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# CONSTITUTIONAL LAW

FIFTEENTH EDITION

*by*

**KATHLEEN M. SULLIVAN**

Stanley Morrison Professor of Law and  
Former Dean of the School of Law,  
Stanford University

**GERALD GUNTHER**

Late William Nelson Cromwell Professor of Law Emeritus,  
Stanford University

**FOUNDATION PRESS**  
NEW YORK, NEW YORK  
2004

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395 Hudson Street  
New York, NY 10014  
Phone Toll Free 1-877-888-1330  
Fax (212) 367-6799  
fdpress.com

Printed in the United States of America

ISBN 1-58778-776-8



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that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate. [He proceeded to interpret Title VI as containing a "crystal clear" meaning:] "Race cannot be the basis of excluding anyone from participation in a federally funded program."

For the next 25 years, many public and private universities and colleges followed Bakke's guidance in continuing to fashion race preferences in admissions. During that period, the Court reviewed with increasing strictness and skepticism race preferences in employment and contracting. These cases led to speculation that race preferences in education would eventually meet the same fate. In a pair of 2003 decisions involving equal protection challenges to the use of race preferences in admissions at the University of Michigan, however, the Court reaffirmed and elaborated upon Justice Powell's opinion for the Court in Bakke finding diversity a compelling interest justifying race preferences in the context of university admissions. Applying that standard, the Court issued split judgments, upholding the use of race preferences by the Law School on the ground that it was part of individualized review of files that was narrowly tailored to produce diversity, but invalidating the use of race preferences in undergraduate admissions on the ground that it involved too mechanical a procedure for taking race into account.

### Grutter v. Bollinger

539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003)

Justice O'CONNOR delivered the opinion of the Court [in which Justices STEVENS, SOUTER, GINSBURG, and BREYER joined].

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

I. A. The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." [The Law School's admissions policy also] aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School." The policy does not define diversity "solely in terms of racial and ethnic status."

B. Petitioner Ba the Law School in 19 The Law School initi rejected her applicati respondents discrimi Fourteenth Amendm concluded that the La was unlawful. [Sitting

II. A. We last ad years ago. In the lanc that reserved 16 out certain minority gro Justice Powell's opi the touchstone for co Public and private u admissions programs policies. [Today] we er a compelling state i admissions.

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B. Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit [alleging] that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment. [After a 15-day bench trial,] the District Court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. [Sitting] en banc, the Court of Appeals reversed.

II. A. We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. [Since] this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies. [Today] we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

B. [We] have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. [Strict] scrutiny is not "strict in theory, but fatal in fact." Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. [Context] matters when reviewing race-based governmental action under the Equal Protection Clause. [Not] every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

III. A. With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body."

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*. It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. See, e.g., *Richmond v. J.A. Croson Co.* (plurality opinion) [(1989); p. 739 below]. But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. [Our] scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions. [We] have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment,

universities occupy a special niche in our constitutional tradition. [Our] conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission.

[The] Law School seeks to "enroll a 'critical mass' of minority students." The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. These benefits are substantial. [The] Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." [Student] body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." These benefits are not theoretical but real, as major American businesses have made clear [in their amicus briefs in support of the University]; that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert [in their amicus brief] that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." [At] present, "the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." [We] agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."

[Moreover,] universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. 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.

B. [Even] in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, [the means] must be specifically and narrowly framed. [We] find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each

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and every applicant. We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. [The] Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.

[That] a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. [We] also find that [the] Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. The Law School does not [limit] in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the [admissions] policy makes clear "[t]here are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

[Petitioner] and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both. [The] United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State. The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individual-

ized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission. [To] be narrowly tailored, a race-conscious admissions program [also] must not “unduly burden individuals who are not members of the favored racial and ethnic groups.” We are satisfied that the Law School’s admissions program does not. Because the Law School considers “all pertinent elements of diversity,” it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.

[We] are mindful, however, that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” Accordingly, race-conscious admissions policies must be limited in time. [We] see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. [We] take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV. In summary, the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. [Affirmed.]

Justice GINSBURG, with whom Justice BREYER joins, concurring.

[It] is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. As to public education, data for the years 2000–2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. And schools in predominantly minority communities lag far behind others measured by the educational resources available to them. However strong the public’s desire for improved education systems may be, it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. [As] lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.

Justice SCALIA, with whom Justice THOMAS joins, concurring in part and dissenting in part.

[Unlike] a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today’s Grutter–Gratz split double header [see *Gratz v. Bollinger*, the undergraduate admissions decision, below] seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether

the discriminatory scheme applicant “as an individual tracks” to fall under Grutter. The university has gone beyond a quota system, rather than focus on whether, in the flow from racial diversity, the institution’s expressed commitment to the discriminatory program will be those who suppose, will be those who racial diversity in the segregation on their can separate minority housing even separate minority-occupied dorms. The institution’s claim that the institution’s Grutter-approved program is in the best interest of the composition of its generic body of these cases. The Constitution’s basis of race, and state-p

Justice THOMAS, concurring in part and dissenting in part.  
Frederick Douglass, 1845, delivered a message

“[I]n regard to benevolent, I perceive negro is not benevolent. American people have with us. . . . I have with us! Your doing nothing with us! If strength, if they are disposed to fall, let them fall, let him fall alone! Let him alone!”

Like Douglass, I believe without the meddling of students succeed whatever of those who sponsor the Michigan Law School tolerate institutional decisions such devotion ripens in countenance the unprecise approach inconsistent

I. [The] Constitution cause those classificatory motives, but also because registers and makes race demeans us all.

II. [Unlike] the message asserted by the Law School compelling as to justify

the discriminatory scheme in question contains enough evaluation of the applicant "as an individual," and sufficiently avoids "separate admissions tracks" to fall under Grutter rather than Gratz. Some will focus on whether a university has gone beyond the bounds of a "good faith effort" and has so zealously pursued its "critical mass" as to make it an unconstitutional de facto quota system, rather than merely "a permissible goal." Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in Grutter. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical Grutter-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

Justice THOMAS, with whom Justice SCALIA joins as to Parts I–VII, concurring in part and dissenting in part.

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority:

"[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury."

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (Law School). The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny."

I. [The] Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.

II. [Unlike] the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it

wishes to obtain "educational benefits that flow from student body diversity." [But attaining] "diversity," whatever it means,<sup>1</sup> is the mechanism by which the Law School obtains educational benefits, not an end of itself. [It] is the educational benefits that are the end, or allegedly compelling state interest, not "diversity." [But the] Law School [refuses] to entertain changes to its current admissions system that might produce the same educational benefits. The Law School adamantly disclaims any race-neutral alternative that would reduce "academic selectivity." [Instead] the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution.

III. [Under] the proper standard, there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school. [While] legal education at a public university may be good policy or otherwise laudable, it is obviously not a pressing public necessity.

IV. [The] Court never explicitly holds that the Law School's desire to retain the status quo in "academic selectivity" is itself a compelling state interest. [Therefore], the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways. With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination. [The] Court ignores the fact that other top law schools have succeeded in meeting their aesthetic demands without racial discrimination. [The] sky has not fallen at Boalt Hall at the University of California, Berkeley, for example. Prior to Proposition 209's adoption of Cal. Const., Art. 1, § 31(a), which bars the State from "grant[ing] preferential treatment . . . on the basis of race . . . in the operation of . . . public education," Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics. Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels. [The] Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution.

V. [The] rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a "true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities. The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the

1. "[D]iversity," for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue. Because the Equal Protection Clause renders the color of one's skin constitutionally irrelevant to the Law School's mission, I refer to the Law School's interest as an "aesthetic." That is, the Law School wants to have a

certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them. [It] must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation. [Footnote by Justice Thomas.]

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VI. [I must also] contest the notion that the Law School's discrimination benefits those admitted as a result of it. [The] Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. [To] cover the tracks of the aestheticists, this cruel farce of racial discrimination must continue—in selection for the Michigan Law Review, and in hiring at law firms and for judicial clerkships—until the "beneficiaries" are no longer tolerated. While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less "elite" law school for which they were better prepared.

[Beyond] the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engender[s] attitudes of superiority or, alternatively, provoke [s] resentment among those who believe that they have been wronged by the government's use of race." "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.

VII. As the foregoing makes clear, I believe the Court's opinion to be, in most respects, erroneous. I do, however, find two points on which I agree. First, I note that the issue of unconstitutional racial discrimination among the groups the Law School prefers is not presented in this case. [I] join the Court's opinion insofar as it confirms that this type of racial discrimination remains unlawful. Under today's decision, it is still the case that racial discrimination that does not help a university to enroll an unspecified number, or "critical mass," of underrepresented minority students is unconstitutional. Thus, the Law School may not discriminate in admissions between similarly situated blacks and Hispanics, or between whites and Asians. [The] Court also holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest. While I agree that in 25 years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now.

[For] the immediate future, however, the majority has placed its imprimatur on a practice that can only weaken the principle of equality embodied in the

2. Were this Court to have the courage to forbid the use of racial discrimination in admissions, legacy preferences (and similar practices) might quickly become less popu-

lar—a possibility not lost, I am certain, on the elites (both individual and institutional) supporting the Law School in this case. [Footnote by Justice Thomas.]

Declaration of Independence and the Equal Protection Clause. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, [(1896) (Harlan, J., dissenting); p. 672 above]. It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see the principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court's opinion and the judgment.

Chief Justice REHNQUIST, with whom Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, dissenting.<sup>3</sup>

I agree with the Court that, "in the limited circumstance when drawing racial distinctions is permissible," the government must ensure that its means are narrowly tailored to achieve a compelling state interest. I do not believe, however, that the University of Michigan Law School's (Law School) means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps it does to achieve a "critical mass" of underrepresented minority students. But its actual program bears no relation to this asserted goal.

[From] 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. [In] order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving "critical mass," without any explanation of why that concept is applied differently among the three underrepresented minority groups.

[Only] when the "critical mass" label is discarded does a likely explanation for these numbers emerge. The Court states that the Law School's goal of attaining a "critical mass" of underrepresented minority students is not an interest in merely "'assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" The Court recognizes that such an interest "would amount to outright racial balancing, which is patently unconstitutional." The Court concludes, however, that the Law School's use of race in admissions, consistent with Justice Powell's opinion in *Bakke*, only pays "'[s]ome attention to numbers.'" But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers." [From] 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups. [For] example, in 1995, when 9.7% of the applicant pool was African-American, 9.4%

3. Justice KENNEDY also filed a separate dissent, agreeing with the District Court that an inference could be drawn from the

record "that the Law School's pursuit of critical mass mutated into the equivalent of a quota."

of the admitted class, applicant pool was African-American. This percentage of applicants is a careful race based planning

[I] do not believe the use of race. The admissions practices and School has managed its but to extend offers of proportion to their status precisely the type of race unconstitutional."

### Gratz v. Bollinger

129 U.S. 244, 123 S.Ct. 2411,

Chief Justice REHNQUIST, with whom Justices O'CONNOR, SCALIA,

[This case, like *Gratz v. Bollinger*, the admissions policy of the College of Literature, considered the challenge. The college considered including high school curriculum strength, general college used a selection represented racial or ethnic groups, and Native Americans. The college used a selection virtually every qualified applicant. The Chief Justice

Petitioners argue [the] admissions policy violates the Constitution. The college sanctioned the use of race as a justification on which race is a basis for employing race. The college used a selection of applicants indefinitely to constitute a "critical mass." [For] [above] the Court has held that the University's policy, which requires the points needed to guarantee a "critical mass" applicant solution to the interest in education program.

[Justice] Powell's opinion in *Bakke* required each particular applicant to possess a unique set of characteristics. Powell described, however, that the University's policy automatically ensured

of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American. This correlation is striking. [The] tight correlation between the percentage of applicants and admittees of a given race [must] result from careful race based planning by the Law School.

[I] do not believe that the Constitution gives the Law School such free rein in the use of race. The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional."

### **Gratz v. Bollinger**

539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003).

Chief Justice REHNQUIST delivered the opinion of the Court [in which Justices O'CONNOR, SCALIA, KENNEDY, and THOMAS, joined].

[This case, like *Grutter*, involved a challenge by white students to an admissions policy of the University of Michigan, this time by the undergraduate College of Literature, Science, and the Arts (LSA). Although the college considered the challengers "qualified," they were ultimately denied admission. The college considered a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race. The college used a selection method under which every applicant from an underrepresented racial or ethnic minority group—namely, African-Americans, Hispanics, and Native Americans—was automatically awarded 20 points of the 100 needed to guarantee admission. It was undisputed that the University admitted virtually every qualified applicant from these groups. The majority opinion began by dismissing the dissenters' objections that the challengers lacked standing. The Chief Justice proceeded:]

Petitioners argue [that] the University's use of race in undergraduate admissions violates the Fourteenth Amendment [because] this Court has only sanctioned the use of racial classifications to remedy identified discrimination, a justification on which respondents have never relied, [and that] "diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." [For] the reasons set forth today in *Grutter v. Bollinger* [above] the Court has rejected these arguments. [But we] find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

[Justice] Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's

diversity. [The] current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. [Even if a student's] "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. At the same time, every single underrepresented minority applicant [would] automatically receive 20 points for submitting an application. Clearly, the LSA's system does not offer applicants the individualized selection process.

[Respondents] contend that "[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the admissions system" upheld by the Court today in *Grutter*. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis. We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.

Justice O'CONNOR, concurring.<sup>1</sup>

Unlike the law school admissions policy the Court upholds today in *Grutter*, the procedures employed by the University of Michigan's Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. [Although] the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race. [The] selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class.

Justice THOMAS, concurring.

I join the Court's opinion because I believe it correctly applies our precedents, including today's decision in *Grutter v. Bollinger*. For similar reasons to

1. Justice BREYER concurred in the judgment, and joined Justice O'Connor's concurring opinion except insofar as it joined

that of the Court, and Justice Ginsburg's dissent except insofar as it found no constitutional violation.

those given in my separate opinion. The State's use of racial diversity is not constitutionally prohibited by the Equal Protection Clause.

Justice SOUTER, concurring.

[Even] if the merit-based admissions system is not the best way to achieve the State's goal of diversity, the merit-based system is not unconstitutional. [The] cases in *Grutter* and the unconstitutionality of the merit-based system reaffirms the permissibility of diversity of students, as opposed to racial quotas or set-aside places in a class. Although the argument on the merit-based system is what *Bakke* condemns, the merit-based system is not unconstitutional.

The record does not show that the University's use of race in *Bakke*, which was struck down from certain seats for all places and valuations of race, but on the grounds of race, but on the course of study, residence, socioeconomic disadvantage, and other factors. [The] one qualification for membership in an underrepresented minority group on the 150-point scale. On the other hand, the record does not set race as a factor in the selection process. Minority students may receive a bonus for being a high school graduate, attendance at a minority high school, or other factors. Points for being a resident of Michigan county, 5 for being a high school graduate. Admission is not left entirely to the discretion of the admissions officer. It is inappropriate in assigning points to race whether it be reasonable or not. [Nor] is it possible to set a point value for race comparable to reservation points.

[It] seems especially important to consider the character of the factor it gives for race. In *Grutter*, the Court supposedly not based on race. Universities in California and Michigan could get student body diversity by guaranteeing admission to high school in Michigan. In practice, it nonetheless guarantees a certain percentage of deliberate obfuscation as the point scale. The results without saying so. In contrast, Michigan stands for the proposition that

2. Justice STEVENS dissented. He filed a separate dissenting opinion that the named petitioner

those given in my separate opinion in that case, however, I would hold that a state's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.

Justice SOUTER, dissenting.<sup>2</sup>

[Even] if the merits were reachable, I would dissent from the Court's judgment. [The] cases now contain two pointers toward the line between the valid and the unconstitutional in race-conscious admissions schemes. Grutter reaffirms the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases. On the other hand, Justice Powell's opinion in [Bakke] rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class. Although the freshman admissions system here is subject to argument on the merits, I think it is closer to what Grutter approves than to what Bakke condemns, and should not be held unconstitutional on the current record.

The record does not describe a system with a quota like the one struck down in Bakke, which "insulate[d]" all nonminority candidates from competition from certain seats. [The] plan here, in contrast, lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic disadvantage, athletic ability, and quality of a personal essay. [The] one qualification to this description of the admissions process is that membership in an underrepresented minority is given a weight of 20 points on the 150-point scale. On the face of things, however, this assignment of specific points does not set race apart from all other weighted considerations. Nonminority students may receive 20 points for athletic ability, socioeconomic disadvantage, attendance at a socioeconomically disadvantaged or predominantly minority high school, or at the Provost's discretion; they may also receive 10 points for being residents of Michigan, 6 for residence in an underrepresented Michigan county, 5 for leadership and service, and so on. [Since] college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. [Nor] is it possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in Bakke.

[It] seems especially unfair to treat the candor of the admissions plan as an Achilles' heel. In contrast to the college's forthrightness in saying just what plus factor it gives for membership in an underrepresented minority, it is worth considering the character of one alternative thrown up as preferable, because supposedly not based on race. Drawing on admissions systems used at public universities in California, Florida, and Texas, the United States contends that Michigan could get student diversity in satisfaction of its compelling interest by guaranteeing admission to a fixed percentage of the top students from each high school in Michigan. While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage. It is the disadvantage of deliberate obfuscation. The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case

2. Justice STEVENS, joined by Justice Souter, filed a separate dissent on the ground that the named petitioners lacked standing.

Justice Ginsburg joined Justice Souter's dissent on the merits.

for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.

Justice GINSBURG, with whom Justice SOUTER joins, dissenting.

[The] Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. This insistence on "consistency" would be fitting were our Nation 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. [Unemployment], poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions.

[The] Constitution instructs all who act for the government that they may not "deny to any person . . . the equal protection of the laws." Amdt. 14, § 1. In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated. [Where] race is considered "for the purpose of achieving equality," no automatic proscription is in order.

[Examining] in this light the admissions policy employed by [LSA], I see no constitutional infirmity. Like other top-ranking institutions, the College has many more applicants for admission than it can accommodate in an entering class. Every applicant admitted under the current plan [is] qualified to attend the College. The racial and ethnic groups to which the College accords special consideration (African-Americans, Hispanics, and Native-Americans) historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day. There is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race. Nor has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race.

The stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. [If] honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative ac-

tion program is preferable and disguises.

1. *Comparing Bakke*  
Powell's determinative (passed, however, the lack of the public employment affirmative action activity in fact, still the law. precedential value. See, striking down racial preference, Justice Powell's dissent and Gratz, there can be no doubt that education remains a core race preferences in high

But was the diversity upheld in Bakke? Is Bakke, or does it have that, "[a]lthough Grut opinion in Bakke, Grut really from Powell's. Po educational process itself [that] thrived on the confrontation between conceptions of education goods like professional for diversity thus potential. The Supreme Court, tion: Culture, Courts, a

Other scholars agree in the classroom but accessible to all individuals to leadership. [It] may higher education generally large to include all public Bakke would be overruled. Revisited," University Research Papers, 2003 diversity "depends on when it might be argued importantly, different conceptions of its societal reverberations. lar educational institutions. racial-majority leaders substantial racial diversity at institutions." Lee, "of Diversity," 72 Fordh

2. *The Court's ruling else?* Despite upheld another. the Court assumes higher education is a c

tion program is preferable to achieving similar numbers through winks, nods, and disguises.

1. *Comparing Bakke, Grutter, and Gratz.* For twenty-five years, Justice Powell's determinative opinion in *Bakke* was considered governing law. As time passed, however, the lack of a majority opinion in *Bakke*, and developments in the public employment and procurement cases considered below, led anti-affirmative action activists to begin to question whether Powell's opinion was, in fact, still the law. Some lower courts also began to question *Bakke*'s precedential value. See, e.g., *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000) (striking down racial preferences at the University of Texas and holding that Justice Powell's diversity rationale was not binding precedent). After *Grutter* and *Gratz*, there can be no question as to the law: achieving diversity in higher education remains a compelling state interest sufficient to justify at least some race preferences in higher education.

But was the diversity interest that was upheld in *Grutter* that same as that upheld in *Bakke*? Is *Grutter* simply a reaffirmance of Powell's opinion in *Bakke*, or does it have even farther-reaching implications? Consider the view that, "[a]lthough *Grutter* casts itself as merely endorsing Justice Powell's opinion in *Bakke*, *Grutter*'s analysis of diversity actually differs quite dramatically from Powell's. Powell conceptualizes diversity as a value intrinsic to the educational process itself [because] education was a practice of enlightenment [that] thrived on the 'robust exchange of ideas' characteristically provoked by confrontation between persons of distinct life experiences. [*Grutter* instead] conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership. [*Grutter*'s] justifications for diversity thus potentially reach far more widely than do Powell's." Post, "The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law," 117 *Harv. L. Rev.* 4 (2003).

Other scholars agree that "Justice O'Connor championed diversity not only in the classroom but beyond. After noting that higher education 'must be accessible to all individuals regardless of race or ethnicity,' she linked education to leadership. [It] may be possible to confine [her] words to law schools or to higher education generally, but it may also be that diversity has now been writ large to include all public institutions. [The] debate has shifted from whether *Bakke* would be overruled to how far it should be extended." Jeffries, "Bakke Revisited," University of Virginia School of Law, Public Law & Legal Theory Research Papers, 2003 Supreme Court Review \_\_\_\_\_. If *Grutter*'s conception of diversity "depends on minority participation in leadership for satisfaction," then it might be argued that "in *Grutter*, the Court endorsed a subtly, but importantly, different claim [than in *Bakke*]: diverse discourse on campus and its societal reverberations notwithstanding, student body diversity at a particular educational institution is sought to produce, and in fact produces, not just racial-majority leaders who are open to diverse perspectives, but actual and substantial racial diversity in the leadership ranks of important non-educational institutions." Lee, "University Dons and Warrior Chieftains: Two Concepts of Diversity," 72 *Fordham L. Rev.* (forthcoming 2004).

2. *The Court's rationale—epistemic, distributive, compensatory, or something else?* Despite upholding one affirmative action program and striking down another, the Court assumed in both *Grutter* and *Gratz* that seeking diversity in higher education is a compelling state interest; *Gratz* simply found the under-