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# ACCENTUATE THE POSITIVE, ELIMINATE THE NEGATIVE, LATCH ON TO THE AFFIRMATIVE [ACTION], DO MESS WITH MR. IN-BETWEEN\*

Martin H. Belsky\*\*

In 1978, the United States Supreme Court found in *Regents of the University of California v. Bakke*<sup>1</sup>—a very close decision—that a program which set quotas for higher education admissions would be considered to involve reverse discrimination. This reverse discrimination violated the Equal Protection Clause of the United States Constitution’s Fourteenth Amendment. Justice Powell, the “swing” vote who wrote for the five-member majority, noted, however, that a program merely taking “race into account” as one factor among others was not unconstitutional.<sup>2</sup>

For nearly twenty-five years, the distinction between programs that use quotas and those that simply take race into account has split the courts and the general public. Two cases coming out of the University of Michigan were to decide the issue, it was hoped, once and for all.

On June 23, 2003, the United States Supreme Court in *Gratz v. Bollinger*<sup>3</sup> reviewed the procedures by which decisions were made to accept or not accept an undergraduate in the University of Michigan’s College of Literature, Science, and the Arts. The college assigned points to each applicant based on the high school grades, ACT or SAT scores, relationship to alumni, special talents, leadership qualities, geography, curriculum strength, and other factors.<sup>4</sup> One such other factor, in order to promote diversity, was “underrepresented minority status.”<sup>5</sup> In an opinion written by Chief Justice William Rehnquist and representing the votes of six of nine Justices, that admissions process was declared unconstitutional.<sup>6</sup>

In the other case, *Grutter v. Bollinger*,<sup>7</sup> the Court reviewed the admissions policies for the University of Michigan Law School. The school’s policy involved

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\* With apologies to Johnny Mercer.

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1. 438 U.S. 265 (1978).
2. *Id.* at 316.
3. 123 S. Ct. 2411 (2003).
4. *Id.* at 2418-19.
5. *Id.* at 2419.
6. *Id.* at 2416.
7. 123 S. Ct. 2325 (2003).

review of standardized test scores, college grades, and "all the information available in the file," including activities, background, family contacts, a personal statement, recommender's enthusiasm, and diversity.<sup>8</sup> The Law School, unlike the undergraduate school, did not add points for "underrepresented minority status," but rather considered diversity as just one factor, among many, that may or may not be determinative.<sup>9</sup> The Michigan Law School admissions process, in a five-to-four decision written by Justice Sandra Day O'Connor, was found to be constitutional.<sup>10</sup>

In both cases, a majority of the Court stated that the Equal Protection Clause barred any type of discrimination by race, unless (1) there was a compelling governmental interest justifying the discrimination, and (2) the program was designed or "tailored" as narrowly as possible to achieve its goals.<sup>11</sup> A diverse student body may be considered, as it was in *Bakke*, such an interest.<sup>12</sup>

In the undergraduate case, the policy of adding points was not "narrowly tailored" so as to satisfy the Equal Protection Clause.<sup>13</sup> The additional points afforded minority applicants meant that race was "decisive," almost guaranteeing admission.<sup>14</sup> This procedure does not involve "individualized consideration"; rather it provides specific bonuses based on race.<sup>15</sup> Thus, the Court found it unconstitutional because other policies could be adopted to promote diversity.<sup>16</sup>

In the law school case, the more amorphous diversity program was narrowly tailored to have as just one factor among others, promotion of diversity.<sup>17</sup> This was done by individualized review of all applications, and not by using any set of specific criteria.<sup>18</sup> As a result, the Court found the program constitutionally permissible.

In this article, I will review the history that led to these decisions and the difficult policy issues that the opinions address. I will then discuss the niceties of the new two-tier analysis and its application to diversity programs generally.

## I. FROM *DRED SCOTT* TO *BAKKE*

It is important to put the issue of affirmative action in its historical context. We should not forget that until the Civil War and then the Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments), African-Americans were not considered "persons." In fact, in *Scott v. Sandford*,<sup>19</sup> the United States

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8. *Id.* at 2331-32.

9. *See id.* at 2334 (noting the testimony of Dean Jeffrey Lehman that sometimes "an applicant's race may play no role, while in others it may be a determinative factor" (internal quotations omitted)).

10. *Id.* at 2330.

11. *Gratz*, 123 S. Ct. at 2427; *Grutter*, 123 S. Ct. at 2341.

12. *Gratz*, 123 S. Ct. at 2426-27; *Grutter*, 123 S. Ct. at 2339.

13. *Gratz*, 123 S. Ct. at 2430.

14. *Id.* at 2428.

15. *Id.*

16. *See id.* at 2427-30.

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

18. *Id.* at 2343.

19. 60 U.S. 393 (1856).

Supreme Court, speaking through Chief Justice Taney,<sup>20</sup> stated that “Negroes,” whether slaves or freedmen, were neither citizens nor persons under the American Constitution.<sup>21</sup> Neither Congress nor the States could make them citizens of our society.<sup>22</sup>

After the Civil War, the Fourteenth Amendment was adopted. It provided that all citizens, without regard to race, were to obtain “equal protection of the laws” and all the same “privileges and immunities.”<sup>23</sup> This soon became a mere hope and not, of course, a reality. Segregation took the place of slavery as a way to limit the rights of minorities, particularly African-Americans.<sup>24</sup>

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20. Only two Justices dissented. *Id.* at 529 (McLean, J., dissenting); *id.* at 564 (Curtis, J., dissenting).

21. Justice Taney stated on behalf of the Supreme Court:

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement [Negroes] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges. . . . On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

*Id.* at 404-05.

22. The Court further stated:

[T]he personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. . . .

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. . . .

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

*Id.* at 406-07. The Court continued:

And if the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

*Scott*, 60 U.S. at 451.

23. U.S. Const. amend. XIV.

24. See generally Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (Alfred A. Knopf 1976).

A frontal attack on segregation was made at the end of the nineteenth century in *Plessy v. Ferguson*.<sup>25</sup> It was unsuccessful. In an opinion by Justice Brown, with only a single dissent,<sup>26</sup> the Supreme Court held that it was not the business of government to enforce social or societal equality.<sup>27</sup>

Segregation was acceptable public policy. Discrimination based on race was not only practiced but also legal and enforced in the courts.<sup>28</sup> It took nearly sixty

25. 163 U.S. 537 (1896).

26. *Id.* at 552 (Harlan, J., dissenting). Justice Brewer did not hear the argument or participate in the decision. *Id.* at 564.

27. The Supreme Court stated:

The object of the [Civil Rights Amendments were] undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. . . .

*Id.* at 544. The Court further stated:

If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . "When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

*Id.* at 551-52 (quoting *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883)).

28. As described by Justice Marshall in his opinion in *Bakke*:

In the wake of *Plessy*, many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after *Plessy*, the Charlestown News and Courier printed a parody of Jim Crow laws:

"If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow Bible for colored witnesses to kiss."

The irony is that before many years had passed, with the exception of the Jim Crow witness stand, "all the improbable applications of the principle suggested by the editor in derision had been put into practice—down to and including the Jim Crow Bible."

Nor were the laws restricting the rights of Negroes limited solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson,

years for the United States Supreme Court, in *Brown v. Board of Education of Topeka*,<sup>29</sup> to admit it had been wrong and to hold that state sanctioned discrimination was unconstitutional.<sup>30</sup> It took an additional decade for Congress to pass legislation saying that discrimination in all public accommodations was also prohibited.<sup>31</sup>

With the rejection of the separate but equal doctrine, the question of how American law and society would address hundreds of years of slavery and then nearly a hundred more years of segregation was brought to the forefront of debate. Responding to this call, the Supreme Court authorized experimentation with numerous policies so long as the actions were taken with “all deliberate speed.”<sup>32</sup>

the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was “not humiliating but a benefit” and that he was “rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against.”

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like—is also well established. It is of course true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to *Brown v. Board of Education*.

*Bakke*, 438 U.S. at 393-94 (Marshall, J., dissenting) (citations omitted).

29. 347 U.S. 483 (1954) (“*Brown I*”).

30. The unanimous opinion written by Chief Justice Warren stated:

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

*Id.* at 495.

31. *Civil Rights Act of 1964*, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (1964). See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding the validity of the Civil Rights Act of 1964 in Alabama based upon the Commerce Clause); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964).

32. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955) (“*Brown II*”). In *Brown II* the Court stated:

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. . . .

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. . . .

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. . . .

In education, the Supreme Court indicated that to eliminate all vestiges of state-imposed segregation, courts and school districts may adopt quotas or assign students to schools based on race.<sup>33</sup> In other areas, Congress, state legislatures, and private entities authorized race-based quotas for hiring or race-based goals and timetables for contracts.<sup>34</sup>

And then came *Bakke*. The Court from this case forward would separate court-ordered mandates that may include quotas, set-asides, or explicit race-based goals, from voluntary efforts.<sup>35</sup>

In *Bakke*, however, a five-Justice "majority" held that a University of California special race-based admissions policy to its medical school was unconstitutional.<sup>36</sup> The Justices noted that the program was not a court-mandated policy, but rather a voluntary effort. If, though, it had been found to be a

The judgments below . . . are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.

*Id.* at 299-301.

33. See Bernard Schwartz, *Behind Bakke: Affirmative Action and the Supreme Court* 31 (N.Y.U. Press 1988). Schwartz discusses the Supreme Court decision in *Swann v. Charlotte-Mecklenburg Board of Education*, in which the Court considered what actions school authorities may take to integrate schools and wherein the Court stated:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.

402 U.S. 1, 16 (1971).

34. See e.g. *Public Works Employment Act of 1977*, Pub. L. No. 95-28, 91 Stat. 116 (1977); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979). As described by Justice Marshall in *Bakke*:

After the Civil War our Government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs.

438 U.S. at 402 (Marshall, J., dissenting).

35. The Court stated, "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." *Bakke*, 438 U.S. at 307.

36. 438 U.S. at 271-72. Justice Powell stated on behalf of the Court:

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

*Id.*

“neutral” policy that would allow race to be one factor among many, the program would be constitutional.<sup>37</sup>

The background to this decision is fascinating and described in depth by Professor Bernard Schwartz in *Behind Bakke*.<sup>38</sup>

In a deeply divided decision, four of the Justices believed that the University of California’s program was permissible, while four others disagreed.<sup>39</sup> Of the four Justices who believed the program was in full compliance with the Equal Protection Clause, Justice Marshall was the most adamant:

For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.<sup>40</sup>

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37. *Id.* at 316-19.

38. See Schwartz, *supra* n. 33. The book, using documentary and oral sources, traces the method by which the Justices reached their decision in this “*cause célèbre*.” *Id.* at ix-x, 1.

39. Section 601 of the Civil Rights Act of 1964 provides that “[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination. . . .” in any program that receives federal funding. 28 U.S.C. § 2000d. It was assumed that this section proscribed the same racial classifications as the Equal Protection Clause. *Bakke*, 438 U.S. at 287.

40. *Bakke*, 438 U.S. at 387 (Marshall, J., dissenting). Later, Justice Marshall concluded:

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today’s judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. 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.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. . . .

Most importantly, had the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the “Constitution is color-blind” appeared only in the opinion of the lone dissenter. The majority of the Court rejected the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, by law, an individual could be given “special” treatment based on the color of his skin.

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. 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. 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.



Four other Justices believed that the Civil Rights Act of 1964 barred discrimination based on race and, because of the statutory solution, they declined to answer the constitutional question.<sup>41</sup>

One Justice—Justice Lewis F. Powell, Jr.<sup>42</sup>—made up a majority by taking an “in-between” position. At one point in his deliberations, Justice Powell had rejected any type of affirmative action program as being an “explicit” and invalid race-based program.<sup>43</sup> He reaffirmed this in his opinion: “The special admissions program is undeniably a classification based on race and ethnic background.”<sup>44</sup> As such, the classification had to be reviewed under a “strict scrutiny” standard.<sup>45</sup>

But by the time of the Justices’ conference on the decision, Justice Powell was moving towards some compromise, one in favor of diversity.<sup>46</sup> He asserted that societal discrimination is not a substantial or compelling government interest capable of withstanding strict scrutiny. However, the attainment of a diverse student body may be.<sup>47</sup>

Still, the “colossal blunder [in this case] was to pick a [specific] number.”<sup>48</sup> The University of California had a special committee to review “Minority Group” candidates, and the admission criteria were lower for these students.<sup>49</sup> The special admissions program was “designed to assure the admission of a specified number of students from certain minority groups.”<sup>50</sup>

The method used to reach this goal, Powell states in his opinion, must be “necessary to promote this interest.”<sup>51</sup> Powell suggests that a program that uses race as simply a “plus” factor when considered with other factors may be a method narrow enough to satisfy strict scrutiny.<sup>52</sup>

The “holding,” of course, was that the California system was invalid. Bakke had to be admitted. The remainder of the decision was dictum—not necessary for

*Id.* at 400-02 (citation omitted).

41. *Bakke*, 438 U.S. at 411-12, 417-18 (Stevens, J., Burger, C.J., Stewart & Rehnquist, JJ., concurring in the judgment in part and dissenting in part).

42. On his retirement, Justice Powell indicated that his opinion in *Bakke* was his most important. Schwartz, *supra* n. 33, at 1.

43. *Id.* at 85.

44. 438 U.S. at 289.

45. *Id.* at 291. Powell did not use this language in the decision. He did, however, use it in his memoranda to the other Justices explaining his position. See Schwartz, *supra* n. 33, at 82-85.

46. See Schwartz, *supra* n. 33, at 96-97.

47. *Bakke*, 438 U.S. at 311-12.

48. Schwartz, *supra* note 33, at 96 (quoting Justice Stevens) (internal quotation omitted). In the opinion, Justice Powell noted that the California courts found that the program was a quota. Specifically, he observed, “The court below found—and petitioner does not deny—that white applicants could not compete for the 16 places reserved solely for the special admissions program. Both courts below characterized this as a ‘quota’ system.” *Bakke*, 438 U.S. at 288-89 n. 26 (citation omitted).

49. *Bakke*, 438 U.S. at 274-75.

50. *Id.* at 269-70.

51. *Id.* at 314-15.

52. *Id.* at 317-19.

resolution of the case. But the dictum was important and stood as the controlling constitutional law.<sup>53</sup>

## II. *BAKKE TO ADARAND*

Despite the concerns raised in *Bakke* about any numerical set-asides, such programs continued, both in education admissions and in private and public contracting. Colleges and universities interpreted the case as a “license, not [a] prohibit[ion of] race-conscious admissions programs.”<sup>54</sup> Minor distinctions were made to comply with the literal language used by Justice Powell, but “[t]he bottom line [was] that *Bakke* . . . meant anything but the end of special admissions programs. On the contrary, the post-*Bakke* situation [was], practically speaking, not very different from what it was before the Supreme Court decision.”<sup>55</sup>

The impact of *Bakke* upon situations other than higher education was even less. Private employers saw the case as making special preference for minorities still acceptable. Quotas were acceptable and encouraged or even mandated by federal policy in appropriate circumstances where there was past discrimination.<sup>56</sup>

The limited interpretation of *Bakke* to higher education was supported by Supreme Court decisions. Numerical mandates for new trainees in industries where minority representation had been historically low, said the Court, were acceptable.<sup>57</sup> Fixed goals and numbers for hiring and promotion of minorities were allowed where there could be shown a historical policy of discrimination.<sup>58</sup> In addition, federal Minority Based Enterprise (MBE) programs mandated specific percentages (ten percent) of minority participation, to remedy past discrimination. Again, the Court found these programs constitutional.<sup>59</sup>

In 1989, the Court in *City of Richmond v. J.A. Croson Co.*<sup>60</sup> entered a new phase in its affirmative action jurisprudence.<sup>61</sup> A minority set-aside, similar to the federal set-aside, was adopted by the City of Richmond, Virginia.<sup>62</sup> The purpose

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53. See Schwartz, *supra* n. 33, at 152.

54. *Id.* at 154.

55. *Id.* at 156.

56. See J. Harvie Wilkinson III, *The Rehnquist Court and the Search for Equal Justice*, in *The Rehnquist Court: A Retrospective* 44, 45-47 (Martin H. Belsky ed., Oxford U. Press 2002) (calling this the “first phase” of the Supreme Court’s “modern race jurisprudence” which accepts race-based solutions “through the use of numerical racial benchmarks”).

57. See e.g. *United Steelworkers*, 443 U.S. at 193 (upholding an employer’s affirmative action plan which mandated that half of all individuals in a training program be black).

58. See *Loc. No. 93, Intl. Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Loc. 28 Sheet Metal Workers Intl. Assn. v. EEOC*, 478 U.S. 421 (1986).

59. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding the set-aside in the Public Works Employment Act of 1977 as applied to the construction industry).

60. 488 U.S. 469 (1989).

61. See Wilkinson, *supra* n. 56, at 48.

62. The Court described the set-aside plan in *Croson* as follows:

The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE’s) . . .

was to overcome historic discrimination in the construction industry. Justice O'Connor wrote the opinion<sup>63</sup> and established the new affirmative action agenda, which she later applied in the Michigan cases:

1. The Richmond set-aside was bad.
2. Based on *Bakke*, any classification, such as a minority set-aside or benign or remedial quota, based on race—whether to benefit a majority or minority—had to be reviewed by a strict scrutiny test, and therefore, the classification must be justified by a compelling state interest and narrowly tailored to achieve those ends.<sup>64</sup>
3. The compelling state interest must be based on at least “an articulated factual basis” for a racial classification and a clear “nexus” between the scope of relief and factual basis.<sup>65</sup>
  - a. Societal discrimination or even nationwide discrimination in an industry, like the construction industry, is not enough.<sup>66</sup>
  - b. A “race-conscious” remedy would only be allowed when there are “wrongs worked by specific instances of racial discrimination.”<sup>67</sup>
  - c. Thus, a compelling interest for race-conscious remedy must be based on “judicial, legislative, or administrative findings of constitutional or statutory violations.”<sup>68</sup>

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The Plan defined an MBE as “[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members.” “Minority group members” were defined as “[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.”

488 U.S. at 477-78 (quoting Richmond City Code (Va.) § 12-23, 941 (1985)).

63. Justice O'Connor's opinion is divided into sections. *See id.* at 476-511. Chief Justice Rehnquist and Justice White joined in the whole opinion. *Id.* at 476. Justice Scalia concurred but would have gone further and never allow states or local governments to have “race-conscious” classifications (which he calls discrimination) to ameliorate past discrimination. *Id.* at 521 (Scalia, J., concurring). Justice Kennedy concurred, accepting that all the basic premises of the O'Connor opinion would allow states or local governments to remedy demonstrated past discrimination. *Id.* at 518-520 (Kennedy, J., concurring in part and concurring in the judgment). Justice Stevens only concurred on the basis that this ordinance was not narrowly tailored. He would allow “race-conscious” classifications for societal discrimination—not just as remedy for specific past wrongs—if there were specific findings of discrimination. This finding would preferably be made by courts, and the availability of remedy limited to only those who were the real victims, not to non-affected minorities or from other areas. *Crosen*, 488 U.S. at 511-17 (Stevens, J., concurring in part and concurring in the judgment).

Totaling this up, five Justices fully supported Justice O'Connor's conclusion or would have gone further. One Justice focused on the issue of “narrow tailoring.” Three Justices, Marshall, Brennan and Blackmun, in an opinion by Justice Marshall, would not have applied the “compelling government interest” or the “narrow tailoring” standards. Rather, they would allow “remedial” legislation to “serve important governmental objectives” and require that it be “substantially related to achievement of those objectives.” Societal discrimination might be enough as proof should be practical and not rigid. *Id.* at 535 (Marshall, Brennan & Blackmun, JJ., dissenting) (citations omitted).

64. *Crosen*, 488 U.S. at 493; *id.* at 520 (Scalia, J., concurring).

65. *See id.* at 494-95.

66. *See id.* at 499.

67. *Id.* at 496-97 (quoting *Bakke*, 438 U.S. at 307) (internal quotations omitted).

68. *Crosen*, 488 U.S. at 497 (quoting *Bakke*, 438 U.S. at 307) (internal quotations omitted).

4. Even if a compelling interest is shown, the remedy must be “narrowly tailored” to the specific case.<sup>69</sup>
  - a. Here, the scope was too broad—including groups with no showing of prior discrimination against them.<sup>70</sup>
  - b. There must be a “waiver” procedure that is broad enough to cover exigencies. Here, the waiver was too narrow and based solely on the availability of Minority Business Enterprises and not on the number of individuals with qualifications who were able and willing.<sup>71</sup>
  - c. Other alternatives to a fixed quota must be considered—such as “race-neutral” programs supporting smaller businesses.<sup>72</sup>
5. A ban on quotas does not mean that individuals who have been discriminated against do not have a remedy. But this must be done through an “individualized procedure” for specific cases to determine if the program is discriminatory. The administrative convenience of a set-aside is not sufficient justification for a quota.<sup>73</sup>

Even with *Croson*'s detailed test, the question of whether the federal government could enact laws that impose specific quotas on companies using federal funds, participating in federal programs, or engaging in business with the government was left open. At first, in *Metro Broadcasting, Inc. v. FCC*,<sup>74</sup> the Court, by a bare five-to-four majority, upheld minority preference programs enacted by the federal government. Five years later, the Court changed its mind, in another opinion written by Justice O'Connor.<sup>75</sup>

In *Adarand Constructors, Inc. v. Peña*, the Court held that the standard for reviewing government programs was the same whether it was a local, a state, or the federal government. The detailed test established in *Croson* for state and local governments must be congruent with those applied to the federal government.<sup>76</sup> However, Justice O'Connor urged, reviewing programs by a strict scrutiny, narrowly tailored test does not mean that all such programs are bad:

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

70. *Id.* at 506. (finding that “[t]here [was] absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons,” all of whom were included in the list of minorities to be included in the set-aside).

71. *Id.* at 508.

72. See *id.* at 507.

73. *Croson*, 488 U.S. at 508.

74. 497 U.S. 547 (1990).

75. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The decision was a five-to-four decision. The dissenting justices, Justices Stevens, Souter, Ginsburg, and Breyer, would have allowed a test of less than strict scrutiny, like the dissent in *Croson*. See generally *id.* at 242-64 (Stevens & Ginsburg, JJ., dissenting); *id.* at 264-71 (Souter, Ginsburg & Breyer, JJ., dissenting); *id.* at 271-76 (Ginsburg & Breyer, JJ., dissenting). Justice Scalia would have gone further than Justice O'Connor by stating that there could never be a “compelling interest” to justify racial discrimination. *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment).

76. See *Adarand Constructors*, 515 U.S. at 235.

Finally, we wish to dispel the notion that strict scrutiny is “strict in theory, but fatal in fact.” The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the “narrow tailoring” test this Court has set out in previous cases.<sup>77</sup>

### III. LEADING UP TO *GRUTTER* AND *GRATZ*

It was assumed by most commentators that *Croson* and *Adarand* meant both the end of racial preferences<sup>78</sup> and perhaps an implicit overruling of *Bakke*.<sup>79</sup> Then, in *Hopwood v. Texas*,<sup>80</sup> a panel of Fifth Circuit judges seemed to confirm this belief that the era of racial preferences had ended. In that case, the Fifth Circuit was asked to review an affirmative action plan that applied “disparate standards” and a separate evaluation track for blacks and Mexican-Americans “to meet an ‘aspiration’ of admitting a class consisting of 10% Mexican Americans and 5% blacks, proportions roughly comparable to the percentages of those races graduating from Texas colleges.”<sup>81</sup>

The application of different standards and set percentages in the program clearly violated the “taking into account” standard set out in *Bakke*. While the trial court found the program unacceptable, it indicated that a revised procedure, which used race as just one factor among others, would be acceptable.<sup>82</sup> The court of appeals went further, however, and stated that *Bakke* was no longer good law:

We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell’s argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.

Justice Powell’s view in *Bakke* is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale.<sup>83</sup>

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77. *Id.* at 237 (quoting *Fullilove*, 448 U.S. at 519 (Marshall, Brennan & Blackmun, JJ., concurring)).

78. Judge Wilkinson calls this the “nondiscrimination principal.” Wilkinson, *supra* n. 56, at 48.

79. See Lino A. Graglia, *The Myth of a Conservative Supreme Court*, 26 Harv. J.L. & Pub. Policy 281, 289 (2003).

80. 78 F.3d 932 (5th Cir. 1996).

81. *Id.* at 937.

82. *Id.* at 946.

83. *Id.* at 944. The Court continued:

Thus, only one Justice concluded that race could be used solely for the reason of obtaining a heterogenous student body. As the *Adarand* Court states, the *Bakke* Court did not express a majority view and is questionable as binding precedent.

The Supreme Court did not grant certiorari in *Hopwood*, primarily for procedural reasons.<sup>84</sup> For six years, the debate mounted. Many people were torn over the obvious conflict—fairness vs. fairness.

On the one hand, it was argued, there is a tragic history of quotas in higher education, especially against minority groups such as Jews and blacks.<sup>85</sup> Any affirmative action plan, whether titled quotas, targets, or even the seemingly neutral “goals and timetables,” must be opposed in principal.<sup>86</sup> Moreover, such plans must also be opposed because in operation, they discriminate against Jews and other ethnic minorities. It is not the traditionally favored who will lose their placement—the establishment will make sure of that.<sup>87</sup>

Some affirmative action opponents made the historical argument. They argued that other minority groups have been successful despite overt discrimination and without the aid of affirmative action programs.<sup>88</sup> And, if those groups were successful, why couldn't others be? Moreover, maybe there was overt discrimination in the past, but that time is gone and now all that is needed is

Since *Bakke*, the Court has accepted the diversity rationale only once in its cases dealing with race. Significantly, however, in that case, *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, the five-Justice majority relied upon an intermediate scrutiny standard of review to uphold the federal program seeking diversity in the ownership of broadcasting facilities. In *Adarand*, the Court squarely rejected intermediate scrutiny as the standard of review for racial classifications, and *Metro Broadcasting* is now specifically overruled to the extent that it was in conflict with this holding. No case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis.

Indeed, recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny. Foremost, the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs.

In short, there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court caselaw strongly suggests, in fact, that it is not.

*Id.* at 944-45 (citations omitted).

84. Justice Ginsburg, joined by Justice Souter, indicated the reasons for denial of the petition:

Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance. The petition before us, however, does not challenge the lower courts' judgments that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional. Acknowledging that the 1992 admissions program “has long since been discontinued and will not be reinstated,” Pet. for Cert. 28, the petitioners do not defend that program in this Court. Instead, petitioners challenge the *rationale* relied on by the Court of Appeals. “[T]his Court,” however, “reviews judgments, not opinions.” *Chevron U.S.A. Inc. v. Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984) (footnote omitted). Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition.

*Tex. v. Hopwood*, 518 U.S. 1033, 1033 (1996) (citations to Reply Brief and Brief of Amicus Curiae of United States omitted).

85. Alan M. Dershowitz, *Chutzpah* 78 (Little, Brown & Co. 1991); James D. Besser, *Big Relief on Race Cases*, *Jewish Week* 28 (June 27, 2003).

86. Dershowitz, *supra* n. 85, at 76-77.

87. *See id.* at 75.

88. *Id.* at 77.

a “level playing field.” This is a “New America,” more diverse and without the historic powerful elite and powerless racial minorities.<sup>89</sup>

Finally, there was the moral argument against affirmative action plans. To allow racial preferences, they argued, is to “stamp” those given this preference with a “badge of inferiority.”<sup>90</sup>

On the other hand, the argument in favor of affirmative action programs also talked about the real world. In the real world, discrimination based on race still exists.<sup>91</sup> In the real world, diversity is still essential to overcome the ill effects of past discrimination and to assure eventual equality. Diversity is also necessary, especially in an academic setting, to allow the communication of other perspectives and “for people to learn that all members of the same minority seldom share the same viewpoints.”<sup>92</sup> Efforts to promote diversity should be encouraged, not opposed.<sup>93</sup>

In the real world, the argument continued, no one is demanding quotas any longer. Rather, all that colleges and universities want is to consider an applicant’s race as one factor among many that can be taken into account. Right now, college administrators can “take into account” ability to pay; financial support for the university (donations by parents); legacy (alumni parents or siblings); special skills like music, theater, and athletics; and even political support. Why not allow race as just one additional factor to encourage diversity in the student body and faculty?<sup>94</sup>

The pro-affirmative action argument further asserted that this is not just a question of equal opportunity. Stereotypes about differences between people are more likely to lessen when people get to know each other as associates.<sup>95</sup> Academically, in a classroom, someone who is Asian, African-American, Jewish, Muslim, or Christian, can bring differing perspectives to everything from history and culture to even science and math.<sup>96</sup>

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89. Wilkinson, *supra* n. 56, at 57-59.

90. See Scott Douglas Gerber, *First Principles: The Jurisprudence of Clarence Thomas* 101-02 (N.Y.U. Press 1999) (quoting *Adarand Constructors*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment)).

91. *Bakke*, 438 U.S. at 326-27 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part); see Julius L. Chambers, *Race and Equality: The Still Unfinished Business of the Warren Court*, in *The Warren Court: A Retrospective* 21, 38 (Bernard Schwartz ed., Oxford U. Press 1996).

92. *Pros and Cons of Affirmative Action*, 46 Law Quadrangle Notes 38 (Spring 2003) (quoting Prof. Richard Primus).

93. M. Lee Pelton, *This Issue Has a Human Face*, in Tim Foley, *In Reactions to the Michigan Rulings, Diversity Abounds*, Chron. Higher Educ. B10, B10-11 (July 4, 2003). Justice Stevens, who supported the majority decision in *Croson*, noted that he “would not totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits.” *Croson*, 488 U.S. at 511 n. 1 (Stevens, J., concurring in part and concurring in the judgment).

94. This was, in fact, the argument accepted by Justice O’Connor in *Grutter*. 123 S. Ct. at 2334. See Vikram David Amar, *Equal Protection: Racial Minorities in the 2002 Term*, in *Preview of United States Supreme Court Cases* 475, 480 (ABA 2003).

95. Nancy E. Cantor, *A Victory for Justice, and a Vindication*, in Tim Foley, *In Reactions to the Michigan Rulings, Diversity Abounds*, Chron. Higher Educ. B10, B12 (July 4, 2003).

96. Any teacher can tell you that varied experiences enrich the classroom. I have experienced this myself in teaching law courses. A discussion of the constitutionality of abortion restrictions is better

The debate between opponents and advocates of affirmative action programs heightened when the Supreme Court agreed to hear two cases from Michigan—one involving a law school minority admissions policy<sup>97</sup> and one involving an undergraduate minority admissions program.<sup>98</sup> The cases were taken at the same time “so that [the] Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances.”<sup>99</sup> The specific focus was on reconciling conflicting decisions, including *Hopwood*.<sup>100</sup>

#### IV. *GRATZ V. BOLLINGER* AND *GRUTTER V. BOLLINGER*

As indicated earlier, *Bakke* dealt with voluntary efforts by a university to provide for diversity,<sup>101</sup> while both *Croson* and *Adarand* dealt with legislative and executive efforts to mandate diversity.<sup>102</sup> Neither these cases nor the Michigan cases of 2003 dealt with goals and timetables, set-asides, or quotas mandated by a court after findings of past discrimination. Such actions are part of the courts’ inherent remedial powers to deal with the effects of segregation.<sup>103</sup>

The Court’s focus in the two Michigan decisions was the two-part “strict scrutiny” test for reviewing racially based governmental actions under the Equal Protection Clause of the Fourteenth Amendment.<sup>104</sup> To satisfy this test, there must first be a “compelling state interest,” and, second, even if such an interest is found, the government entity must employ only “narrowly tailored measures.”<sup>105</sup>

The Court was heavily influenced in these decisions by the briefs of numerous amici.<sup>106</sup> These briefs came from a broad array of groups, including

when there are both men and women in the classroom. Perspectives on the meaning of equal protection of the laws—and, yes, affirmative action—are enriched when there are people of color in the classroom. A discussion of the separation of church and state is much more interesting when Catholics, Jews, Muslims, and atheists can state their personal experiences. I have been told by English professors that diversity in the student body helps class discussion and analysis of everything from Robert Frost poetry and Shakespearean plays to Ellison’s “The Invisible Man” and Malamud’s “The Assistant.” See Ronald Dworkin, *The Court and University*, 50 N.Y. Rev. of Bks. 8 (May 15, 2003).

97. See *Grutter*, 123 S. Ct. 2325.

98. See *Gratz*, 123 S. Ct. 2411.

99. *Id.* at 2422.

100. The Court stated in *Grutter*:

We granted certiorari to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. Compare *Hopwood v. Texas*, 78 F.3d 932 (CA5 1996) (*Hopwood I*) (holding that diversity is not a compelling state interest), with *Smith v. University of Wash. Law School*, 233 F.3d 1188 (CA9 2000) (holding that it is).

123 S. Ct. at 2335 (citation of grant of certiorari omitted).

101. See text accompanying *supra* n. 35.

102. *Adarand Constructors*, 515 U.S. 200; *Croson*, 488 U.S. 469.

103. See e.g. *U.S. v. Fordice*, 505 U.S. 717, 742-43 (1992); *U.S. v. Paradise*, 480 U.S. 149, 183-84 (1987).

104. *Gratz*, 123 S. Ct. at 2427; *Grutter*, 123 S. Ct. at 2337.

105. *Gratz*, 123 S. Ct. at 2427; *Grutter*, 123 S. Ct. at 2337-38.

106. See Jonathan Groner, *How University Got Support of Military Leaders*, 26 Leg. Times 1 (June 30, 2003).



American businesses and the military,<sup>107</sup> who supported the position that diversity was essential to a flourishing economy and military.<sup>108</sup>

Relying on *Bakke*,<sup>109</sup> Justice O'Connor in *Grutter* wrote for a five-Justice majority that "obtaining 'the educational benefits that flow from a diverse student body'"<sup>110</sup> is such a compelling reason. Justice O'Connor rejected the idea that cases post-*Bakke* had implicitly overruled *Bakke* on this issue.<sup>111</sup> Rather, the Court accepted the informed and complex judgments of education officials that "diversity is essential to its educational mission. . . ."<sup>112</sup> Chief Justice Rehnquist accepted this as a given in his decision in *Gratz*.<sup>113</sup>

How a program was to be designed to meet the "compelling interest" of diversity became the Court's focus of review. As a practical matter, the key

107. Dworkin, *supra* n. 96.

108. The Supreme Court stated in *Grutter*:

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." We agree that "[I]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. *Sweat* Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. . . .

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. . . .

The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

123 S. Ct. at 2340-41 (quoting Br. of Amicus Curiae Julius W. Becton, Jr. et al. at 27).

109. See Amar, *supra* n. 94, at 479 (noting that Justice O'Connor quoted *Bakke* a "whopping 16 times").

110. *Grutter*, 123 S. Ct. at 2338-39 (quoting Br. of Respt. Bollinger et al. at i).

111. *Id.* at 2339.

112. *Id.*

113. In his opinion for the Court, Chief Justice Rehnquist stated:

Petitioners further argue that "diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." But for the reasons set forth today in *Grutter v. Bollinger*, the Court has rejected these arguments of petitioners.

*Gratz*, 123 S. Ct. at 2426-27 (quoting Br. of Petr. at 17).

decisions were those of Justices O'Connor and Breyer.<sup>114</sup> While Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas felt that both the Michigan Law School and undergraduate admissions programs were in violation of the Equal Protection Clause,<sup>115</sup> Justices Stevens, Souter, and Ginsburg felt that both of the programs were constitutional.<sup>116</sup>

The terms used by Justice O'Connor in *Grutter* to describe the review process illustrates the split Court's insistence that the "means chosen" must be "specifically and narrowly framed" to "accomplish" the government's "asserted purpose."<sup>117</sup> The terms must be almost architectural in nature: "defin[ing] the contours" and "calibrat[ing]" the "inquiry" to make sure that the remedy would "fit the distinct issues raised by the use of race to achieve student body diversity . . . ."<sup>118</sup>

Certain things are clear—there can be no quota system.<sup>119</sup> "Instead, a university may consider race . . . only as a plus in a particular applicant's file. . . ."<sup>120</sup> The Michigan Law School's plan of taking race into account as one of many factors in an attempt to establish a "critical mass" of minorities satisfies this narrow tailoring.<sup>121</sup> For now, Justice O'Connor will accept the Law School's word that it is moving towards a "race-neutral admissions formula,"<sup>122</sup> and reject the argument that the Law School's policy is really a sham to cover explicit racial balancing.<sup>123</sup>

114. See *infra* n. 124.

115. See *Gratz*, 123 S. Ct. at 2417; *id.* at 2443 (Thomas, J., concurring); *Grutter*, 123 S. Ct. at 2348 (Scalia & Thomas, JJ., concurring in part and dissenting in part); *id.* at 2350 (Thomas & Scalia, JJ., concurring in part and dissenting in part); *id.* at 2365 (Rehnquist, C.J., Scalia, Kennedy & Thomas, JJ., dissenting); *id.* at 2370 (Kennedy, J., dissenting).

Chief Justice Rehnquist reviews the defense of the law school administrators that it seeks only to obtain a "critical mass" and attempts to use statistical tables to show that "[t]he tight correlation between the percentage of applicants and admittees of a given race, therefore, must result from careful race based planning by the Law School." *Id.* at 2369 (Rehnquist, C.J., Scalia, Thomas & Kennedy, JJ., dissenting).

Justice Scalia rejects the idea that diversity is a compelling interest, that there is any legitimate benefit to "teach[ing] good citizenship . . . through a patriotic, all-American system of racial discrimination . . . ." *Grutter*, 123 S. Ct. at 2349 (Scalia & Thomas, JJ., concurring in part and dissenting in part).

Justice Kennedy similarly uses statistics to argue that there really was not individualized review in the law school admission process as allowed by "taking into account" language in *Bakke*, but rather that racial balancing occurred. *Id.* at 2372-73.

116. *Gratz*, 123 S. Ct. at 2440 (Souter & Ginsburg, JJ., dissenting); *id.* at 2445 (Ginsburg & Souter, JJ., dissenting); *Grutter*, 123 S. Ct. at 2347 (Ginsburg & Breyer, JJ., concurring).

117. *Grutter*, 123 S. Ct. at 2341 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)) (internal quotations omitted).

118. *Id.*

119. *Id.* at 2342 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system. . . .").

120. *Id.* (quoting *Bakke*, 438 U.S. at 317) (internal quotations omitted).

121. See *id.*

122. *Grutter*, 123 S. Ct. at 2346 (quoting Br. for Resp't. Bollinger 34) (internal quotations omitted).

123. *Id.* at 2343. Chief Justice Rehnquist and Justices Scalia and Kennedy take the position that the policy is a pretense. *Id.* at 2365 (Rehnquist, C.J., Scalia, Thomas & Kennedy, JJ., dissenting); *id.* at 2348 (Scalia & Thomas, JJ., concurring in part and dissenting in part); *id.* at 2371 (Kennedy, J., dissenting).

The undergraduate admissions plan, used to consider applicants to the College of Literature, Science, and the Arts, does not pass constitutional scrutiny. Unlike the Law School's consideration of race, Justice O'Connor states, the focus of the undergraduate admissions process is not on "individualized review" but rather uses numerical values—points—which turns the process into one that is invalid.<sup>124</sup>

## V. DIFFERENCE IN PERSPECTIVE

That great legal philosopher Yogi Berra has noted, "Where you stand depends on where you sit." In the various opinions in *Grutter* and *Gratz*, three very different visions of the present state of racism are depicted.

Justice Thomas believes that although racism continues to exist, affirmative action programs stamp minority students with a "badge of inferiority," a stigma that follows them throughout their life.<sup>125</sup> It engenders resentment against them and even leads to questions of competence, just at a time when they are taking "positions in the highest places of government, industry, or academia."<sup>126</sup>

Justice O'Connor takes an "in-between" position. The "core purpose" of the Equal Protection Clause "was to do away with all governmentally imposed discrimination based on race."<sup>127</sup> Great progress has been achieved in the twenty-five years since *Bakke*. It is appropriate for schools to "terminate . . . race-conscious admissions . . . as soon as practicable."<sup>128</sup>

Still, Justice O'Connor believes that it is not yet time to mandate an end to all race-conscious admissions. Some time limit must be set. According to Justice O'Connor, setting such a "termination point 'assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.'"<sup>129</sup> She sets a goal of twenty-five years from 2003 as the termination point.<sup>130</sup>

124. See *Gratz*, 123 S. Ct. at 2431-33 (O'Connor, J., concurring). Justice Breyer agrees with Justice O'Connor's reasoning but also accepts the idea, expressed by Justice Ginsburg, that a racially based policy of "inclusion" may be appropriate and constitutional in some cases. Careful judicial inspection is necessary but not so intensive as to exclude all reasonable efforts to overcome past racial oppression. *Id.* at 2433-34 (Breyer, J., concurring in the judgment); see *id.* at 2443-44 (Ginsburg, J., dissenting).

125. *Grutter*, 123 S. Ct. at 2362 (Thomas & Scalia, JJ., concurring in part and dissenting in part).

126. *Id.*

127. *Id.* at 2346 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)) (internal quotations omitted).

128. *Id.*

129. *Id.* (quoting *Croson*, 488 U.S. at 510). Justice O'Connor also quotes:

It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all.

*Grutter*, 123 S. Ct. at 2346 (quoting Nathaniel L. Nathanson & Casimir J. Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 Chi. Bar Rec. 282, 293 (May-June 1977)) (internal quotations omitted).

130. Justice O'Connor stated in her opinion:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the

Justice Ginsburg gives a more pessimistic history lesson. It has been only fifty years since public school segregation was declared unconstitutional, and that was followed by years of “prolonged resistance.”<sup>131</sup> Moreover, Justice Ginsburg states, “It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land. . . .”<sup>132</sup> Schools are still segregated by race, and black schools are still inferior to white ones.<sup>133</sup>

“Irrational” racial prejudice persists, she argues, not just in educational access, but also in employment, health care, housing, and even day-to-day consumer transactions.<sup>134</sup> It is at best a hope, but not really an expectation, that in another twenty-five years “progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”<sup>135</sup>

## VI. LOOKING TO THE FUTURE

The Court in both *Grutter* and *Gratz* noted that the challenges to the undergraduate and law admissions programs were based on not only the Equal Protection Clause but also Title VI of the Civil Rights Act of 1964.<sup>136</sup> That Act prohibits discrimination based on race by any program or activity receiving federal financial assistance.<sup>137</sup> Colleges and universities, of course, receive loans, grants, and other federal support and thus, it would seem, come under this provision. And looking back at previous precedents dealing with contracting and licensing,

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number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

*Id.* at 2346-47.

131. *Id.* at 2347 (Ginsburg & Breyer, JJ., concurring).

132. *Id.*

133. Justice Ginsburg provides the following information in support of her argument:

As to public education, data for the years 2000-2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. And schools in predominantly minority communities lag far behind others measured by the educational resources available to them.

*Id.* at 2348 (citations omitted).

134. *Gratz*, 123 S. Ct. at 2443-44 (Ginsburg & Souter, JJ., dissenting).

135. *Grutter*, 123 S. Ct. at 2348 (Ginsburg & Breyer, JJ., concurring) (footnote omitted). Justice Thomas, who dissented in *Grutter*, saying the racially based policies are unconstitutional now as they were in the past, did recognize that there may not be much change twenty-five years from now:

The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that time-frame. In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black. In 1993 blacks constituted 1.1% of law school applicants in that score range, though they represented 11.1% of all applicants. In 2000 the comparable numbers were 1.0% and 11.3%. No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years.

*Id.* at 2364 (Thomas & Scalia, JJ., concurring in part and dissenting in part) (citations and footnotes omitted).

136. *Gratz*, 123 S. Ct. at 2418; *Grutter*, 123 S. Ct. at 2332.

137. 42 U.S.C. § 2000d.

these rules apply not just to educational institutions but also to a broad number of businesses and industries that receive benefits from governments at any level.<sup>138</sup>

So, what are the rules? Racial quotas are just not permissible unless done pursuant to a court order. In fact, whether implemented by a private or public entity, specific quotas based on race have been illegal since at least *Bakke*, which applied both the Constitution and the 1964 Civil Rights Act.<sup>139</sup> Quotas have been upheld only when they are imposed by a court pursuant to findings that they are the necessary remedy to end discrimination.<sup>140</sup>

Under *Gratz*, which reaffirmed *Bakke*, specific goals with defined timetables, preferences, or set-asides are also invalid if imposed by a government entity. They are probably invalid, under the Civil Rights Act of 1964, to any private entity taking government funds, like a private college or university,<sup>141</sup> or receiving any government financing, contract, or license.

The Supreme Court did not accept the idea of reverse or “negative discrimination,” often used to describe affirmative action programs based on explicit goals and timetables and set-asides. Instead, it accepted or “accentuated” the positive concept of promoting diversity by allowing it to be a compelling interest justifying some selection based on race. The issue for the future will be the “in-between.”<sup>142</sup>

For most universities and colleges, the *Grutter/Gratz* “in-between” will be seen as a welcome relief from a set of attacks.<sup>143</sup> Justice O’Connor indicated that schools should move to other non-race-based alternatives, and that for a period of up to twenty-five years, diversity based *Grutter* type programs would be considered acceptable.<sup>144</sup> The *Grutter* decision was, of course, only a five-to-four

138. See *Adarand Constructors*, 515 U.S. 200 (contracting); *Metro Broadcasting*, 497 U.S. 547 (licensing).

139. *Bakke*, 438 U.S. at 287, 320.

140. See e.g. *Fordice*, 505 U.S. 717; *Paradise*, 480 U.S. at 183-85.

141. The Center for Equal Opportunity has already filed complaints and sent “warning letters” to private colleges and universities challenging their minority admissions programs under *Bakke* and now *Gratz/Grutter*. Pat Wingert & Debra Rosenberg, *Just the Beginning*, 142 Newsweek 10 (July 28, 2003).

142. See Peter Schmidt, *Affirmative Action Survives, and So Does the Debate*, Chron. of Higher Educ. S1 (July 4, 2003).

143. *Id.* at S2.

144. Justice O’Connor stated in her opinion in *Grutter*:

We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all “race-conscious programs must have reasonable durational limits.”

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.

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

“holding,” and any change in the Court’s composition could alter that discretionary period quickly.<sup>145</sup>

Even with the decision, though, there are some real doubts by members of the Court about the discretion to be given to administrators in the near future. Justice Scalia warns that all these cases will do is “prolong the controversy and the litigation.”<sup>146</sup> Chief Justice Rehnquist and Justice Kennedy question the acceptance of university statistics.<sup>147</sup> Justice Thomas goes further and makes a direct attack on granting this type of discretion to “university administrators.” Justice Thomas believes that the real defense of the University of Michigan’s affirmative action program is protection of its “elite status.”<sup>148</sup> There is “nothing compelling” in helping a school maintain its elite status.<sup>149</sup> The Court should not

expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

123 S. Ct. at 2346-47 (quoting Br. of Respt. Bollinger et al. at 32) (citations omitted).

145. See *The Supreme Court Approves Affirmative Action*, 3 *The Week* 4 (July 11, 2003).

146. *Grutter*, 123 S. Ct. at 2349 (Scalia & Thomas, JJ., concurring in part and dissenting in part). Justice Scalia asserted:

Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today’s *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant “as an individual,” *ante*, at 2343, and sufficiently avoids “separate admissions tracks” *ante*, at 2342, to fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a “good faith effort” and has so zealously pursued its “critical mass” as to make it an unconstitutional *de facto* quota system, rather than merely “a permissible goal.” *Ante*, at 2342 (quoting *Sheet Metal Workers’ v. EEOC*, 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986) (O’CONNOR, J., concurring in part and dissenting in part)). Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter*; and while the opinion accords “a degree of deference to a university’s academic decisions,” *ante*, at 2339, “deference does not imply abandonment or abdication of judicial review.” *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).) Still other suits may challenge the bona fides of the institution’s expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution’s racial preferences have gone below or above the mystical *Grutter*-approved “critical mass.” Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution’s composition of its generic minority “critical mass.” I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

*Id.* at 2349-50.

147. See *supra* n. 115 and accompanying text.

148. *Grutter*, 123 S. Ct. at 2353 (Thomas & Scalia, JJ., concurring in part and dissenting in part).

149. *Id.* at 2355. Later in his opinion, Justice Thomas states:

While these students [of elite schools] may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less “elite” law school for which they were better prepared. And the aestheticists will never address the real problems facing “underrepresented minorities,” instead continuing their social experiments on other people’s children.

promote such stress on academic quality at the expense of racial equality. It is unfair, and not just to white students. It sets up minority students for failure.<sup>150</sup>

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions.<sup>151</sup>

Justice Thomas asserts that there are race-neutral alternatives to increase the number of minorities at Michigan, “such as accepting all students who meet minimum qualifications . . . .”<sup>152</sup>

But, for at least a while, such discretion will still be given to university administrators. “Taking into account” affirmative action programs will continue, and may even be reinstated in those places where there was some belief that they were invalid.<sup>153</sup> The desire and hope of these programs will be to use a case-by-case review to increase percentages of under-represented minorities.

Opponents will try to demonstrate that these programs approach set-asides or even quotas.<sup>154</sup> In her opinion upholding the program at the University of Michigan Law School, Justice O’Connor suggested another tactic for opponents, sunset provisions for such programs.<sup>155</sup> Thus, some will likely seek state-by-state legislation to bar affirmative action plans of any type.<sup>156</sup>

Still for now, whether in favor of affirmative action or opposed to it, most will welcome the “murky ground” as a temporary truce based on a “delicate balance.”<sup>157</sup>

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*Id.* at 2362 (footnote omitted).

150. *See id.*

151. *Id.*

152. *Grutter*, 123 S. Ct. at 2356 (Thomas & Scalia, JJ., concurring in part and dissenting in part). Justice Thomas goes even further and challenges the whole concept of “selective admissions” and reliance on a “racially skewed” Law School Admission Test. *Id.* at 2360-61. The court should not allow schools to use these principles and then try to reduce their impacts by overlaying these with explicit racially discriminatory admissions programs. *Id.* Schools, like Michigan, are “seek[ing] only a facade—it is sufficient that the class looks right, even if it does not perform right.” *Id.* at 2362. *See* George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. Leg. Educ. 103 (March 2003).

153. *See* Jeffrey Selingo, *Decisions May Prompt Return of Race-Conscious Admissions at Some Colleges*, Chron. Higher Educ. S5 (July 4, 2003) (indicating that state schools in the states covered by the Fifth Circuit, which were barred by *Hopwood* from any affirmative action programs, would be reinstating their programs); *see supra* nn. 80-84 and accompanying text.

154. *See* Curt A. Levey, *Colleges Should Take No Comfort in the Supreme Court’s Reprieve*, Chron. Higher Educ. B11, B11-14 (July 18, 2003). The Center for Equal Opportunity has already filed three complaints with the Office of Civil Rights in the Federal Department of Education, arguing that programs designed to increase minority representation violate the law and has sent “warning letters” to thirty others. Wingert & Rosenberg, *supra* n. 141, at 10.

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

156. *See* Peter Schmidt, *Affirmative-Action Fight is Renewed in the States*, Chron. Higher Educ. A19 (July 18, 2003).

157. *See* Daniel Treiman, *ADL, Bush Hail Court’s Decision on Affirmative Action*, Forward 3 (June 27, 2003).