A 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, Does Not Violate the Equal Protection Clause of the Fourteenth Amendment: *Grutter v. Bollinger*

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**Constitutional Law – Fourteenth Amendment – Equal Protection Clause** – The United States Supreme Court held that a law school’s narrowly tailored use of race in its admissions decisions is not prohibited by the Equal Protection Clause of the Fourteenth Amendment because the policy furthers a compelling interest in obtaining the educational benefits that flow from having a diverse student body.


Barbara Grutter, a 43 year-old white resident of Michigan, applied for admission to the University of Michigan Law School (Law School) in 1996.¹ The Law School notified Ms. Grutter that she was placed on the waiting list for further consideration, but was subsequently declined admission to the 1997 incoming class.² According to its admissions policy, the Law School sought a variety of individuals with “a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others.”³ Although the Law School considered each applicant’s Law School Admissions Test (LSAT) score and grade point aver-

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1. Grutter v. Bollinger, 123 S. Ct. 2325, 2332 (2003); see also Brief for Petitioner at 2, *Grutter* (No. 02-241). Ms. Grutter had a 3.8 undergraduate grade point average and a LSAT score of 161 at the time of her application. *Grutter*, 123 S. Ct. at 2332. In addition to the application, Grutter was required to send in additional information such as a personal statement, letters of recommendation, and an essay stating how the applicant will contribute to the life and diversity of the institution. *Id.* at 2331-32.

2. Brief for Petitioner at 2.

3. *Grutter*, 123 S. Ct. at 2331. Prior to 1992, the Law School’s policy was identified as a “special admissions program” in order to increase the number of minority student enrolled. Grutter v. Bollinger, 137 F. Supp. 2d 821, 830 (E.D. Mich. 2001). The admission’s policy was later amended but still reflected these same principles: “a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against.” *Grutter*, 123 S. Ct. at 2332.
age (GPA), the policy required admissions officials to consider other criteria known as "soft variables" to assess whether an applicant could successfully contribute socially and intellectually to the institution. The key component of the Law School's admissions policy was to enroll a "critical mass" of underrepresented minority students, who would provide integration of racial and ethnic origins within the classrooms, in an effort to achieve student body diversity.

Ms. Grutter initiated proceedings against the Law School alleging that she was denied admission because the Law School uses race as a "predominate factor" which increased the chance of admission for applicants from favorable minority groups. The complaint further alleged that the Law School discriminated against her constitutional rights, in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d. In her claim, Ms. Grutter

4. Grutter, 123 S. Ct. at 2332. These "soft variables" included: the quality of the applicant's essay, the quality of the undergraduate institution, and the areas and difficulty of undergraduate course selection. Id.

5. Id.

6. Bollinger, 137 F. Supp. 2d at 829. The Law School bulletin for the 1996-1997 academic year stated that "minorities, minority groups, and underrepresented minorities refer to African American, Native American, Mexican American, and mainland Puerto Rican students. Id.

7. Grutter, 123 S. Ct. at 2332. Erica Munzel testified that "critical mass" means "meaningful numbers" or "meaningful representation" but stated that there is no number, percentage or range of numbers or percentages that constitute critical mass. Bollinger, 137 F. Supp. 2d at 833-34. Dean Syverud also testified that "critical mass cannot be quantified, but that a professor knows when it is present because minority students feel free to express their views, rather than to state ... 'politically correct' views." Id. at 836. In addition, Syverud indicated that "when a critical mass of underrepresented minority students are present, racial stereotypes lose their force because non-minority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." Id.

8. Bollinger, 137 F. Supp. 2d at 823. The complaint also names as defendants Lee Bollinger, the Dean of the Law School from 1987-1994 and the President of the University of Michigan from 1987 to the present, Jeffrey Lehman, the Dean of the Law School from 1994 to the present, Dennis Shields, the Director of Admissions at the Law School from 1991-1998, and the Regents of the University of Michigan. Id. at 824.

9. Id.

10. Id. The pertinent section of the Fourteenth Amendment provides: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend XIV, § 1.

11. Bollinger, 137 F. Supp. 2d at 824. The statutory language of 42 U.S.C. § 2000d states: "No person in the United States shall, on the ground of race, color, or national ori-
requested compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from using race to discriminate in the admissions process.\textsuperscript{12}

Using a strict scrutiny standard,\textsuperscript{13} the district court determined the use of race in the Law School’s policy was unconstitutional and a violation of the Equal Protection Clause and Title VI of the 1964 Civil Rights Act.\textsuperscript{14} In making this determination, the court concluded that the argument set forth by Justice Powell in \textit{Regents of the University of California v. Bakke}\textsuperscript{15} did not authorize the use of race for an attainment of diversity as a compelling state interest.\textsuperscript{16} The Court of Appeals for the Sixth Circuit, reviewing the district court’s opinion \textit{de novo},\textsuperscript{17} reversed the judgment and held that the Law School has a compelling interest in achieving a diverse student body and that Justice Powell’s opinion in \textit{Bakke} established

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\begin{itemize}
  \item \textsuperscript{12} \textit{Bollinger}, 137 F. Supp. 2d at 824. Ms. Grutter also motioned for class certification and for bifurcation of the trial into liability and damages phases. \textit{Id.} The district court defined the class as:
  \begin{quote}
    \begin{itemize}
      \item [A]ll persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were member of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their application for admission to Law School.
  \end{itemize}
  \end{quote}
  \textit{Id.}
  \item \textsuperscript{13} \textit{Id.} at 821. “All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” \textit{Adarand Constructors Inc. v. Pena}, 515 U.S. 200, 227 (1995). “In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” \textit{Id.} Under the strict scrutiny test, the legislature must have a compelling state interest to enact the law, and the measures prescribed by the law must be the least restrictive means possible to accomplish the legislature’s goal. \textit{BLACK’S LAW DICTIONARY} 712 (7th ed. 1999).
  \item \textsuperscript{14} \textit{Bollinger}, 137 F. Supp. 2d at 872.
  \item \textsuperscript{15} 438 U.S. 265 (1978). Alan Bakke, a white applicant, was twice rejected from the University of California Medical School. \textit{Id.} at 276. After his second rejection, Bakke initiated proceedings against the Medical School alleging that the special admissions program operated to exclude him from the school on the basis of his race in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment. \textit{Id.} at 277.
  \item \textsuperscript{16} \textit{Bollinger}, 137 F. Supp. 2d at 848. The district court stated that no other justice joined Justice Powell in Part IV of his opinion, which was the only portion that discussed using race in order to obtain student body diversity. \textit{Id} at 849. The court also stated that even if using race was a compelling state interest, “the Law School has not narrowly tailored its use of race to achieve that interest.” \textit{Id.} at 872.
  \item \textsuperscript{17} An appellate court is to conduct an independent review of the record when constitutional facts are at issue. \textit{Johnson v. Econ. Dev. Corp.}, 241 F.3d 501, 509 (6th Cir. 2001); see also \textit{Women’s Med. Prof. Corp. v. Voinovich}, 130 F.3d 187, 192 (6th Cir. 1997).
\end{itemize}
binding precedent for the courts. In coming to this conclusion, the Sixth Circuit stated that the Law School’s use of race and ethnicity were merely “plus factors” in an applicant’s file considered along with a range of other factors. The court also concluded that the Law School’s use of race was narrowly tailored since the Law School’s admissions policy was indistinguishable from the Harvard plan, which Justice Powell approved.

In order to resolve the disagreement between the district court and the court of appeals, the Supreme Court granted certiorari to determine “[w]hether diversity was a compelling interest that could justify the narrowly tailored use of race in selecting applicants for admission to public universities.” The Supreme Court, in a 5-4 decision delivered by Justice O’Connor, held that the Law School’s narrowly tailored use of race in admissions decisions to further diversity amongst the student body was not prohibited by the Equal Protection Clause.

The majority began its analysis by reviewing the precedent set forth by Justice Powell twenty-five years ago in Bakke. Justice Powell criticized a racial set-aside program as unconstitutional, but did not per se prohibit the use of race in admissions policies. Alternatively, Justice Powell held that a state has a substantial interest in attaining student body diversity and approved the university’s use of race solely to further this goal. The majority decided it was not necessary to determine whether the court’s hold-

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20. See Bakke, 438 U.S. at 317. Under the Harvard plan, an institution could consider the race and ethnicity of applicants, but race and ethnicity alone were not the exclusive components of academic diversity. Id. Justice Powell approved the plan because it was “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.” Id.
22. Grutter, 123 S. Ct. at 2335.
23. Id. at 2347. Grutter’s claims based on Title VI also failed because “Title VI prescribe[s] only those racial classifications that would violate the Equal Protection Clause.” Id.
26. Id. at 315.
ing in *Bakke* was binding under *Marks v. United States* and endorsed Justice Powell's diversity rationale. Next, the court analyzed the Law School's only justification for using race in its admission process, the purported educational benefits that flow from having a diverse student body. In response to this assertion, Justice O'Connor agreed with the expert studies demonstrating that diversity provided students with skills necessary to become better professionals in a diverse workforce.

After determining that the educational benefits of a diverse student body was a compelling state interest, the majority had to determine whether the admissions policy was narrowly tailored to achieve this goal in order for it to be found constitutional. Justice O'Connor, citing *Bakke*, acknowledged that the admissions policy would qualify as narrowly tailored as long as it did not use quotas to separate those applicants with certain characteristics from competition with other applicants or unduly harm non-minority applicants. Instead, race or ethnicity could be used in consideration for admission if it is considered a "plus" factor in a particular applicant's file, without separating the applicant from comparison with other qualified individuals. Contrary to the district court's holding, the majority regarded the attainment of a "critical mass" as not being synonymous with a quota system because "some attention to numbers, without more, does not transform a flexible admissions system into a rigid quota." Justice O'Connor likewise stated the Law School's admission policy, like

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27. 430 U.S. 188 (1977). In *Marks*, the court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoyed the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (internal quotation marks and citation omitted).


29. *Id.* at 2338.

30. *Id.* at 2340. *See* *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (citing Report of Patricia Gruin, at 3). Patricia Gruin, a professor of psychology and women's studies at the University of Michigan, submitted research which suggested that "[s]tudents learn better in a [racially and ethnically] diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such setting." *Id.*


34. *Id.* at 2343 (quoting *Bakke*, 438 U.S. at 323 (1978)).
the Harvard Plan approved by Justice Powell, "consider[ed] all pertinent elements of diversity in light of the particular qualifications of each applicant . . . to place them on the same footing for consideration, although not necessarily according them the same weight."35

The last issue the majority addressed was whether any other race-neutral alternatives existed which could achieve the educational benefits of a diverse student body.36 The majority and the Court of Appeals agreed that the alternatives proscribed by the district court would require a dramatic sacrifice of diversity or quality of students.37 Justice O'Connor stated her satisfaction with the Law School's consideration of other race-neutral alternatives and was assured the Law School would terminate its race-conscious admissions policy as soon as practical.38 The majority concluded that since the Law School's admission policy was narrowly tailored to achieve a "critical mass" of underrepresented minority students to further a compelling interest of diversity, the admissions policy was constitutional and did not violate Grutter's Fourteenth Amendment Rights.39

Justice Thomas, in his dissent, critically examined the Law School's alleged compelling state interest.40 Both Justice Thomas and Justice Scalia scrutinized the Law School for using "critical mass" as a mere fabrication to maintain admission of minority students who would otherwise be disproportionately excluded.41 In his dissenting opinion, Justice Thomas argued that the Law School refused to change its current admissions process because race-neutral alternatives would reduce "academic selectivity and would require the Law School to sacrifice a core part of its educational mission."42 He believed the majority allowed the Law School

35. Grutter, 123 S. Ct. at 2344. The Law School considered "each applicant's promise of making a notable contribution to the class by way of a particular strength or characteristic." Id. An applicant's potential contribution to student body diversity can be demonstrated through an essay and a personal statement. Id.
36. Id. at 2344-45.
37. Id. at 2345. The district court suggested that the Law School could implement race-neutral alternatives such as a lottery system for all qualified applicants or decreasing the emphasis placed on all applicant's undergraduate GPA and LSAT scores. Id.
38. Id. at 2346.
39. Id. at 2347.
40. Grutter, 123 S. Ct. at 2350 (Thomas, J., dissenting). Justice Scalia joined Parts I-VII of Justice Thomas' dissenting opinion. Id. at 2350.
41. Id. at 2349 (Scalia, J., dissenting).
42. Id. at 2356 (Thomas, J., dissenting).
to use race to advance its interest in "offering a marginally superior education while maintaining an elite institution." Likewise, Justice Thomas noted that the majority ignored evidence from other institutions that have succeeded in reaching these objectives without resorting to racial discrimination in its admissions policies.

In a separate dissenting opinion, Chief Justice Rehnquist, stated the interest being asserted by the Law School was not narrowly tailored to achieve it means. Although the Law School sought to accumulate a "critical mass" of each underrepresented minority group, Chief Justice Rehnquist disapproved of the argument because the record demonstrated that significantly more individuals were admitted from one underrepresented minority group than from other groups. Chief Justice Rehnquist also contended that the Law School's admissions policy failed the strict scrutiny standard because it did not place a reasonable time limit on the duration of its program, which is one of the factors in determining whether a race-conscious program is constitutional.

Finally, in Justice Kennedy's dissenting opinion, he noted the majority had failed to apply strict scrutiny in determining the constitutionality of the Law School's race-conscious admissions program. He contended that the Law School had the burden of showing that its institution ensured that each applicant received individual consideration and that race was not the determinative

43. Id. at 2355 (Thomas, J., dissenting). Furthermore, Justice Thomas stated that the Law School's decision to be an elite institution does not advance the welfare of the State of Michigan because very few lawyers remain in the state. Id. (Thomas, J., dissenting).

44. Id. at 2359 (Thomas, J., dissenting). Justice Thomas cited statistics from Boalt Hall at the University of California, Berkeley. See id. at 2359. Prior to the adoption of California's Proposition 209, which barred the state from granting preferential treatment on the basis of race in public education, Boalt Hall enrolled 20 blacks and 28 Hispanics. Id. (Thomas, J., dissenting). In 2002, without instituting racial discriminations in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics and the total underrepresented minority student enrollment exceeded its 1996 numbers. Id. (Thomas, J., dissenting).

45. Grutter, 123 S. Ct. at 2365 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's opinion was joined by Justices Scalia, Kennedy, and Thomas. Id. (Rehnquist, C.J., dissenting).

46. Id. at 2386-67 (Rehnquist, C.J., dissenting). The record demonstrated that from 1995 through 2000, the Law School admitted between 13 and 19 Native Americans, between 91 and 108 African Americans, and between 47 and 56 Hispanic. Id. at 2386 (Rehnquist, C.J., dissenting). The Law School failed to provide any race-specific reasons why significantly more individuals from a certain minority were needed to achieve diversity. Id. at 2367 (Rehnquist, C.J., dissenting).

47. Id. at 2389 (Rehnquist, C.J., dissenting).

48. Id. at 2370 (Kennedy, J., dissenting).
factor for admission.\textsuperscript{49} Justice Kennedy emphasized that the majority's holding, allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities, was only permitted because of their abandonment of the strict scrutiny standard.\textsuperscript{50}

The historical treatment of race in the judiciary found its roots more than a century ago with the Supreme Court's decision to legalize segregation in \textit{Plessy v. Ferguson}.\textsuperscript{51} The Court found it was constitutional to provide "separate but equal"\textsuperscript{52} railroad accommodations for white and colored races.\textsuperscript{53} In upholding the Louisiana statute, Justice Brown rejected the Equal Protection challenge by distinguishing between political and social equality.\textsuperscript{54} The Equal Protection clause, Justice Brown stated, sought to enforce only political equality.\textsuperscript{55} However, laws that required separation of races in order to avoid contact with one another did not "imply the inferiority of either race" and involved only social equality, which the Equal Protection did not encompass.\textsuperscript{56} The majority opined, "[i]f the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. . . [i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."\textsuperscript{57} In his dissent, Justice Harlan rejected the majority's position as he contended that the Fourteenth Amendment guaranteed both civil and political rights to all citizens.\textsuperscript{58} The government's separation of race, Justice Harlan argued, necessarily implied that one of the races was inferior.\textsuperscript{59} This position is summarized in Justice Harlan's famous

\textsuperscript{49} Id. at 2373 (Kennedy, J., dissenting).
\textsuperscript{50} Grutter, 123 S. Ct. at 2374 (Kennedy, J., dissenting).
\textsuperscript{51} 163 U.S. 537 (1896). Plessy had been arrested for violating the Louisiana statute by purchasing a ticket for a first class seat and refusing to move from the seat to the separate section for "colored" people. Id. at 541-42. Plessy was seven-eighths Caucasian and one-eighth African. Id. at 541.
\textsuperscript{52} Plessy, 163 U.S. at 543-44. Under this doctrine, equality of treatment was accorded when races were provided substantially equal facilities, even though these facilities were separate. See Brown v. Board of Education, 347 U.S. 483, 488 (1954).
\textsuperscript{53} Plessy, 163 U.S. at 551-52.
\textsuperscript{54} Id. at 544.
\textsuperscript{55} Id. at 545 (citing Strauder v. West Virginia, 100 U.S. 303 (1879), in which the Court held that a West Virginia law limiting juries to white males discriminated by implying legal inferiority).
\textsuperscript{56} Plessy, 163 U.S. at 544.
\textsuperscript{57} Id. at 551-52.
\textsuperscript{58} Id. at 555.
\textsuperscript{59} Id. at 559.
quote: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."\(^6^0\)

In 1954, the Court overruled the holding in *Plessy* and held the separate but equal doctrine unconstitutional.\(^6^1\) In *Brown v. Board of Education*,\(^6^2\) the United States Supreme Court stated that "segregation of children in public schools solely on the basis of race deprived children of a minority group equal educational opportunities, in violation of the Equal Protection Clause of the Fourteenth Amendment."\(^6^3\) Segregation, Chief Justice Warren declared, was detrimental to black children's education because it generated feelings of inferiority.\(^6^4\) Accordingly, the Court held that the "separate but equal" doctrine had no place in public education because separate educational facilities were inherently unequal and denied black children equal educational opportunities.\(^6^5\)

The modern era of affirmation action began a decade after *Brown* was decided when Congress passed Title VI of the Civil Rights Act of 1964, which provided "that no person on the grounds of race . . . be subjected to discrimination under any program or activity receiving federal funds."\(^6^6\) Under the statutory language of Title VI of this Act, it was evident that Congress intended to prohibit racial discrimination.\(^6^7\) However, the legislative history of Title VI was ambiguous on whether Title VI intended to bar all race-conscious efforts of federally financed programs to minorities.\(^5^8\) This proposition became the subject of debate and allowed

\(^{60}\) Id. Justice Harlan further stated that "the law regards man as man, and takes no account of his surroundings or of his color when civil rights as guaranteed by the supreme law of the land are involved." Id.


\(^{62}\) Brown, 347 U.S. at 483. This case involved the consolidation of 4 separate cases. *Brown*, 347 U.S. at 486. In each of the cases, African American minors were denied admission to schools attended by white children under laws requiring or permitting segregation according to race. Id. at 487-88.

\(^{63}\) Id. at 483.

\(^{64}\) Id. at 494. In reaching its decision, the Court relied in part on *Sweatt v. Painter*, 339 U.S. 629 (1950) and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), which allowed intangible factors to be considered in determining whether separate schools are in fact equal. Id. at 493-94.

\(^{65}\) Id. at 495.


\(^{68}\) Bakke, 438 U.S. at 328-37.
courts to interpret the meaning of Title VI to permit discrimination in favor of a minority race.69

The Supreme Court had its first opportunity to address the constitutionality of racial classifications in the realm of education with its opinion in \textit{Regents of the University of California v. Bakke}.70 In this landmark case, Justice Powell provided the fifth vote invalidating the Medical School of the University of California at Davis' (Medical School) dual-track admissions program,71 which reserved 16 out of 100 seats in the entering class for members of minority or "economically and/or educationally disadvantaged groups."72 While the special admissions applicants were eligible to compete for all of the available seats, the regular admissions applicants were only eligible for the remaining eighty-four seats.73 Alan Bakke, a white male, applied twice to the Medical School in 1973 and 1974.74 In both years, Bakke's application was considered and rejected under the general admissions program.75

69. \textit{Id.}

70. 438 U.S. 265 (1978). \textit{But see} DeFunis v. Odegaard, 416 U.S. 312 (1974). DeFunis, a white applicant, applied to the University of Washington Law School alleging that the law school's policy of considering race in admissions violated the Fourteenth Amendment. \textit{Id.} at 314. Believing that the issue was moot, the Court declined the opportunity to hear the case because DeFunis had since been admitted to and was in his final year at the law school. \textit{Id.} at 317.

71. \textit{Bakke}, 438 U.S. at 272-73. This admissions program consisted of a separate admission system operating in coordination with the regular admission process. \textit{Id.} at 272-73. Materials distributed to applicants of the 1973 entering class described the special admissions program as the following:

A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she requests such an evaluation. Ethnic minorities that are not categorically considered under the Task Force Program unless they are from disadvantaged backgrounds.

\textit{Id.} at 272 n.1.

72. \textit{Id.} at 274-76. The special admissions program was devised to increase the representation of disadvantaged students in each Medical School class. \textit{Id.} at 272. No formal definition of "disadvantaged" was ever produced, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation. \textit{Id.} at 274-75.

73. \textit{Id.} at 275-76.

74. \textit{Id.} at 276. In 1973, there were four special admissions seats that remained vacant for which Bakke was not considered. \textit{Id.} Bakke's benchmark score was a 468 out of a 500. \textit{Id.}

75. \textit{Id.} at 276. Under the general admissions system, a candidate whose overall undergraduate grade point average fell below a 2.5 on a scale of 4.0 was rejected. \textit{Id.} at 273. From these remaining applicants, one out of six were invited for a personal interview and the candidate received a benchmark score out of 500 reflecting the interviewer's summaries, the candidate's overall grade point average and grade point average in science courses, MCAT scores, letters of recommendation, extracurricular activities, and other biographical
After his second rejection, he filed a suit alleging that "the Medical School's special admissions program operated to exclude him on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment." Justice Powell rejected the position offered by the Medical School that strict scrutiny should not be applied because white males "were not a 'discrete and insular minority' requiring extraordinary protection." Instead, the Court determined that racial and ethnic distinctions are "inherently suspect and thus call for the most exacting judicial examination." Justice Powell further asserted that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color . . . . [i]f both are not accorded the same protection, then it is not equal." In order to justify the use of a suspect classification, "a State must show that its purpose or interest [was] both constitutionally permissible and substantial and its use of the classification was 'necessary to the accomplishment' of its purpose." Justice Powell addressed each of the four justifications the Medical School offered for its special admissions program. The purposes the program sought to serve were (i) to reduce the historic deficit of traditionally disfavored minorities in medical school and in the medical profession; (ii) to counter the effects of societal discrimination; (iii) to increase the number of physicians who will practice in communities currently underserved; and (iv) to obtain the educational benefits that flow from an ethnically diverse student body. Justice Powell rejected the first justification as facially invalid. As to the second purpose, Justice Powell agreed that the state did have a legitimate interest in remedying the effects of societal discrimination, but it did not justify a classification that aids members of victimized groups at the expense of

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/data. *Id.* at 274. In both years, the applicants who were admitted under the special admissions program were significantly less qualified than Bakke in relation to grade point averages, MCAT scores, and benchmark scores. *Id.* at 277.

76. *Bakke*, 438 U.S. at 277-78.
77. *Id.* at 290.
78. *Id.* at 291.
79. *Id.* at 289-90.
80. *Id.* at 305 (citing *In re* Griffiths, 413 U.S. 717, 721-22 (1973)).
82. *Id.*
83. *Id.* at 307.
other innocent individuals.\textsuperscript{84} The Court did not address the Medical School's third assertion because there was no empirical data to demonstrate how the classification was likely to have any significant effect on the problem.\textsuperscript{85}

Justice Powell found that the fourth asserted goal, the attainment of a diverse student body, was the only constitutionally permissible goal for an institution to use in its admissions decisions.\textsuperscript{86} Justice Powell conceptualized diversity from a mix of "experiences, outlooks, and ideas" which could enrich a student body.\textsuperscript{87} When achieving diversity, the Court noted, race or ethnicity should only be one of many factors considered in the admissions process.\textsuperscript{88} The Medical School's special admissions program focused solely on racial classifications.\textsuperscript{89} Furthermore, the two track admissions program excluded regular applicants from competing for seats in the entering class with applicants from the special admission program.\textsuperscript{90} This policy of insulating applicants from competing with one another did not further the Medical School's goal of true diversity.\textsuperscript{91}

Justice Powell endorsed the Harvard admissions program as a more acceptable method of achieving diversity.\textsuperscript{92} The Harvard admissions program deemed race or ethnicity as a 'plus' factor in a particular applicant's file, but did not insulate the individual from comparison with all other candidates for available seats.\textsuperscript{93} This kind of program treated each applicant as a unique individual in the admissions process, but it was flexible enough to consider all pertinent elements of diversity.\textsuperscript{94} Accordingly, Justice Powell

\textsuperscript{84} Id. at 310.
\textsuperscript{85} Id. at 311.
\textsuperscript{86} Bakke, 438 U.S. at 311-12.
\textsuperscript{87} Id. at 314.
\textsuperscript{88} Id. A "quota" is a program that requires that a fixed number of positions be reserved and filled exclusively with members of a certain minority group. See, e.g., Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
\textsuperscript{89} Bakke, 438 U.S. at 315. Diversity furthers a compelling state interest when it encompasses other qualifications and characteristics instead of utilizing race as the predominant factor. See id. at 317.
\textsuperscript{90} Id. at 319-20.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 316.
\textsuperscript{93} Id. at 317. In its admission process, the committee had not set target-quotas, but chose applicants who are not only admissible academically but had other strong qualities. Id. at 316. All applicants had equal opportunities for consideration for every seat in the class. Id. at 320.
\textsuperscript{94} Bakke, 438 U.S. at 317. Such qualities could include unique work or service experience, geographic location, special talents, leadership potential, maturity, and a history of
found the Medical School's program unconstitutional and in violation of the Fourteenth Amendment, but the decision set the framework for other public universities to devise race-conscious programs by following the aforementioned principles.  

Justice Brennan would have upheld the Medical School's program as constitutional by applying an intermediate scrutiny standard because no fundamental right or suspect classification was involved. In contrast to Justice Powell's opinion, Justice Brennan contended that the Medical School's purpose of remedying the effects of past societal discrimination was sufficiently important to justify the use of race in admissions. In his view, Title VI prohibited only those uses of race by a state or its agencies that would violate the Fourteenth Amendment. Congress, Justice Brennan stated, "intended Title VI to permit preferential treatment of racial minorities as long as such action was consistent with the Fourteenth Amendment." Justice Stevens concurred with Justice Powell in holding the Medical School's program unconstitutional, but he would have decided the case on statutory grounds under Title VI, thus avoiding the constitutional issue.

After the *Bakke* decision, the Supreme Court had an opportunity to discuss its diversity rationale in the context of faculty in *Wygant v. Jackson Board of Education*. In writing the plurality

overcoming disadvantages. In addition, the weight attributed to a particular quality could vary each year, depending on the applicants for the incoming class. *Id.* at 318.

95. *Id.* at 320.

96. *Id.* at 324 (Brennan, J., concurring in part and dissenting). Justice Brennan's opinion was joined by Justices Brennan, White, Marshall, and Blackmun. *Id.*

97. *See id.* at 357 (Brennan, J., concurring in part and dissenting). Justice Brennan contended that racial classifications designed to further remedial purposes "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 359 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

98. *Bakke*, 488 U.S. at 325 (Brennan, J., concurring in part and dissenting). These Justices further opined that "[g]overnment may take race into account . . . at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area." *Id.*

99. *Id.* at 328 (Brennan, J., concurring in part and dissenting).

100. *Id.* (Brennan, J., concurring in part and dissenting). These Justices agreed that neither "the legislative history, administrative regulations interpreting the statute, congressional and executive action, or prior decisions" barred this contention. *Id.*

101. *Id.* at 421 (Stevens, J., concurring in part and dissenting).

102. 476 U.S. 267 (1985). The school board and the union agreed upon a collective bargaining agreement (CBA) that would protect employees who were members of certain minority groups against layoffs. *Wygant*, 476 U.S. at 270. In the event that any layoffs were needed, they would be done on a seniority basis, "except that at no time [would] there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed . . ." *Id.* However, in 1974, when layoffs became necessary, the school
opinion, Justice Powell examined the school board's racial classifications under the same analysis applied in *Bakke.*\(^{103}\) In *Wygant*, the Court invalidated an attempt by a school board to maintain a racially integrated faculty because its layoff program was not narrowly tailored to promote this interest.\(^{104}\) Extending preferential protection against layoffs to certain minority employees over non-minority tenured teachers, the Court opined, was a violation of the Equal Protection Clause of the Fourteenth Amendment.\(^{105}\) Furthermore, Justice Powell noted that "other, less intrusive means of accomplishing similar purposes [of a racially integrated faculty] are available, such as the adoption of hiring goals."\(^{106}\) The school board asserted that their purpose in designing the layoff program was to remedy past discrimination against minorities, but the Court found no evidentiary support for this assertion.\(^{107}\) The Court, consistent with its view in *Bakke*, expressed that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."\(^{108}\) Justice O'Connor, in her concomurrence, noted that a public employer's practice, to further its purpose of an integrated faculty, might be upheld if its implementation was narrowly tailored and did not "impose disproportionate harm on the interests of individuals directly or adversely affected by a plan's racial preference."\(^{109}\)

In *City of Richmond v. J.A. Croson,*\(^{110}\) the Court invalidated a plan created by the City of Richmond which required 30% of the dollar amount of each city funded construction contract to be subcontracted to businesses that were owned by members of racial minorities.\(^{111}\) A majority of the Court, for the first time, adopted a compelling state interest or strict scrutiny test as its standard of

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\(^{103}\) *Wygant*, 476 U.S. at 274-79.

\(^{104}\) *Id.* at 283.

\(^{105}\) *Id.* at 282-84.

\(^{106}\) *Id.* at 283-84 (internal emphasis added).

\(^{107}\) *Id.* at 277.

\(^{108}\) *Wygant*, 476 U.S. at 276.

\(^{109}\) *Id.* at 287 (O'Connor, J., concurring).


\(^{111}\) *Croson*, 488 U.S. at 477-78. The 'Plan' defined minority businesses to include "business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo or Aleut citizens." *Id.*
review in cases involving racial classifications. The City argued that its plan was remedial in nature enacted to promote participation of minority businesses in the local contracting industry. Justice O'Connor, relying heavily on Justice Powell's opinion in Bakke, rejected this argument because none of the evidence presented by Richmond pointed to any identified discrimination in the city's construction industry. According to the Croson court, if a state or local entity attempted to defend its use of race for remedial purposes, it must demonstrate that the program is pursuing a compelling interest and the goal is narrowly tailored so that there is "no possibility that the motive for the classification was illegitimate prejudice or stereotype."

One year after Croson was decided, the Supreme Court refused to apply the compelling interest test to racial classifications created by federal law. In Metro Broadcasting v. Federal Communications Commission, the Court considered the constitutionality of two race-based policies adopted by the Federal Communications Commission (FCC). Since Congress found substantial underrepresentation of minorities in broadcasting, the important objective of the policies was to minority participation in the broadcasting industry. By a five to four vote, the Court gave deference to congressional decision-making holding that "benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objec-

112. Id. at 493-95. Justice O'Connor announced the opinion of the Court, which was in part a majority opinion and in part a plurality opinion. Id. at 476. The portion of the opinion written by Justice O'Connor, which adopted the strict scrutiny test, was joined by Chief Justice Rehnquist and Justices White, Stevens and Kennedy. Id. The majority justified applying the strictest judicial inquiry because "there was no way of determining what classifications are 'benign' or remedial and what were motivated by racial." Id. at 493.
113. Id. at 478.
114. Id. at 506. Some of this evidence included a statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority business in recent years and statements of plan proponents indicating that there had been widespread racial discrimination in the local, state, and national construction industries. Id. at 469.
115. Id. at 493. The Court also noted the lack of consideration on the part of the city to seek other race-neutral means to increase participation of minority business in the contracting industry. Id. at 507.
118. Metro, 497 U.S. at 552. The first policy enhanced the position of minority ownership in the competition of licenses for new radio or television broadcast stations." Id. The second policy, allowed 'distress sale' stations to be assigned only to FCC approved minority enterprises meeting certain requirements before any competitive process took place. Id.
119. Id. at 554.
tives with the power of Congress and are *substantially related* to those objectives. In making this determination, the Court stated that racial classifications created by the federal government needed to satisfy only intermediate scrutiny to be constitutionally permissible.

After the Supreme Court's decision in *Metro*, the constitutionality of affirmative action programs was at a split, applying strict scrutiny to racial classifications employed by state entities and applying intermediate scrutiny to federally funded programs. However, in *Adarand Constructors v. Pena*, Justice O'Connor overruled the intermediate scrutiny requirement and held that all laws employing racial classifications must undergo strict scrutiny, with no exception made on the basis of allegedly benign intentions. If strict scrutiny was not extended to race-based affirmative action programs established by the federal government, it would be inconsistent with prior precedent in *Croson*. The Court stated that "[t]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." The strict scrutiny standard applied to all race-based programs regardless of whether the programs were state or federal. After the Court's holding in *Adarand*, all race-based classifications imposed by federal, state, or local governments would be constitutionally upheld only if they were narrowly tailored in furtherance of a compelling governmental interest.

In *Grutter*, the Supreme Court had to address two constitutional issues before permitting the use of racial classifications in admissions decisions: (1) whether there existed a compelling interest, and (2) whether the asserted goal was narrowly tailored to serve its compelling interest. By analyzing both an institution's mission to achieve the educational benefits stemming from diversity

120. *Id.* at 564-65 (emphasis added).
121. *Id.*
125. *Id.* at 222-24. However, the *Croson* Court did not state what standard of review the [Due Process Clause of the] Fifth Amendment require[d] for such action taken by the [f]ederal [g]overnment. *Id.*
126. *Id.* at 224 (quoting *Croson*, 488 U.S. at 494).
127. *Id.* at 227.
128. *Id.*
and the constitutional privilege that all individuals are afforded equal treatment under the law, the Supreme Court was correct in upholding diversity as a compelling governmental interest.

Consistent with Bakke, the Grutter court granted deference to the Law School's judgment that diversity is essential to its educational mission. This deference was analogous to Justice Powell's diversity rationale founded upon the First Amendment principle that "[t]he freedom of a university to make its own judgments as to education include[d] the selection of its student body." Inherent in this principle was the school's right to select those students who would provide an exchange of ideas and views and enhance the classroom environment. Because diversity plays a central role in strengthening the experience of the entire student body and preparing students for a culturally diverse society, the majority properly upheld the first prong of the strict scrutiny test.

With respect to the second requirement, which explicitly required an institution's policy to be narrowly tailored, the majority's analysis seems inconsistent with its past precedent. Bakke established that university admissions policies are considered narrowly tailored only if race or ethnicity was considered as a "plus" factor without insulating a candidate from comparison with other qualified applicants. In other words, quotas were unconstitutional, but using race as a "plus" factor was permissible. In agreeing with Justice Kennedy, the majority erroneously granted deference to the Law School's implementation of its goal. The majority stated that the Law School has determined, based on its experience and expertise, that a "critical mass" was necessary to further diversity. The Grutter court never required any evidence or statistics to support this assumption. Instead, the majority's premise for holding the Law School's program as narrowly tailored hinged on their distinction between a quota and a critical mass.

When examining the Medical School's use of race in admissions, which Justice Powell struck down as unconstitutional, and comparing it with the Law School's policy at issue in Grutter, it is difficult to conceptualize the difference between a quota and a critical mass. Under the Medical School's program, a quota operated to obtain a fixed number of underrepresented minorities, which were

130. Bakke, 438 U.S. at 312.
131. Id. at 318.
132. Grutter, 123 S. Ct. at 2341.
necessary to achieve student body diversity. The Law School, although never defining what constituted a "critical mass," sought to achieve "meaningful numbers" of minority individuals to obtain this same compelling interest. Although the Law School did not explicitly set any fixed number of seats or percentages to achieve this "critical mass," their policy seemed to operate in the same manner as a quota. When looking at the statistics, the percentage of enrolled minority students varied only slightly between 13.5% to 13.8% from 1995 to 1997. Although there was a greater variance of 5% between the years of 1987 through 1994, the percentage of enrolled minority students never fell below 12%. This evidence supports an inference that the Law School's pursuit of a "critical mass" was converted into the equivalent of a quota. It also seems inconceivable that the university can, on one hand, use race as a "plus" factor and, on the other hand, still maintain these consistent percentages. The *Grutter* court should have held that the admissions program was functionally equivalent to a quota. Under *Bakke's* analysis, the admissions program would not be narrowly tailored and therefore unconstitutional.

Another persuasive argument, posed by Justice Scalia, speculated that the focal point of future controversies may hinge on the distinction between whether race becomes a determinative factor or whether race is used flexibly to give an applicant enough individualized consideration. The argument may perhaps be made that when an institution is seeking to achieve diversity, and considers all factors within an application, the defining feature between two applicants would ultimately come down to the individual who has the preferred race or ethnicity.

In conclusion, twenty five years after the decision in *Bakke*, the Supreme Court has again reaffirmed the constitutionality of race-based admissions policies in the realm of education, as long as they are narrowly tailored. The decision in *Grutter* authorizes institutions to mold their own admissions polices to consider race as a potential "plus" factor in an attempt to establish a diverse student body. However, institutions should still be cautious when examining their own admissions policy so as not to blur the distinction between a critical mass and a quota. The next time the issue is presented to the Supreme Court, a different conclusion

133. *Id.* at 2371 (Kennedy, J., dissenting).
134. *Id.*
may be reached. As Justice O'Connor stated, "we expect that in 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."\textsuperscript{135}

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\textsuperscript{135} \textit{Id.} at 2347.

* The author would like to thank the following people for their help in the preparation of this casenote: Tim Lulich, Mike Cetra, Jake McCrea, Shannon Smith, and Erik Jansen. The author would especially like to thank her family, Sam, Debbie, and Kristy Cherillo, for all of their support and guidance through the years.