The Michigan Cases: *Grutter* and *Gratz*

A good place to begin discussion of the modern history of what has come to be called affirmative action is President Lyndon Johnson's 1965 commencement address at Howard University (named after the same General Howard who served as Commissioner of the Freedmen's Bureau). After reviewing recent advances in civil and voting rights, Johnson said:

> But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.
>
> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.
>
> Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.
>
> This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

That September, Johnson signed Executive Order 11246, which, building on prior orders, not only imposed on government contractors an obligation to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin" but also created an effective enforcement mechanism.

In succeeding years, many public institutions, at the federal, state, and local levels, adopted a wide array of race-based remedial programs. Inevitably, these programs were challenged in the courts on equal protection grounds. And so an important question arose. Should a program that gives a preference to members of an historically disadvantaged group—say, setting aside a spot in an institution of higher learning, or creating greater protections against layoffs—be viewed in the same way as racial classifications that had promoted subjugation?

The Supreme Court first considered the substance of such claims in *Regents of the University of California v. Bakke* (1978), involving a program in which the medical school of the University of California at Davis reserved 16 of 100 seats in its entering class for members of designated minority groups. There was no majority opinion. Four members of the Court believed the program satisfied constitutional and statutory requirements. Another four members, without reaching the constitutional question, believed that any

consideration of race in admissions by an educational institution receiving federal funds violated Title VI of the 1964 Civil Rights Act. That left Justice Powell with the decisive vote in the middle. He believed that some consideration of race was permissible, but it would have to satisfy the standards of strict scrutiny. Though countering the effects of societal discrimination was a legitimate goal, he did not believe that it could be accomplished at the expense of "innocent individuals." The pedagogical advantages of diversity in the student body was a compelling interest, but the rigid set-aside of Davis's program was not, in his view, sufficiently tailored. Powell suggested that he would accept a more holistic use of race as one "plus factor" among others in university admissions criteria, citing Harvard College's affirmative action program as an example.

For a quarter century, Justice Powell's *Bakke* opinion was the leading judicial authority on affirmative action in higher education. Twenty-five years later, this rationale was put to the test in two companion cases involving affirmative action at the University of Michigan: *Grutter v. Bollinger* (law school admissions) and *Gratz v. Bollinger* (undergraduate college admissions). The two cases came out differently, so reading them together—and trying to understand what constitutional differences the Court saw between them—is instructive.

Grutter v. Bollinger

Supreme Court of the United States, 2003.
539 U.S. 306.

Justice O'Connor delivered the opinion of the Court.

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

I

A

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its

efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. See *Regents of Univ. of Cal. v. Bakke* (1978). Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."

... [T]he policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. So-called "'soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution."

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African–Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." By enrolling a "'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School."

The policy does not define diversity "solely in terms of racial and ethnic status." Nor is the policy "insensitive to the competition among all students for admission

to the [L]aw [S]chool." Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession."

B

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 GPA and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application.... Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment....

During the 15-day bench trial, the parties introduced extensive evidence concerning the Law School's use of race in the admissions process. Dennis Shields, Director of Admissions when petitioner applied to the Law School, testified that he did not direct his staff to admit a particular percentage or number of minority students, but rather to consider an applicant's race along with all other factors. Shields testified that at the height of the admissions season, he would frequently consult the so-called "daily reports" that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender). This was done, Shields testified, to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body. Shields stressed, however, that he did not seek to admit any particular number or percentage of underrepresented minority students.

Erica Munzel, who succeeded Shields as Director of Admissions, testified that "'critical mass'" means "'meaningful numbers'" or "'meaningful representation,'" which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass.... The current Dean of the Law School, Jeffrey Lehman, also testified.... He indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race. When asked about the extent to which race is considered in admissions, Lehman testified that it varies from one applicant to another. In some cases, according to Lehman's testimony, an applicant's race may play no role, while in others it may be a "'determinative'" factor.

The District Court heard extensive testimony from Professor Richard Lempert, who chaired the faculty committee that drafted the 1992 policy. Lempert emphasized that the Law School seeks students with diverse interests and

backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom. When asked about the policy's "'commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against,'" Lempert explained that this language did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination. Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers.

Kent Syverud was the final witness to testify about the Law School's use of race in admissions decisions. Syverud was a professor at the Law School when the 1992 admissions policy was adopted and is now Dean of Vanderbilt Law School. In addition to his testimony at trial, Syverud submitted several expert reports on the educational benefits of diversity. Syverud's testimony indicated that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no "'minority viewpoint'" but rather a variety of viewpoints among minority students....

We granted certiorari to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.

II

A

We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. The decision produced six separate opinions, none of which commanded a majority of the Court.... Justice Powell provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever. 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." Thus, we reversed that part of the lower court's judgment that enjoined the university "from any consideration of the race of any applicant."

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.... [F]or the reasons set out 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.

B

...Because the Fourteenth Amendment "protect[s] *persons,* not *groups,*" all "governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Peña* (1995).... It follows from that principle that "government may treat people differently because of their race only for the most compelling reasons." *Adarand*.

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Richmond v. J.A. Croson Co.* (1989) (plurality opinion).

Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Peña*. Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." But that observation "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied....

III

A

With these principles in mind, we turn to the question whether the Law

School's use of race is justified by a compelling state interest. Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity....

We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke*. It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. *See, e.g.*, *Richmond v. J.A. Croson Co.* (plurality opinion) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"). But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke,* have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.... We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.... Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." Brief for Respondent Bollinger et al. The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke* (opinion of Powell, J.). That would amount to outright racial balancing, which is patently

unconstitutional. *Freeman v. Pitts* (1992) ("Racial balance is not to be achieved for its own sake"); *Richmond v. J.A. Croson Co*. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

The Law School's claim of a compelling interest is further bolstered by its *amici,* who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as *Amici Curiae*; Brief for General Motors Corp. as *Amicus Curiae*. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security." Brief for Julius W. Becton, Jr., et al. as *Amici Curiae*. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." *Ibid.*

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the

fabric of society. This Court has long recognized that "education ... is the very foundation of good citizenship." *Brown v. Board of Education* (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.... And, "[n]owhere is the importance of such openness more acute than in the context of higher education." Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. *Sweatt v. Painter* (1950) (describing law school as a "proving ground for legal learning and practice")... The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." See *Sweatt v. Painter*. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." Brief for Respondent Bollinger. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

B

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw v. Hunt* (1996). The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.* (plurality opinion).

Since *Bakke,* we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice Kennedy's assertions, we do not "abando[n] strict scrutiny," *see post* (dissenting opinion). Rather, as we have already explained, we adhere to *Adarand's* teaching that the very purpose of strict scrutiny is to take such "relevant differences into account."

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke* (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke,* truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.

We are satisfied that the Law School's admissions program, like the Harvard

plan described by Justice Powell, does not operate as a quota. Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." Quotas "'impose a fixed number or percentage which must be attained, or which cannot be exceeded,'" and "insulate the individual from comparison with all other candidates for the available seats." In contrast, "a permissible goal ... require[s] only a good-faith effort ... to come within a range demarcated by the goal itself," and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants."

Justice Powell's distinction between the medical school's rigid 16-seat quota and Harvard's flexible use of race as a "plus" factor is instructive. Harvard certainly had minimum *goals* for minority enrollment, even if it had no specific number firmly in mind. What is more, Justice Powell flatly rejected the argument that Harvard's program was "the functional equivalent of a quota" merely because it had some "'plus'" for race, or gave greater "weight" to race than to some other factors, in order to achieve student body diversity.

The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." "[S]ome attention to numbers," without more, does not transform a flexible admissions system into a rigid quota. Nor, as Justice Kennedy posits [in dissent], does the Law School's consultation of the "daily reports," which keep track of the racial and ethnic composition of the class (as well as of residency and gender), "sugges[t] there was no further attempt at individual review save for race itself" during the final stages of the admissions process. To the contrary, the Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports. Moreover, as Justice Kennedy concedes, between 1993 and 1998, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota....

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized

consideration in the context of a race-conscious admissions program is paramount.

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto,* of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger*, *infra*, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. See *Gratz* (distinguishing a race-conscious admissions program that automatically awards 20 points based on race from the Harvard plan, which considered race but "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity")....

The Law School does not ... limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear "[t]here are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.,* an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. This shows that the Law School seriously weighs many other diversity factors besides race that can make a ... dispositive difference ... as well... Justice Kennedy speculates that "race is likely outcome determinative for many members of minority groups" who do not fall within the upper range of LSAT scores and grades. But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke,* and indeed of any plan that uses race as one of many factors.

Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See *Wygant v. Jackson Bd. of Ed.* (1986) (alternatives must serve the interest "'about as well'"). Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.

We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.... The United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California, to guarantee admission to all students above a certain class-rank threshold in every high school in the State. The United States does not, however, explain how such plans could work for graduate and professional schools....

We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission....

We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti* (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits."

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to

determine whether racial preferences are still necessary to achieve student body diversity.... The requirement that all race-conscious admissions programs have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Richmond v. J.A. Croson Co.* (plurality opinion).

We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV

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

Justice Ginsburg, with whom Justice Breyer joins, concurring.

... The Court ... observes that "[i]t has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education." ... [But] it was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery. See *Brown v. Board of Education* (1954); cf. *Cooper v. Aaron* (1958).

It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.... However strong the public's desire for improved education systems may be, it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.

Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be

anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.

Justice Scalia, with whom Justice Thomas joins, concurring in part and dissenting in part.

… The "educational benefit" that the University of Michigan seeks to achieve by racial discrimination consists, according to the Court, of "'cross-racial understanding,'" and "'better prepar[ation of] students for an increasingly diverse workforce and society,'" all of which is necessary not only for work, but also for good "citizenship." … [This] is a lesson of life rather than law—essentially the same lesson taught to … people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens. If properly considered an "educational benefit" at all, [this] is surely not one that is either uniquely relevant to law school or uniquely "teachable" in a formal educational setting.

And therefore: If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, *particularly* appropriate—for the civil service system of the State of Michigan to do so. There, also, those exposed to "critical masses" of certain races will presumably become better Americans, better Michiganders, better civil servants…. The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.

Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant "as an individual," and sufficiently avoids "separate admissions tracks," to fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a "'good faith effort'" and has so zealously pursued its "critical mass" as to make it an unconstitutional *de facto* quota system, rather than merely "'a permissible goal.'" Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity…. Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be

those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass."

I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

Justice Thomas, with whom Justice Scalia joins [in relevant part], concurring in part and dissenting in part.

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

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

What the Black Man Wants: An Address Delivered in Boston, Massachusetts (January 26, 1865). Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators....

The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti. Nevertheless, I concur in part in the Court's opinion.... I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years. I respectfully dissent from the remainder of the Court's opinion and the judgment, however, because I believe that ... the Constitution means the same thing today as it will in 300 months.

I

The majority agrees that the Law School's racial discrimination should be subjected to strict scrutiny. Before applying that standard to this case, I will briefly revisit the Court's treatment of racial classifications.

The strict scrutiny standard that the Court purports to apply in this case was first enunciated in *Korematsu v. United States* (1944). There the Court held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." This standard of "pressing public necessity" has more frequently been termed "compelling governmental interest." A majority of the Court has validated only two circumstances where "pressing public necessity" or a "compelling state interest" can possibly justify racial discrimination by state actors. First, the lesson of *Korematsu* is that national security constitutes a "pressing public necessity," though the government's use of race to advance that objective must be narrowly tailored. Second, the Court has recognized as a compelling state interest a government's effort to remedy past discrimination for which it is responsible. *Richmond v. J.A. Croson Co.* (1989).

The contours of "pressing public necessity" can be further discerned from those interests the Court has rejected as bases for racial discrimination. For example, [consider] the sensitive role of courts in child custody determinations. In *Palmore v. Sidoti* (1984), the Court held that even the best interests of a child did not constitute a compelling state interest that would allow a state court to award custody to the father because the mother was in a mixed-race marriage. (finding the interest "substantial" but holding the custody decision could not be based on the race of the mother's new husband).

Finally, the Court has rejected an interest in remedying general societal discrimination as a justification for race discrimination. *See Croson* (plurality opinion); *id.* (Scalia, J., concurring in judgment). "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" because a "court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."

Where the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a "pressing public necessity." *Cf. Lee v. Washington* (1968) (per curiam) (Black, J., concurring)....

II

Unlike the majority, I seek to define with precision the interest being asserted

by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it wishes to obtain "educational benefits that flow from student body diversity." This statement must be evaluated carefully, because it implies that both "diversity" and "educational benefits" are components of the Law School's compelling state interest. Additionally, the Law School's refusal to entertain certain changes in its admissions process and status indicates that the compelling state interest it seeks to validate is actually broader than might appear at first glance.

Undoubtedly there are other ways to "better" the education of law students aside from ensuring that the student body contains a "critical mass" of underrepresented minority students. Attaining "diversity," whatever it means,[1] is the mechanism by which the Law School obtains educational benefits, not an end of itself. The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational "benefits" *not* simply the forbidden interest in "racial balancing," that the majority expressly rejects?

A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic—so much so that the majority uses them interchangeably. Compare *ibid.* ("[T]he Law School has a compelling interest in attaining a diverse student body"), with *ante* (referring to the "compelling interest in securing the *educational benefits* of a diverse student body" (emphasis added)). The Law School's argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the *educational benefits* that are the end, or allegedly compelling state interest, not "diversity."

One must also consider the Law School's refusal to entertain changes to its current admissions system that might produce the same educational benefits. The

[1] "[D]iversity," for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue. Because the Equal Protection Clause renders the color of one's skin constitutionally irrelevant to the Law School's mission, I refer to the Law School's interest as an "aesthetic." That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them. I also use the term "aesthetic" because I believe it underlines the ineffectiveness of racially discriminatory admissions in actually helping those who are truly underprivileged…., [like] those too poor or uneducated to participate in elite higher education….

Law School adamantly disclaims any race-neutral alternative that would reduce "academic selectivity," which would in turn "require the Law School to become a very different institution, and to sacrifice a core part of its educational mission." Brief for Respondent Bollinger. In other words, the Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status.

The proffered interest that the majority vindicates today, then, is not simply "diversity." Instead the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution. Unless each constituent part of this state interest is of pressing public necessity, the Law School's use of race is unconstitutional. I find each of them to fall far short of this standard.

III

A close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a "compelling interest in securing the educational benefits of a diverse student body." No serious effort is made to explain how these benefits fit with the state interests the Court has recognized (or rejected) as compelling.... Today, the Court [thus] insists on radically expanding the range of permissible uses of race to something as trivial (by comparison) as the assembling of a law school class. I can only presume that the majority's failure to justify its decision by reference to any principle arises from the absence of any such principle.

Under the proper standard, there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school. Likewise, marginal improvements in legal education do not qualify as a compelling state interest.... While legal education at a public university may be good policy or otherwise laudable, it is obviously not a pressing public necessity when the correct legal standard is applied....

Still, even assuming that a State may, under appropriate circumstances, demonstrate a cognizable interest in having an elite law school, Michigan has failed to do so here.... The only cognizable state interests vindicated by operating a public law school are ... the education of that State's citizens and the training of that State's lawyers.... The Law School today, however, does precious little training of those attorneys who will serve the citizens of Michigan. In 2002, graduates of the Law School made up less than 6% of applicants to the Michigan bar, even though the Law School's graduates constitute nearly 30% of all law students graduating in Michigan. Less than 16% of the Law School's graduating class elects to stay in Michigan after law school. Thus, while a mere 27% of the Law School's 2002

entering class is from Michigan, only half of these, it appears, will stay in Michigan. In sum, the Law School trains few Michigan residents and overwhelmingly serves students, who, as lawyers, leave the State of Michigan….

IV

… The Court never explicitly holds that the Law School's desire to retain the status quo in "academic selectivity" is itself a compelling state interest, and, as I have demonstrated, it is not. Therefore, the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways. With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination. The Law School concedes this, but the Court holds, implicitly and under the guise of narrow tailoring, that the Law School has a compelling state interest in doing what it wants to do. I cannot agree….

V

Putting aside the absence of any legal support for the majority's reflexive deference, there is much to be said for the view that the use of tests and other measures to "predict" academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law. The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a "true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities….

In any event, there is nothing ancient, honorable, or constitutionally protected about "selective" admissions. The University of Michigan should be well aware that alternative methods have historically been used for the admission of students, for it brought to this country the German certificate system in the late-19th century. Under this system, a secondary school was certified by a university so that any graduate who completed the course offered by the school was offered admission to the university. The certification regime supplemented, and later virtually replaced (at least in the Midwest), the prior regime of rigorous subject-matter entrance examinations. The facially race-neutral "percent plans" now used in Texas, California, and Florida are in many ways the descendents of the certificate system.

Certification was replaced by selective admissions in the beginning of the 20th century, as universities sought to exercise more control over the composition of their student bodies. Since its inception, selective admissions has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators. The initial driving force for the relocation of the selective function from the high school to the universities was the same desire to select racial winners and losers that the Law School exhibits today. Columbia, Harvard, and others infamously determined that they had "too many" Jews, just as today the Law School argues it would have "too many" whites if it could not discriminate in its admissions process. Columbia employed intelligence tests precisely because Jewish applicants, who were predominantly immigrants, scored worse on such tests....

Having decided to use the LSAT, the Law School must accept the constitutional burdens that come with this decision. The Law School may freely continue to employ the LSAT and other allegedly merit-based standards in whatever fashion it likes. What the Equal Protection Clause forbids, but the Court today allows, is the use of these standards hand-in-hand with racial discrimination. An infinite variety of admissions methods are available to the Law School. Considering all of the radical thinking that has historically occurred at this country's universities, the Law School's intractable approach toward admissions is striking....

VI

The absence of any articulated legal principle supporting the majority's principal holding suggests another rationale. I believe what lies beneath the Court's decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, and that racial discrimination is necessary to remedy general societal ills....

While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less "elite" law school for which they were better prepared. And the aestheticists will never address the real problems facing "underrepresented minorities," instead continuing their social experiments on other people's children.... "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." *Adarand* (Thomas, J., concurring in part and concurring in judgment).

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are

admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination. Is this what the Court means by "visibly open"? ...

* * *

... It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court's opinion and the judgment.

Chief Justice Rehnquist, with whom Justice Scalia, Justice Kennedy, and Justice Thomas join, dissenting.

I agree with the Court that, "in the limited circumstance when drawing racial distinctions is permissible," the government must ensure that its means are narrowly tailored to achieve a compelling state interest. I do not believe, however, that the University of Michigan Law School's (Law School) means are narrowly tailored to the interest it asserts.... Stripped of its "critical mass" veil, the Law School's program is revealed as a naked effort to achieve racial balancing....

Before the Court's decision today, we consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used. We rejected calls to use more lenient review in the face of claims that race was being used in "good faith" because "'[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.'" *Adarand*.... Although the Court [today] recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference....

In practice, the Law School's program bears little or no relation to its asserted goal of achieving "critical mass." Respondents explain that the Law School seeks to accumulate a "critical mass" of *each* underrepresented minority group. But the record demonstrates that the Law School's admissions practices with respect to these groups differ dramatically and cannot be defended under any consistent use

of the term "critical mass."

From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-American, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case,[2] how can this possibly constitute a "critical mass" of Native Americans in a class of over 350 students? ... Surely strict scrutiny cannot permit these sorts of disparities without at least some explanation....

The Court states that the Law School's goal of attaining a "critical mass" of underrepresented minority students is not an interest in merely "'assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" The Court recognizes that such an interest "would amount to outright racial balancing, which is patently unconstitutional." ... But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers." ... [F]rom 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups.

[2] Indeed, during this 5-year time period, enrollment of Native American students dropped to as low as three such students. Any assertion that such a small group constituted a "critical mass" of Native Americans is simply absurd.

TABLE 1

Year	Number of law school applicants	Number of African-American applicants	% of applicants who were African-American	Number of applicants admitted by the law school	Number of African-American applicants admitted	% of admitted applicants who were African-American
1995	4147	404	***9.7%***	1130	106	***9.4%***
1996	3677	342	***9.3%***	1170	108	***9.2%***
1997	3429	320	***9.3%***	1218	101	***8.3%***
1998	3537	304	***8.6%***	1310	103	***7.9%***
1999	3400	247	***7.3%***	1280	91	***7.1%***
2000	3432	259	***7.5%***	1249	91	***7.3%***

Table 2

Year	Number of law school applicants	Number of Hispanic applicants	% of applicants who were Hispanic	Number of applicants admitted by the law school	Number of Hispanic applicants admitted	% of admitted applicants who were Hispanic
1995	4147	213	***5.1%***	1130	56	***5.0%***
1996	3677	186	***5.1%***	1170	54	***4.6%***
1997	3429	163	***4.8%***	1218	47	***3.9%***
1998	3537	150	***4.2%***	1310	55	***4.2%***
1999	3400	152	***4.5%***	1280	48	***3.8%***
2000	3432	168	***4.9%***	1249	53	***4.2%***

Table 3

Year	Number of law school applicants	Number of Native American applicants	% of applicants who were Native American	Number of applicants admitted by the law school	Number of Native American applicants admitted	% of admitted applicants who were Native American
1995	4147	45	***1.1%***	1130	14	***1.2%***
1996	3677	31	***0.8%***	1170	13	***1.1%***
1997	3429	37	***1.1%***	1218	19	***1.6%***
1998	3537	40	***1.1%***	1310	18	***1.4%***
1999	3400	25	***0.7%***	1280	13	***1.0%***
2000	3432	35	***1.0%***	1249	14	***1.1%***

... The tight correlation between the percentage of applicants and admittees of a given race ... must result from careful race based planning by the Law School. It suggests a formula for admission based on the aspirational assumption that all applicants are equally qualified academically, and therefore that the proportion of

each group admitted should be the same as the proportion of that group in the applicant pool....

Justice Kennedy, dissenting

The separate opinion by Justice Powell in *Regents of Univ. of Cal. v. Bakke* (1978)..., in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents....

The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's assurances that its admissions process meets with constitutional requirements. The majority fails to confront the reality of how the Law School's admissions policy is implemented....

There was little deviation among admitted minority students during the years from 1995 to 1998. The percentage of enrolled minorities fluctuated only by 0.3%, from 13.5% to 13.8%. The number of minority students to whom offers were extended varied by just a slightly greater magnitude of 2.2%, from the high of 15.6% in 1995 to the low of 13.4% in 1998.

The District Court relied on this uncontested fact to draw an inference that the Law School's pursuit of critical mass mutated into the equivalent of a quota. Admittedly, there were greater fluctuations among enrolled minorities in the preceding years, 1987-1994, by as much as 5% or 6%. The percentage of minority offers, however, at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range. The greater variance during the earlier years, in any event, does not dispel suspicion that the school engaged in racial balancing. The data would be consistent with an inference that the Law School modified its target only twice, in 1991 (from 13% to 19%), and then again in 1995 (back from 20% to 13%). The intervening year, 1993, when the percentage dropped to 14.5%, could be an aberration, caused by the school's miscalculation as to how many applicants with offers would accept or by its redefinition, made in April 1992, of which minority groups were entitled to race-based preference.

Year	Percentage of enrolled minority students
1987	12.3%
1988	13.6%
1989	14.4%
1990	13.4%
1991	19.1%

1992	19.8%
1993	14.5%
1994	20.1%
1995	13.5%
1996	13.8%
1997	13.6%
1998	13.8%

The narrow fluctuation band raises an inference that the Law School subverted individual determination, and strict scrutiny requires the Law School to overcome the inference. Whether the objective of critical mass "is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status," and so risks compromising individual assessment. *Bakke* (opinion of Powell, J.)....

The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review. For these reasons, though I reiterate my approval of giving appropriate consideration to race in this one context, I must dissent in the present case.

Gratz v. Bollinger

Supreme Court of the United States, 2003.
539 U.S. 244.

Chief Justice Rehnquist delivered the opinion of the Court.

We granted certiorari in this case to decide whether "the University of Michigan's use of racial preferences in undergraduate admissions violate[s] the Equal Protection Clause of the Fourteenth Amendment...." Because we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court's decision upholding the guidelines.

I

A

Petitioner[] Jennifer Gratz ... applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as [a] resident[] of the State of Michigan.... Gratz was notified in April [1996] that the

LSA was unable to offer her admission. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999....

B

The University has changed its admissions guidelines a number of times during the period relevant to this litigation, and we summarize the most significant of these changes briefly. The University's Office of Undergraduate Admissions (OUA) .... considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership. OUA also considers race. During all periods relevant to this litigation, the University has considered African-Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits "virtually every qualified ... applicant" from these groups....

[The OUA now relies on a] "selection index," on which an applicant could score a maximum of 150 points. This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject). Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Of particular significance here, under a "miscellaneous" category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group.

II

... It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand Constructors, Inc. v. Peña* (1995).... To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admissions program employs "narrowly tailored measures that further compelling governmental interests." ... We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program....

In *Bakke*, Justice Powell reiterated that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own

sake." He then explained, however, that in his view it would be permissible for a university to employ an admissions program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file." He explained that such a program might allow for "[t]he file of a particular black applicant [to] be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism." Such a system, in Justice Powell's view, would be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." ...

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, the LSA's automatic distribution of 20 points has the effect of making "the factor of race ... decisive" for virtually every minimally qualified underrepresented minority applicant....

Respondents contend that "[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the ... admissions system" upheld by the Court today in *Grutter*. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. See *J.A. Croson Co.* (rejecting "'administrative convenience'" as a determinant of constitutionality in the face of a suspect classification)....

We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment....

WORTH NOTING

Justice O'Connor wrote a concurrence emphasizing the lack of "meaningful individualized review" in the undergraduate admissions program; although there was an Admissions Review Committee, the evidence in the record indicated that it was "a kind of afterthought, rather than an integral component of a system of individualized review." Justice Breyer concurred in the judgment, signing on to all of O'Connor's opinion except the last sentence stating that she joined the Court. He also joined Part I of Justice Ginsburg's dissent. Justice Thomas wrote a concurrence, joining the opinion of the Court but noting that he would hold "that a State's use of racial discrimination in higher education

Justice Souter, with whom Justice Ginsburg joins [in relevant part], dissenting.

... The cases now contain two pointers toward the line between the valid and the unconstitutional in race-conscious admissions schemes. *Grutter* reaffirms the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases. On the other hand, Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke* (1978), rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class. Although the freshman admissions system here is subject to argument on the merits, I think it is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record.

The record does not describe a system with a quota like the one struck down in *Bakke*, which "insulate[d]" all nonminority candidates from competition from certain seats. The *Bakke* plan "focused *solely* on ethnic diversity" and effectively told nonminority applicants that "[n]o matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the [set-aside] special admissions seats." *Bakke* (opinion of Powell, J.).

The plan here, in contrast, lets all applicants compete for all places and values

an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic disadvantage, athletic ability, and quality of a personal essay. A nonminority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20-point bonus.... In the Court's own words, "each characteristic of a particular applicant [is] considered in assessing the applicant's entire application." ...

The one qualification to this description of the admissions process is that membership in an underrepresented minority is given a weight of 20 points on the 150-point scale. On the face of things, however, this assignment of specific points does not set race apart from all other weighted considerations. Nonminority students may receive 20 points for athletic ability, socioeconomic disadvantage, attendance at a socioeconomically disadvantaged or predominantly minority high school, or at the Provost's discretion; they may also receive 10 points for being residents of Michigan, 6 for residence in an underrepresented Michigan county, 5 for leadership and service, and so on.

WORTH NOTING

In her separate opinion, Justice O'Connor noted some additional ways for applicants to boost their score: 5 points for personal achievement, 4 points for being the child of a University of Michigan graduate, and 3 points for an outstanding essay.

The Court nonetheless finds fault with a scheme that "automatically" distributes 20 points to minority applicants because "[t]he only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups." The objection goes to the use of points to quantify and compare characteristics, or to the number of points awarded due to race, but on either reading the objection is mistaken.

The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review," *Grutter*; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their

applications may disclose.

Nor is it possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in *Bakke*. Of course we can conceive of a point system in which the "plus" factor given to minority applicants would be so extreme as to guarantee every minority applicant a higher rank than every nonminority applicant in the university's admissions system. But petitioners do not have a convincing argument that the freshman admissions system operates this way.... It suffices for me, as it did for the District Court, that there are no *Bakke*-like set-asides and that consideration of an applicant's whole spectrum of ability is no more ruled out by giving 20 points for race than by giving the same points for athletic ability or socioeconomic disadvantage....

Without knowing more about how the Admissions Review Committee actually functions, it seems especially unfair to treat the candor of the admissions plan as an Achilles' heel. In contrast to the college's forthrightness in saying just what plus factor it gives for membership in an underrepresented minority, it is worth considering the character of one alternative thrown up as preferable, because supposedly not based on race. Drawing on admissions systems used at public universities in California, Florida, and Texas, the United States contends that Michigan could get student diversity in satisfaction of its compelling interest by guaranteeing admission to a fixed percentage of the top students from each high school in Michigan.

While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage. It is the disadvantage of deliberate obfuscation. The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball....

Justice Ginsburg, with whom Justice Souter joins [and Justice Breyer joins except for the last paragraph presented below], dissenting.

... Educational institutions, the Court acknowledges, are not barred from any and all consideration of race when making admissions decisions. But the Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. This insistence on "consistency" would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past, and the effects of

centuries of law-sanctioned inequality remain painfully evident in our communities and schools.

In the wake "of a system of racial caste only recently ended," large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions. "Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." [Justice Ginsburg supports each of these assertions with citations to social science research.]

... In implementing [the] equality instruction [of the Fourteenth Amendment], as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated. See Carter, *When Victims Happen To Be Black*, 97 Yale L.J. 420 (1988) ("[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppressio[n] is to trivialize the lives and deaths of those who have suffered under racism. To pretend ... that the issue presented in [*Regents of Univ. of Cal. v. Bakke* (1978)] was the same as the issue in [*Brown v. Board of Education* (1954)] is to pretend that history never happened and that the present doesn't exist.").

Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." But where race is considered "for the purpose of achieving equality," no automatic proscription is in order.... The mere assertion of a laudable governmental purpose, of course, should not immunize a race-conscious measure from careful judicial inspection. Close review is needed "to ferret out classifications in reality malign, but masquerading as benign," and to "ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups." *Adarand* (Ginsburg, J., dissenting)....

> Examining in this light the admissions policy employed by the University of Michigan's College of Literature, Science, and the Arts (College), and for the reasons well stated by Justice Souter, I see no constitutional infirmity....

Epilogue to the University of Michigan Cases

Immediately after the Court issued the *Grutter* and *Gratz* decisions, Mary Sue Coleman, the president of the University of Michigan, released the following statement:

> A majority of the Court has firmly endorsed the principle of diversity articulated by Justice Powell in the *Bakke* decision. This is a resounding affirmation that will be heard across the land—from our college classrooms to our corporate boardrooms.
>
> The Court has provided two important signals. The first is a green light to pursue diversity in the college classroom. The second is a road map to get us there. We will modify our undergraduate system to comply with today's ruling, but make no mistake: We will find the route that continues our commitment to a richly diverse student body.
>
> I believe these rulings in support of affirmative action will go down in history as among the great landmark decisions of the Supreme Court. And I am proud of the voice the University of Michigan provided in this important debate. We fought for the very principle that defines our country's greatness. Year after year, our student body proves it and now the Court has affirmed it: Our diversity is our strength.

That, however, was not the end of the story. In the 2006 election, Michigan voters voted 58%-42% to adopt the Michigan Civil Rights Initiative ("Proposition 2"), a proposal most visibly supported by an organization whose executive director was Jennifer Gratz. The voters' decision amended the Michigan Constitution's Bill of Rights to include the following new provision:

> The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Several groups brought a challenge to this provision. Their main claim was that it was

an unconstitutional restructuring of the political system: While others seeking a preferential policy in admissions—on the basis, say, of alumni legacies—could secure it by persuading the institution's board of trustees, Proposition 2 required those seeking a policy giving preference on the basis of race to amend the state constitution. The challengers based their argument in large part on *Hunter v. Erickson* (1969), and *Washington v. Seattle School Dist. No. 1* (1982). *Hunter* had held invalid an Akron city charter amendment that prevented the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of the city's voters. *Seattle* invalidated a state law passed by voters' initiative that effectively prohibited busing (unless court-ordered) for desegregative purposes.

The challenge to Proposition 2 was rejected by the district court. After the Sixth Circuit reversed, the Supreme Court granted certiorari and ruled 6-2 that Proposition 2 did not violate the federal Constitution. Justice Kennedy wrote the opinion for the majority, and Justices Ginsburg and Sotomayor dissented. Justice Kagan recused herself. *Schuette v. Coalition to Defend Affirmative Action* (2014). To this day, state law prohibits the use of affirmative action by any public educational institution in Michigan.