its real and accepted meaning.”<sup>177</sup> In so doing, it “undermine[d] both the test and its own controlling precedents.”<sup>178</sup> The Court’s review had been “perfunctory,” not strict.<sup>179</sup>

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169. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2442 (2003).

170. *See, e.g., Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 224 (1995).

171. *Gratz*, 123 S. Ct. at 2443.

172. *Id.* at 2444.

173. Justice Stevens had drawn this distinction on earlier occasions. *See, e.g., Adarand*, 515 U. S. at 243-45 (Stevens, J., dissenting); *see also Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (upholding racial classification under intermediate scrutiny with Justice Stevens in the majority).

174. *Gratz*, 123 S. Ct. at 2445.

175. *Id.*

176. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2366 (2003); *see also id.* at 2370 (accusing the Court of “an unprecedented display of deference under our strict scrutiny analysis”).

177. *Id.* at 2370.

178. *Id.*

179. *Id.* at 2371.

*Grutter*, then, presented an anomalous situation in which four members of the Court who joined an opinion based on strict scrutiny did not really believe that standard should apply to race preference in admissions. The *Grutter* dissenters, who believed such plans should be measured against strict scrutiny, did not believe the Michigan plan passed muster. They believed the Court did not really apply strict scrutiny to the Michigan Law School program. Only Justice O'Connor both believed strict scrutiny should apply to racial classifications benefiting minorities and that Michigan Law School's program satisfied that test.

On earlier occasions, Justice O'Connor's colleagues had suggested that she exercised a more lenient brand of strict scrutiny. Indeed, in some respects, her strict scrutiny resembled Justice Brennan's intermediate review as he described it in *Bakke*. Review of race preferences, he said, should be "strict—not strict in theory and fatal in fact,"<sup>180</sup> a formulation Justice O'Connor adopted.<sup>181</sup> Justice Scalia had observed that Justice O'Connor's rendition of strict scrutiny showed "that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest."<sup>182</sup> Justices Ginsburg and Breyer inferred from Justice O'Connor's *Adarand* opinion that strict scrutiny would invalidate racial classifications burdening discrete minorities but would not inevitably be fatal to those designed to foster equality.<sup>183</sup> They applauded her reiteration that strict scrutiny separates legitimate from illegitimate uses of race and thought that the decision permitted change to accommodate new circumstances.<sup>184</sup> Justice O'Connor herself had noted overlap between Justice Powell's formulation of strict scrutiny and the intermediate scrutiny that Justice Brennan would apply. The distinction between "compelling" and "important" was "negligible," she suggested.<sup>185</sup> Indeed, in *Grutter* she occasionally used "important."<sup>186</sup> She was careful to emphasize that "[n]ot every decision influenced by race is equally objectionable."<sup>187</sup> Strict scrutiny was designed "to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."<sup>188</sup>

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180. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 361-62 (1978) (internal quotations omitted).

181. *Grutter*, 123 S. Ct. at 2338; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

182. *Adarand*, 515 U.S. at 268.

183. *Id.* at 275 (Ginsburg, J., dissenting).

184. *Id.* at 275-76.

185. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

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

187. *Id.*

188. *Id.*

In fact, the Court in *Grutter* did apply a less rigorous form of strict scrutiny than it had in the past. The Court typically had found compelling only those rare justifications that are truly irresistible, like national security,<sup>189</sup> remedying prior discrimination,<sup>190</sup> or vindicating First Amendment values.<sup>191</sup> Justice O'Connor engaged in a curious methodology in deciding that diversity was compelling. In essence, the Court deferred to the "Law School's educational judgment that such diversity is essential to its educational mission."<sup>192</sup> That judgment might be correct and appropriate. Yet it seems something of an oxymoron to claim to be using strict scrutiny even while confessing deference to the party being scrutinized.<sup>193</sup> Indeed, the predicate of strict scrutiny is that the classification being used renders deference inappropriate.<sup>194</sup> In *Grutter*, the Court deferred in identifying the compelling interest and in measuring the fit.<sup>195</sup>

Moreover, the Court's presumption of the good faith of the University<sup>196</sup> also departed from strict scrutiny. Strict scrutiny presumes that racial classifications are invalid and makes the government prove its good faith by showing a compelling interest and a close fit. Indeed, elsewhere, Justice O'Connor stated that strict scrutiny is applied to "smoke out illegitimate uses of race."<sup>197</sup> But how can strict scrutiny smoke out illegitimate uses of race if the good faith of the user is presumed? Acknowledging good faith of universities might be appropriate, but it seems at odds with strict scrutiny.

Justice O'Connor recognized this problem, but her response was unconvincing:

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. Our holding today is in

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189. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944).

190. *See, e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *United States v. Paradise*, 480 U.S. 149 (1987).

191. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

192. *Grutter*, 123 S. Ct. at 2339.

193. *See id.* at 2373 (Kennedy, J., dissenting) ("Deference is antithetical to strict scrutiny, not consistent with it.").

194. To be sure, the Court deferred heavily to military authorities in *Korematsu*. Yet the deference was not in deciding that national security was a compelling interest, hardly a controversial issue, but rather in deciding the means appropriate to vindicating that interest. *See Korematsu*, 323 U.S. at 218-19.

195. Justice Kennedy, in dissent, was willing to accept the "objective of racial diversity . . . based on empirical data known to us," but criticized the Court for deferring to the University regarding implementation. *See Grutter*, 123 S. Ct. at 2370-71.

196. *Id.* at 2339.

197. *Id.* at 2338 (internal quotations omitted).

keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.<sup>198</sup>

Justice O'Connor cannot have it both ways. "Strict scrutiny" and "deference" are at opposite ends of the spectrum. It might be appropriate to defer to a university regarding areas within its expertise, but deference is one hundred eighty degrees away from strict scrutiny. School diversity might be a compelling goal but, under conventional applications of strict scrutiny, that is a judgment for the Court to make and is not one where deference is appropriate.

The deference to universities might, of course, be grounded in values implicit in the First Amendment, as Justice Powell had argued a quarter century earlier. Academic freedom is a "special concern of the First Amendment," he wrote. "The freedom of a university to make its own judgments as to education includes the selection of its student body."<sup>199</sup> A university's judgment that student body diversity promotes education therefore finds shelter under the First Amendment. Justice Powell could view choosing a diverse student body as a compelling interest based on this link to First Amendment values.<sup>200</sup>

It is not clear that the Court leaned heavily on the First Amendment in *Grutter*. To be sure, Justice O'Connor did note that "[w]e have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."<sup>201</sup> She also observed that Justice Powell, in recognizing student body diversity as a compelling interest, "invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy."<sup>202</sup> Yet Justice O'Connor never explicitly rested her own conclusion on the First Amendment. Her references to the First Amendment cited what the Court or Justice Powell had done in the past; she did not explicitly adopt those sources as reflecting the *Grutter* Court's interpretation. And her clincher, which followed these citations, did not depend on the First Amendment. Instead, it rested her conclusion that diversity is a compelling interest on (1) "our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission" and (2) a presumption of good faith.<sup>203</sup>

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198. *Id.* at 2339.

199. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

200. Justice Kennedy criticized the Court for abandoning "rigorous judicial review," which he associated with Justice Powell's *Bakke* approach. *Grutter*, 123 S. Ct. at 2370. Of course, Justice Powell did not need to measure the implementation of the Harvard College plan, which he approved but that was not before the Court.

201. *Id.* at 2339.

202. *Id.*

203. *Id.* Justice O'Connor noted:

The Court seemed, then, to be placing a lower hurdle for racial classifications benefiting minorities in admissions decisions than on those burdening them. A thought experiment helps test this proposition.<sup>204</sup> Imagine that a particular law school determined that student diversity would be served by admitting fewer Jewish, Asian-American, or, for that matter, African-American students and that the same institution designed a narrowly tailored Harvard College-type program to serve that end. Would the Court have deferred to such a policy to advance the compelling interest of student diversity in the narrowly tailored way here hypothesized? For Justice O'Connor to perform her strict scrutiny test consistently she would need to assess such a plan by asking whether campus diversity was a compelling interest and whether the minority restriction was narrowly tailored. Yet it is possible that such a program would be invalidated as a per se violation of the Equal Protection Clause without running it through the justificatory screen.<sup>205</sup> If this prediction is correct, it suggests that in fact the *Grutter* majority would treat differently preferences that benefit minorities from those that burden them.<sup>206</sup> This is as it should be. Ultimately, Justice O'Connor's decision to relax the strict scrutiny in *Grutter* is appropriate because racial preferences favoring minorities do not deserve the same degree of suspicion as do those burdening them.

Racial preferences for minorities find their justification on entirely different grounds than do those for whites. Minority preferences relate to disadvantages attributable to a history of oppression that compromise the ability of some minorities to compete and accordingly leave them under-represented on campuses and in various leadership and professional cohorts.<sup>207</sup> As Justice Marshall wrote in *Bakke*, "It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give

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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, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."

*Id.*

204. Cf. DWORKIN, *supra* note 107, at 313-14.

205. Indeed, Justices Ginsburg and Souter seemed to count the fact that a program favored disadvantaged groups and was not designed "to limit or decrease enrollment by any particular racial or ethnic group" as an important factor in assessing it. See *Gratz v. Bollinger*, 123 S. Ct. 2411, 2445 (2003) (Ginsburg, J., dissenting).

206. Cf. *Grutter*, 123 S. Ct. at 2361 (Thomas, J., concurring in part and dissenting in part) (referring to the Court's "implicit rejection of [the idea] that beneficial and burdensome racial classifications are equally invalid").

207. See, e.g., *Gratz v. Bollinger*, 123 S. Ct. 2411, 2443 (Ginsburg, J., dissenting) ("This insistence on 'consistency' would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law.") (citations omitted).

consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.”<sup>208</sup>

Preferences in favor of minorities, unlike their predecessors, do not reflect racial prejudice. Benevolent motives—to achieve campus diversity, to redress past wrongs, and to create a more pluralistic society—inform them. What makes racial classifications suspect is not that race is immutable. It is rather that such distinctions have historically reflected stereotypes based on prejudice.<sup>209</sup> There is a difference between programs of exclusion and those of inclusion,<sup>210</sup> or, in Justice Stevens’s formulation, “between a ‘No Trespassing’ sign and a welcome mat.”<sup>211</sup>

Finally, the reason to view race as a suspect classification does not apply when a minority is the beneficiary. Prejudice against “discrete and insular minorities” might distort the fair operation of “those political processes ordinarily to be relied upon to protect minorities.”<sup>212</sup> White majorities might discriminate against “discrete and insular minorities” who might not be able to form coalitions to defend their interests. Majorities do not face the same risks. As John Hart Ely explained:

There is no danger that the coalition that makes up the white majority in our society is going to deny to whites generally their right to equal concern and respect. Whites are not going to discriminate against all whites for reasons of racial prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks or to overestimate the costs of devising a more finely tuned classification system that would extend to certain whites the advantages they are extending to blacks. The function of the Equal Protection Clause . . . is largely to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves—or at least widespread elements of the constituency on which they depend for reelection. The argument does not work the other way around, however: similar reasoning supports no insistence that our representatives cannot hurt themselves, or the majority on whose

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208. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 401 (1978).

209. See DWORKIN, *supra* note 107, at 301.

210. See, e.g., *Gratz*, 123 S. Ct. at 2434 (Breyer, J., concurring); *id.* at 2444 (Ginsburg, J., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 316 (1986) (Stevens, J., dissenting).

211. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Steven, J. dissenting). Paul Freund exposed the difference in a 1964 article. He wrote:

There is finally the moral, and it may be the legal, difference between a preference in favor of a minority and one against it. Compare a trust fund donated to a university, the income to be used for the education of the descendants of John Hancock, and an unrelated fund for the education of anyone except those descendants. It would not be surprising if the governing board of the university felt differently about the two preferences, and judges might be animated by the same sense of justice in applying the constitutional guarantee of equal protection of the laws.

PAUL A. FREUND, *ON LAW AND JUSTICE* 47 (1968).

212. *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

support they depend, without at the same time hurting others as well. Whether or not it is more blessed to give than to receive, it is surely less suspicious.<sup>213</sup>

Ultimately, the argument for a uniform standard is unpersuasive. The notion of a color-blind Constitution might be a pleasing metaphor but “it is not a constitutional text.”<sup>214</sup> American society is color-conscious, not color-blind, and this is a fact that flows inexorably from our history. Race remains a potent defining characteristic.<sup>215</sup> To the extent a color-blind Constitution represents an aspiration, it can only be achieved by allowing greater tolerance for racial preferences that favor minorities than those that subjugate them.<sup>216</sup>

Indeed, the call for consistent application of strict scrutiny ignores the fact that American history has not been symmetrical. As Justice Marshall wrote in *Bakke*, “it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwillingly to hold that a class-based remedy for that discrimination is permissible.”<sup>217</sup>

To be sure, deciding which minorities merit preference and for how long might involve courts in making difficult judgments, as Justice Powell observed. Yet strict scrutiny does not relieve the judiciary from making these same judgments. Ultimately, it must make them in deciding whether justifications for particular preferences are compelling and whether the programs used are narrowly tailored. Moreover, these decisions will necessarily evolve over time based on changing historical circumstances.

Justice O’Connor is correct to apply a kinder, gentler scrutiny to admissions classifications designed to benefit disadvantaged minorities. Yet the insistence on the same standard to review both types of classification is unfortunate. It might confuse courts and attorneys involved in litigating the standards. They might understandably take their cues from Justice O’Connor’s words rather than her actions.

Moreover, the symmetrical language obscures the underlying issues at stake. It is not difficult to appreciate the Court’s desire to offer a formal test to handle these problems. Yet the emphasis on standards of review tends to divert attention from the underlying principles involved. Instead of focusing on the fundamental differences between racial classifications discriminating against blacks and those helping them, the use of a uniform standard tends to camouflage these issues behind a formal facade.

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213. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 170-71 (1980); *see also Adarand*, 515 U.S. at 247-48 (Stevens, J., dissenting) (distinguishing legislative decision to burden the minority from the majority race).

214. FREUND, *supra* note 211, at 45.

215. *See, e.g.,* DWORKIN, *supra* note 107, at 294.

216. *See, e.g.,* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J.) (“In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.”).

217. *Id.* at 400.

## 2. Narrowly Tailored

The *Grutter* Court's description of the "narrow tailored" prong suggested some flexing of that requirement as well. *Bakke* had established that race as used in the Harvard College plan was acceptable but set-asides were not. *Bakke* did not say, however, whether the Harvard approach touched the outer limit of constitutionality or whether mechanical approaches short of quotas were also within constitutional bounds.<sup>218</sup> In *Bakke*, Justice Powell rather easily found the Davis plan's sixteen-place set-aside was not narrowly tailored. Conversely, he found a plan, like Harvard's, which used race as a plus factor, constitutionally sufficient. Yet the University of California-Davis had not implemented the Harvard College's plan, and Harvard's conduct was not before the Court. Justice Powell accordingly could address the contours of the Harvard College plan without examining its application.

In *Grutter*, the parties litigated a Harvard-like plan and its implementation. *Grutter-Gratz* moved the lines *Bakke* had set in both directions. *Gratz* made clear that not only quotas but also mechanical allotments of substantial points were not narrowly tailored. The "automatic" award of points was a defective system because it was not individualized and because it tended to be outcome-determinative.<sup>219</sup> *Gratz* thereby tightened the fit requirement. On the other hand, *Grutter* stretched a bit the extent to which schools could use targets. The Harvard College plan had renounced using "set target-quotas" but acknowledged the need to pay "some attention to numbers" so that minorities would not be isolated.<sup>220</sup> Justice O'Connor made clear that a school could seek a "critical mass" of minority students without violating the Equal Protection Clause.<sup>221</sup> It could have "minimum goals for minority enrollment."<sup>222</sup> To that end, it could consult daily tracking reports to measure its success in admitting minorities.<sup>223</sup> Whereas Justice Powell suggested only that the weight given race might vary from year to year subject to the characteristics of the student body and applicant pool,<sup>224</sup> Justice O'Connor implied that more attention might be given to race. A school could give "greater 'weight' to race than to some other factors, in order to achieve student body diversity,"<sup>225</sup> Justice O'Connor explained, presumably so long as it did not do so in a way that made race or ethnicity "the defining feature"<sup>226</sup> of an applicant as had the

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218. See DWORKIN, *supra* note 107, at 306.

219. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2429-31 (2003). *But see id.* at 2432-33 (O'Connor, J., concurring) (criticizing the Michigan plan for a lack of "individualized review").

220. *Bakke*, 438 U.S. at 323.

221. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2343 (2003).

222. *Id.* at 2342.

223. *Id.* at 2343.

224. *Bakke*, 438 U.S. at 317-18.

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

226. *Id.* at 2343.



undergraduate school in the mechanical approach rejected in *Gratz*. To be sure, Justice O'Connor emphasized that race could not be the only diversity factor valued. The Law School scored points because it "does not . . . limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity."<sup>227</sup> It "gives substantial weight to diversity factors besides race,"<sup>228</sup> such as foreign travel, community service, and overcoming hardship. The Law School's program "considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race."<sup>229</sup>

Justice O'Connor's method of reviewing implementation suggested that the "narrow tailored" requirement allowed deference to the tailor's judgment rather than a close measure of snugness. She relied essentially on the testimony of admissions officers and the fact that the number of minority students who matriculated at the Law School varied from year to year. She largely ignored or dismissed evidence that suggested discrepancies in implementation. For instance, Chief Justice Rehnquist noted the large disparities between the numbers of African-Americans admitted compared to Native-Americans and wondered why the critical mass concept tolerated such differences. He pointed out the close resemblance between the percentage of minorities in each group who applied and those admitted.<sup>230</sup> Justice Kennedy also argued that the consistency in numbers suggested a hidden quota.<sup>231</sup>

Regardless of the merits of the debate, Justice O'Connor's lack of concern with these details seemed inconsistent with classic narrow tailoring. Instead of insisting that the Law School show a close fit, she seemed content to take a distant view. Indeed, Justice O'Connor made clear that narrow tailoring was not synonymous with the least restrictive alternative analysis.<sup>232</sup> The Law School must make a "good faith consideration of workable race-neutral alternatives," but it need not exhaust every last possibility nor need it compromise standards.<sup>233</sup>

The final characteristic of fit involved the projected life span of the preferences. Whereas *Bakke* was silent regarding the duration of racial

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227. *Id.* at 2344.

228. *Id.*

229. *Id.* at 2345.

230. *Grutter*, 123 S. Ct. at 2368.

231. *Id.* at 2371.

232. *Id.* at 2344 ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative."). *But see id.* at 2365 (Rehnquist, C.J., dissenting) (explaining that strict scrutiny requires that a racial classification fit the compelling interest "'with greater precision than any alternative means'") (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).

233. *Id.* at 2345.

preferences, *Grutter* said such programs “must be limited in time.”<sup>234</sup> Indeed, Justice O’Connor used imperative language repeatedly to emphasize the mandatory nature of a sunset provision.<sup>235</sup> Still, she hedged her bets as to when the sun would set. Contrary to Justice Thomas’s claim, she did not hold that race preference plans will end in twenty-five years. “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today,”<sup>236</sup> she wrote. Her use of “expect” left some wriggle room to account for developments during the next quarter century. As Justice Ginsberg put it, the twenty-five year concept was a “hope” rather than a “firm forecast.”<sup>237</sup>

Justice Thomas’s repeated characterization of the Court’s “holding” that race preferences in higher education “will be illegal in 25 years” reflected either wishful thinking, sloppy reading, or deliberate distortion.<sup>238</sup> Indeed, Justice Thomas supported his interpretation of the Court’s decision by a parenthetical explanation that the majority “stat[ed] that racial discrimination will no longer be narrowly tailored, or ‘necessary to further’ a compelling state interest in 25 years.”<sup>239</sup> The majority said no such thing. Justice O’Connor prefaced her language with “we expect.” The verb, which Justice Thomas conveniently ignored, controlled the sentence and revealed Justice Thomas’s misreading. By contrast, Chief Justice Rehnquist accurately depicted the majority’s language as a tentative suggestion.<sup>240</sup>

The approach that the Court endorsed makes it more difficult for judicial scrutiny of admissions plans to take place because it requires that such decisions consider various subjective factors on a case-by-case basis. No doubt, it will be more difficult and more expensive for admissions offices to do their work than it would have been if *Gratz* had been decided the other way. Individual admissions officers might pursue their own agendas and consider

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234. *Id.* at 2346.

235. *Grutter*, 123 S. Ct. at 2346 (stating that “race-conscious admissions policies must be limited in time;” “the requirement that all governmental use of race must have a logical end point;” “[t]he requirement that all race-conscious admissions programs have a termination point”).

236. *Id.* at 2347.

237. *Id.* at 2348.

238. *See id.* at 2350 (“I agree with the Court’s holding that racial discrimination in higher education admissions will be illegal in 25 years.”); *id.* at 2363-64 (“The Court also holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School’s fabricated compelling state interest.”); *id.* at 2364 (“Nor is the Court’s holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time.”); *id.* at 2365 (“I therefore can understand the imposition of a 25-year time limit only as a holding . . .”).

239. *Id.* at 2350-51.

240. *Grutter*, 123 S. Ct. at 2369-70 (“The Court suggests a possible 25-year limitation on the Law School’s current program.”).

race to the exclusion of other forms of diversity. Yet under the approach the Court has approved in *Grutter*, these activities will take place largely below the judicial radar screen and Justice O'Connor has signaled that courts need not insist on a skin-tight fit to accept a plan.

## V. THE RATIONALE FOR RACE PREFERENCES

*Grutter* is most significant for the way it might transform the debate about the justifications of race preferences. Justice O'Connor expanded Justice Powell's student diversity rationale to incorporate instrumental goals. Whereas Justice Powell saw diversity essentially as a means to enhance campus discussion, Justice O'Connor saw it as a way also to achieve basic American ideals regarding a racially pluralistic society. In order to appreciate the contributions that *Grutter* makes, it is useful to consider the ways in which race preferences have been justified.

### A. *Justifying Race Preferences: A Historical View*

The idea that diversity contributes to education is neither new nor historically dependent upon the debate about race preferences. On the contrary, long before *Bakke*, or even *Brown*, universities appreciated the advantages of student body diversity.<sup>241</sup> To be sure, early applications of the concept did not include race. Instead, universities defined diversity largely as exposure to competing ideas.<sup>242</sup> Not surprisingly, proponents of diversity soon came to recognize that the vital assortment of ideas would more likely characterize a campus that included students from different regional, national, economic, and ethnic backgrounds.<sup>243</sup> The concept of educational diversity was not artificially contrived to justify racial preference. Rather, it preceded race preference as an educational strategy, but eventually expanded to include race as a relevant factor.

Student body diversity was not, however, always the only, or even the preferred, rationale for racial preferences in admissions. Historically, proponents advanced two other justifications. First, a compensatory or remedial justification grew from the premise that African-Americans have historically gotten a bad deal in America, that the history of slavery, Jim Crow, and social ostracism have denied them anything approximating a fair and equal

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241. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 218-19 (1998) (demonstrating that the "concept of diversity is far from new in American higher education"); NEIL L. RUDENSTINE, *The University and Diversity*, in *POINTING OUR THOUGHTS: REFLECTIONS ON HARVARD AND HIGHER EDUCATION, 1991-2001*, at 17 (2001) (collection of addresses and essays tracing diversity at Harvard to the mid-Nineteenth Century).

242. Neil L. Rudenstine, *Diversity and Learning at Harvard: A Historical View*, Address to the Massachusetts Historical Society (Nov. 6, 1996), in RUDENSTINE, *supra* note 241, at 23.

243. *Id.* at 24.

opportunity. Racial discrimination is not entirely a vice of the distant past; rather “conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”<sup>244</sup> The history of unfair treatment has produced disparities between the educational attainments and economic status of African-Americans as compared to white Americans.<sup>245</sup> These handicaps have undermined the ability of African-Americans to compete. Racial preference was seen as a strategy to remedy that history of abuse, to put African-Americans in the position they would have been in absent this history of mistreatment.<sup>246</sup> President Lyndon B. Johnson put it well during his 1965 address at Howard University. He said:

But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.<sup>247</sup>

Compensatory arguments take race into account in at least four different contexts. First, they are offered as a reason for awarding relief to a particular plaintiff who was denied something by a particular defendant based upon race. This paradigm involves no exceptional remedy; awarding relief to actual victims should not be seen as race preference. Rather, it simply involves granting a conventional judicial remedy to redress harm one party has caused another. Indeed, this variation is not controversial and every justice who has sat on the Court during the last quarter century (if not longer) would have no trouble accepting it.<sup>248</sup>

A second form of race sensitivity arises when a candidate’s race might act as a surrogate for a set of obstacles overcome. “It is simply not possible to

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244. *Grutter*, 123 S. Ct. at 2347-48 (Ginsburg, J., concurring).

245. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 395-96 (1978) (Marshall, J.).

246. *See generally* Frank Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65 (1969).

247. President Lyndon B. Johnson, Address at Howard University, 2 PUB. PAPERS 636 (June 4, 1965).

248. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J. concurring) (supporting a hypothetical order raising the salaries of black employees in response to past discriminatory conduct); *see also Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 239 (1995) (Scalia, J., concurring) (stating that “[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole . . .”).

understand how individuals have come to be the people they are without considering the elements that have shaped them,” wrote William G. Bowen in 1977.<sup>249</sup> The achievements of a person of color might, in certain instances, reflect “a degree of drive and determination that should be given weight in the competition for admission.”<sup>250</sup> Such relative judgments might be difficult, subjective and contested. Yet analytically the principle is not controversial. It amounts to a judgment that, but for a disadvantage, a particular individual’s achievement to date would have been sufficient to merit a benefit. It might also suggest potential for further performance. As such, this form of race preference is fully consistent with a meritocratic system.

A third type of compensatory argument involves situations where an institution or class of institutions has been identified as having discriminated based on race in the past.<sup>251</sup> Here, racial preference might extend beyond victims of that action to others of the same race even though all beneficiaries might not have been specific victims. This paradigm is also widely supported.

The fourth variation of the compensatory claim is that racial preference is merited to address societal discrimination even absent a finding of wrongdoing by the institution in question. This version is controversial. It was at issue in *Bakke* where it won the endorsement of four justices,<sup>252</sup> but was rejected by

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249. WILLIAM G. BOWEN, *Admissions and the Relevance of Race*, in EVER THE TEACHER: WILLIAM G. BOWEN’S WRITINGS AS PRESIDENT OF PRINCETON 422, 430 (1988); see also Brief of Massachusetts Institute of Technology et al. at 23, *Grutter*, 123 S. Ct. 2325 (2003) (Nos. 02-241, 02-516).

250. See BOWEN, *supra* note 249, at 430. Justice Douglas took note of this in his dissent in *DeFunis v. Odegaard*:

A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance, and ability that would lead a fairminded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would be offered admission not because he is black, but because as an individual he has shown he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered him. Because of the weight of the prior handicaps, that black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria.

*DeFunis v. Odegaard*, 416 U.S. 312, 331 (1974) (Douglas, J., dissenting).

251. See, e.g., *Hopwood v. Texas*, 236 F.3d 256, 273 (5th Cir. 2000) (holding that the government can use race preferences to remedy “present effects of past discrimination”); *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion) (explaining that discriminatory conduct created a justification for race-conscious relief).

252. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 369 (1978) (Brennan, J., concurring in part and dissenting in part). According to Justice Brennan:

Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe

Justice Powell in his decisive opinion: “We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”<sup>253</sup> Justice Powell’s statement suggested two problems. First, remedying societal discrimination was “an amorphous concept of injury that may be ageless in its reach into the past.”<sup>254</sup> The rationale involved “sheer speculation.”<sup>255</sup> Second, regardless of the merits of the rationale, universities could not address it. Their business was education; they were not judicial, legislative, or administrative institutions. Accordingly, they were not competent to make the requisite findings.<sup>256</sup> The societal discrimination rationale has never commanded a majority on the Court. Responding in part perhaps to prevailing judicial doctrine, leading universities go out of their way to reject it.<sup>257</sup> Michigan did not invoke it in *Grutter* or *Gratz* and no justice wrote an opinion championing it.<sup>258</sup>

Justice Powell might have pointed out other problems universities would encounter if the societal discrimination compensatory argument was used as the basis for race preferences in admissions. Those who suffered most from such discrimination, and accordingly who would have the strongest claim to compensation, might not be the best candidates for undergraduate or professional schools. Committing spaces to such candidates might poorly allocate precious resources. This objection might be met by limiting race preference as compensation to those who were very qualified. Such a limitation, though entirely sensible, would suggest a criteria other than compensation at work. Moreover, a compensatory approach might not help many African-Americans. Some African-Americans might have a modest, or no, claim to compensation based on disadvantage suffered. Some from other backgrounds might have strong claims to have suffered from economic

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that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. There is no question that Davis’ program is valid under this test.

*Id.*

253. *Id.* at 307.

254. *Id.*

255. *Richmond v. J.A. Croson Co.*, 488 U. S. 469, 499 (1989) (O’Connor, J.).

256. *Bakke*, 438 U. S. at 309. *Cf.* Thomas Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. 348, 356-58 (1973) (reform of system of rewards beyond capacity of educational institutions).

257. *See, e.g.*, Brief of Massachusetts Institute of Technology et al. at 23, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241, 02-516) (“Neither MIT nor Stanford makes admission decisions to compensate for past wrongs.”).

258. To be sure, Justice Ginsburg pointed out an array of disparities between races related to past and present discrimination. But her discussion was largely oriented to contending for a lower level of scrutiny for minority preferences rather than supporting the societal discrimination rationale. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2443-45 (2003) (Ginsburg, J., dissenting).

circumstances, prejudice, or other disadvantage.<sup>259</sup> Some groups, who might have suffered from discrimination, might be well-represented at universities already. The entire enterprise would be fraught with controversy and would put universities in the business of redistributive justice, an activity far from their basic mission.

Alternatively, proponents of racial preferences identify certain instrumental justifications that would promote social well-being outside of the campus. The common premise of these arguments is that social utility will increase and the world will be a better place if more African-Americans and certain other minorities have access to a greater share of society's resources. For instance, in *Bakke*, the University argued that reserving medical school spots for minorities would improve the delivery of medical care to underserved minority communities.<sup>260</sup> Alternatively, some cite society's need for more minorities in leadership positions as a ground for considering race in admissions.<sup>261</sup> Other such instrumental justifications include providing role models<sup>262</sup> and developing an expanded African-American upper middle class "able to pass its material advantages and elevated aspirations to subsequent generations."<sup>263</sup>

These instrumental justifications for race preferences might seem primarily oriented to helping African-Americans and other disadvantaged populations. To be sure, that outcome is consistent with these purposes. Yet many such rationales benefit the whole community. In some roles, African-Americans might be more successful than whites. It is plausible to suggest that African-

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259. Excluded from this discussion are disadvantages because of different distributions of traits and talents that arguably produce the greatest disparity in rewards. *See, e.g.,* Nagel, *supra* note 256, at 353-58.

260. *See* Nagel, *supra* note 256, at 361 (arguing for race preferences to increase black doctors on utilitarian grounds). *Cf.* Karst & Horowitz, *supra* note 62, at 970 (arguing for race preferences as a way to improve legal representation for minorities).

261. *See, e.g.,* BOWEN, *supra* note 249, at 430. For a discussion of the role of universities in educating office holders, see AMY GUTMANN, *DEMOCRATIC EDUCATION* 181-85 (1987).

262. Ronald Dworkin called the role model rationale "a calculation of strategy." He explained:

[T]hat increasing the number of blacks who are at work in the professions will, in the long run, reduce the sense of frustration and injustice and racial self-consciousness in the black community to the point at which blacks may begin to think of themselves as individuals who can succeed like others through talent and initiative.

DWORKIN, *supra* note 107, at 294; Karst & Horowitz, *supra* note 62, at 970; *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) (endorsing the role model theory in public schools). Others criticize this rationale. *See, e.g.,* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222 (1991) (criticizing affirmative action's reliance on the instrumental rather than the compensatory rationale); *id.* at 1226-31 (criticizing the role model rationale).

263. Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986).

American police officers might have better rapport in some minority communities than would an all-white complement. If this interaction translates into less crime, the entire community benefits.<sup>264</sup> Moreover, rudimentary economic principles suggest communal benefits might flow from some race preferences. The relative lack of minorities as doctors, lawyers, or chief executive officers suggests an under-utilization of human resources, which, if tapped, would better society. Programs that identify and prepare talented African-Americans for these roles might help society increase overall productivity by making better use of the pool of human capital. Finally, success of African-Americans and other disadvantaged minorities is critical to moving social reality closer to basic American ideals. America's democratic character becomes less evident if minorities cannot participate in meaningful ways in civic life. The American dream is revealed as part fantasy if it only applies to whites.

The compensatory and instrumental rationales provided part of the argument for race preferences in the early days. Student body diversity was by no means the dominant factor. Writing before *Bakke* was decided, McGeorge Bundy, then-President of the Ford Foundation, suggested that remedying societal discrimination was the primary rationale for racial preferences. He wrote:

Many legitimate purposes have animated those engaged in this effort, but the deepest and most general objective—toward which any one school or college can do only a little—has been to ensure full and fair access to all parts of our social, economic, and professional life for nonwhite Americans. Of course *all* kinds of Americans deserve such access, and it is right to remember from the outset that no past injustice permits us to set any one group above any other. But there can be no blinking the enormous and unique set of handicaps which our whole history, right up to the present, has imposed on those who are not white. It is not the fault of today's laws or of the present Supreme Court that racism should be our most destructive inheritance. But that reality makes the effort to overcome it a matter of the most compelling interest.<sup>265</sup>

He suggested that “what special admissions, and only special admissions, can do today is to make access to the learned profession a reality for nonwhites.”<sup>266</sup>

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264. *Wygant*, 476 U.S. at 314 (Stevens, J. dissenting); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 601-02 (1990) (Stevens, J., concurring); *see also Kennedy*, *supra* note 263, at 1329 (stating that affirmative action within police force often leads to improved public safety for everyone). *But see Alexander & Alexander*, *supra* note 43, at 227-29 (criticizing the use of racial criteria in choosing police officers).

265. McGeorge Bundy, *The Issue Before the Court: Who Gets Ahead in America?*, *THE ATLANTIC MONTHLY*, Nov. 1977, at 42; *see also DEREK BOK, BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY*, 102-03 (1982).

266. Bundy, *supra* note 265, at 54.



Some proponents of racial preference in admissions invoked the instrumental argument that society needed more blacks in professional and leadership positions. In 1969, Dean Louis Pollak cited this objective to explain Yale Law School's decision to increase its number of African-American students. He wrote:

For me, a large part of the answer lies in the fact, which we lawyers have only belatedly realized, that far too few black citizens are being trained for positions of future leadership. Leadership-training is needed on many fronts, but it seems particularly clear that the country needs far more—and especially far more well-trained—black lawyers, bearing in mind that today only 2 or 3 percent of the American bar is black.<sup>267</sup>

Dean Pollak did not cite student body diversity in his defense.

Similarly, the University of Washington School of Law cited instrumental rationales for the admissions policy it adopted in December 1973: “[C]ertain ethnic groups in our society have historically been limited in their access to the legal profession . . . [that] can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities.”<sup>268</sup> The policy made no mention of the benefits of a diverse student body.

As suggested by the discussions of Dean Pollak and Mr. Bundy, the remedial and instrumental rationales, not diversity, dominated early discussion of the merits of race preferences in admissions. Yet clearly, student diversity was embraced as a desirable goal in and of itself pre-*Bakke*. In different contexts, the Court's prior jurisprudence hinted at the merit of the rationale.<sup>269</sup> The Harvard College plan celebrated it.<sup>270</sup> Similarly, the Supreme Court of Washington recognized student body diversity as a compelling state interest in *DeFunis v. Odegaard*.<sup>271</sup> It said:

The legal profession plays a critical role in the policy making sector of our society, whether decisions be public or private, state or local. That lawyers, in making and influencing these decisions, should be cognizant of the views, needs and demands of all segments of society is a principle beyond dispute.

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267. Louis H. Pollak, *Dean Pollak Replies*, THE PUBLIC INTEREST, Spring 1970, at 50, 51 (letter from Dean Louis Pollak to Hon. Macklin Fleming (June 29, 1969)).

268. *DeFunis v. Odegaard*, 416 U.S. 312, 346-47 (1974) (Appendix to Opinion of Douglas, J., dissenting).

269. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (school authorities could conclude “that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students”); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (indicating the need to study law in a context of “interplay of ideas and the exchange of views with which the law is concerned”); see also O’Neil, *supra* note 54, at 949.

270. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-17 (1978).

271. 507 P.2d 1169, 1184 (Wash. 1973).

The educational interest of the state in producing a racially balanced student body at the law school is compelling.<sup>272</sup>

So, too, did an influential essay that William G. Bowen, then-President of Princeton University, wrote in 1977.<sup>273</sup> Dr. Bowen pointed out that “a great deal of learning occurs informally” through “interactions” among students from “different races, religions, and backgrounds.”<sup>274</sup> These contacts have value. He wrote:

Our society—indeed our world—is and will be multiracial. We simply must learn to work more effectively and more sensitively with individuals of other races, and a diverse student body can contribute directly to the achievement of this end. One of the special advantages of a residential college is that it provides unusually good opportunities to learn about other people and their perspectives—better opportunities than many will ever know again. If people of different races are not able to learn together in this kind of setting, and to learn about each other as they study common subjects, share experiences, and debate the most fundamental questions, we shall have lost an important opportunity to contribute to a healthier society—to a society less afflicted by the failure of too many people to understand and respect one another.<sup>275</sup>

In the same essay, Dr. Bowen stressed the instrumental rationale “that our country needs a far larger number of able people from minority groups in leadership positions of all kinds.”<sup>276</sup> Dr. Bowen rejected “‘proportional representation’ of different races or ethnic groups in various professions.” But, he argued, one could oppose that approach yet “still refuse, as I do, to regard as acceptable the present disparities which are clearly products of generations of unfair treatment.”<sup>277</sup>

272. *Id.* at 1183-84; *see also* Sandalow, *supra* note 65, at 684-86 (educational responsibility of law schools includes exposing law students to diversity of population). *But see* Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1 (criticizing the diversity rationale).

273. *See* BOWEN, *supra* note 249, at 422-36. Dr. Bowen’s article was cited in Justice Powell’s *Bakke* opinion. *See Bakke*, 438 U.S. at 313 n.48.

274. *See* BOWEN, *supra* note 249, at 427.

275. *Id.* at 429; *see also* Karst & Horowitz, *supra* note 62, at 970 (discussing the importance of bringing “to both the classroom and the profession effective voices representing a culture and a set of experiences hitherto largely hidden from the majority”).

276. BOWEN, *supra* note 249, at 430. Samuel Issacharoff offers a contrasting view:

The early rationale for affirmative action . . . was clearly integrationist. Society was taking responsibility for minorities’ past subordination. Based on this moral authority, a forward-looking claim emerged about the necessity to improve the status of minorities, with blacks as the overwhelming case in chief, so as to promote their integration into mainstream American society. No one seriously claimed that the prime benefit would come from the improvement of the internal life of the affected institutions.

Samuel Issacharoff, *Law and Misdirection in the Debate Over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 23 (2002).

277. BOWEN, *supra* note 249, at 430-31.

Dr. Bowen's double-barreled attack was imitated by others. In an amicus brief in *Bakke*, four leading universities identified two problems from the fact that their student bodies were "overwhelmingly white." First, by not enrolling significant numbers of minority students, they "were continuing to deny intellectual house room to a broad spectrum of diverse cultural insights, thereby perpetuating a sort of white myopia among students and faculty in many academic disciplines."<sup>278</sup> Second, they were doing "next to nothing to enlarge the minute minority fraction . . . of the pool of persons with doctoral-level graduate and professional training" from which universities drew faculty "and also the pool from which, increasingly, local and national leaders in the public and private sectors tend to be selected."<sup>279</sup> "[M]aking conscious efforts" to include minority students helped universities discharge their "function of providing tomorrow's leaders in all walks of life."<sup>280</sup> The brief presumed the desirability of "increasing the number of minority doctors, judges, corporate executives, university faculty members and government officials," an objective that would not occur unless qualified minority students were given educational opportunity.<sup>281</sup>

*Bakke* shifted the terms of the discussion. Justice Powell embraced the student body diversity rationale while either rejecting, or expressing reservations about, the other justifications. Reducing the "historic deficit" of minorities in professions was objectionable, at least if tied to "some specified percentage."<sup>282</sup> Countering the "effects of 'societal discrimination'" required identified wrongdoing as found by an authoritative governmental body.<sup>283</sup> Justice Powell rejected the instrumental goal of fostering more equitable health care delivery because the University had failed to present sufficient evidence that its program would promote that goal.<sup>284</sup> Although *Bakke* did not categorically reject instrumental rationales, it did not embrace them. Instead, it adopted a narrow conception of diversity grounded in First Amendment values and focused on the value diversity added to campus life. Subsequent cases did little to encourage instrumental arguments. For instance, the Court criticized the role model theory in *Wygant v. Jackson Board of Education* as lacking a "logical stopping point."<sup>285</sup> Moreover, the idea threatened a return to

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278. Brief of Columbia University et al. at 3, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811).

279. *Id.*

280. *Id.* at 8.

281. *Id.*

282. *Bakke*, 438 U.S. at 305, 307.

283. *Id.* at 307.

284. *Id.* at 310-11. *But see* *DeFunis v. Odegaard*, 507 P.2d 1169, 1184 (Wash. 1973) (recognizing the shortage of minority attorneys as a compelling interest).

285. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986).

segregated schools if “[c]arried to its logical extreme.”<sup>286</sup> Justice O’Connor argued that Justice Powell in *Bakke* had “decisively rejected” the “desire to have more black medical students or doctors” as discriminatory; the desire to increase professional classes of African-Americans was unconstitutional.<sup>287</sup> Accordingly, Justice Powell’s student diversity rationale emerged as the only possible justification for race preference in admissions programs, although the justification was controversial.<sup>288</sup> Justice O’Connor seemed to endorse some notion of racial diversity as “compelling,” at least in the case of higher education.<sup>289</sup> But she had rejected diversity in other contexts and had suggested that remedying past discrimination was the only compelling interest the Court had accepted.<sup>290</sup> Diversity was “simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.”<sup>291</sup>

Following *Bakke*, many universities designed their admissions programs to fit within the boundaries Justice Powell drew.<sup>292</sup> To be sure, Justice Powell’s campus-focused diversity rationale had some genuine merit. Students learn more in heterogeneous communities than when exposed solely to those from similar backgrounds.<sup>293</sup> The diversity rationale also introduced race preferences into a strategy to which universities have been committed for decades. Selective universities do not simply admit those students with the most robust grade point averages and standardized scores. They measure applicants based upon a range of qualities as well as against the strengths and weaknesses of the rest of the class. They look for the violinist, the journalist,

286. *Id.* at 276; *see also id.* at 288-89, 288 n.1 (O’Connor, J., concurring) (criticizing the role model “racial diversity” rationale).

287. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (“The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was ‘discrimination for its own sake,’ forbidden by the Constitution.”).

288. *See, e.g.*, *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1245-50 (11th Cir. 2001) (Powell’s opinion not binding precedent); *Hopwood v. Texas*, 236 F.3d 256, 274-75, 275 n.66 (5th Cir. 2000) (same); *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (same). *But see* *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1198-1201 (9th Cir. 2000) (Powell’s *Bakke* opinion constitutes law).

289. *See Wygant*, 476 U.S. at 286 (1986).

290. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612 (1995).

291. *Id.* (stating that broadcast diversity is “clearly not a compelling interest.”). *But see* *Amar & Katyal*, *supra* note 121, at 1761-68 (arguing that Justice O’Connor’s opinion did not repudiate *Bakke*, but only repudiated an extension of the principle beyond the educational context and distinguishing the troublesome features of affirmative action identified by O’Connor).

292. *See, e.g.*, Brief of Amherst College et al. at 27, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (Nos. 02-241, 02-516) (indicating that twenty-eight signatory small colleges and universities fashioned policies based on Justice Powell’s opinion); Brief of Judith Areen et al. at 12-13, *Grutter*, 123 S. Ct. 2325 (Nos. 02-241, 02-516) (ten leading law schools base the school’s admission program on Justice Powell’s opinion).

293. *See generally* BOWEN & BOK, *supra* note 241.

the poet, the shortstop. They also look for students from different backgrounds, places, and walks of life. When one accepts the virtue of a campus that includes students with varied qualities and characteristics, as have selective American universities for some time, adding race to the mix represents a new variation on an old theme. To be sure, preferring a student based on race raises some concerns not present when simply looking for a high-jumper or percussionist. Whether these issues can be mitigated depends in part on the design and implementation of the preference. The point here is simply that the diversity rationale reflects a variation on a long-standing commitment of universities.

Moreover, the diversity rationale introduced a new argument that made racial preferences more palatable. The compensatory rationale imagined a zero-sum game with winners and losers fighting over the same scarce resources. Its nomenclature was divisive. It conceived the relevant universe as consisting of wrongdoers (or their progeny) and victims. The diversity rationale transformed the debate by broadening the beneficiaries. To be sure, African-Americans and other minorities benefit. Exposure to whites on a diverse campus is valuable,<sup>294</sup> especially to those minorities who seek to achieve high levels of influence and accordingly must fare well in environments that whites dominate. Yet the diversity rationale helps whites, too.<sup>295</sup> The exposure to racial and ethnic minorities enhances their education, exposing them to new insights and providing experience in interacting in an interracial context that will help them succeed. Because more whites attend selective schools than do blacks, on one measure at least, whites arguably benefit more from diversity than do minorities: "While the minority students would benefit incidentally from such a program, the primary beneficiaries would be the institution and the students whose educational experience would be enriched by contact with a broader segment of society."<sup>296</sup> Indeed, evidence suggests that students of all races appreciate the contribution diversity makes to their education.<sup>297</sup> Everyone is a winner (except perhaps for the isolated whites who lose spots to preferred minorities).

Moreover, the diversity rationale mitigated the stigma attached to race-conscious admissions. Under its logic, African-Americans and other minorities were contributors to, not just beneficiaries of, campus life. They

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294. *Id.* at 222.

295. *Cf.* *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 568 (1990) (discussing how broadcast diversity redounds to society at large). In this respect, there is an inescapable irony in the diversity rationale. It was once claimed that integrated schools would help black students learn better by exposing them to more academically advanced white peers. The diversity rationale inverted that standard argument. It suggests that white students will learn better if they are exposed to minority students.

296. O'Neil, *supra* note 54, at 949.

297. BOWEN & BOK, *supra* note 241, at 218-55.

were being admitted because they brought something to the campus that it needed. The experiences associated with being black in America were a valued credential, just as having a reliable jump-shot or being from Wyoming or an alumni child were all valued credentials. Recognizing the multitude of such factors, as the Harvard College plan did, diminished the stigma attached to race.

Finally, the diversity rationale accorded universities the greatest latitude when acting within their expertise. Universities are most competent to make judgments regarding how to define, and deliver, education. Accordingly, if universities believe that campus diversity has pedagogical value, as most have argued, that conclusion deserves some respect. They are less competent, however, at determining who society has harmed and who should be sacrificed to compensate those deemed disadvantaged.

Yet diversity, as Justice Powell conceived it, had some clear drawbacks. Justice Powell's diversity rationale deviated from the initial purpose behind race preferences. Affirmative action was initially part of the remedy to give African-Americans a fair shake. It gave a benefit to African-Americans to undo the burden that American history had imposed and to allow them to participate in the American dream.<sup>298</sup> Justice Powell's diversity rationale had an entirely different focus. It justified racial preference, not as a means to help disadvantaged minorities, but as a strategy to allow universities to enhance educational quality.<sup>299</sup> It might be, as some suggest, that African-Americans historically have only been able to advance when their interests coincide with those of the larger community or at least some powerful faction of it.<sup>300</sup> Yet it was somewhat perverse to deny that race-conscious admissions served instrumental rationales related to race and to instead treat educational quality as the only articulated rationale, as it was in Justice Powell's opinion in *Bakke*. Alternatively, some contended that diversity was merely an argument of convenience, not the real rationale.<sup>301</sup>

Moreover, diversity might not be the best rationale to advance African-Americans. Diversity might broaden the class of preferred candidates.<sup>302</sup> The

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298. See, e.g., Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) ("The purpose of affirmative action is to bring into our nation's institutions more blacks, more Hispanics, more Native Americans, more women, sometimes more Asians, and so on—period. . . . In fact, the true, core objective of race-based affirmative action is nothing other than helping blacks.").

299. See, e.g., O'Neil, *supra* note 54, at 949.

300. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

301. See, e.g., Rubenfeld, *supra* note 298, at 471; Peter H. Schuck, *Affirmative Action: Past, Present and Future*, 20 YALE L. & POL'Y REV. 1, 34 (2002).

302. See, e.g., Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky But Classical Liberal Defense*, 100 MICH. L. REV. 2036, 2040 (2002) (stating that "diversity is a trope that may sweep too broadly, for it allows, indeed requires, the accommodation of all minority

child of Appalachia or of immigrant farm workers, the new immigrant from Iran or Russia, and the Alaskan Eskimo might all diversify a campus. To the extent these and other groups claim “diversity” spots, those available for African-American candidates will be diminished. Yet diversity, as Justice Powell justified it, would seem to value potential contributions of candidates from these groups no less than those of African-Americans.

*B. Grutter’s Justification of Race Preferences*

Notwithstanding these problems associated with the diversity rationale, *Bakke* left it the only available justification of a race-conscious admissions program at a university not guilty of past discrimination. Indeed, parties shied away from invoking other justifications. The societal discrimination rationale clearly could not command a majority. In *Grutter*, representatives of the Law School were quick to deny any remedial intent. The School’s policy spoke of its “commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against.”<sup>303</sup> Justice O’Connor reported that the drafter “explained that this language did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination.”<sup>304</sup> Michigan’s brief focused entirely on arguing that student body diversity was a compelling state interest, that *Bakke* recognized such a rationale, and that Michigan’s plan was narrowly tailored to fit it. Michigan did not attempt to persuade the Court of arguments it had previously rejected. Instead, it hammered at the benefits of student diversity.

At a superficial level, the Court in *Grutter* simply adopted Justice Powell’s student diversity rationale. Justice O’Connor made a point of noting that Michigan Law School, before the Court and throughout the litigation, “assert[ed] only one justification for their use of race in the admissions process,” that rationale being the diversity justification.<sup>305</sup> The Court claimed that the narrowly tailored compelling interest that justified a racial classification was “the educational benefits that flow from a diverse student

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groups, not just blacks who have nationwide suffered the stain of slavery and past discrimination”).

303. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2334 (2003) (internal quotations omitted).

304. *Id.*

305. *Id.* at 2338. The Court quoted Michigan as resting on “the educational benefits that flow from a diverse student body.” *Id.* (quoting Brief for Respondent at i, *Grutter*, 123 S. Ct. 2325 (No. 02-241)). In fact, Michigan added the words “to an institution of higher education, its students, and the public it serves.” Brief for Respondent at i, *Grutter*, 123 S. Ct. 2325 (No. 02-241).

body.”<sup>306</sup> That rationale suggested that a diverse student body fostered high quality education, that students can best learn to address a multicultural society and world if they learn and gain experience on campuses consisting of students from different racial and ethnic backgrounds. Thus, in *Bakke*, Justice Powell observed that medical students, who might one day “serve a heterogeneous population,” would benefit from exposure in graduate school to students from different backgrounds.<sup>307</sup> In *Grutter*, Justice O’Connor found “substantial” educational benefits flow from diversity. These include cross-racial understanding that erodes racial stereotypes, richer classroom discussion, and better preparation for participating in a diverse workforce.<sup>308</sup>

In fact, *Grutter* went well beyond Justice Powell’s *Bakke* opinion in the rationales it recognized for race preferences. While repeatedly sounding the student diversity chord, Justice O’Connor signaled her novel approach in several ways.

First, although she discussed *Bakke* extensively, she specifically avoided treating it as binding precedent. Instead, the Court simply endorsed Justice Powell’s view that student body diversity was “a compelling state interest that can justify the use of race in university admissions.”<sup>309</sup> In declining to give *Bakke* stare decisis effect, the Court avoided a main argument Michigan’s Law School made. Indeed, the Law School began its brief by stating the “essential holding”<sup>310</sup> of *Bakke* that “a University may consider race in admissions”<sup>311</sup> and claiming that “Settled Principles of Stare Decisis Strongly Counsel Against Overruling *Bakke*.”<sup>312</sup> Michigan Law School spent three pages applying the criteria for stare decisis from the *Casey* plurality opinion. Although Justice O’Connor and Justice Souter were two of the three co-authors of the *Casey* plurality, they elected not to analyze the problem in that mode.

Second, Justice O’Connor muted Justice Powell’s reliance on the First Amendment. The First Amendment had allowed Justice Powell to affirm the use of race in admissions decisions without basing his opinion on the need to address America’s race problems. Justice Powell explicitly grounded student body diversity in the protection the First Amendment gave universities to make judgments regarding academic and pedagogic matters. Justice O’Connor’s reliance on the First Amendment was softened and ambiguous. She attributed every reference to the First Amendment or free speech to Justice Powell or

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306. *Grutter*, 123 S. Ct. at 2338 (quoting Brief for Respondent at i, *Grutter*, 123 S. Ct. 2325 (No. 02-241)); see also *id.* at 2329 (noting the “educational benefits that diversity is designed to produce”); *id.* at 2341 (noting the “educational benefits of a diverse student body”).

307. *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 314 (1978).

308. *Grutter*, 123 S. Ct. at 2339-40.

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

310. Brief for Respondent at 12, *Grutter*, 123 S. Ct. 2325 (No. 02-241).

311. *Id.* at 15.

312. *Id.* at 17.



earlier Court decisions rather than asserting the connection herself. And she rested her conclusion that Michigan had a compelling state interest in student body diversity on a belief that the rationale was “at the heart of the Law School’s proper institutional mission” and the school’s good faith should be presumed.<sup>313</sup> To be sure, she did not reject the First Amendment as a basis for her conclusion, but she hardly trumpeted it either.

Finally, whereas Justice Powell’s discussion focused almost entirely on the impact of diversity on the campus, Justice O’Connor saw the payoff as occurring primarily *after* graduation. Justice Powell made only one comment regarding the post-campus benefits of student body diversity, acknowledging, almost in passing, that exposure to a diverse student body might “better equip” future doctors “to render with understanding their vital service to humanity.”<sup>314</sup>

Justice O’Connor devoted pages to the topic.<sup>315</sup> She accepted the argument of “major American businesses” that America’s economic well-being was related to diversity: “[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>316</sup> This argument resembled in some respects Justice Powell’s passing reference to the benefits of campus diversity on post-campus life. But whereas that single reference represented the furthest Justice Powell strayed from campus, this justification represented Justice O’Connor’s most modest argument and one to which she devoted barely more than a sentence.<sup>317</sup>

The *Grutter* Court implicitly relied on other justifications that went well beyond those that Justice Powell identified as well. Student body diversity was not simply a strategy to promote the robust exchange of ideas and learning on campus and to expose college and graduate students to a heterogeneous peer group. The Court also saw it as a way to educate more African-Americans and other disadvantaged minorities. The Court thought this rationale important for several reasons.

First, the Court tied race-sensitive admissions to national security. An amicus brief by an impressive list of military leaders argued that race-conscious admissions programs were necessary to protect national security, the most compelling state interest.<sup>318</sup> National security depended on a “cohesive military” that required “a diverse officer corps and substantial numbers of officers educated and trained in diverse educational settings, including the

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313. *Grutter*, 123 S. Ct. at 2339.

314. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

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

316. *Grutter*, 123 S. Ct. at 2340.

317. *Id.*

318. Brief of Lt. Gen. Julius W. Becton, Jr. et al. at 7, *Grutter*, 123 S. Ct. 2325 (Nos. 02-241, 02-516).

military academics and ROTC programs.”<sup>319</sup> The brief sounded two of the rationales for race-conscious admissions—the benefits of training in a diverse environment and the instrumental need for minority officers. The latter was clearly the dominant theme. The brief focused on the need to attract minority officers,<sup>320</sup> with the pedagogical benefits of a diverse student body a much fainter theme.<sup>321</sup> Racial preferences thus were not simply a strategy to provide a rich campus experience in which students broadened their horizons; they also were a means to develop a potential officer pool including racial minorities. Justice O’Connor, in effect, accepted the need to recruit and train more minority officers to serve our country. In *Bakke*, Justice Powell had rejected as a per se violation the University’s desire to increase the number of minority medical students and minority physicians. Military leaders made clear the military’s reliance on rather specific minority admissions goals at the various military academies.<sup>322</sup> For instance, West Point set “specific percentage goals for minorities” based upon their representation in the population, college-bound pool, and army.<sup>323</sup> The naval academy used specified goals and targets for minorities.<sup>324</sup> Justice O’Connor saw no problem. Whereas the University of California-Davis’s instrumental goal of attracting minority doctors to serve minority communities was not sufficiently tailored to the end advanced, racial preferences were judged necessary to produce the required diverse officer corps.<sup>325</sup> The reliance on the military argument signaled that First Amendment values relating to campus diversity were not all that drove the Court. If campus diversity was all that mattered, as Justice Powell suggested, the military arguments would have been totally irrelevant under the circumstances. Justice O’Connor’s reliance on them indicated that she viewed diversity in far broader terms.

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319. *Id.* at 8; *see also id.* at 27. The brief pointed out that eighty-one percent of active duty officers were white as compared to 8.8% African-American, four percent Hispanic, 3.2% Asian-American, and .6% Native American. *Id.* at 7. These figures for officers compared to those enlisted in active duty forces, of which 61.7% were white, 21.7% African-American, 9.6% Hispanic, 1.2% Native American, four percent Asian-American, and 1.8% others. *Id.* at 12.

320. *See, e.g., id.* at 17-18 (calling the “integration of the officer corps a military necessity;” stating that equal opportunity is indispensable to cohesiveness; demonstrating a link between minority officers and military effectiveness; explaining the need to increase percentage of minority officers; stating that service academics and ROTC use limited race-conscious policies to expand the number of minority officers, and that integration of officer corps is essential to reduce race turmoil in the military).

321. *Id.* at 28 (stating that diversity at military academies and ROTC provides leaders of forces with experience to lead forces with forty percent minority members).

322. *Id.* at 18-27.

323. Brief of Lt. Gen. Julius W. Becton, Jr. et al. at 19, *Grutter*, 123 S. Ct. 2325 (Nos. 02-241, 02-516).

324. *Id.* at 20-21.

325. *Grutter*, 123 S. Ct. at 2340.

The military rationale has been dismissed as a cynical effort to attract and motivate African-American soldiers to shoulder disproportionate responsibility for fighting America's wars.<sup>326</sup> That interpretation might have a measure of truth. Yet when the military discussion is restored to the context of the opinion, it merits a more benevolent spin. The Court did not discuss military leadership alone. Rather, it located it as one aspect of a larger problem. The Court also justified racial preference at law schools, particularly selective ones, because they would help develop a cadre of African-American leaders. It observed that a high percentage of national leaders have law degrees, many from selective law schools. "Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."<sup>327</sup>

Justice O'Connor also justified racial preferences as necessary to promote important civic aspirations: "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."<sup>328</sup> Justice O'Connor set up this punch line by quoting the government's amicus brief affirming the "paramount government objective" to ensure "that public institutions are open and available to all segments of American society, including people of all races and ethnicities."<sup>329</sup> This reliance on the government was ironic because it supported Grutter's position and the thrust of its brief expressed little sympathy for the Law School's plan. Good citizenship depended on education. Accordingly, "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."<sup>330</sup> Yet the Court's stated purpose was not simply to teach minorities how to be patriotic citizens. It was also to make the American dream their reality. "Access to legal education" had to cross racial lines so that minorities could "succeed in America,"<sup>331</sup> an idea that came from *Brown*.<sup>332</sup> Thus, the Michigan Law School plan served not only the immediate goal of creating a diverse campus, but also the long-term instrumental goal of perfecting American society and democracy by promoting participation of African-Americans "in the civic life of our Nation."<sup>333</sup>

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326. See William Nelson, *Brown v. Board of Education and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. 834 (2004).

327. *Grutter*, 123 S. Ct. at 2341.

328. *Id.* at 2340-41.

329. *Id.* at 2340.

330. *Id.*

331. *Id.* at 2341.

332. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

333. *Grutter*, 123 S. Ct. at 2340.

The Court also saw race-sensitive admissions as a way to preserve the legitimacy of important societal institutions. Justice O'Connor wrote:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.<sup>334</sup>

Although the court did not attribute this idea, it closely resembled a passage in the military brief.<sup>335</sup>

Finally, the Court saw race-sensitive admissions as a way to combat stereotypes that disparage minorities. The Law School's desire for a critical mass of minority students was not premised on the belief that minorities would "express some characteristic minority viewpoint on any issue."<sup>336</sup> On the contrary, race-sensitive admissions were designed to enroll a critical mass in order to burst such stereotypes. The "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters" would contribute to learning, the Court proclaimed.<sup>337</sup>

The rationales Justice O'Connor articulated for race-sensitive admissions were certainly not novel. They had been suggested for years in various contexts. What made her opinion noteworthy was the distance she traveled beyond Justice Powell in justifying race preferences. Rather than adhering to Justice Powell's narrow version of diversity, Justice O'Connor viewed diversity as a broader concept that incorporated some of the very instrumental rationales that Justice Powell had rejected.

### C. *Influences Behind the Expanded Rationale: Some Speculations*

How did this happen? One can only speculate. I cannot prove that any of the briefs or prior opinions swayed Justice O'Connor's thinking, but it is interesting to note the overlap between some of them and her opinion.

Michigan School of Law was constrained by *Bakke* and did not ask the court to accept justifications it had previously rejected. Yet it exploited opportunities to sneak other themes into its student diversity argument. For

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334. *Id.* at 2341.

335. Brief of Lt. Gen. Julius W. Becton, Jr. et al. at 9, *Grutter*, 123 S. Ct. 2325 (Nos. 02-241, 02-516).

336. *Grutter*, 123 S. Ct. at 2341 (quoting Brief for Respondent at 30, *Grutter*, 123 S. Ct. 2325 (No. 02-241)). Such a view would have run afoul of Justice O'Connor's prior expressions. *See, e.g.,* *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think"); *see also* *Hopwood v. Texas*, 78 F.3d 932, 946 (5th Cir. 1996) ("To believe that a person's race controls his point of view is to stereotype him.").

337. *Grutter*, 123 S. Ct. at 2341.

instance, in arguing that *Bakke* was precedent that should not be overruled, Michigan suggested that abandoning *Bakke* would damage the stability of society by making state schools white enclaves. Michigan stated that:

[A] decision to overrule *Bakke* would cut the minority lawyers currently being trained by half or three-quarters, resulting in the near-complete absence of minority students from the schools that train most of our federal judges, prosecutors and law clerks (to say nothing of the new lawyers at our country's leading law firms).<sup>338</sup>

Michigan's argument did not persuade the Court of its asserted purpose—to apply *Bakke* as binding precedent. Still, the Court made similar arguments that race-sensitive admissions were necessary to furnish society's need for African-American leaders and lawyers.<sup>339</sup>

Michigan's stability of society argument helped shape Justice O'Connor's opinion in a second respect independent of its asserted intent. Justice O'Connor argued that only racially diverse institutions would be seen as legitimate by the entire citizenry. Michigan made this argument in insisting that *Bakke* not be overruled:

As our country becomes increasingly racially diverse, the public confidence in law enforcement and legal institutions so essential to the coherence and stability of our society will be difficult to maintain if the segments of the bench and bar currently filled by graduates of those institutions again become a preserve for white graduates, trained in isolation from the communities they will serve.<sup>340</sup>

Michigan's argument was close to the formulation Justice O'Connor adopted, but not as close as a passage from the military brief: "Broad access to the education that leads to leadership roles is essential to public confidence in the fairness and integrity of public institutions, and their ability to perform their vital functions and missions."<sup>341</sup>

Finally, Michigan's arguments concerning stereotyping apparently connected with Justice O'Connor. She had previously related race preferences to impermissible stereotypes.<sup>342</sup> Michigan devoted pages of its brief to addressing Justice O'Connor's specific articulated concerns. It wrote in part:

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338. Brief for Respondent at 20, *Grutter*, 123 S. Ct. 2325 (No. 02-241).

339. *Grutter*, 123 S. Ct. at 2341.

340. Brief for Respondent at 20-21, *Grutter*, 123 S. Ct. 2325 (No. 02-241).

341. Brief of Lt. Gen. Julius W. Becton, Jr. et al. at 9, *Grutter*, 123 S. Ct. 2325 (Nos. 02-241, 02-516).

342. See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (stating that "the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they think."); *id.* at 618 (opposing the equation of race with "belief and behavior").

The Law School does not premise its need for a racially integrated student body on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. To the contrary, breaking down such stereotypes is a crucial part of its mission, and one that cannot be advanced with only token numbers of minority students. The Law School values the presence of minority students because they will have direct, personal experiences that white students cannot—experiences which are relevant to the Law School’s mission.<sup>343</sup>

The Court quoted part of this language.<sup>344</sup> Moreover, Michigan’s distinction between “the fiction that race determines a person’s ‘belief and behavior’” and “the inescapable reality that race affects life experiences in our society”<sup>345</sup> apparently resonated with Justice O’Connor who acknowledged that the “unique experience of being a racial minority” would likely affect views.<sup>346</sup>

Justice O’Connor did cite Justice Powell’s *Bakke* opinion at length in *Grutter*. Yet it was by no means the only text that influenced her opinion. As shown above, arguments from a small set of briefs also found their way into the Court’s opinion and expanded the dimensions of the student diversity rationale.

Ultimately, Justice O’Connor’s opinion also reflected a more surprising influence—the opinion of Justice Marshall in *Bakke*. To be sure, *Grutter* did not come out as he would have written it. Most significantly, the societal discrimination rationale that he advanced received no sympathetic hearing from Justice O’Connor. Yet other strands of his argument did find their way into her opinion.

The vision of an open and inclusive society was central to her thinking; she devoted several paragraphs of her *Grutter* opinion to this theme: “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.”<sup>347</sup> This idea echoed from Justice Marshall’s opinion. He complained that America excluded Negroes. Thus “meaningful equality remains a distant dream for the Negro.”<sup>348</sup> According to Justice Marshall, “[t]he dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.”<sup>349</sup> Therefore, “bringing

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343. Brief for Respondent at 30, *Grutter*, 123 S. Ct. 2325 (No. 02-241) (citation omitted).

344. *Grutter*, 123 S. Ct. at 2341.

345. Brief for Respondent at 30, *Grutter*, 123 S. Ct. 2325 (No. 02-241).

346. *Grutter*, 123 S. Ct. at 2341. It might have helped that Michigan quoted Justice O’Connor’s observation that “[L]ike race, gender matters’ in one’s ‘resulting life experience[s].’” Brief for Respondent at 31, *Grutter*, 123 S. Ct. 2325 (No. 02-241) (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 148-49 (1994)).

347. *Grutter*, 123 S. Ct. at 2340-41.

348. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 395 (1978).

349. *Id.* at 400-01.

the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.”<sup>350</sup> The “doors” to positions had been closed to Negroes; “[i]f we are ever to become a fully integrated society” steps must be taken “to open those doors.”<sup>351</sup> Justice O’Connor used similar rhetoric and metaphors.<sup>352</sup>

Justice O’Connor’s opinion borrowed a few themes from an older work in which Thurgood Marshall also played a part, *Brown v. Board of Education*. Its two principal ideas echoed in her opinion. She, too, saw education as “the very foundation of good citizenship”<sup>353</sup> and as the ticket to participate in the American dream. And, if she did not display Chief Justice Warren’s communitarian idea as fully as she might have, her opinion embraced the vision of a racially inclusive society that was *Brown*’s own contribution.

#### D. *The Significance of Grutter’s Broadened Rationale*

Justice O’Connor’s *Grutter* opinion provided a more complete and convincing defense of race preferences in university admissions than had *Bakke* a quarter century earlier. She did not abandon the notion of campus diversity. Yet, her approach mitigated some of the problems with the diversity rationale by expanding it beyond the narrow parameters Justice Powell drew. She recognized that a diverse student body was not simply a means to foster a robust campus experience or even to prepare people to work well in a multicultural and multiracial workforce. For Justice O’Connor, race was not a relevant factor of diversity simply because it shaped experiences and accordingly contributed to campus life; it also was included because of a need to increase participation of African-Americans in civic life. It was an instrumental means to build a better society—increasing the number of African-Americans in leadership positions, enhancing the legitimacy of social institutions, combating stereotypes, improving civic participation, and ultimately making the American dream a reality. Finally, race preferences, for Justice O’Connor, were not primarily to benefit whites by enriching their

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350. *Id.* at 396.

351. *Id.* at 401-02.

352. It is perhaps noteworthy that Justice O’Connor included a short sketch of Justice Marshall in her recent memoir:

No one could help but be moved by Justice Thurgood Marshall’s spirit. No one could avoid being touched by his soul. . . . Occasionally, at conference meetings, I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world.

SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 138 (2003).

353. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340 (2003) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

education. They served that purpose, but also were a way to allow African-Americans a more complete opportunity to participate in American life.

In addition to providing a more persuasive defense of race preferences in admissions, Justice O'Connor's opinion contributed in a second critical way. Her opinion, and the sources it cited, demonstrated that race-sensitive admissions plans represent a consensus approach of a broad spectrum of American society. Those who endorsed approaches, like that at issue in *Grutter*, were not simply a predictable collection of civil rights groups with a perceived stake in the outcome. They included, too, bastions of the American establishment—major universities, Fortune 500 corporations, and the armed services. That such institutions also identified their interests as inextricably linked to race-sensitive admissions underscored the importance of these programs.

## VI. CONCLUSION

To be sure, *Grutter's* long-term impact is uncertain. For the immediate future, it threw a strong life-line to university admissions programs using racial preferences to produce a diverse student body. In articulating the rationale, the Court channeled the universities' use of race-sensitive criteria in areas that coincided with their basic mission. The opinion's undercurrents suggest a broader rationale—to open channels whereby more minorities can participate in leadership positions in society, to help America make the American dream a reality for all. These rationales—diversity and instrumental—are forward-looking and designed to improve social utility. They license universities particularly within their areas of special expertise. They allow universities to serve societal needs without impairing their basic mission.

It is not at all clear what, if any, impact the decision will have beyond college and graduate admissions. The instrumental rationales are tied to diversity. Thus, *Grutter* might be limited to applications where a diverse population provides either the specific benefits Justice O'Connor identifies or at least some gain related to education. And *Grutter's* future might turn, in part, on the fortuity of judicial retirements and appointments. Who will retire first and when? Will affirmative action become a litmus test for Supreme Court nominees?

Moreover, without ignoring the positive impact of programs of race-sensitive admissions at colleges and universities, we should not overstate their impact. To be sure, they have conferred clear benefits, but they are by no means a full solution to racial disparities that afflict our country. After all, they afford benefits to a relatively select portion of the minority population. They offer no relief to those who do not apply to college or graduate school. It is difficult to see such efforts ameliorating racial disparities absent commitment to redressing the gaps that exist in K-12 education. In many urban areas, African-American children attend inferior schools in



circumstances that make learning difficult. Race-sensitive admissions are simply one approach to affording opportunity. Clearly, additional strategies must exist to address other racial disparities.

Nevertheless, *Grutter* represents a judicial reaffirmation of the constitutional ideal of a racially open society. We might lament that fifty years after *Brown* that vision remains a challenge for the future rather than an accomplishment of the past. On the other hand, *Grutter*'s renewed commitment to that vision of a racially diverse society provides something to celebrate on this fiftieth anniversary of *Brown*.