The Constitution and Racial Equality After *Gratz* and *Grutter*

Linda S. Greene*

I. Introduction

It is not surprising that significant attention focused on the outcomes of *Gratz v. Bollinger*[1] and *Grutter v. Bollinger.*[2] Significant race cases always attract tremendous attention. Jennifer Gratz and Barbara Grutter challenged the admissions policies of one of the most prestigious institutions of higher education, the University of Michigan.[3] In the *Gratz* case, Jennifer Gratz asserted that the University violated the Constitution by considering race as a factor in its undergraduate admissions programs.[4] A federal district court agreed with her contention as to the earlier years of the program[5] but concluded that the then-current undergraduate admissions program was constitutional.[6] In the *Grutter* case, Barbara Grutter claimed that the University of Michigan Law School used race as a predominant factor in its admissions decisions.[7] In that case, a different federal judge from the same district concluded that the law school admissions program was unconstitutional.[8]

The cases were significant in part because Gratz and Grutter were represented by lawyers who were employed by an organization engaged in a campaign to defeat affirmative action.[9] And the University of Michigan was represented by its own expert in the field,[10] as well as the most experienced attorneys who work to sustain affirma-

* Evjue-Bascom Professor of Law, Associate Vice Chancellor for Academic Affairs, University of Wisconsin-Madison; B.A., California State University at Long Beach, 1970; J.D., University of California, Berkeley (Boalt Hall) 1974.

1. 123 S. Ct. 2411 (2003) (*United States Reports* pagination not available at time of publication).
2. 123 S. Ct. 2325 (2003) (*United States Reports* pagination not available at time of publication).
3. US News and World Report ranks the University of Michigan Law School in the top ten. *America's Best Graduate Schools 2004*, US News & World Report, *available at* http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php (last visited Feb. 20, 2004).
4. Gratz v. Bollinger, 122 F. Supp. 2d 811, 814 (E.D. Mich. 2000), *rev'd*, 188 F.3d 394 (6th Cir. 1999), *rev'd in part*, 123 S. Ct. 2411 (2003).
5. *Id.*
6. *Id.* at 814, 827-30, 836.
7. Grutter v. Bollinger, 137 F. Supp. 2d 821, 824 (E.D. Mich 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003).
8. *Id.* at 872.
9. Michael E. Rosman and Hans Bader of the Center for Individual Rights represented Grutter and Gratz. Brief for the Petitioner, *Grutter* (No. 02-241); Brief for the Petitioners, *Gratz* (No. 02-516).
10. John R. Alger of the University of Michigan Office of the Vice President and General Counsel represented the University. Brief for Respondents, *Grutter* (No. 02-241); Brief for Respondents, *Gratz* (No. 02-516).

tive action programs.[11] The drama was increased by the inconsistent rulings from different judges during the lower court proceedings in the two cases. In the *Grutter* law school case, a federal district court judge ruled that educational diversity is not a compelling interest.[12] In the undergraduate admissions case, *Gratz*, a different federal district court judge reached the opposite conclusion.[13]

The drama was heightened by the proceedings in the Sixth Circuit Court of Appeals. Over eighty organizations filed briefs for the consideration of the appellate court.[14] They represented business,[15] labor,[16] law deans,[17] the legal profession,[18] law schools,[19] universities, and higher education associations.[20] The decision of the Sixth Circuit to hear the *Grutter* case en banc and to consolidate the two cases before the panel could hear *Gratz* increased public attention. This decision also provoked an intrajudicial squabble over the

11. John Payton of the law firm of Wilmer, Cutler & Pickering and Maureen Mahoney of Latham & Watkins represented the University. Brief for Respondents, *Grutter* (No. 02-241); Brief for Respondents, *Gratz* (No. 02-516). Mr. Payton also represented the City of Richmond in the case of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Reply Brief of Appellant City of Richmond, *Croson* (No. 87-998).

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

13. Gratz v. Bollinger, 122 F. Supp. 2d 811, 824 (E.D. Mich. 2000), *rev'd in part*, 123 S. Ct. 2411 (2003).

14. Amicus Briefs filed with the Sixth Circuit Court of Appeals in support of the Appellant are available online. Amicus Briefs, *available at* http://www.umich.edu/~urel/admissions/legal/amicus.html, copyright by the Regents of the University of Michigan.

15. *See, e.g.*, Brief of 3M et al. as Amici Curiae in Support of Defendants-Appellants Seeking Reversal, Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2001) (No. 01-1447), Amicus Briefs, *supra* note 14; Brief of General Motors Corporation as Amicus Curiae in Support of Appellants, *Grutter* (No. 01-1447), Amicus Briefs, *supra* note 14.

16. *See* Brief of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as Amicus Curiae, in Support of Appellants, Lee Bollinger et al., *Grutter* (No. 01-1447), Amicus Briefs, *supra* note 14.

17. Brief of Amici Curiae Judith Areen et al. in Support of Appellants' Appeal for Reversal of the District Court's Order, *Grutter* (No. 01-1447), Amicus Briefs, *supra* note 14.

18. Brief of The American Bar Association as Amicus Curiae in Support of Defendants-Appellants, *Grutter* (No. 01-1447), Amicus Briefs, *supra* note 14; Brief of Amici Curiae National Asian Pacific American Bar Association et al. in Support of Defendants-Appellants and in Favor of Reversal, *Grutter* (No. 01-1447), Amicus Briefs, *supra* note 14.

19. Brief of Amici Curiae American Council on Education et al. in Support of Appellants and in Support of Reversal, *Grutter* (No. 01-1447), Amicus Briefs, *supra* note 14.

20. Amicus Briefs, *supra* note 14. The following organizations signed on this brief: American Association for Higher Education, American Association of Colleges for Teacher Education, American Association of Colleges of Nursing, American Association of Collegiate Registrars and Admissions Officers, American Association of Community Colleges, American Association of State Colleges and Universities, American Association of University Professors, American College Personnel Association, American Dental Education Association, ACT, Inc., Association of Academic Health Centers, Association of American Colleges and Universities, Association of American Law Schools, Association of American Medical Colleges, Association of American Universities, Association of Catholic Colleges and Universities, Association of Community College Trustees, Association of Governing Boards of Universities and Colleges, Association of Jesuit Colleges and Universities, College and University Personnel Association, Council for Advancement and Support of Education, Council of Independent Colleges, Educational Testing Service, Educause, Hispanic Association of Colleges and Universities, National Association for College Admission Counseling, National Association of Independent Colleges and Universities, National Association of Student Financial Aid Administrators, National Association of Student Personnel Administrators, National Council of University Research Administrators, and United Negro College Fund.

propriety of the removal of the case from the panel to which it was originally assigned.[21] The Sixth Circuit decision that recognized diversity as a compelling interest sharpened the division among the circuits on this issue.[22] The cases seemed headed for the United States Supreme Court.

21. That dispute is recounted in both the majority opinion and a dissenting opinion by Judge Boggs in which he charges that the Sixth Circuit did not follow established procedure in assigning the case to a panel. *Grutter*, 288 F.3d at 810-14 (Boggs, J., dissenting).

22. Prior to the decision of the Sixth Circuit in *Grutter*, the question of whether diversity qualifies as a compelling interest had been addressed by four of the United States Courts of Appeal. Three of those decisions were in the areas of higher education. These courts include the Fifth Circuit in both 1996, Hopwood v. University of Texas, 78 F.3d 932 (5th Cir. 1996) [hereinafter *Hopwood II*], and 2000, Hopwood v. University of Texas, 236 F.3d 256 (5th Cir. 2000) [hereinafter *Hopwood III*], the Fourth Circuit in 1999, Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999), the Ninth Circuit in 2000, Smith v. University of Washington, 233 F.3d 1188 (9th Cir. 2000), and the Eleventh Circuit in 2001, Johnson v. Board of Regents, 263 F.3d 1234 (11th Cir. 2001).

The Fifth Circuit, which encompasses the federal district courts in Texas, Louisiana, and Mississippi, addressed the issue twice while considering the constitutionality of the race-conscious admissions policy of the University of Texas Law School. *See generally Hopwood II*, 78 F.3d at 1932; *Hopwood III*, 236 F.3d 256.

In *Hopwood II*, the Fifth Circuit declared the admissions program unconstitutional and along the way refused to accept the achievement of a diverse student body as a compelling interest. 78 F.3d at 943. While the panel concluded that no single rationale had emerged from the *Bakke* decision, the court concluded that subsequent decisions, such as *Croson*, ruled out diversity as a compelling interest. *Id.* at 945. According to the 1996 panel, remedying past institutional discrimination was the only acceptable and compelling rationale for a voluntary affirmative action program. *Id.* at 950.

In *Hopwood III*, a case addressing the entitlement of the plaintiffs to attorney's fees, the Fifth Circuit addressed the issue again. Here, the specific question was whether the prior panel had committed clear error when it concluded that remedying past identified (or institutional) discrimination was the only rationale for a voluntary affirmative action program. If the decision of the first panel was clear error, a subsequent panel might set the decision aside, thus reopening the case while also defeating the quest for attorney's fees. The second panel rejected Texas' contention that the first decision was "clear error." The court adopted a middle ground—*Bakke* neither required nor foreclosed lower courts from considering diversity as a compelling state interest. The court reasoned that the Powell opinion was an opinion by a single justice and was not explicitly embraced by the Brennan group. The court stated, "In the absence of subsequent Supreme Court precedent squarely and unequivocally holding that diversity can never be a compelling interest, we read *Bakke* as not foreclosing but certainly not requiring the acceptance by the lower courts of diversity as a compelling interest." *Hopwood III*, 236 F.3d at 275. Thus, the Fifth Circuit did not answer the question of whether diversity is a compelling interest. Rather, it left the initial decisions on the question to the lower federal courts in the Circuit.

Subsequently, the Eleventh Circuit also declined to resolve the question. In *Johnson*, the Eleventh Circuit considered the constitutionality of an undergraduate admissions program which considered race as a factor. The *Johnson* court stated, "The fact is inescapable that no five justices in *Bakke* expressly held that student body diversity is a compelling interest under the Equal Protection Clause . . . simply put, Justice Powell's opinion does not establish student body diversity as a compelling interest." *Johnson*, 263 F.3d at 1248-49.

However, the court declined to decide for the Circuit whether diversity is a compelling interest. Instead, the court assumed, but failed to decide, that diversity was a compelling interest. Next, the court considered whether the use of race was narrowly tailored to accomplish this student body diversity interest. The court concluded that the admissions program failed this prong of strict scrutiny. The *Johnson* court found that the program used race in a rigid way, failing to take into account race-neutral factors while also giving an arbitrary or disproportionate benefit to certain groups. The court also concluded that there was no evidence that the university explored other race-neutral alternatives and approaches. However, ultimately, the Eleventh Circuit left open the question of whether diversity was, in fact, a compelling interest.

The Fourth Circuit adopted a similar approach in *Tuttle*. There, the court also assumed, but did not decide, that diversity is a compelling interest. *See generally* Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999). Like the Eleventh Circuit, the court decided that the kindergarten admissions program did not use race to achieve diversity in a narrowly tailored manner. *Id.*

After the United States Supreme Court decision to hear the case, media and amici attention intensified. The Court received over three hundred amicus briefs from educational institutions,[23] law school

However, in 2001 the Ninth Circuit concluded that *Bakke* established diversity as a compelling interest. *See generally Smith*, 233 F.3d 1188. *Smith* addressed the constitutionality of the University of Washington Law School student affirmative action program. In *Smith*, the Ninth Circuit concluded that the Brennan opinion was broader than the Powell opinion, but not necessarily inconsistent with that opinion. *Id.* at 1198-99. The court reasoned that although the Brennan opinion relied on societal discrimination, the Brennan Justices would have also supported the diversity rationale. *Id.* at 1199. In other words, the Brennan group did not oppose the use of race as a factor to broaden opportunity, and would have embraced the diversity rationale as a subset of its own views.

Smith was the only circuit court decision subsequent to *Hopwood II* to squarely deal with the question of whether the consideration of diversity in voluntary affirmative action programs is a compelling interest. However, the question of other circuits' treatment of the issue of diversity and the scope of compelling interests in affirmative action programs remains to be seen.

23. *See* Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241); Brief of American Law Deans Association as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of Amherst College et al. Amici Curiae, Supporting Respondents, *Grutter* (No. 02-241); Brief for the Arizona State University College of Law Supporting Respondent, *Grutter* (No. 02-241); Brief of Amicus Curiae Association of American Law Schools in Support of Respondent, *Grutter* (No. 02-241); Brief of the Association of American Medical Colleges et al. as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of Carnegie Mellon University and 37 Fellow Private Colleges and Universities as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of Amici Curiae Columbia University et al. in Support of Respondents, *Grutter* (No. 02-241); Brief of Harvard University et al. as Amici Curiae Supporting Respondents, *Grutter* (No. 02-241); Brief of Howard University as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of Indiana University as Amicus Curiae Supporting Respondents, *Grutter* (No. 02-241); Brief of the Law School Admission Council as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of the University of Pittsburgh et al. as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241). Amicus Curiae briefs to the United States Supreme Court in the *Grutter* case are available online. Amicus Curiae briefs, *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html, copyright by the Regents of the University of Michigan; *see also* Brief of Amici Curiae American Council on Education et al. in Support of Respondents, Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516); American Educational Research Association et al. as Amici Curiae in Support of Respondents, *Gratz* (No. 02-516); Brief of Amherst College et al. Amici Curiae, Supporting Respondents, *Gratz* (No. 02-516); Brief of Carnegie Mellon University and 37 Fellow Private Colleges and Universities as Amicus Curiae in Support of Respondents, *Gratz* (No. 02-516); Brief of Amici Curiae Columbia University et al. in Support of Respondents, *Gratz* (No. 02-516); Brief of Harvard University et al. as Amici Curiae Supporting Respondents, *Gratz* (No. 02-516); Brief of Howard University as Amicus Curiae in Support of Respondents, *Gratz* (No. 02-516); Brief of Amici Curiae Massachusetts Institute of Technology et al. in Support of Respondents, *Gratz* (No. 02-516); Amicus Curiae Brief of Northeastern University Supporting the Respondents, *Gratz* (No. 02-516); Brief of the University of Pittsburgh as Amici Curiae in Support of Respondents, *Gratz* (No. 02-516). Amicus Curiae briefs to the United States Supreme Court in the *Gratz* case are available online. Amicus Curiae briefs, *available at* http://www.umich.edu/~urel/admissions/legal/gra_amicus-ussc/um.html, copyright by the Regents of the University of Michigan.

deans,[24] law professors[25] and other professors,[26] students,[27] professional associations,[28] "civil rights" law firms and organizations both for and against affirmative action,[29] corporations,[30] and the

24. Brief of Amici Curiae Judith Areen et al. in Their Individual Capacities as Deans of, Respectively, Georgetown Law Center et al. in Support of Respondents, *Grutter* (No. 02-241), *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html, copyright by the Regents of the University of Michigan.

25. *See* Brief of Amici Curiae Law Professors Larry Alexander et al. in Support of Petitioner, *Grutter* (No. 02-241), *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/, copyright by the Regents of the University of Michigan; Brief of the Society of American Law Teachers as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241), *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html, copyright by the Regents of the University of Michigan.

26. *See* Brief of Amicus Curiae the Michigan Association of Scholars in Support of Petitioners, *Grutter* (No. 02-241); Brief for Amicus Curiae National Association of Scholars in Support of Petitioners, *Grutter* (No. 02-241). Both briefs are available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/, copyright by the Regents of the University of Michigan.

27. *See* Brief of 13,922 Current Law Students at Accredited American Law Schools as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of the Harvard Black Law Students Association et al. as Amici Curiae Supporting Respondents, *Grutter* (No. 02-241); Brief on Behalf of Hillary Browne et al. and the Students of Howard University School of Law as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondent, *Grutter* (No. 02-241); Brief of the Michigan Law Students Association et al. as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241). Briefs are available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html, copyright by the Regents of the University of Michigan.

28. *See, e.g.*, Brief of the American Bar Association as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241); Amicus Brief of Boston Bar Association et al. in Support of Respondents, *Grutter* (No. 02-241); Brief Amici Curiae of the Hispanic National Bar Association and the Hispanic Association of Colleges and Universities in Support of Respondents, *Grutter* (No. 02-241); Brief of King County Bar Association as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of Amici Curiae, The New Mexico Hispanic Bar Association et al. in Support of the Respondents, *Grutter* (No. 02-241); Brief Amicus Curiae of the Black Women Lawyers Association of Greater Chicago, Inc., in Support of Respondents, *Grutter* (No. 02-241). Briefs are available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html, copyright by the Regents of the University of Michigan.

29. *See, e.g.*, Brief of the Asian American Legal Foundation as Amicus Curiae in Support of Petitioners, *Grutter* (No. 02-241); Brief Amici Curiae of the Center for Equal Opportunity et al. in Support of Petitioner, *Grutter* (No. 02-241); Brief of Amicus Curiae Center for Individual Freedom in Support of Petitioners, *Grutter* (No. 02-241); Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, *Grutter* (No. 02-241). Briefs in support of the Petitioners are available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/, copyright by the Regents of the University of Michigan. Brief of Amici Curiae the Lawyer's Committee for Civil Rights Under Law et al. in Support of Respondents, *Grutter* (No. 02-241); Brief of the Leadership Conference on Civil Rights and the LCCR Education Fund as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief for the NAACP Legal Defense and Educational Fund, Inc. and the American Civil Liberties Union as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of the National Urban League et al. as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of NOW Legal Defense and Education Fund et al. as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241). Briefs in support of the Respondents in the *Grutter* case are available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html, copyright by the Regents of the University of Michigan. Brief of Latino Organizations as Amici Curiae in Support of Respondents, *Gratz* (No. 02-516); Brief of Amici Curiae the Committee for Civil Rights Under Law et al. in Support of Respondents, *Gratz* (No. 02-516); Brief of Amici Curiae National Asian Pacific American Legal Consortium et al. in Support of Respondents, *Gratz* (No. 02-516); Brief of NOW Legal Defense and Education Fund et al. as Amici Curiae in Support of Respondents, *Gratz* (No. 02-516). Briefs in support of the Respondents in the *Gratz* case are available at http://www.umich.edu/~urel/admissions/legal/gra_amicus-ussc/um.html, copyright by the Regents of the University of Michigan.

30. Brief of Exxon Mobil Corporation as Amicus Curiae in Support of Neither Party, *Grutter* (No. 02-241); Brief of BP America Incorporated as Amicus Curiae in Support of Neither Party, *Grutter* (No. 02-241), *available at* http://www.umich.edu/~urel/admissions/legal/amicus-ussc/BPA-neither.pdf, copyright by the Regents of the University of Michigan; Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter* (No. 02-241); Brief

military.[31] By this time, it seemed clear that the day of decision in *Gratz* and *Grutter* would be a day of racial reckoning in the United States Supreme Court, not unlike those of *Dred Scott v. Sanford*,[32] *Brown v. Board of Education*,[33] and *Regents of the University of California v. Bakke*.[34]

In this article, I discuss the significance of the *Gratz* and *Grutter* decisions and their meaning within and beyond race-conscious affirmative action. In Part II, I discuss the most important issue before the Court, whether educational diversity is a sufficiently compelling interest to justify the use of race as a factor in university admissions programs. In Part III, I review the Court's consideration of the two programs under the narrow tailoring prong of strict scrutiny and the principles *Gratz* and *Grutter* lay down for future race-conscious programs. In Part IV, I address the implications of *Gratz* and *Grutter* for the scope of constitutionally cognizable racial discrimination. In particular, I posit that *Gratz* and *Grutter* have implications for the reconsideration of equal protection and the reinvigoration of *Brown*'s potential. If read more broadly, *Gratz* and *Grutter* provide a foundation for a broader, more inclusive vision of equality and citizenship under the Fourteenth Amendment, a fitting tribute to *Brown* on its fiftieth anniversary.

II. THE MEANING OF EDUCATIONAL DIVERSITY

A. *From* Bakke *to* Gratz *and* Grutter

The issue of most immediate consequence was whether the Court would recognize educational diversity as a compelling interest. Though *Adarand Constructors, Inc. v. Pena*,[35] by a divided Court, established that strict scrutiny applied to so-called benign uses of race,[36] the case offered no guidance on the criteria for the determination of compelling interests.[37]

of General Motors Corporation as Amicus Curiae in Support of Respondents, *Grutter* (No. 02-241); Brief of MTV Networks in Support of Respondents, *Grutter* (No. 02-241); Brief of Amici Curiae Media Companies in support of Respondents, *Grutter* (No. 02-241). Briefs in support of Respondents are available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html, copyright by the Regents of the University of Michigan.

31. Former high-ranking officers and civilian leaders of the Army, Navy, Air Force, and Marine Corps, including former military academy superintendents, former Secretaries of Defense, and present and former members of the U.S. Senate, filed an Amici Curiae brief. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241), *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/MilitaryL-both.pdf, copyright by the Regents of the University of Michigan.

32. 60 U.S. (19 How.) 393 (1857).

33. 347 U.S. 483 (1954).

34. 438 U.S. 265 (1978).

35. 515 U.S. 200 (1995).

36. *Id.* at 240-41.

37. *Id.* at 237-38.

At the time of the decisions, there were few definitive precedents on the question. The dearth of majority opinions in most United States Supreme Court cases addressing the constitutionality of affirmative action programs cast a dense fog on this crucial question.[38]

In the course of prior United States Supreme Court decisions addressing the constitutionality of racial classification, institutions had offered a variety of interests in support of voluntary affirmative action programs. These interests included remedying identified past discrimination,[39] preventing the "perpetuation of the effects of prior discrimination,"[40] avoiding the participation of the government in private discrimination,[41] remedying societal discrimination,[42] providing role models for minority students,[43] promoting minority representation in Congress,[44] the interest of diversity in broadcast ownership,[45] and student body makeup.[46] Although the interest in using racial classifications to remedy past, identified, specific institutional discrimination is not controversial as it ensues from the obligation to remedy arguable or proven constitutional or statutory violation,[47] the compelling nature of the remaining noted interests had not been established at the time of the United States Supreme Court decisions in *Gratz* and *Grutter*.

As to diversity, *Metro Broadcasting, Inc. v. FCC*[48] posed the issue but did not resolve it. Although the five-justice majority in *Metro*, led by Justice Brennan, did endorse diversity as an interest sufficiently important to justify the consideration of race in the allocation of broadcast ownership, that majority embraced a mid-level standard of review[49] without the compelling and narrow tailoring language and explicit rigor of strict scrutiny. And while one might make the case that the majority's review was strict in fact,[50] their mid-level scrutiny, with its embrace of a benign-invidious distinction and judicial defer-

38. *See* Paradise v. United States, 480 U.S. 149 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 268-69 (1986); *Bakke*, 438 U.S. at 307-10.

39. Shaw v. Hunt, 517 U.S. 899, 899-909 (1996); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 (1989); Fullilove v. Klutznick, 448 U.S. 448, 484 (1980).

40. *Fullilove*, 448 U.S. at 473.

41. *Croson*, 488 U.S. at 492; *Fullilove*, 448 U.S. at 475.

42. *See Wygant*, 476 U.S. at 268-69; *Bakke*, 438 U.S. at 307-10. But see generally *Shaw v. Reno*, 509 U.S. 630 (1993), and *Shaw v. Hunt*, 517 U.S. 899 (1996), in which a majority rejected societal discrimination as a compelling interest.

43. *Wygant*, 476 U.S. at 272.

44. *See* Shaw v. Hunt, 517 U.S. 899 (1996).

45. Metro Broad., Inc. v. FCC, 497 U.S. 547, 552-53 (1990).

46. *See Bakke*, 438 U.S. at 311-12; *see also* United States v. Fordice, 505 U.S. 717 (1992).

47. *See Metro Broad., Inc.*, 497 U.S. at 613 (O'Connor, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 483 (1980).

48. 497 U.S. 547 (1990).

49. *Id.* at 566-69.

50. The rigor of the majority's review of the program rationale as well as the FCC pursuit of prior race-neutral policies suggested that the mid-level review performed was for all practical purposes a form of "strict" scrutiny.

ence to Congress, did not bring to their analyses the aura—or threat—of presumptive unconstitutionality. So while it was quite plausible that the majority could have found the interest of broadcast diversity compelling, given its relationship to speech[51] and press freedoms,[52] the Brennan majority did not decide the issue using a strict scrutiny scheme. Moreover, by the time *Gratz* and *Grutter* snaked their way to the United States Supreme Court, all but one of the *Metro* majority Justices who had favored a broad array of voluntary affirmative action interests had retired.[53] But the *Metro* dissenters remained on the Court. And they were decidedly less sanguine about the suitability of diversity in a compelling interest role.[54]

Throughout this interregnum, the *Bakke* case remained relevant to the scope of compelling interests as the only prior United States Supreme Court case to address the educational diversity rationale. The Powell opinion,[55] an opinion of Justice Powell alone, did recognize diversity as a compelling interest.[56]

The lower courts were faced with the daunting task of interpreting the *Bakke* opinions. Pursuant to United States Supreme Court case law, divided cases do establish binding precedent if there is a narrower ground of decision on which a majority would agree.[57] If the lower courts could conclude that the Powell opinion was the narrowest ground on which at least five Justices agreed or could have agreed, then lower courts would be bound to recognize diversity as a compelling interest. Under this view, if Justice Powell's embrace of diversity was a rationale narrower than, but not inconsistent with, societal discrimination, the lower courts would be bound to recognize the interest of diversity subject to the possibility of later Court correction. On the other hand, if the rationale of diversity is not only narrower than, but also inconsistent with, societal discrimination, then *Bakke* did establish diversity as a compelling interest.

The United States Courts of Appeals struggled mightily to divine the diversity meaning of *Bakke*.[58] At the time of *Gratz* and *Grutter*,

51. *Metro Broad., Inc.*, 497 U.S. at 567.
52. *Id.* at 568.
53. *Id.* The Justices that composed the majority were Brennan, White, Marshall, Blackman, and Stevens. Only Justice Stevens remains on the bench.
54. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 909 (1996) (reiterating opposition to compelling interests other than identified discrimination).
55. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978).
56. *Id.* at 311-12. Four other Justices, led by Justice Brennan, approved societal discrimination as an "important governmental interest." *Id.* at 324. The remaining Justices decided the case on statutory interpretation grounds. *Id.* at 408-21.
57. Marks v. United States, 430 U.S. 188, 193 (1977).
58. Grutter v. Bollinger, 123 S. Ct. 2325, 2337 (2003). "In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale . . . is . . . binding precedent." *Id.* It does not seem "useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Id.* (citations omitted).

the United States Supreme Court considered that only the Sixth and Ninth Circuits had recognized educational diversity as a compelling interest sufficient to justify the use of race in admissions decisions.[59] And the Ninth Circuit decision had little practical effect in the Circuit due to the initiative-adopted bans on race-conscious affirmative action in Washington[60] and California.[61]

The Fifth Circuit decided that diversity was not a compelling interest[62] and later seemed to hedge on that question.[63] Nonetheless, the *Hopwood v. Texas*[64] decision became the most important on the question of whether United States Supreme Court precedent required the recognition of diversity as compelling. The Fourth and Eleventh Circuits had the opportunity to decide the question, but both Circuits avoided the issue with a non-precedent-setting assumption that educational diversity was compelling. They then decided that the programs were deficient based on "narrow tailoring" analyses.[65]

Against this florid field in *Gratz* and *Grutter*, five members of the Court, Justices Breyer, Souter, Stevens, Ginsberg, and O'Connor in an O'Connor opinion, clearly embraced educational diversity as a compelling interest. Justice Kennedy did so in his own opinion,[66] and Chief Justice Rehnquist may have acquiesced in the approval of diversity as a compelling interest under the circumstances presented in *Gratz* and *Grutter*.[67]

Chief Justice Rehnquist may have embraced diversity as a compelling interest, although he did not do so explicitly in *Gratz* or *Grutter*.[68] Before *Gratz* and *Grutter*, Chief Justice Rehnquist did not foreclose the possibility that some circumstances might be compelling enough to justify the use of race.[69] But in all the cases decided hereto-

59. *See, e.g.*, Grutter v. Bollinger, 288 F.3d 732, 739 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003); Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000).

60. Wash. Rev. Code Ann. § 49.60.030 (West 2002).

61. Cal. Const. art. I, § 31.

62. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

63. LeSage v. Texas, 158 F.3d 213 (5th Cir. 1998), *rev'd*, 528 U.S. 18 (1999).

64. 236 F.3d 256 (5th Cir. 2000).

65. Wooden v. Bd. of Regents, 263 F.3d 1262 (11th Cir. 2001); Tuttle v. Arlington Sch. Bd., 195 F.3d 698, 704 (4th Cir. 1999); Johnson v. Bd. of Regents, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001).

66. Grutter v. Bollinger, 123 S. Ct. 2325, 2370-74 (Kennedy, J., dissenting).

67. Chief Justice Rehnquist does not challenge the legitimacy of diversity as an interest in his dissent. *Id*. at 2365-70 (Rehnquist, C.J., dissenting). Nor does he join the opinion of Justices Thomas or Scalia, who categorically reject educational diversity as an interest.

68. *Id.*

69. Compare the language of Justice O'Connor's opinion in *Croson*, in which Chief Justice Rehnquist joined. In that case, Justice O'Connor agreed with Justice Powell's view expressed in *Bakke* "that for the governmental interest in remedying past discrimination to be triggered, 'judicial, legislative, or administrative findings of constitutional or statutory violations' must be made." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497 (1989) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)). "Only then does the government have a compelling interest . . . ." *Id.*

In contrast, in *Croson*, Justice Scalia concluded that "[a]t least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can

fore, he had not found those required limited circumstances present.[70] Moreover, in *Metro*, he joined Justice O'Connor's dissent that limited compelling interests to identifiable institutional discrimination on the ground that other interests such as diversity and societal discrimination, and role models were "far too amorphous" to limit the use of race.[71] These were the criterion Justice O'Connor identified as pivotal to the identification of compelling interests.[72]

But what did the Court mean by educational diversity? Several briefs offered views on what diversity might mean in various contexts. In *Grutter*, the University of Michigan asked the Court to recognize the value of diversity in breaking down stereotypes, enabling students to better understand "persons of different races,"[73] and creating a livelier and more interesting classroom learning environment.[74]

In the *Gratz* case, the University of Michigan provided evidence to support its assertion that diversity improved the classroom learning environment, promoted better thinking skills, increased student satisfaction with the college experience, and improved interpersonal skills and self-confidence.[75] In addition to the foregoing benefits to students, Michigan also argued that social and societal benefits justified the use of race to increase student body diversity.[76] Michigan further argued that the recognition of student body diversity as a compelling interest would promote the elimination of racial discrimination[77] and would enhance cross-racial understanding.[78] This argument focused on the class disabilities that are the legacy of past discrimination as well as the societal and civic benefits of increased racial tolerance. These benefits were linked to the argument that more classroom di-

justify an exception to the principle . . . that 'our constitution is colorblind.'" *Id.* at 521 (Scalia, J., concurring) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

70. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 259 (2001) (Thomas, J., dissenting) (majority-minority district unconstitutional); Shaw v. Hunt, 517 U.S. 899, 909 (1996) (majority-minority district unconstitutional); Bush v. Vera, 517 U.S. 952 (1995) (plurality opinion) (majority-minority district unconstitutional); Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (federal broadcast ownership diversity plan unconstitutional); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 472-73 (1989) (plurality opinion) (city minority subcontractor plan unconstitutional); Paradise v. United States, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting) (black state trooper hiring decree unconstitutional); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality opinion) (black teacher retention plan unconstitutional); Fullilove v. Klutznick, 448 U.S. 448, 522-32 (1980) (Rehnquist, C.J., dissenting) (federal minority contractor plan unconstitutional); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 408 (1978) (Stevens, J., concurring in part and dissenting in part) (university medical school minority admissions program unconstitutional).

71. *Metro Broad., Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting).

72. In that *Metro* dissent, Justice O'Connor said that only those interests capable of limiting the use of race could qualify as compelling. *Id.* at 612-14 (O'Connor, J., dissenting).

73. Brief for Respondents at 3, *Grutter* (No. 02-241).

74. *Id.*

75. Brief for Respondents at 29-30, Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516); *see also* Brief for Respondents at 2, *Grutter* (No. 02-241).

76. Brief for Respondents at 12, *Gratz* (No. 02-516).

77. *Id.* at 25, *Gratz* (No. 02-516).

78. Brief for Respondents at 3, *Grutter* (No. 02-241).

versity would produce greater respect for a broader range of viewpoints, a benefit in a democratic society.[79] This interest is not far removed from another theme in the amicus briefs—the elimination of prejudicial and stereotypical views.

The National Education Association and others asked the Court to take seriously the evidence that student body diversity would lead to a reduction in the "distorting [of] perceptions with stereotypes and prejudice."[80] The brief stated,

> Empirical research has repeatedly and consistently confirmed . . . that interracial contact can combat stereotypes and prejudice, and make individuals more comfortable relating to members of other racial groups.
>
> . . . .
>
> . . . [C]ontact with a number of different people of another race is more effective in breaking down racist attitudes than contact with just a few individuals . . . because it forces people to "decategorize" . . . and to treat them as individuals rather than simply as members of a particular racial group.[81]

And, although the University of Michigan did not explicitly rely on the elimination of past discrimination as a rationale for its programs, its argument suggested that an end to racial discrimination would be one of the benefits of a race-conscious admissions policy. "Despite noble aspirations and considerable progress, our society remains deeply troubled by issues of race. Against this backdrop, there are important educational benefits . . . associated with a diverse, racially integrated student body."[82] Moreover, Michigan invoked *Brown v. Board of Education* to reinforce the connection between the interest of diversity and the elimination of racial discrimination.[83]

The Kodak Corporation Brief, on behalf of sixty-five of America's most important corporations,[84] also suggested that a benefit of educational diversity is the elimination of prejudice through contact in educational institutions, increasing the prosperity of American business at home and abroad.[85]

---

79. Brief for Respondents at 2-3, *Gratz* (No. 02-516).

80. Brief Amicus Curiae of the National Education Association et al. in Support of Respondents at 9, *Gratz* (No. 02-516).

81. *Id.* at 12-14.

82. Brief for Respondents at 12, *Grutter* (No. 02-241).

83. Brief for Respondents at 24, *Gratz* (No. 02-516).

> Well before *Bakke*, this Court recognized the importance of diversity in educational settings, noting in *Sweatt v. Painter* that legal education "cannot be effective in isolation from the individuals and institutions with which the law interacts." *Bakke* thus was a capstone to—not a departure from—an established line of precedent acknowledging the importance of diversity in education.

Id. (citations omitted).

84. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter* (No. 02-241), *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/Fortune500-both.pdf, copyright by the Regents of the University of Michigan.

85. *Id.* at 7.

> [B]y enriching students' education with a variety of perspectives, experiences, and ideas, a university with a diverse student body equips all of its students with the skills and understanding necessary to succeed in any profession. Those skills include the ability to understand, learn from, and work and build consensus with individuals from different backgrounds and cultures.
>
> . . . .
>
> . . . Employees at every level of an organization must be able to work effectively with people who are different from themselves.
>
> . . . .
>
> . . . [A] racially diverse group of managers with cross-cultural experience are better able to work with business partners, employees, and clientele in the United States and around the world.[86]

The Court also heard arguments sounding in regime legitimacy. The University said that its experience showed that student body diversity increased civic participation by all students. Both Michigan and other amici argued that the faith of all Americans in key institutions depends upon the opportunity of all, including minorities, to assume the highest positions of leadership. For example, the brief for the United States touted the importance of keeping institutions open and available to all segments of society.[87]

The Association of American Law Schools (AALS) reminded the Court that "a very small group of law schools produces a remarkable share of the Congress and the federal judiciary, including a high proportion of black and Hispanic high public officials."[88] The AALS documented the role that legal education institutions play in producing these leaders and argued that the absence of open and visible minority participation in this leadership would delegitimize these institutions.

> The legitimacy of the American legal system depends upon meaningful minority participation at every level . . . . Legal training is a formal prerequisite for many key positions from prosecutor to legislative counsel to attorney-advisor within the executive branch to judge. And it provides an informal gateway to even more.[89]

86. *Id.* at 4-7 (citations omitted).

87. Brief for the United States as Amici Curiae Supporting Petitioner at 13-14, *Grutter* (No. 02-241). But the United States opposed the use of racial means as a factor in selection to achieve these access ends. *Id.* at 14. The brief suggested all Michigan and other educational institutions may eliminate facially neutral criteria that undercut their goals of educational diversity. *Id.* at 8. Of course, the elimination of racially neutral criteria that produce racially disproportionate effects would be a race-conscious decision, but implicitly the United States must argue that it would not be unconstitutional solely on that basis. The proposal is similar in race-consciousness to the policies that the United States opposes, but it may be understood as endorsing the elimination of criteria that produce disproportionate and excluding effects on minorities. Although this proposal acknowledges that "Race Matters," the United States may have proposed the elimination of exclusionary criteria as an alternative that would benefit minorities without imposing differential criteria on nonminorities. Justice Thomas also favored the elimination of exclusionary criteria to the use of race as a factor in the consideration of individuals. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2352-56 (2003) (Thomas, J., concurring in part and dissenting in part); *see also* CORNEL WEST, RACE MATTERS (1993).

88. Brief of Amicus Curiae of the Association of American Law Schools in Support of Respondents at 2, *Grutter* (No. 02-516).

89. *Id.*

Similarly, the brief on behalf of past military and civilian leaders of the Army, Navy, Air Force, and Marine Corps offered their view that leadership diversity was essential to their forces. They asserted that the absence of diversity would impair the effectiveness of the armed forces and render that leadership illegitimate in the eyes of the soldiers.[90] The military brief used concrete, historical examples outlining failures of morale and the chain of command and also described the effects of the absence of diversity on combat readiness and effectiveness.[91]

> The admissions policies of the service academies and the ROTC reflect a collective military judgment—that the carefully tailored consideration of race in the admission and training of officer candidates is essential to an integrated officer corps and hence to our fighting force. Today, there is no race-neutral alternative that will fulfill the military's and the nation's compelling need for a diverse officer corps of the highest quality to serve the country.[92]

Without this diversity, the ability to effectively govern a military composed of diverse recruits would be significantly impaired due to the fact the military is one of the most integrated institutions in America.

B. *The Court's Opinions*

In *Grutter*, Justice O'Connor incorporated these arguments into her opinion for the Court on the question of diversity as a compelling interest. She concluded that the Court's precedents left open the question whether diversity might be recognized as a compelling interest.[93] Although she affirmed that the Court should judge the Michigan programs through the lens of strict scrutiny,[94] she also noted that whether the Court would approve the use of race should depend on the context in which the use of race occurs.[95] In this respect, Justice O'Connor concluded that it was appropriate to defer to the academic judgments of universities as to whether diversity was necessary for the operation of their institutions.[96]

---

90. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Grutter* (No. 02-241), *available at* http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/MilitaryL-both.pdf, copyright by the Regents of the University of Michigan.

91. *Id.* at 13-18.

92. *Id.* at 30.

93. *Grutter*, 123 S. Ct. at 2338 ("We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke*.").

94. *Id.* at 2337.

95. *Id.* at 2338 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 343-44 (1960)) ("'[I]n dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.'").

96. *Id*. at 2339 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

Justice O'Connor's *Grutter* opinion agreed that the law school and its amici had substantiated the educational benefits of diversity and agreed with many of the arguments described above. Diversity, Justice O'Connor stated, contributed to the breakdown of stereotypes[97] as well as to a livelier and more interesting classroom discussion.[98] Moreover, she concurred that the law school played an important role in the development of community leaders.[99] Beyond the service role, she embraced the regime legitimacy argument for a diverse leadership cadre. "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."[100] The rationale is also redolent and reminiscent of the role-model rationale.[101]

Although the O'Connor opinion did explicitly rely on the interest of eliminating past discrimination, Justice O'Connor's *Grutter* opinion drew on *Brown*'s citizenship preparation prong[102] for the proposition that "knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."[103] The implication that the recognition of diversity was in part related to the aim of eliminating the past of racial discrimination was also strengthened by the poignant references to *Brown v. Board of Education* and its predecessor, *Sweatt v. Painter*.[104] The opinion also rejected a tokenism approach to equality,[105] approving the "critical mass" idea central to the Law School's claim and acknowledging the extent to which "race unfortunately still matters."[106] To be sure, this was not an explicit embrace of a *societal discrimination* rationale for the law school program; nonetheless, the Court's acceptance of diversity as a compelling interest was linked to concerns about lingering effects of discrimination.[107]

In her concurring opinion, Justice Ginsburg, who in *Grutter* wrote for Justice Breyer as well,[108] was much more explicit about the link between the elimination of discrimination and their approval of the

97. *Id.* at 2339-40.
98. *Id.* at 2340.
99. *Id.* at 2341.
100. *Id.*
101. *See generally* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284-89 (1986) (O'Connor, J., concurring).
102. *Grutter*, 123 S. Ct. at 2340 (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
103. *Id*. Interestingly, Justice O'Connor also cited *Plyler v. Doe*, 457 U.S. 202 (1982), in which a five-to-four majority struck down a Texas statute that denied education to illegal immigrant children. In *Plyler*, Justice O'Connor joined in Chief Justice Burger's dissenting opinion. 457 U.S. at 242 (Burger, C.J., dissenting).
104. 339 U.S. 629 (1950).
105. *Grutter*, 123 S. Ct. at 2341.
106. *Id.*
107. *Id.*
108. *Id.* at 2347 (Ginsburg, J., concurring).

Michigan programs. Justice Ginsburg was specifically addressing the question of narrow tailoring when she invoked "The International Convention on the Elimination of All Forms of Racial Discrimination."[109] But her invocation of this particular Convention reinforces the point that the diversity rationale, in addition to its instrumental quality as a means to the end of a diverse law school environment and a diverse legal profession, was also arguably linked to the objective of the elimination of past discrimination. She went further than the Court did in *Brown*, acknowledging the role of *Brown* in initating the end of a racial caste system, which was a direct descendant of slavery.[110] In her view, "conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding the realization of our highest values and ideas."[111]

Justice Ginsburg was skeptical about Justice O'Connor's twenty-five-year window for affirmative action. In Justice Ginsburg's view, the time since the Court's declaration that segregation was unconstitutional had been very short in comparison to centuries of slavery.[112] Expanding on these views in her *Gratz* dissent,[113] she noted that "the stain of generations of racial oppression is still visible in our society . . . and the determination to hasten its removal remains vital,"[114] and that "the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race."[115] For Justice Ginsburg, and the other Justices who joined the opinion, the elimination of racial discrimination was the important reason to validate diversity as a compelling interest.[116]

In his *Grutter* dissenting opinion, Justice Kennedy added his endorsement of the educational diversity rationale.[117] But that endorsement was tempered by his reservations about the recognition of diversity as a compelling interest in the context of *Grutter*. Justice Kennedy charged that the Court had "abdicat[ed] its constitutional duty to give strict scrutiny to the use of race in university admissions."[118] "The dissenting opinion by [Rehnquist], which I join in full,

109. *Id.* at 2347-48 (Ginsburg, J., concurring).
110. *Id.* at 2347 (Ginsburg, J., concurring).
111. *Id.* at 2347-48 (Ginsburg, J., concurring).
112. *Id.* at 2347 (Ginsburg, J., concurring).
113. *See generally* Gratz v. Bollinger, 123 S. Ct. 2411, 2442-46 (2003) (Ginsburg, J., dissenting).
114. *Id*. at 2446 (Ginsburg, J., dissenting).
115. *Id.* at 2441, 2446 n.11 (Ginsburg, J., dissenting). "This insistence on 'consistency' would be fitting were our Nations free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools." *Id.* at 2443 (Ginsburg, J., dissenting) (citations omitted).
116. *Id.* at 2446 (Ginsburg, J., dissenting).
117. *Grutter*, 123 S. Ct. at 2374 (Kennedy, J., dissenting).
118. *Id.* (Kennedy, J., dissenting).

demonstrates beyond question why the concept of critical mass is a delusion used by the Law School . . . to achieve numerical goals indistinguishable from quotas."[119] Chief Justice Rehnquist had called the "critical mass" rationale a veil seeking to disguise the pursuit of a quota, "a carefully managed program designed to insure proportionate representation of applicants from selected minority groups."[120]

Justices Scalia and Thomas, who would have none of the diversity business, at least in the context of race-conscious university admissions,[121] shared a different skepticism about the majority *Grutter* opinion. They both agreed that the law school's real interest was to preserve its elite status by retaining standards that disproportionately excluded blacks and other minorities.[122] Justice Thomas put it bluntly, "The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results."[123] Justice Thomas concluded Michigan was not really interested in the "educational benefits that flow from student body diversity"[124] but in mere *color in the classroom*, pejoratively panned by Justice Thomas as "racial aesthetic" and "classroom aesthetic" interests.[125]

119. *Id.* at 2371 (Kennedy, J., dissenting). Justice Kennedy's comments emphasize the difference between the Court's acceptance of diversity as a potentially compelling interest and the proof that diversity is in fact a compelling interest in the context of a particular program. Justice Kennedy's comments show how important the standard of review dispute is to the future of minority diversity as a compelling interest. *See infra* text accompanying notes 145-153 (discussing standard of review).

120. *Grutter*, 123 S. Ct. at 2365, 2369 (Rehnquist, C.J., dissenting). Justices Scalia, Kennedy, and Thomas joined this dissent.

121. Justice Scalia did see the value of diversity in education in his VMI opinion. United States v. Virginia, 518 U.S. 515, 578 (1996) (Scalia, J., dissenting). In that case, he argued that the State of Virginia had an important interest in preserving a diversity of educational environments including a single sex elite military college. *Id*. (Scalia, J., dissenting). In *United States v. Fordice*, 505 U.S. 717, 728 (1992), Justice Thomas argued that the preservation of the historically black colleges, though a practice traceable to the dual system of segregated higher education in Mississippi, could be sustained on the basis of the "sound educational justification" of diversity in educational options. *Id*. at 749 (Thomas, J., dissenting). There is an argument that this view is incompatible with his views in *Gratz* and *Grutter*. However, his views in *Fordice* may have been based on the assumption that the racially identifiable schools would be open to all on a race-neutral basis without the direction or involvement of the state in student choice. If so, his views in *Fordice* may be compatible with his views in *Gratz* and *Grutter* as well as compatible with his anti-stigma sentiments in both *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240-241 (1995) (Thomas, J. concurring), and *Missouri v. Jenkins*, 515 U.S. 70 (1995). In *Jenkins*, he complained that previous decisions concluding "that racial imbalances constituted an ongoing constitutional violation . . . [and] inflict harm on black students. . . . appear[ ] to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites." *Jenkins*, 515 U.S. at 118-19 (Thomas, J., concurring). These stigma concerns, a theme in Justice Thomas' race jurisprudence, are a partial explanation for his opposition to race-conscious affirmative action as well as his opposition to school desegregation remedies based on mere racial imbalance.

122. *Grutter*, 123 S. Ct. at 2348-49 (Scalia, J., concurring in part and dissenting in part); *id.* at 2350 (Thomas, J., concurring in part and dissenting in part).

123. *Id.* at 2350 (Thomas, J., concurring in part and dissenting in part).

124. *Id.* at 2352 (Thomas, J., concurring in part and dissenting in part) (quoting Brief for Respondents at 14, *Grutter* (No. 02-241)).

125. *Id.* at 2356 (Thomas, J., concurring in part and dissenting in part).

Justice Thomas further disparaged Michigan's diversity defense. He concluded that the State of Michigan could not demonstrate a compelling public interest rising to the level of a "pressing public necessity" in the maintenance of a public law school that produced so small a percentage of Michigan lawyers.[126] Nor could Michigan, according to Justice Thomas, demonstrate that the retention of its elite and exclusive status was a compelling interest.[127] Justices Thomas and Scalia agreed that the "Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions systems—it cannot have it both ways."[128]

The dissenters' skepticism about diversity cast doubt on the force of the *Grutter* precedent. Although Justices Rehnquist and Kennedy did not rule out diversity as a compelling interest in future cases, they rejected it in a case that was expensively and expertly prepared and litigated. Thus, even if it is clear that *Grutter* establishes diversity as a compelling interest, a debate will continue as to whether it establishes diversity as a compelling interest without specific proof and development of the rationale in every subsequent case. If the latter is true, the force of the precedent established will depend upon the resources and preparedness of each institution to defend the diversity rationale in its *particular* context.

C. *Are There Compelling Interests Beyond Diversity?*

As important as the question whether the diversity interest recognized in *Gratz* and *Grutter* will survive future contests is the question whether Justice O'Connor's opinion opened the door for the use of

126. *Id.* (Thomas, J., concurring in part and dissenting in part). Here, Justice Thomas seems to misunderstand the core principle of *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). It is true that *Gaines* held that the state of Missouri could not satisfy its equal protection obligations to blacks by providing legal education outside the state while barring them from its state white-only law school. But it is one thing to say that equal protection must be satisfied within the state. It is quite another to suggest, as does Justice Thomas, that the State of Michigan and future Michigan lawyers do not benefit from having a nationally ranked law school populated by extremely talented students and faculty from all over the world.

But Justice Thomas' opinion implicitly poses an important question. What are the criteria for the recognition of compelling interests? Neither *Grutter* nor *Gratz* settled this issue. At best, *Gratz* and *Grutter* suggest a case-by-case approach without a clear doctrinal or evidentiary standard.

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

128. *Id.* at 2356 (Thomas, J., concurring in part and dissenting in part). It will be interesting to discover whether Justices Thomas and Scalia will continue to support constitutional doctrine that immunizes so called "race neutral" criteria that produce racially disproportionate exclusionary effects. In this article I argue that the concerns of dissenters and the majority may be reconciled through the development of constitutional doctrine grounded in individual opportunity and citizenship values. Under this approach, the doctrinal rules that immunize criteria with disproportionate racially exclusionary effects would fall, and the principle of individualized consideration and a right to access to participation at all levels of society would develop. The fact that only five members of the Court were persuaded by Michigan's voluminous factual presentation does raise questions about the precedential value of the diversity holding. Justice Scalia suggests (or perhaps invites) litigation over a number of issues that may provide the Court an opportunity to consider the reach of its diversity holding in other contexts.

race to further a broader range of compelling interests than the Court has heretofore recognized. To begin, Justice O'Connor's shift on compelling interests is stark when compared to her narrow and categorical stance in prior cases such as *Metro* where she ruled out all interests save the interest in remedying identified discrimination.[129] In *Grutter* and *Gratz*, the Court not only embraced diversity as a compelling interest but recognized diversity as a compelling interest in the context of education, business, employment, and the military. Moreover, the rationale for the recognition of diversity as a compelling interest included the argument that minority inclusion serves as a symbol of opportunity and institutional legitimacy. This diversity argument is similar to the "role model" rationale previously rejected by Justice O'Connor and others.[130] Although it is also clear that Justice O'Connor's opinion for the majority (and Justice Ginsburg's concurrence that Justice Breyer joined) does not explicitly embrace "societal discrimination" as a compelling interest,[131] there is a clear link between the recognition of diversity and the goal of eliminating past discrimination. Justice O'Connor's *Grutter* opinion reopens that door.

For some time, Justice Stevens, who joined the *Grutter* majority opinion, has maintained a flexible approach to the identification of compelling interests. In *Wygant v. Jackson Board of Education*,[132] he agreed that a "school board may reasonably conclude that an inte-

129. Metro Broad., Inc. v. FCC, 497 U.S. 547, 613-14 (1990). "An interest capable of justifying race-conscious measures must be sufficiently specific and verifiable, such that it supports only limited and carefully defined uses of racial classifications." *Id.* at 613. In *Croson*, the Court held that an interest in remedying societal discrimination cannot be considered compelling. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (noting that because the City of Richmond had presented no evidence of identified discrimination, it had "failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race"). The Court determined that a "generalized assertion" of past discrimination "has no logical stopping point" and would support unconstrained uses of race classifications. *Id.* at 498 (internal quotation omitted). In *Wygant*, the Court rejected the asserted interest in "providing minority role models for [a public school system's] minority students, as an attempt to alleviate the effects of societal discrimination," because "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" and would allow "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986) (plurality opinion). Both cases condemned those interests because they would allow distribution of goods essentially according to the demographic representation of particular racial and ethnic groups. *See Croson*, 498 U.S. at 505-07; *Wygant*, 476 U.S. at 276.

130. *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment).

> I agree with the plurality that a governmental agency's interest in remedying "societal" discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny. . . . I also concur in the plurality's assessment that use by the courts below of a "role model" theory to justify the conclusion that this plan had a legitimate remedial purpose was in error.

Id. (citations omitted).

131. *Grutter*, 123 S. Ct. at 2348 (Ginsburg, J., concurring) ("Nor does this case necessitate reconsideration whether interests other than 'student body diversity' rank as sufficiently important to justify a race-conscious government program.").

132. 476 U.S. 267 (1986).

grated faculty will be able to provide benefits to the student body that could not be provided by an all white, or nearly all white faculty."[133] But in *Richmond v. J.A. Croson Co.*,[134] Justice Stevens concluded that there was "[n]o claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises."[135] His flexibility was also evident in *Metro*, where Justice Stevens agreed that there was indeed a public interest in the expansion of broadcast diversity.[136] Justice Stevens also suggested other diversity-related interests "like the interest in an integrated police force, diversity in the composition of a public school faculty or diversity in the student body of a professional school."[137]

As noted above, Chief Justice Rehnquist did not quarrel with the proposition that diversity *could* be compelling; he just did not agree that Michigan proved its case. But this result is not suprising as Chief Justice Rehnquist previously joined opinions that ruled out the expansion of compelling interest beyond identified institutional discrimination[138] and consistently voted against the constitutionality and legality of race-conscious programs in a wide range of circumstances.[139] Neither *Gratz* nor *Grutter* provide any clues as to his criteria for the recognition of additional compelling interests that might be furthered by the consideration of race.

Justice Kennedy, who had embraced a limited view on the scope of compelling interests,[140] explicitly embraced educational diversity as an interest. But his opinions do not suggest whether he might approve diversity in other contexts or sanction other interests. However, if his *Grutter* opinion sets his standard, Justice Kennedy would condemn any program that makes race a significant factor in the allocation of opportunity. In this respect, Justice Kennedy's ultimate decision about the compelling nature of the government's interest would appear to turn on the actual details of the programs and the outcome of his "narrow tailoring" analysis. He remains skeptical.

133. *Id.* at 315 (Stevens, J., dissenting).

134. 488 U.S. 469 (1989).

135. *Id.* at 512 (Stevens, J., concurring).

136. Metro Broad., Inc. v. FCC, 497 U.S. 547, 601 (1990) (Stevens, J., concurring).

137. *Id.* at 602.

138. Chief Justice Rehnquist joined Justice O'Connor's dissent in *Metro*, which rejected as compelling interests diversity, the remediation of societal discrimination, and the provision of role models. *Id.* at 613-14 (O'Connor, J., dissenting); *see also* Shaw v. Hunt, 517 U.S. 899, 909-10 (1996) ("Accordingly, an effort to alleviate the effects of societal discrimination is not a compelling interest."); *Wygant*, 476 U.S. at 276, 288 (rejecting societal discrimination and the promotion of role models as compelling interests).

139. *See supra* note 70.

140. Justice Kennedy also joined Justice O'Connor's dissent in *Metro* that rejected diversity, societal discrimination, and roles models as compelling interests. *Metro Broad., Inc.*, 497 U.S. at 613-14 (O'Connor, J., dissenting).

On the other hand, Justices Scalia and Thomas clearly state that there are few circumstances that demonstrate the existence of compelling interests that might justify the use of race. Justice Scalia articulated his opposition to the use of race in all but the most dire of emergency situations.

> At least where . . . social emergency rising to the level of imminent danger to life and limb for example, a prison race riot, requiring temporary segregation of inmates . . . can justify an exception to the principle . . . that [o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.[141]

In *Grutter*, he did not retreat. "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."[142]

Justice Thomas used the occasion of these decisions to reiterate his oppostion to government consideration of race, expressed initially and in especially passionate terms in *Adarand*.[143] In *Grutter*, he condemned the Court's failure to address the obvious inconsistency between the *Grutter* opinion and the very limited approach to compelling interests that characterized the *Wygant* plurality opinion.[144] He concluded that only a narrow window for the use of race was possible—"that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity.'"[145]

Thus, the Court is still sharply divided on the question of what future compelling interests might justify the consideration of race. And no explicit guidance emerges from the opinion for the judgment of those "compelling interests" in the future, a result not unexpected in a case that was controversial enough on the narrow questions presented. However, Justices O'Connor, Stevens, Ginsburg, Breyer, and Souter have all embraced the "benign-invidious" distinction as well as a "flexible" and "contextual" approach to compelling interests. It is possible, then, that the Court will be open to a broader range of interests, having opened the door broadly in *Gratz* and *Grutter*.

But the divisions on the Court signal caution and suggest that the *Grutter* modification of *Adarand* may be a temporary phenomenon. Justices Scalia and Thomas have hardened their opposition to any expansion of race-related compelling interests; Justice Kennedy's and Chief Justice Rehnquist's views show a degree of flexibility that can-

---

141. Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (citations omitted).

142. Grutter v. Bollinger, 123 S. Ct. 2325, 2350 (2003) (Scalia, J., dissenting).

143. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

144. *Grutter*, 123 S. Ct. at 2352 (Thomas, J., dissenting).

145. *Id.* (Thomas, J., dissenting) (quoting Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam) (Black, J., concurring)).

not be explained completely by their past opinions. The theoretical acceptance of diversity as a compelling interest may be understandable in the absence of judicial standards for that determination and in the presence of the broad public coalition that pressed for the recognition of diversity as a compelling interest in order to benefit society in general, rather than minorities specifically. Perhaps in this notion of a public/corporate benefit from affirmative action lies the seed to the future viability of race-related compelling interests, including student body diversity. In any event, Michigan and its supporting amici spent millions to gain a five-to-four vote recognizing diversity as a legitimate interest in *Gratz* and *Grutter*. If diversity does survive, it will be a costly life.

D. Adarand *Redux*

Although the dominant feature of *Grutter* and *Gratz* is the Court's exposition on the question of whether diversity is a compelling interest, both *Grutter* and *Gratz* shine a bright spot on the standard of review for the evaluation of race-conscious programs. In this respect, the standard of review issues raised in the course of the *Gratz* and *Grutter* opinions are directly linked to the scope and viability of the diversity interest established in the decisions. Although this question was arguably settled in *Adarand*, both *Grutter* and *Gratz* show that this issue is always "in play."

The question whether the Court would continue to use the strict scrutiny standard was not a formal issue in *Grutter* and *Gratz*. However, on closer reading, it is the issue on which so much of the disagreement turns among the Justices and the one that contributed much to the fractured *Grutter* opinion. Justice O'Connor and four other Justices agreed that the strict scrutiny standard should apply whenever the government uses race as a factor in decisions[146] but also agreed that the application of the strict scrutiny standard would not necessarily be fatal to the programs reviewed.[147] The meaning of the *Gratz/Grutter* strict scrutiny standard was also colored by language that seemed to adopt the benign-invidious distinction, a concept Justice O'Connor had previously rejected.[148] The argument that Justice O'Connor retreated from her opposition to a benign-invidious distinction is supported by the fact that three of the Justices who joined her opinion wrote separately to emphasize that "benign" racial classifica-

146. *Id.* at 2338.
147. *Id.*
148. "Context matters when reviewing race-based governmental action . . . . Not every decision influenced by race is equally objectionable. . . ." *Id.* Compare *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion), in which Justice O'Connor joined a majority opinion that rejected this contention, with *Adarand*, 515 U.S. at 242 (Ginsburg, J., dissenting), in which Justice Ginsburg endorsed a context approach.

tions should not be strictly scrutinized by courts.[149] In addition, Justice O'Connor's note that the Court would defer to "[t]he Law School's educational judgment that such diversity is essential to its educational mission"[150] led the dissenters to charge that the Court had abandoned the strict scrutiny standard.[151] Though Justice O'Connor reassured that "[o]ur 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,"[152] the dissenters were not persuaded.

The standard of review observations of the dissenters are telling. Though Justice O'Connor did offer obeisance to strict scrutiny, her joinder of strict scrutiny with "context" and "deference" weakens the standard and signals a retreat from the "skepticism" about *all* racial classifications that marked her *Metro* dissent[153] and her *Adarand* opinion.[154] Another way to view the standard that emerges from *Grutter* is to characterize it as an embrace of a "balancing approach" in which generalized concerns about "dangers" of race consciousness are weighed against the concerns about a society bereft of opportunity and legitimacy. One may also view the *Grutter* language as a sign of, or an exercise in, signification. At the bottom, standards of review are *stop*, *go*, or *caution* signs. In this case, the *Grutter* majority opinion signals that institutions may continue to pursue inclusive policies. But in *Gratz*, in which the Court found the undergraduate admissions program flawed, the Court signals "caution." Its support for diversity does not mean judicial approval for all programs. Indeed, the discussion of narrow tailoring in both *Grutter* and *Gratz* and the sharp division of the Court on the bottom line question of constitutionality signal that the generosity of the O'Connor standard may be more symbol than substance.

III. NARROW TAILORING IN *GRATZ* AND *GRUTTER*

Even if most attention has been paid to the Court's recognition of diversity as a compelling interest, *Grutter* and *Gratz* are equally significant as the first post-*Adarand* opportunity for the Court to discuss the meaning of narrow tailoring. Between *Bakke* and *Adarand*, the Court's cacophony on the question of the standard of review left the lower courts both bereft of guidance on the scope of compelling inter-

149. Gratz v. Bollinger, 123 S. Ct. 2411, 2442 (2003) (Ginsburg, J., dissenting). Justices Souter and Breyer joined this opinion. *Id.*
150. *Grutter*, 123 S. Ct. at 2339.
151. *Id*. at 2351-52 (Thomas, J., dissenting); *id.* at 2365-66 (Rehnquist, C.J., dissenting).
152. *Id.* at 2339.
153. Metro Broad., Inc. v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting).
154. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

ests as well as the meaning of narrow tailoring. *Croson* provided some guidance[155] but was of limited utility because the O'Connor majority did not believe that the City of Richmond had demonstrated any connection between racial discrimination and the miniscule number of black city construction contractors.[156] In *Metro*, decided the year after *Croson*, the Court used a mid-level scrutiny standard and did not explicitly address the narrow tailoring point.[157] Therefore, *Grutter* and *Gratz* were a first opportunity, apart from an opaque series of divided decisions on majority-minority districts,[158] to clarify the post-*Adarand* meaning of narrow tailoring generally, as well as in the context of race-conscious admissions programs.

Before *Gratz* and *Grutter*, the lower federal courts filled the void with narrow tailoring standards adapted from *Bakke* and other United States Supreme Court decisions. For example, in *Tuttle v. Arlington County*,[159] a case in which the Fourth Circuit considered the constitutionality of a kindergarten admissions scheme in which race was a factor, the Fourth Circuit relied on judicial interpretation of the so-called *Paradise* factors.[160] These factors were as follows:

> (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties.[161]

The Court drew on these lower court decisions in crafting its standards in *Grutter* and *Gratz*. The key factors applied were whether Michigan adequately considered race-neutral alternatives,[162] whether the program was limited in duration,[163] whether the program was flexible and avoided quotas,[164] and the extent to which the program burdened nonminorities.

155. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477 (1989).

156. *Id.* at 499.

157. *Metro Broad., Inc.*, 497 U.S. at 564.

158. *See* Easley v. Cromartie, 523 U.S. 234 (2001); Shaw v. Hunt, 517 U.S. 899 (1996); Bush v. Vera, 517 U.S. 952 (1996). The O'Connor opinion does cite *Hunt* for the proposition that the purpose of narrow tailoring is to ensure that "the means chosen fit . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." Grutter v. Bollinger, 123 S. Ct. 2325, 2341 (2003) (citation omitted).

159. 195 F.3d 698 (4th Cir. 1999).

160. Paradise v. United States, 480 U.S. 149, 171 (1987).

161. *Tuttle*, 195 F.3d at 706 (citations omitted); *see also* Johnson v. Bd. of Regents, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001).

162. *Grutter*, 123 S. Ct. at 2344-45.

163. *Id.* at 2344-46.

164. *Id.* at 2342-44.

A. Grutter

In Justice O'Connor's *Grutter* opinion, Justices Stevens, Souter, Ginsburg, and Breyer found that these criteria had been met. As to whether Michigan had adequately considered race-neutral alternatives, the Court agreed that Michigan was not required to exhaust every conceivable race-neutral alternative.[165] Importantly, the Court did not require the Law School to choose between diversity and academic quality and was not required, as Justices Scalia and Thomas urged, to eliminate all criteria that disproportionately and negatively affected the minority pool.[166] As to duration, the Court accepted Michigan's assurances that the program was not a permanent one and strongly stated its expectation that in twenty-five years the program would no longer be necessary.[167]

The "flexibility" criterion fleshed out the "no quota" rules, a direct descendant of Justice Powell's *Bakke* opinion as well as earlier decisions on the constitutionality of affirmative regulations applicable to federal contractors.[168] The Court found that the Law School's admissions policy required a highly individualized, nonmechanized evaluation of each individual without "predetermined diversity bonuses based on race or ethnicity."[169] The Court's determination that Michigan evaluated every candidate on an equal footing with others, and that race was not the only diversity factor considered, satisfied the criterion that nonminorities were not unduly burdened by the admissions policy.[170]

There was dissent. The dissents of Justices Scalia and Thomas were shaped by their view that any consideration of race violates the Constitution as well as their skepticism about Michigan's reasons for adopting the program. Both Justices agreed that the Law School was really pursuing its interest in retaining an academically selective insti-

165. *Id.*
166. *Id.* at 2345.
167. *Id.* at 2346-47.
168. Justice O'Connor's opinion on narrow tailoring relies heavily on *Local 28 of Sheet Metal Workers v. EEOC*, a case in which she emphasized the distinction between the pursuit of a "'fixed number or percentage which must be attained, or which cannot be exceeded . . . [and] a permissible goal . . . [that] require[s] only a good faith effort . . . to come within a range demarcated by the goal itself.'" *Id*. at 2342 (quoting Local 28 of Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986)).

In turn, this distinction between permissible goals and quotas, and its relevance to the constitutionality of race-conscious government action, is directly traceable to the Office of Federal Contract Compliance regulations applicable to federal contractors, and the Philadelphia Plan, one of the earliest contractor affirmative action plans to survive the "quota charge." *See* James E. Jones, Jr., *The Transformation of Fair Employment Practices Policies*, *in* FEDERAL POLICIES AND WORKER STATUS SINCE THE THIRTIES (J. Goldberg ed., 1976), *reprinted in* INDUSTRIAL RELATIONS RESEARCH INSTITUTE, no. 206, at 159, 190-93 (Univ. of Wisconsin-Madison 1976); James E. Jones, Jr., *The Bugaboo of Employment Quotas*, 1970 WISCONSIN L. REV. 341, 373-85.
169. *Grutter*, 123 S. Ct at 2343.
170. *Id.*

tution with a "racial aesthetic,"[171] and that the Court should not recognize such interests as "compelling."[172] Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas also agreed that the critical mass argument was a sham.[173] Their "racial aesthetic" charge was in part a rejection of Michigan's claim that it had no alternatives to the establishment of a race-conscious program.[174] They accused Michigan of maintaining "a stubborn refusal to alter the status quo."[175] And it is not surprising that the element of duration did not figure prominently in the analysis of Justices Thomas and Scalia. They agreed that the use of race would be illegal in twenty-five years because they believe it to be illegal now.[176]

The dissent of Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, charged that Justice O'Connor had not applied strict scrutiny and that her approval of the program was traceable to that flaw.[177] As a result, Chief Justice Rehnquist's examination of the program lacked the deference that characterized the O'Connor opinion. The most important area of disagreement was in Chief Justice Rehnquist's view of the critical mass issue. Chief Justice Rehnquist concluded that the Michigan law school program was a "carefully managed program designed to insure proportionate representation of applicants from selected minority groups,"[178] rather than a program of individualized evaluation of each applicant as an individual—a fatal form of "racial balancing."[179] In this respect, the majority opinion and the Rehnquist dissent differ on the weight to be accorded to yearly variations in the number and percentage of minority applicants admitted each year. Four Justices believed that the program was a disguised quota system. Five believed that it was not.

B. Gratz

In *Gratz*, Chief Justice Rehnquist wrote an opinion for Justices O'Connor, Scalia, Kennedy, and Thomas that condemned the undergraduate admissions program on narrow tailoring grounds.[180] In a return to *Bakke*, they found the program flawed because the award of

171. *Id.* at 2353-57 (Thomas, J., concurring in part and dissenting in part).
172. *Id.* at 2354-56 (Thomas, J., concurring in part and dissenting in part).
173. *Id.* at 2367 (Rehnquist, C.J., dissenting).
174. *Id.* at 2353 (Thomas, J., concurring in part and dissenting in part).
175. *Id.* at 2357 (Thomas, J., concurring in part and dissenting in part).
176. *Id.* at 2350-51 (Thomas, J., concurring in part and dissenting in part).
177. *Id.* at 2366-69 (Rehnquist, C.J., dissenting). "Our cases establish that, in order to withstand this demanding inquiry, respondents must demonstrate that their methods of using race 'fit' a compelling state interest 'with greater precision than any alternative means.'" *Id.* at 2365 (Rehnquist, C.J., dissenting) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (plurality opinion)).
178. *Id.* at 2369 (Rehnquist, C.J., dissenting).
179. *Id.* (Rehnquist, C.J., dissenting).
180. Gratz v. Bollinger, 123 S. Ct. 2411, 2427-31 (2003).

points to minority applicants was inconsistent with the individualized consideration contemplated by Justice Powell in *Bakke*.[181] In addition, the Court objected to Michigan's flagging of minority applicants for consideration at a later stage of the process.[182] The Court concluded that the flagging and an addition of points thwarted the individualized evaluation of all applicants, minority as well as nonminority. The Court also concluded that these factors imposed too high a burden on nonminorities by preventing consideration of a nonminority student's "individual background, experiences, and characteristics to assess his individual 'potential contribution to diversity.'"[183] The Court rejected arguments that the individualized consideration of all applicants with flagging and points would impose an undue administrative burden.[184]

Justice O'Connor, the swing vote in both cases, wrote in *Gratz* to reconcile her *Grutter* vote in favor of Michigan with her *Gratz* vote against Michigan. For her, the crucial difference between the undergraduate policy and the law school policy is that the undergraduate policy did "not provide for a meaningful individualized review of applicants."[185] She thought that the flaw with Michigan's selection index, as well as with the flagging system, was that its "automatic, predetermined point allocations for the soft variables" prevented the individual assessment of applicants' diversity contributions.[186]

Though the Court decided the two cases differently, one clear principle emerges that individualized consideration of all applicants is a requirement for the constitutionality of race-conscious affirmative action programs. In rejecting a system of individualized consideration involving points, the Court held that universities seeking racial diversity must evaluate every applicant as an individual, wholistically.

What is the reason for these rules of limitation? What is the purpose of these rigorous narrow tailoring requirements? Narrow tailoring, in any context, imposes, constrains, and limits governmental infringement on constitutional rights. In the context of racial classifications, it is an analysis that limits the infringement on the constitutional right characterized in *Croson* as a bulwark against "illegitimate racial prejudice or stereotype."[187] In a regime of skepticism, narrow tailoring limits the extent to which race may be a factor in decision-making, hence the requirement that institutions consider race-neutral alternatives. In the event an institution deems the race-neutral alter-

181. *Id.* at 2428.
182. *Id.* at 2429.
183. *Id.* (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).
184. *Id.* at 2430.
185. *Id.* at 2431 (O'Connor, J., concurring).
186. *Id.* at 2432 (O'Connor, J., concurring).
187. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

natives ineffective, narrow tailoring, as currently conceived by the Court, insures that race will not be the dispositive factor in decision-making and that all individuals will receive individualized attention irrespective of their race.

For both minorities and nonminorities, the requirement of individual attention insures that they are not harmed by the consideration of race with respect to their interest in admission. As to minorities, one question is whether they will be stigmatized by the charge that their admission was made solely or primarily on racial grounds, often a preposterous charge, but one which does create individualized and group reputational harm. Also, a legitimate concern is whether minorities have been fully considered as individuals and not solely as minorities. Such a phenomenon would obscure and cloud the visibility of their individual merits. As to nonminorities, the requirement of individualized consideration preserves for them the opportunity to compete without racial disadvantage. In addition, individualized consideration of nonminorities ought also to assess the extent to which their achievements are the product of racial or class advantage or racial privilege rather than individual effort. Likewise, individualized consideration of minorities ought to assess whether their achievements have been accomplished in spite of racial disadvantage or whether any deficits are associated with racial disadvantage.[188]

In every case, individual consideration should focus on the questions of preparedness for, and potential contributions to, the educational environment and, ultimately, society at large. Thus, while a regime of narrow tailoring imposed in *Gratz* and *Grutter* is a significant and costly limitation on the consideration of race in university admissions and may be judicially administered as an unattainable moving target,[189] such a regime may also be viewed as a protective one that limits harm to the personhood and equality interests of all candidates. But if individualized review is taken seriously, the requirement may incrementally move affirmative action doctrine away from its role as a protection regime for status quo interests[190] towards the creation of a meritocracy navigable by nonminorities and minori-

188. DeFunis v. Odegaard, 416 U.S. 312, 330-32 (1974) (Douglas, J., dissenting).

189. In a series of cases involving race-conscious programs, some Justices have never found a program sufficiently narrowly tailored to meet the narrow tailoring prong of strict scrutiny. Compare the decisions of Chief Justice Rehnquist in *Fullilove*, *Wygant*, *Paradise*, *Croson*, *Metro*, and *Hunt* with those of Justice Stevens in the same cases. Until *Grutter*, Justice O'Connor had rejected every race-conscious program to come before the Court as insufficiently narrowly tailored.

190. A consistent criterion for the approval of race-conscious programs, whether court ordered or voluntarily undertaken, has been the requirement that these programs produce limited effects on the *interests* and *expectations* of nonminorities. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 598 (1990); Fullilove v. Klutznick, 448 U.S. 448, 514 (1980); Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

ties alike. It is this latent potential that may open the door to a more inclusive vision of constitutional equality.

IV. Towards an Inclusive Vision of Constitutional Equality from *Brown* to *Grutter*

As a matter of course, the discussion of race-conscious affirmative action proceeds without any reference, at all, to the remainder of the equal protection doctrine and its important defining cases. In the run up to *Gratz* and *Grutter*, few remembered that 2003 was the eve of *Brown v. Board of Education*'s fiftieth birthday. Indeed, but for the Ginsburg opinions and a few words in O'Connor's *Grutter* opinion, it is impossible to discover any link between the constitutional history of race in America and the recent paroxysms, the affirmative action cases. But the publication of this symposium will coincide with the birth year of one of the great cases, so famous now that, like Madonna or Beyonce, its first name is quite sufficient—*Brown*.

Brown v. Board of Education belongs to the pantheon of prophetic United States Supreme Court decisions on race. Like the proverbial "handwriting on the wall," those decisions portended a visionary new era in the tortured legal history of race in America. Whereas *Dred Scott v. Sanford*,[191] *Prigg v. Pennsylvania*,[192] *The Civil Rights Cases*,[193] and *Plessy v. Ferguson*[194] reaffirmed the racial subordination values, *Brown* and its predecessors, *McLaurin v. Oklahoma State Regents*[195] and *Sweatt v. Painter*,[196] signaled the possibility of a new racial order devoid of subordinating state arrangements.

Together, *McLaurin* and *Sweatt* said that shared educational experiences were so important to future success that separation was inherently unequal. *McLaurin* held that a university could not admit a black to graduate school and thereafter prevent him from having contact with white students.[197] In *Sweatt*, the United States Supreme Court concluded that the isolation of blacks from those who would become future lawyer colleagues would limit blacks' ability to become effective members of the legal profession. *McLaurin* and *Sweatt* laid the foundation for *Brown*'s conclusion that a separate education de-

191. 60 U.S. (19 How.) 393 (1857).
192. 41 U.S. (16 Pet.) 539 (1842).
193. 109 U.S. 3 (1883).
194. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
195. 339 U.S. 637 (1950).
196. 339 U.S. 629 (1950).
197. *McLaurin*, 339 U.S. at 641-42. "Such restrictions impair and inhibit his ability to study, to engage in discussions, and exchange views with other students, and, in general, to learn his profession." *Id.* at 641.

prived black children of the opportunity to become a part of America's civic community.[198]

Brown did not focus on the motivation behind America's educational apartheid. Rather, *Brown* examined the importance of education in American life[199] and the consequences of educational isolation on black children.[200] Though a path-breaking decision, *Brown* set forth no clear standard for the evaluation of America's myriad subordinating structures. In the post-*Brown* interregnum, the depth of *Brown* and its *McLaurin-Sweatt* foundations were lost. The Court's decision in *Washington v. Davis*,[201] mooring constitutional inequality to motive and intent, was one step in a process that subordinated the question of whether institutional norms were *just* to focus on evidentiary inquiries into institutional states of mind.[202] After setting a high bar for successful litigation of constitutional equality claims, the Court clouded the landscape for voluntary inclusion efforts with its decision in *Bakke*.

The post-*Bakke* debate over standards of review and those governmental interests that might justify race-conscious affirmative action also obscured the *McLaurin-Sweatt-Brown* emphasis on the development of a just and inclusive interracial community. When *Adarand* finally set a high standard for the constitutionality of programs of racial inclusion and opportunity, it increased the legal and political risks associated with such programs. The subsequent controversy over the constitutionality of programs of racial inclusion focused on the question whether narrow and probable remedial objectives would be the sole justification for these initiatives.

This was the question presented in *Grutter* and *Gratz*. The cases held that the goal of educational diversity could justify the consideration of race as a factor in admission to the University of Michigan Law School and the undergraduate college. The question with broader implications has always been whether the law of constitutional equality would thwart efforts to break down the multi-century legacy of exclusion and subordination. *Grutter* and *Gratz* did confer constitutional legitimacy on the principle of the diversity of an undergraduate college and law school's environment as compelling interests. These decisions are significant; for the moment, *if the majority holds*, they set aside twenty-five years of constitutional ambivalence and doubt about the constitutional permissibility of race-conscious affirmative action outside the context of litigated cases. It is significant that five Justices

198. *Brown*, 347 U.S. at 495.
199. *Id.* at 492-93.
200. *Id.* at 493.
201. 426 U.S. 229 (1976).
202. *See, e.g.*, McKleskey v. Kemp, 481 U.S. 279 (1987).

are persuaded that educational diversity is indeed a compelling interest and that two more Justices *may* be open to this view in some future set of circumstances. The amici interest in the cases certainly demonstrates the importance of the principle to a broad cross section of American society. These decisions that salvage voluntary educational affirmative action programs, defended at a dear cost, are very significant.

From a different perspective, however, *Grutter* and *Gratz* are modest developments. The holding that diversity is a compelling interest is only relevant where universities and other institutions voluntarily pursue programs of racial inclusion. And if the attack on Michigan is a prologue, institutions that pursue voluntary inclusion must be prepared to assume great legal risk and significant expense. But, the Court precedents still confer constitutional legitimacy on race-neutral rules without regard to their impact on opportunity,[203] or life and death.[204] *Gratz* and *Grutter*, decided without re-examination of this doctrine, are testaments to the Court's deep ambivalence about a transformative role for the Equal Protection Clause. Examined closely, *Grutter* reveals our ambivalence over the extent of constitutionally mandated equality. Read narrowly, *Grutter* does not mandate minority inclusion in the nation's elite law schools or universities. Neither *Gratz* nor *Grutter* requires that the nation's elite universities or other institutions pursue diversity. Further, neither eliminates the narrow and rigid conceptions of merit that contribute to the production of segregated institutions.

But a broader reading of *Grutter* is possible. Justice O'Connor's *Grutter* opinion draws on the civic and citizenship dimensions of constitutional equality articulated in *McLaurin*, *Sweatt*, and *Brown*. The Court's approval of diversity as a compelling interest is grounded in the Court's recognition that the full enjoyment of equal citizenship—as well as the legitimacy of American institutions—includes both a right of non-token inclusion in the most prestigious institutions as well as inclusion in the ranks of leadership and power. Thus, *Grutter* is grounded in the reality that a robust vision of citizenship for racial minorities in America remains an unfinished constitutional work-in-progress.

Likewise, the Court's emphasis in both *Gratz* and *Grutter* on individual and holistic consideration of applicants, grounded in a vision of equal protection that guarantees individual opportunity, cannot be defended as a principle of equal protection solely applicable when institutions undertake voluntary programs of inclusion. If individual-

203. *See Davis*, 426 U.S. 229.
204. *See McCleskey*, 481 U.S. 279.

ized evaluation preserves the guarantee of equal protection to every "person," selection schemes that generalize and stereotype individuals ought to be unconstitutional as well. *Gratz* and *Grutter* are inconsistent with the *Washington-McCleskey* impact-intent dichotomy which constitutionalizes precisely the kind of generalizations and stereotypes condemned in *Grutter* and *Gratz*.

The Court's discussion of the feasibility of race-neutral alternatives to the use of race also underscores the importance of individual consideration to the satisfaction of equal protection norms. The Government suggested Michigan pursue lower admissions standards, a lottery, or percentage plans. The Court raised doubt about whether such percentage plans are in fact race-neutral and therefore potentially unconstitutional on that basis. In addition, the Court suggested that these alternatives may be constitutionally flawed because they fail to afford individual treatment: "[A]ssuming such plans are race-neutral, they may preclude the university from conducting, the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[205] Furthermore, the entire post-*Brown* remedial scheme has been erected on distinctions between de jure and de facto discrimination, distinctions that are inconsistent with the *Grutter* and *Gratz* emphases on opportunity, inclusion, and full citizenship. *Grutter* and *Gratz* should prompt us to rethink, and abandon, passive approaches to constitutional equality that make broad minority participation at every level of our society an optional endeavor.

That is the unfinished work of *Brown*. Our challenge is to avoid the treatment of *Brown* as a historical relic. The discussion of *Brown* should be closely linked with a discussion of its successor cases that have limited the constitutional legitimacy of inclusion efforts and also limited constitutional inquiry into systemic racial disparity. The discussion should go farther than integration, segregation, and desegregation. The question for fierce debate should be opportunity and inclusion and those elements of constitutional doctrine that are indifferent to these concerns. The decisions in *Gratz* and *Grutter*, though modest in their scope and reach, are a small part of that endeavor. But the full potential of *Brown* remains unrealized.

205. Grutter v. Bollinger, 123 S. Ct. 2325, 2345 (2003).