

1-1-2003

# Affirmative Action, Race and the Constitution: From Bakke to Grutter

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## Recommended Citation

Robert A. Sedler, *Affirmative Action, Race, and the Constitution: From Bakke to Grutter*, 92 Ky. L.J. 219, 240 (2003)  
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# Affirmative Action, Race, and the Constitution: From *Bakke* to *Grutter*

BY ROBERT A. SEDLER\*

When law schools and medical schools first adopted race-conscious admission policies in the middle-1960s, their primary purpose for doing so was *not* to obtain a racially diverse student body. Rather, the primary purpose was to increase the representation of African-Americans and other racial minorities such as Hispanics and Native-Americans in the legal and medical professions, where they were seriously under-represented.<sup>1</sup> In order to increase the number of minority lawyers and

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<sup>1</sup> As of 1970, although over eleven percent of the national census population was black, African-American males constituted only 1.2% of the nation's male lawyers and judges and 2.0% of its male physicians and dentists. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 407-08 tbl.662 (1977). The Bureau of the Census did not bother to compile figures for female lawyers, judges, physicians, or dentists. *See id.* at 407-08 tbl.662, 31 tbl.35. In 1970, while there was one lawyer for every 637 persons, there was only one African-American lawyer for every 7000 African-Americans, and at that time fewer than 4000 of the 300,000 lawyers in the country were African-American. *See* Martin H. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. REV. 343, 389 nn.194-95 (1974). At that time, when I and my colleagues in the

doctors at that time, it was absolutely necessary for the law schools and medical schools, which controlled entrance into these professions, to adopt race-conscious admissions policies. For reasons directly traceable to the consequences of the long and tragic history of racial discrimination in this nation, there was an enormous economic gap between racial minorities as a group and whites as a group,<sup>2</sup> which in turn led to an educational gap between racial minorities as a group and whites as a group.<sup>3</sup> This unpleasant and undisputed fact, coupled with the fact that in the aggregate there were many more white applicants than minority applicants competing for places at a particular law school or medical school, meant that if race were not affirmatively taken into account in the admissions process, relatively few minority students would have been admitted at most law schools and

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ACLU of Kentucky were looking for African-American lawyers to work on civil rights cases, we concluded that there were no more than 20 African-American lawyers in Kentucky, in varying degrees of active law practice. Those who were engaged in active law practice were mostly solo practitioners and were mostly in Louisville. As to the shortage of Hispanic lawyers, see Cruz Reynoso, *La Raza, the Law and the Law Schools*, 1970 U. TOL. L. REV. 809, 814-16. In California, as of 1967, the ratio of white lawyers for whites was one for every 530; for Spanish-surnamed lawyers to Spanish-surnamed citizens, it was one for every 9482. *Id.* at 816. As to the very small number of American Indian lawyers, see Rennard Strickland, *Redeeming Centuries of Dishonor: Legal Education and the American Indian*, 1970 U. TOL. L. REV. 847, 861-66. As of 1974, there was one physician for every 750 persons in the general population, but only one African-American physician for every 3500 African-Americans. See Robert M. O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925, 943-44 (1974). In the entire country there were only 250 Chicano and 56 American Indian physicians. *Id.*

<sup>2</sup> The data are discussed in Robert A. Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism*, 14 HARV. C.R.-C.L. L. REV. 133, 138-39 nn.21-27 (1979).

<sup>3</sup> *Id.* at 136-38 nn.15-20. For a review of the data showing the persistence of the economic and educational gap in the early 1980s, see Robert A. Sedler, *The Constitution, Racial Preference, and the Equal Participation Objective*, in SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE 123, 139-42 nn.17-19 (Robert A. Goldwin & Art Kaufman eds., 1988) [hereinafter Sedler, *Equal Participation*]. In 1983, after some years of affirmative action, African-Americans constituted nearly twelve percent of the United States population, but only 2.7% of the lawyers and judges, 3.2% of the physicians, 2.9% of editors and reporters, and 4.4% of college and university teachers in the United States were African-American. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 380 tbl.593 (2001) [hereinafter 2001 CENSUS ABSTRACT].

medical schools.<sup>4</sup> This was the stark reality of the situation a generation ago when *Regents of the University of California v. Bakke* came before the Supreme Court.<sup>5</sup>

In *Bakke*, neither the university nor, to the best of my recollection, any of the numerous proponents of affirmative action in their amicus curiae briefs,<sup>6</sup> tried to justify affirmative action on diversity grounds. Rather, the thrust of the arguments in support of the university's affirmative action program was that the state's interest in overcoming the present consequences of past societal discrimination against racial minorities was compelling. The university and amici further argued that a reasonable racial quota, such as allocating to minorities sixteen of the one hundred seats in the entering class of the medical school of the University of California at Davis, was narrowly tailored to advance that interest. This was the position taken by Justices Brennan, White, Marshall, and Blackmun in *Bakke*, and it led them to conclude that the Davis Medical School's use of race in determining admissions was constitutional.<sup>7</sup> Four other Justices, in an opinion by Justice Stevens, took the position that Title VI prohibited any use of race in admissions by universities receiving federal funds, and so these Justices held that the medical school's admissions program violated Title VI.<sup>8</sup> This left it up to Justice Powell to cast the deciding vote.

It is clear in retrospect that the Powell opinion for the Court in *Bakke* resolved a number of issues relating to the constitutional permissibility of race-conscious affirmative action and represents the holdings of the Court on these issues today. Powell's resolution of these issues constituted

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<sup>4</sup> This situation is discussed at length in Robert A. Sedler, *Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California*, 17 SANTA CLARA L. REV. 329, 345-55 (1977) [hereinafter Sedler, *Racial Preference*]. The minority students admitted to law schools and medical schools under affirmative action programs at that time, like the minority students admitted under affirmative action programs today, are fully qualified in the sense that they have sufficiently good grades and LSAT/MCAT scores that they are likely to successfully complete the course of study at that law school or medical school. Selective admissions means in the literal sense that the school selects *which* of the qualified applicants will be admitted.

<sup>5</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>6</sup> The author was the principal author of the amicus curiae brief for the Society of American Law Teachers in *Bakke*. The arguments in the brief were based on the position set forth in Sedler, *Racial Preference*, *supra* note 4, at 361-80.

<sup>7</sup> *Bakke*, 438 U.S. at 356-79 (Brennan, J., concurring in part and dissenting in part).

<sup>8</sup> *Id.* at 411-21 (Stevens, J., concurring in part and dissenting in part).

holdings in the case itself when his views were supported by four other Justices either in the “Brennan four” or “Stevens four” opinions; also, some of the dicta in Powell’s opinion became law when they were affirmed by a Court majority in subsequent cases. In any event, the following propositions emerged from the Powell opinion in *Bakke* and were established constitutional doctrine at the time of *Grutter-Gratz*.

One: The test under Title VI for the permissible use of race in university admissions is the same as the constitutional test, so whatever is permitted or prohibited for a public university as a constitutional matter is also permitted or prohibited under Title VI for a private university receiving federal funds.<sup>9</sup>

Two: Strict scrutiny applies to racial classifications benefitting racial minorities in the same manner as it applies to racial classifications disadvantaging racial minorities.<sup>10</sup>

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<sup>9</sup> Powell and the “Brennan four” agreed on this point. *See id.* at 285-86. This was the point on which the “Stevens four” dissented. *See id.* at 325 (Stevens, J., dissenting).

<sup>10</sup> In *Bakke*, the University argued, as had some commentators, that when the white majority “discriminated against itself” for a “benign purpose,” strict scrutiny should not apply. *Id.* at 294. Justice Powell decisively rejected this argument and held that strict scrutiny applied in equal measure to discrimination against racial minorities and discrimination against whites. *Id.* at 295. He stated that the Fourteenth Amendment did not embody a “two-class theory,” and that this being so, “the difficulties entailed in varying the level of judicial review according to a perceived ‘preferred’ status of a particular racial or ethnic minority are intractable.” *Id.* He went on to point out that “there are serious problems of justice connected with the idea of preference itself.” *Id.* at 298. These were that: (1) “it may not always be clear that a so-called preference is in fact benign;” (2) “preferential programs may only enforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth;” and (3) “there is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.” *Id.* at 298. Justice Powell then concluded as follows:

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently . . . . When they touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.

Three: Overcoming the present effects of societal discrimination against racial minorities is not a compelling governmental interest justifying governmental action benefitting racial minorities and disadvantaging whites.<sup>11</sup>

Four: Overcoming the present effects of identified unlawful racial discrimination for which the government agency itself is responsible is a

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*Id.* at 299. In one application of strict scrutiny in *Bakke*, Powell found insufficient the medical school's proffered justification of admitting minority students in order to improve the delivery of health care services to currently underserved minority communities. He found that there were "more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race." *Id.* at 311. Powell's conclusion on this point illustrates the application of the "narrowly tailored" component of strict scrutiny. The medical school could not justify its use of race in determining admission by making the seemingly reasonable assumption that in the aggregate minority students were more likely than whites to end up practicing in currently underserved minority communities. It had to identify, without regard to race, an individual applicant "who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal." *Id.* At the same time, the Court has sought to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)). The Court noted, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.*

In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court, in a 5-4 decision, held that benign racial classifications on the part of the federal government were subject to intermediate scrutiny rather than strict scrutiny. *Id.* at 564-65. That holding was overruled in *Adarand*, and it is now clear that all governmental racial classifications are subject to strict scrutiny. *See Adarand*, 515 U.S. at 226-27.

<sup>11</sup> This was the point of disagreement between Powell and the "Brennan four" in *Bakke*. Powell specifically took the position that overcoming the present effects of societal discrimination was not a compelling governmental interest for constitutional purposes. Powell referred to societal discrimination as "an amorphous concept of injury that may be ageless in its reach into the past." *Bakke*, 438 U.S. at 307. He argued that approving this rationale would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.* at 310. He also noted that in the absence of findings of constitutional or statutory violations, the Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals. . . ." *Id.* at 307.

compelling governmental interest justifying the use of narrowly tailored race-conscious criteria.<sup>12</sup>

In light of the third proposition of the Powell opinion in *Bakke*, the primary justification that the university and the proponents of affirmative action had set forth for the university's race-conscious admissions policy could not stand. There also was no claim that the policy was designed to remedy prior identified discrimination in the admission of minorities to the medical schools, and such a claim would have been very difficult to maintain.<sup>13</sup>

This brings us to the diversity justification. The Powell opinion found that a university's interest in enrolling a racially diverse student body was a compelling governmental interest for constitutional purposes, justifying some consideration of race in the admissions process.<sup>14</sup> However, Justice Powell also found that the university's use of a racial quota—reserving

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<sup>12</sup> As Powell stated in *Bakke*: “The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.” *Id.* at 307. Similarly, as Justice O'Connor has stated: “The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986).

<sup>13</sup> See *Bakke*, 438 U.S. at 309-10. The medical school had been operating for only two years and based admission primarily on grades and MCAT scores. Because grades and test scores are neutral factors, a university's use of these factors to determine admissions is not unconstitutional despite the foreseeable disparate impact it will have on minority applicants. *Id.* Cf. *Washington v. Davis*, 426 U.S. 229 (1976) (holding that, although an employment screening criterion had a disproportionate adverse effect on minorities, it was not used as a device of discrimination).

<sup>14</sup> Powell saw this interest as being supported by First Amendment academic freedom values and referred to it as a “countervailing constitutional interest . . . [of] paramount importance in the fulfillment of [the university's] mission.” *Bakke*, 438 U.S. at 313. He said that universities must be “accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas’” and went on to note:

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

*Id.* at 313-14.

sixteen places out of one hundred for minority students—was not necessary to promote diversity and in fact would “hinder rather than further attainment of genuine diversity.”<sup>15</sup> Powell maintained that “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”<sup>16</sup> He insisted that each applicant’s qualifications must be weighed “fairly and competitively,” with the “competitive consideration of race or ethnic origin.”<sup>17</sup> Powell also noted, however, that the university can “pay some attention to the numbers” in order to ensure that there is substantial minority representation in the student body.<sup>18</sup> He cited the Harvard College program as an “illuminating example” of a permissible use of race in admissions.<sup>19</sup> While the “Brennan four” would have preferred to rest their approval of the program on the university’s interest in overcoming the present effects of past societal discrimination, they agreed (albeit in a footnote) with Powell’s position in order to bring about a holding of the Court on this issue.<sup>20</sup>

As a practical matter, *Bakke* settled the question of the constitutional permissibility of race-conscious university admissions. The Constitution permitted universities to adopt admissions programs that included the “competitive consideration of race and ethnic origin” as one of the factors

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<sup>15</sup> *Id.* at 315.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 318, 320.

<sup>18</sup> *Id.* at 323.

<sup>19</sup> *Id.* at 316.

<sup>20</sup> “We also agree . . . that a plan like the ‘Harvard’ plan . . . is constitutional . . . at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.” *Id.* at 326 n.1 (Brennan, J., concurring in part and dissenting in part). The effect of the agreement between Powell and the “Brennan four” on this point was a holding that there could be *some* consideration of race in the admission process in accordance with the guidelines of the Powell opinion. As a result, that part of the judgment of the Supreme Court of California holding that there could be no consideration of race in the admission process was reversed. *Id.* at 272. On the other hand, five Justices, Powell on constitutional grounds, and the “Stevens four” on the basis of their interpretation of Title VI, found the Davis program illegal, and the judgment of the Supreme Court of California was affirmed insofar as it enjoined the operation of the Davis program and ordered the admission of Bakke to medical school. *Id.* at 271. The Powell opinion is also considered to set forth the holding of the Court on the issue of the permissible use of race in admissions, because the opinion represents the “position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977).



in determining admission.<sup>21</sup> After *Bakke*, universities revised their race-conscious admissions programs to comply with the approach set forth in the Powell opinion and justified their consideration of race in determining admissions as advancing a university's compelling interest in attaining educational diversity.<sup>22</sup> While the pre-*Bakke* justification—the strong public interest in increasing the number of minority lawyers and doctors—remained a major motivation for law school and medical school race-conscious admissions programs, the constitutionality of these programs could now be sustained under the different educational diversity justification.<sup>23</sup> Similarly, following *Bakke*, most universities adopted programs taking race into account in all undergraduate, graduate school, and professional school admissions, and today racial diversity has become a hallmark of the university scene. This is all due to Justice Powell's going beyond the arguments of the parties in *Bakke* and invoking the educational diversity justification for race-conscious admissions programs.

The fourth proposition of the Powell opinion in *Bakke*—that there is a compelling governmental interest in overcoming the present effects of identified unlawful racial discrimination for which the government agency itself is responsible—justifies what may be called remedial affirmative action. Whenever a governmental agency has engaged in unlawful racial discrimination, it has the affirmative duty to take remedial action to eliminate the present effects of its past discrimination.<sup>24</sup> When it fails to

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<sup>21</sup> As the Court stated in *Grutter*: "The only holding for the Court in *Bakke* was that a 'State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.'" *Grutter v. Bollinger*, 123 S. Ct. 2325, 2336 (2003) (citing *Bakke*, 438 U.S. at 320).

<sup>22</sup> See Howard Lesnick, *What Does Bakke Require of Law Schools? The SALT Board of Governors Statement*, 128 U. PA. L. REV. 141 (1979). As the Court observed in *Grutter*: "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." *Grutter*, 123 S. Ct. at 2336.

<sup>23</sup> For a discussion of the public interest in what I have called the equal participation of racial minorities in the legal and medical professions, see Sedler, *Equal Participation*, *supra* note 3, at 131-33.

<sup>24</sup> The Powell opinion in *Bakke* illustrates this requirement by citing the school desegregation cases, such as *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), which held that school districts that had been segregated under

satisfy this duty, a court, upon finding the existence of unlawful racial discrimination, can impose a race-conscious remedy. For example, there has been a long history of racial discrimination by cities and states in the hiring and promotion of police officers and firefighters. In order to overcome the present consequences of this identified unlawful discrimination, the courts can impose an affirmative hiring and promotional remedy, which typically requires the hiring or promotion of one minority person for one white person until a designated minority percentage of minority persons has been reached.<sup>25</sup>

And since a governmental agency has the affirmative duty to take remedial action to eliminate the present effects of its identified unlawful discrimination, it can do so voluntarily by adopting a race-conscious affirmative action plan, such as the one-to-one hiring and promotion programs instituted by police departments to remedy past racial discrimination in hiring and promotion. When such an affirmative action program is challenged by adversely affected whites, the government can successfully defend by showing that it had a strong basis in evidence for finding that the department had engaged in past racial discrimination, and that the

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state law prior to *Brown v. Board of Education*, 347 U.S. 483 (1954), had the affirmative duty to desegregate the pre-*Brown* segregated schools, and until that duty was satisfied, to prevent any other schools from becoming racially identifiable. *Bakke*, 438 U.S. at 300.

<sup>25</sup> See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974). The courts may also impose such remedies against private employers and labor unions found to have engaged in illegal employment discrimination in violation of federal law. See *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986). It should be noted that in these cases the beneficiaries of the program are not the individual victims of the identified past discrimination, and that the effect of the program will be to provide a benefit for minority persons as a group over white persons as a group. As Justice Brennan noted in *Bakke*: "Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." *Bakke*, 438 U.S. at 363 (Brennan, J., concurring in part and dissenting in part). Similarly, as former Chief Justice Burger stated in *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980), where the Court upheld a remedial minority business enterprise set-aside: "It is not a constitutional defect in this program that it may disappoint the expectations of non-minority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."

program is narrowly tailored to remedy the present effects of that discrimination.<sup>26</sup>

In the years following *Bakke*, the Supreme Court exhibited what I have referred to as an institutional ambivalence about race-conscious affirmative action.<sup>27</sup> At first the Court appeared to be giving the federal government somewhat greater leeway than the states in enacting race-conscious affirmative action programs, based on Congress' implementing power under section 5 of the Fourteenth Amendment, but the Court has now expressly held that strict scrutiny applies equally to racial classifications by the federal government and by the states.<sup>28</sup> In other decisions, the Court

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<sup>26</sup> This is the test set forth by the Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In that case, the Court held that the city failed to make a showing of past discrimination by the city against minority contractors, with the result that the city's minority business enterprise program was unconstitutional. *Id.* at 510. In a number of cases the courts have found past discrimination by police and fire departments, particularly at an earlier time, and have upheld affirmative action plans directed at remedying that discrimination. *See, e.g.*, *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979) (in that case, the author filed an amicus curiae brief for New Detroit, Inc., a Detroit civic association formed to promote racial equality); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983); *Majeske v. City of Chicago*, 218 F.3d 816 (7th Cir. 2000); *McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir. 1998); *Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13 (1st Cir. 1998).

<sup>27</sup> *See* Robert A. Sedler, *The Constitution, Racial Preference, and the Supreme Court's Institutional Ambivalence: Reflections on Metro Broadcasting*, 36 WAYNE L. REV. 1187 (1990) [hereinafter Sedler, *Institutional Ambivalence*].

<sup>28</sup> In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court, in a 6-3 decision, upheld a 10% minority business enterprise set aside mandated in a Congressional grant to state and local governments for public works projects. *Id.* at 491-92. The purpose of the set-aside was to overcome the present consequences of identified past discrimination against minority business enterprises in government contracts, and the Court emphasized deference both to Congressional findings of past discrimination and to Congressional determination of the appropriate remedy. *Id.* at 467. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court, in a 5-4 decision, held that racial classifications on the part of the federal government were subject to intermediate scrutiny rather than strict scrutiny. *Id.* at 600-01. Applying the lower standard, the Court upheld the FCC minority ownership policies, providing some preference to racial minorities in an effort to increase the very small percentage of minority-owned broadcasting facilities. The Court majority found that the federal government's interest in "broadcast diversity" was "important" and that the Commission's minority ownership policies were "substantially related" to the advancement of that interest. *Id.* A few years later, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court overruled

reaffirmed the proposition in the Powell opinion that overcoming societal discrimination is not a compelling governmental interest; these decisions also defined more fully the operation of the “overcoming identified past discrimination” interest.<sup>29</sup> Finally, in *United Steelworkers of America v. Weber*,<sup>30</sup> which in retrospect appears to be the Title VII equivalent of *Bakke*, the Court held that, consistent with Title VII, private and governmental employers could adopt race-conscious employment policies designed to increase the employment of minority persons in job categories in which they were traditionally underrepresented.<sup>31</sup>

We see then that as a result of *Bakke* and subsequent cases, a substantial amount of race-conscious affirmative action was found to be constitutionally permissible. There could be court-ordered race-conscious hiring and promotion programs to remedy identified past discrimination in employment by governmental and by private employers. Governmental

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*Fullilove* on the issue of the applicable standard of review, and specifically held that racial classifications on the part of the federal government are subject to the same strict scrutiny as such classifications on the part of state and local governments. *Id.* at 226-27. So, if another case involving minority broadcast ownership preference were to come before the Court, the Court would have to decide whether the asserted interest in “broadcast diversity” was compelling, and if so, whether the particular form of the preference was narrowly tailored to the advancement of that interest.

<sup>29</sup> The government must show that it has a strong basis in evidence for finding the existence of identified past discrimination. In addition, it must make this showing for each racial or ethnic group included in the preference. And it must show why race-neutral means will not be sufficient to remedy the present consequences of past discrimination. These requirements emerge from the various opinions adding up to a majority of the Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), at least four Members of the Court held that out-of-line seniority layoffs could not be used for any purpose, including overcoming the present effects of a state agency’s own identified past discrimination. *Id.* at 282-83, 294-95. I have no doubt that the Court would and should so hold if faced with this question in the future. The burden on adversely affected whites from a loss of seniority is simply too severe and in practice is likely to fall on particular individuals. See Sedler, *Institutional Ambivalence*, *supra* note 27, at 1199-1205. Finally, the Court has held that the courts can impose a race-conscious hiring or promotional remedy upon governmental bodies, and upon private employers and labor unions, in order to remedy their identified past discrimination. See *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421 (1986).

<sup>30</sup> *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

<sup>31</sup> *Id.* at 208.

agencies could voluntarily adopt race-conscious affirmative action programs to remedy the present consequences of their identified past discrimination. And universities could adopt race-conscious admissions programs in order to attain educational diversity.

The end result of a quarter-century of race-conscious affirmative action has been a substantial increase in the equal participation of African-Americans and other racial minorities in important areas of American life. The primary purpose for the adoption of these policies was not to provide educational diversity in the classroom, but instead to increase the representation of racial minorities in the legal and medical professions, where they were seriously underrepresented.<sup>32</sup> Because of race-conscious admission policies in law schools and medical schools, the representation of racial minorities in these professions has substantially increased, both in terms of percentages and more importantly in terms of numbers.<sup>33</sup> Turning first to the legal profession, we see that it is a very different profession from what it was a generation ago. Minority lawyers serve as judges, prosecutors, and law professors. They are lawyers for the government, "members of the firm," and bar association officers. They are in a position to contribute directly to the American legal system, to make the system responsive to the needs of minority persons, and to build the confidence of the minority persons in the legal system and the administration of justice precisely because minority lawyers are an integral part of that system.<sup>34</sup>

So too when we look at the medical profession, we see that there has been a substantial increase in the number of minority doctors,<sup>35</sup> so that it

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<sup>32</sup> See *supra* notes 6-7 and accompanying text.

<sup>33</sup> According to Census Bureau data, in 1983, five years after *Bakke* was decided, 2.7%, or 17,577 of the nation's 651,000 lawyers and judges were black, and 1.0%, or 6510, were Hispanic. In 2000, 5.7%, or 52,782 of the nation's 926,000 lawyers and judges were black, and 4.1%, or 37,966, were Hispanic. 2001 CENSUS ABSTRACT, *supra* note 3, at 380 tbl.593.

<sup>34</sup> In *Grutter*, Justice O'Connor, citing the amicus curiae brief submitted by the Association of American Law Schools, pointed out the influence of lawyers in the American political system. "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." *Grutter v. Bollinger*, 123 S. Ct. 2325, 2341 (2003).

<sup>35</sup> According to Census Bureau data, in 1983, five years after *Bakke* was decided, 2.7%, or 19,845 of the nation's 735,000 health diagnosing professionals (including, among others, doctors and dentists) were black, and 3.3%, or 24,225, were Hispanic. In 2000, 5.2%, or 53,976 of the nation's 1,038,000 health diagnosing professionals were black, and 3.4%, or 35,292, were Hispanic. 2001 CENSUS ABSTRACT, *supra* note 3, at 380 tbl.593. For some unexplained reason, the

also is a very different profession from what it was a generation ago. Minority doctors are now in a position to bring a “minority perspective” to the operation of the healthcare delivery system. Physicians do much more than treat patients. They serve on hospital staffs and medical committees. They take part in decisions that affect the kind of medical services that will be offered and the cost of those services. They influence the distribution of medical resources and the location of healthcare facilities. They perform substantially the same function with respect to the healthcare delivery system that lawyers perform with respect to the legal system and the administration of justice. As a result of race-conscious admission policies in the nation’s medical schools, minority doctors now participate more fully in the operation of healthcare.

Following *Bakke*, race-conscious admissions policies were adopted by most universities across the board and resulted in a substantial increase in the number of minority students attending and graduating from what may be called the traditionally white universities. We have thus seen a marked increase in the number of minority college graduates and consequently in the number of teachers, business executives, journalists, professors, and members of other professions. As a nation, we are now moving closer toward reaching a truly diverse society in which racial minorities will be full and equal participants with whites in all important areas of American life.

In addition, while the aggregate economic gap and resultant educational gap between African-Americans and Hispanics in comparison to whites remains,<sup>36</sup> there has been some increase in the size of the African-American and Hispanic middle class.<sup>37</sup> The increase in the size of the African-

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number and percentage of Hispanic physicians and dentists relative to the number and percentage of black physicians and dentists was higher in 1983 than in 2000.

<sup>36</sup> According to Current Population Survey figures, the 2001 median income of households by race and national origin was as follows: white—\$44,517; black—\$29,470; hispanic origin—\$33,565; Asian and Pacific islander—\$53,635. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, MONEY INCOME IN THE UNITED STATES: 2001, 4 tbl.1 (2002). According to U.S. Census Bureau data in 1999, the high school graduation rates for persons eighteen years and over by race and hispanic origin were as follows. High school graduation: white—84.3%; black—77%; hispanic—56.1%; Asian and Pacific islander—84.7%. Bachelor’s degree or higher: white—25.9%; black—15.4%; hispanic—10.9%; asian and pacific islander—42.4%. 2001 CENSUS ABSTRACT, *supra* note 3, at 139 tbl.249.

<sup>37</sup> The increase in the size of the middle class is reflected in the number and higher incomes of married couple families compared to other kinds of family households and nonfamily households. According to the U.S. Bureau of the

American and Hispanic middle class has resulted in improved educational opportunities for an increased number of minority children who come from advantaged homes and attend good schools.

Because there are now more minority students with good academic credentials, the need to take race into account in order to achieve substantial minority representation is most pronounced only at the more "elite" universities and professional schools, such as the University of Michigan. It is contended by opponents of race-conscious admissions policies that if such policies were absolutely prohibited across the board, there would be

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Census, the 2001 median income for 4,233,000 black married couple families was \$51,357, compared to \$34,540 for 773,000 male-headed households, \$22,059 for 3,838,000 female-headed households, and \$20,610 for 4,470,000 nonfamily households. Bureau of the Census, U.S. Dep't of Commerce, *Tables of Income By Detailed Socioeconomic Characteristics* tbl.1 (2003), at <http://www.census.gov/hhes/income/income01/inctab1.html>. The 2000 median income of 5,778,000 hispanic married couple families was \$40,942, compared to \$35,544 for 817,000 male-headed households, \$23,567 for 1,922,000 female-headed households, and \$22,141 for 1,982,000 non-family households. *Id.* The 2001 median income for 44,117,000 white married couple families was \$63,999 compared to \$44,057 for 2,618,000 male-headed households, \$32,786 for 6,884,000 female-headed households, and \$26,240 for 27,200,000 non-family (single-member) households. *Id.* The figures show that overall black household income is \$29,470, overall hispanic household income is \$33,565, and overall white household income is \$46,305, so that overall black household income is 63.6% of overall white household income, and overall hispanic household income is 72.5% of overall white household income. *Id.* Among married couples, the gap decreases for Blacks. Black married couple income (\$51,357) is 80.2% of white married couple income (\$63,999). However, hispanic married couple income (\$40,942) is 64% of white married couple income. *Id.*

In 2000, among 2,276,000 blacks 45 to 49 years old, 19.5% had a bachelor's degree or higher; among 1,709,000 blacks 50-54, the figure was 21%. Bureau of the Census, U.S. Dep't of Commerce, *Percentage of High School and College Graduates of the Population 15 Years Old and Over* tbl. 1a (2001), at <http://www.census.gov/population/socdemo/education/p20-536/tab01.txt>. Among 1,580,000 hispanics 45 to 49 years old, 12.7% had a bachelor's degree or higher; among 1,438,000 hispanics 50-54, 13.2% had a bachelor's degree or higher. *Id.* For whites the figures are as follows: among 19,748,000 whites 45 to 49 years old, 33.2% have a bachelor's degree, and among 16,882,000 whites 50 to 54 years old, 32.7% have a bachelor's degree or higher. *Id.* As these figures indicate, while a much higher percentage of whites in these age groups have a bachelor's degree or higher, a significant percentage of blacks also have a bachelor's degree or higher. The hispanic percentage is not as high, reflecting perhaps a higher percentage of recent immigrants in these age groups.

fewer minority students at the “elite” institutions, but minority students would “cascade down” to institutions at the next level, where their academic credentials would be the same as those of the white students who were applying for admission.<sup>38</sup>

At the other end of the admissions spectrum, so to speak, there is the matter of using race-neutral factors that have the effect of targeting minorities, such as residence and, for undergraduate admission, high school class standing. Because of extensive residential racial segregation and concentration, with racial minorities residing primarily in the central cities of the nation’s major metropolitan areas, admitting students on the basis of residence would ensure the admission of at least some minority students. Residential racial segregation and concentration produce a large number of racially identifiable schools, so admitting students who reside in central cities and who are in the top rank of their high schools will ensure the undergraduate admission of a substantial number of African-American and Hispanic students. As a practical matter, however, these would be low- and moderate-income students generally attending lower-quality schools, who would for the most part not be admitted to “elite” universities such as the University of Michigan due to their relatively lower SAT and ACT scores.<sup>39</sup> When the Fifth Circuit in the *Hopwood* case<sup>40</sup> held that race could not be used in university admissions, the Texas legislature responded by enacting a law entitling the top ten percent of every high school class to be admitted to any university in Texas, including the flagship University of Texas at Austin.<sup>41</sup> After the voters in California adopted a state constitutional

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<sup>38</sup> For a discussion of the “cascading down” in the University of California system following the ending of racial preferences, see James Traub, *The Class of Prop. 209*, N.Y. TIMES, May 2, 1999, § 6 (Magazine), at 44.

<sup>39</sup> In her concurring opinion in *Grutter*, Justice Ginsburg cited data showing that over 70% of African-American and Hispanic children attended schools in which minority students comprised a majority of the student body. She also cited data showing that “schools in predominantly minority communities lag far behind others measured by the educational resources available to them,” and that “it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.” *Grutter*, 123 S. Ct. at 2348 (Ginsburg, J., concurring).

<sup>40</sup> *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

<sup>41</sup> See CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES 20 (2003).



amendment prohibiting any use of race in governmental programs, the University of California System responded by adopting a rule entitling the top four percent of every high school class to be admitted to one of the eight campuses of the system, but not necessarily the campus of the students' choice.<sup>42</sup> The substitution of the four percent rule for the use of race-conscious admissions resulted in a decrease in the number of African-American and Hispanic students at the flagship Berkeley and U.C.L.A. campuses and an increase at the other campuses of the University of California system.<sup>43</sup> The State of Florida also abolished the use of race in university admissions, and provided that students who are in the top twenty percent of their high school class and meet a second criterion based on grade-point average are entitled to be admitted to the main state university system.<sup>44</sup>

For all of these reasons, when *Grutter* and *Gratz* came before the Supreme Court, the stakes were not as high as when *Bakke* came before the Court a quarter-century earlier. Not only had there been a quarter-century of race-conscious admissions programs resulting in a substantial increase in the number of minority lawyers, doctors, and other professionals and some increase in size of the minority middle class and the number of better-educated minority students, but the universities themselves were now firmly committed to affirmative action.<sup>45</sup> If the Court had held that race could not be used in determining admissions, the impact would be felt primarily by the more "elite" universities, and they could cushion the impact a bit by using factors that may correlate with race, such as geographic residence; or factors designed to include a diverse cross-section of students, such as, for undergraduates, high school class rank. Moreover, such a decision would not affect the continued increase in the number of minority lawyers, doctors and other professionals. It would mean only that somewhat fewer of them would be coming from the elite law schools and

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<sup>42</sup> *Id.* at 20-21.

<sup>43</sup> See Traub, *supra* note 38.

<sup>44</sup> See HORN & FLORES, *supra* note 41, at 22. The authors contend that there is insufficient evidence to suggest that percentage plans in Texas, Florida, and California, even with other race-conscious processes, are effective alternatives to the use of race and ethnicity as a factor in determining admissions. *Id.* at vii-x.

<sup>45</sup> I did not believe that this commitment was that strong at the time of *Bakke*, and suggested then that if law schools could not continue to base admission on existing academic standards, supplemented by a consideration of race, they might well abandon affirmative action with the rationalization, "The Court made us do it." See Sedler, *Racial Preference*, *supra* note 4, at 344-45.

medical schools and that in general fewer minorities would be graduating from the elite universities.<sup>46</sup>

But it was precisely for these reasons that the decision would be a very important one for racial minorities and for the elite universities. If racial minorities are truly to be full and equal participants in all important areas of American life, this should include minority representation in substantial numbers at the elite universities and at their law schools and medical schools as well. Otherwise, the nation would be in danger of having a “two-tier” system of higher education and “two-tier” professions, with white university graduates, lawyers, doctors, and other professionals coming from both “elite” and “non-elite” schools, and minority university graduates, lawyers, doctors, and other professionals coming mostly from the “non-elite” schools.<sup>47</sup> And if the elite universities wanted to achieve substantial diversity but were not permitted to use race in determining admission, they would be forced to modify their standards by using factors such as geographic residence and class rank, which can be used to ensure a cross-section of ethnic backgrounds among admitted students. This policy would probably result in somewhat fewer minority students and somewhat lower admission standards, making these universities at the same time both less diverse and less elite.

A final point to be noted is that the decision in *Grutter-Gratz* would be limited to the constitutional permissibility of the use of race in determining university admission and would not affect the Court’s decisions dealing with the constitutional permissibility of other uses of race for the benefit of racial minorities.<sup>48</sup> The issues before the Court in *Grutter-Gratz* were as

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<sup>46</sup> See Robert A. Sedler, *Racial Preferences in Law School Admissions: The Public Interest in a Diverse Legal Profession*, 1 J.L. SOC’Y 17, 22-23 (1999).

<sup>47</sup> See *id.* at 22. The advantages of obtaining one’s legal education at an elite school were highlighted by Justice O’Connor in *Grutter*. Citing the amicus curiae brief submitted by the Association of American Law Schools, she pointed out that a handful of the more selective law schools accounted for 25 of the 100 United States Senators, 74 United States Court of Appeals judges, and nearly 220 of the more than 600 United States District Court Judges. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2341 (2003).

<sup>48</sup> See the discussion, *supra* notes 25-30 and accompanying text. On the morning of the day that *Grutter* and *Gratz* were decided, I predicted in an op-ed piece that regardless of the result, the decision would not reach beyond university admissions. “That is because the Supreme Court has already resolved most of the issues involving the use of race by the government, beginning with the *Bakke* case in 1978.” Robert A. Sedler, *U-M Cases Won’t Reach Beyond Schools*, DETROIT FREE PRESS, June 23, 2003, Editorial page.

follows. First, is attaining a racially diverse student body a compelling governmental interest, justifying the use of race-conscious admission policies? Second, if so, are the University of Michigan Law School's race-conscious admissions programs at the undergraduate level and in the law school narrowly tailored to advance this interest?

The holding of the Court in *Grutter-Gratz* on each of these three issues was as follows. First, and most importantly, the Court held that educational diversity is a compelling governmental interest that can be advanced by the university's competitive consideration of race and ethnic origin as one of the factors in determining admission.<sup>49</sup> Six Justices, O'Connor, joined by Stevens, Souter, Ginsburg, and Breyer in the Opinion of the Court in *Grutter*, and Kennedy, in a dissent in that case, concurred in this holding.<sup>50</sup> Second, the Court held 5-4 in *Grutter*, that the law school's race-conscious admissions program satisfied the competitive consideration of race and ethnic origin test. Third, the Court held 6-3 in *Gratz* that the undergraduate admissions program, which mechanically assigned a number of points for different factors, including twenty points for being African-American, Hispanic or Native American, and did not provide for individualized consideration of all applicants, did not satisfy this test and thus was unconstitutional.<sup>51</sup>

O'Connor's opinion for the Court in *Grutter* expressly adopted and reaffirmed the Powell opinion in *Bakke*. After reviewing at length the Powell opinion, O'Connor stated: "For the reasons below, 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."<sup>52</sup> She

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<sup>49</sup> *Grutter*, 123 S. Ct. at 2325; *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

<sup>50</sup> *Grutter*, 123 S. Ct. at 2337; *id.* at 2370 (Kennedy, J., dissenting). Rehnquist did not take a position on this issue, but recognized in his opinion in *Gratz* that the Court had so held in *Grutter* and that this holding in *Grutter* controlled the result in *Gratz*. *Gratz*, 123 S. Ct. at 2427. Scalia and Thomas, dissenting in *Grutter*, took the position that educational diversity was not a compelling governmental interest. *Grutter*, 123 S. Ct. at 2349-50 (Scalia, J., dissenting); *id.* at 2350-54 (Thomas, J., dissenting).

<sup>51</sup> *Gratz*, 123 S. Ct. at 2427-31. O'Connor joined in the Rehnquist opinion, and wrote a concurrence, substantially agreed with by Breyer, in which she distinguished the undergraduate admissions program from the law school's on the ground that it was based on a "mechanized selection index score and failed to provide for meaningful individualized review." *Id.* at 2431-33 (O'Connor, J., concurring). Justice Stevens dissented on standing grounds. *Id.* at 2434-38 (Stevens, J., dissenting). Justices Ginsburg and Souter maintained that the plan was constitutionally permissible. *Id.* at 2443-46 (Ginsburg, J., dissenting).

<sup>52</sup> *Grutter*, 123 S. Ct. at 2337.

first noted that while strict scrutiny applies to determine the constitutionality of the university's use of race in determining admissions, strict scrutiny is not "strict in theory, but fatal in fact,"<sup>53</sup> and that in applying this test, context matters. As she stated: "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."<sup>54</sup> Quoting from the Powell opinion in *Bakke*, she emphasized that in the context of higher education and taking into account the First Amendment's academic freedom value, the strict scrutiny standard did not preclude some judicial deference to the law school's educational judgment that diversity was essential to its educational mission.<sup>55</sup> This claim was bolstered by the various amici briefs, including those from major American businesses and high-ranking retired officers and civilian military leaders, emphasizing the importance of diversity in training people to operate in the global marketplace and in fulfilling the military's mission respectively.<sup>56</sup> She went on to point out that law schools, particularly the most highly selective, "represent the training ground for a large number of our Nation's leaders,"<sup>57</sup> and that "[i]n 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."<sup>58</sup> For all of these reasons, as she stated, "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."<sup>59</sup>

Justice O'Connor then found that the law school's race-conscious admissions program satisfied the "narrowly tailored" requirement of the Powell opinion in *Bakke*, because 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."<sup>60</sup> Justice Kennedy agreed that educational

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<sup>53</sup> *Id.* at 2338 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2339.

<sup>56</sup> *Id.* at 2340.

<sup>57</sup> *Id.* at 2341.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 2337.

<sup>60</sup> *Id.* at 2343. Justice O'Connor rejected the argument of the plaintiffs and the United States as amici curiae that the plan was not narrowly tailored because facially race-neutral means, such as residence and high school class rank, would also achieve a diverse student body. She pointed out that there was no explanation

diversity was a compelling governmental interest, but insisted, here agreeing with the Rehnquist, Scalia, and Thomas dissents, that the law school's race-conscious admissions program, with its emphasis on enrolling a "critical mass" of minority students, operated in practice like a quota and so failed the "narrowly tailored" requirement.<sup>61</sup>

In *Gratz*, the Court held 6-3, in an opinion by Chief Justice Rehnquist, that the university's undergraduate admissions program failed the narrow tailoring requirement.<sup>62</sup> There was no individualized consideration of the applicants at all, let alone the competitive consideration of race and ethnic origin. Instead, the university mechanically assigned a number of points for different factors, including twenty points for being African-American, Hispanic or Native-American. As Rehnquist noted:

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.<sup>63</sup>

The Constitution does not permit a university to "achieve diversity on the cheap."<sup>64</sup> If the university is going to take race or ethnic origin into account

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as to how such plans would work for graduate and professional schools, and that in any event, such plans could "preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.* at 2345. She also emphasized that narrow tailoring does not mandate that a university choose between "maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.* at 2330. In rejecting the argument that the law school could admit minority students by using a lottery system or decreasing the emphasis on undergraduate GPA and LSAT scores, she stated that "these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." *Id.* at 2345.

<sup>61</sup> *Id.* at 2370-73 (Kennedy, J., dissenting).

<sup>62</sup> *Gratz v. Bollinger*, 123 S. Ct. 2411, 2417 (2003).

<sup>63</sup> *Id.* at 2428.

<sup>64</sup> As I said in a newspaper interview the day after the decisions were rendered, "U-M's [undergraduate] point system was trying to 'achieve diversity on the cheap. Instead of hiring a large number of admissions officers U-M does this mechanically and enters factors into a computer.'" David Zaman & Maryanne George, *U-M Hails Top Court's Support of Race Factor*, DETROIT FREE PRESS, June 24, 2003, at 1A, 4A.

as one of the factors determining admission, it must hire a large number of admissions officers to ensure that each application receives individualized consideration for all of the diversity factors.

The end result of the Supreme Court's decision in *Grutter-Gratz* is, as I said in a newspaper interview the next day: "'We are where we were yesterday. . . . Nothing has changed except now we have certainty rather than ambiguity.'"<sup>65</sup> The Powell opinion in *Bakke* has now been adopted by the Court. The applicable constitutional doctrine is that educational diversity is a compelling governmental interest. A university may take race into account as one of the factors in determining admission, but it must provide individualized consideration for all of the applicants. Universities revised their admissions policies after *Bakke* to comply with the approach set forth in the Powell opinion; similarly, after *Grutter-Gratz*, universities will revise their admission policies to conform to the requirements set forth in the O'Connor opinion in *Grutter* and to avoid the pitfalls set forth in the Rehnquist opinion in *Gratz*.

The Court's holding in *Grutter-Gratz* enables universities to take race into account in determining admission and, to that extent, to continue the progress of the last quarter-century in increasing the number of minority college graduates, lawyers, doctors, and other professionals. This nation will continue to move closer to achieving the full and equal participation of racial minorities in all areas of American life. Justice O'Connor hopefully opined in *Grutter*, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>66</sup> In any event, as a result of the Court's holdings in *Grutter* and *Gratz*, the nation's universities will continue to reflect the diversity of the nation itself.

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<sup>65</sup> Brad Heath, *Court's Ruling Bows to History*, DETROIT NEWS, June 24, 2003, at A5.

<sup>66</sup> *Grutter*, 123 S. Ct. at 2347.

