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Affirmative Action and Diversity in Public Education — Legal Developments

Charles V. Dale

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Affirmative Action and Diversity in Public Education — Legal Developments

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Affirmative Action and Diversity in Public Education — Legal Developments

Updated July 22, 2003

Charles V. Dale
Legislative Attorney
American Law Division

Affirmative Action and Diversity in Public Education — Legal Developments

Summary

Nearly a quarter century after the Supreme Court ruling in *Regents of the University of California v. Bakke*, the diversity rationale for affirmative action in public education remains a topic of political and legal controversy. Many colleges and universities have implemented affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Justice Powell, in his opinion for the *Bakke* Court, stated that the attainment of a diverse student body is “a constitutionally permissible goal for an institution of higher education,” noting that “[t]he atmosphere of ‘speculation, experiment, and creation’ so essential to the quality of higher education is widely believed to be promoted by a diverse student body.” In recent years, however, federal courts began to question the Powell rationale, unsettling expectations about the constitutionality of diversity-based affirmative action in educational admissions and faculty hiring.

In striking down the admissions process at the University of Texas School of Law, the Fifth Circuit in *Hopwood v. Texas* concluded that any use of race in the admissions process was forbidden by the Constitution. Siding with *Hopwood* was the Eleventh Circuit, in *Johnson v. Board of Regents*, which voided a numerical “racial bonus” awarded to minority applicants for freshman admission at the University of Georgia. A circuit court conflict was created, however, when the Ninth Circuit relied on *Bakke* to uphold an affirmative action admissions policy to the University of Washington Law School that made extensive use of race-based factors. The judicial divide over *Bakke*’s legacy widened with the opposing decisions of two federal districts courts in the University of Michigan cases. *Gratz v. Bollinger* upheld for diversity reasons the race-based undergraduate admissions program, while the trial judge in *Grutter v. Bollinger* voided the Michigan Law School’s student diversity policy. The Sixth Circuit reversed in *Grutter*, but before it could act in *Gratz*, the Supreme Court agreed to review both the Michigan undergraduate and law school admissions policies.

The Supreme Court handed down its decisions on June 22, 2003. In *Grutter v. Bollinger*, a 5 to 4 majority of the Justices held that the University Law School had a “compelling” interest in the “educational benefits that flow from a diverse student body,” which justified its race-based efforts to assemble a “critical mass” of “underrepresented” minority students. But in the companion decision, *Gratz v. Bollinger*, six Justices decided that the University’s policy of awarding “racial bonus points” to minority applicants was not “narrowly tailored” enough to pass constitutional scrutiny. The decisions resolved, for the time being, the doctrinal muddle left in *Bakke*’s wake. And because the Court’s constitutional holdings translate to the private sector under the federal civil rights laws, nonpublic schools, colleges, and universities are likewise affected.

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Affirmative Action and Diversity in Public Education — Legal Developments

Nearly a quarter century after the Supreme Court ruling in *Regents of the University of California v. Bakke*,¹ the diversity rationale for affirmative action in public education remained a topic of political and legal controversy. Many colleges and universities established affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Justice Powell, in his opinion for the *Bakke* Court, stated that the attainment of a diverse student body is “a constitutionally permissible goal for an institution of higher education,” noting that “[t]he atmosphere of ‘speculation, experiment, and creation’ so essential to the quality of higher education is widely believed to be promoted by a diverse student body.”

In the last decade, however, federal courts began to question the Powell rationale, unsettling expectations about the constitutionality of diversity-based affirmative action in educational admissions and faculty hiring decisions. In striking down the admissions process at the University of Texas School of Law, the Fifth Circuit in *Hopwood v. Texas* concluded that any use of race in the admissions process was forbidden by the Constitution.² Reverberations of the 1996 *Hopwood* opinion are apparent in several subsequent cases, which voided “race conscious” policies maintained by institutions of higher education as well as public elementary and secondary schools. Some judges avoided resolving the precedential effect of Justice Powell’s opinion by deciding the case on “narrow tailoring” or other grounds not dependent on the constitutional status of student diversity as a compelling state interest.³ But, in *Johnson v. Board of Regents*, the Eleventh Circuit sided with

¹438 U.S. 265 (1978).

²78 F.3d 932, 944 (5th Cir.) (“Justice Powell’s view in *Bakke* is not binding precedent on the issue.”), cert. denied, 518 U.S. 1033 (1996). See also *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (stating, without addressing *Bakke*, that diversity cannot “be elevated to the ‘compelling’ level”).

³See *Brewer v. West Irondequoit Center School District*, 212 F.3d 738, 747-49 (2d Cir. 2000) (noting that “there is much disagreement among the circuit courts as to . . . the state of the law under current Supreme Court jurisprudence,” but concluding that, regardless of *Bakke*, reducing racial isolation may be a compelling interest under Second Circuit precedent); *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 130 (4th Cir. 1999) (explaining that the status of educational diversity as a compelling interest is “unresolved,” and rather than rule on the issue, decided the case solely on narrow tailoring grounds); *Wessmann v. Gittens*, 160 F.3d 790, 795, 800 (1st Cir. 1998) (While “[t]he question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled,” the court concluded defendant’s apparent interest

(continued...)

Hopwood by rejecting diversity as constitutional justification for a numerical “racial bonus” awarded minority freshman applicants to the University of Georgia. A circuit court conflict was created when the Ninth Circuit relied on *Bakke* to uphold an affirmative action admissions policy to the University of Washington Law School that made extensive use of race-based factors. *Smith v. University of Washington* was the first federal appeals court to rely on Justice Powell’s decision as binding precedent on the issue.⁴

The judicial divide over *Bakke*’s legacy was vividly underscored by a pair of separate trial court decisions, one upholding for diversity reasons the race-based undergraduate admissions policy of the University of Michigan,⁵ the other voiding a special minority law school admissions program at the same institution.⁶ Restoring a degree of clarity to the law, the U.S. Supreme Court concluded its 2002-03 term with rulings in the Michigan cases. In *Grutter v. Bollinger*⁷ a 5 to 4 majority of the Justices held that the University Law School had a “compelling” interest in the “educational benefits that flow from a diverse student body,” which justified its consideration of race in admissions to assemble a “critical mass” of “underrepresented” minority students. But in a companion decision, *Gratz v. Bollinger*,⁸ six Justices decided that the University’s policy of awarding “racial bonus points” to minority applicants was not “narrowly tailored” enough to pass constitutional scrutiny.

The first part of this report briefly reviews the judicial evolution of race-based affirmative action, particularly in relation to public education. Recent rulings challenging the use of racial admissions and hiring practices by public educational institutions are then considered for their implications on the future development of affirmative action law.

³(...continued)

in “racial balancing” of the student body was neither “a legitimate [n]or necessary means of advancing” diversity); *Buchwald v. University of New Mexico School of Medicine*, 159 F.3d 487, 499 (10th Cir. 1998)(noting the absence of “a clear majority opinion” in *Bakke*, but according qualified immunity to defendants who relied upon that case in adopting a preference based on durational residency); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998)(citing *Bakke* for statement that “whether there may be compelling interests other than remedying past discrimination remains ‘unsettled,’” but finding defendant’s remedial justification valid).

⁴*Smith v. University of Washington Law School*, 233 F.3d 1188, 1201 (9th Cir. 2000)(pursuant to *Bakke*, “educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race conscious measures”), cert. denied, 121 S.Ct. 2192 (2001).

⁵*Gratz v. Bollinger*, 122 F.Supp.2d 811 (E.D.Mich. 2000).

⁶*Grutter v. Bollinger*, 137 F. Supp. 2d 821, 848 (E.D. Mich. 2001)(concluding that “*Bakke* does not stand for the proposition that a university’s desire to assemble a racially diverse student body is a compelling state interest”).

⁷123 S.Ct 2325 (2003).

⁸123 S.Ct 2411 (2003).

Introduction

The origins of affirmative action law may be traced to the early 1960's as first, the Warren, and then the Burger Court, grappled with the seemingly intractable problem of racial segregation in the nation's public schools. Judicial rulings from this period recognized an "affirmative duty," cast upon local school boards by the Equal Protection Clause, to desegregate formerly "dual school" systems and to eliminate "root and branch" the last "vestiges" of state-enforced segregation.⁹ These holdings ushered in a two decade era of "massive" desegregation--first in the South, and later the urban North--marked by federal desegregation orders frequently requiring drastic reconfiguration of school attendance patterns along racial lines and extensive student transportation schemes. School districts across the nation operating under these decrees have since sought to be declared in compliance with constitutional requirements in order to gain release from federal intervention. The Supreme Court eventually responded by holding that judicial control of a school system previously found guilty of intentional segregation should be relinquished if, looking to all aspects of school operations, it appears that the district has complied with desegregation requirements in "good faith" for a "reasonable period of time" and has eliminated "vestiges" of past discrimination "to the extent practicable."¹⁰

A statutory framework for affirmative action in employment and education was enacted by the Civil Rights Act of 1964. Public and private employers with 15 or more employees are subject to a comprehensive code of equal employment opportunity regulations under Title VII of the 1964 Act. The Title VII remedial scheme rests largely on judicial power to order monetary damages and injunctive relief, including "such affirmative action as may be appropriate,"¹¹ to make discrimination victims whole. Except as may be imposed by court order or consent decree to remedy past discrimination, however, there is no general statutory obligation on employers to adopt affirmative action remedies. But the Equal Employment Opportunity Commission has issued guidelines to protect employers and unions from charges of "reverse discrimination" when they voluntarily take action to correct the effects of past discrimination.¹²

The term "affirmative action" resurfaced in federal regulations construing the 1964 Act's Title VI, which prohibits racial or ethnic discrimination in all federally

⁹See e.g. *Green v. County Board*, 391 U.S. 430 (1968); *Swann v. Board of Education*, 402 U.S. 1 (1971); *Keyes v. Denver School District*, 413 U.S. 189 (1973).

¹⁰*Dowell v. Board of Education*, 498 U.S. 237 (1991). See also *Freeman v. Pitts*, 503 U.S. 467 (1993)(allowing incremental dissolution of judicial control) and *Missouri v. Jenkins*, 515 U.S. 70 (1995)(directing district court on remand to "bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'").

¹¹42 U.S.C. 2000e-5(g).

¹²29 C.F.R. Part 1608 (the guidelines state the EEOC's position that when employers voluntarily undertake in good faith to remedy past discrimination by race- or gender-conscious affirmative action means, the agency will not find them liable for reverse discrimination.)

assisted “programs” and activities,¹³ including public or private educational institutions. The Office of Civil Rights of the Department of Education interpreted Title VI to require schools and colleges to take affirmative action to overcome the effects of past discrimination and to encourage “voluntary affirmative action to attain a diverse student body.”¹⁴ Another Title VI regulation permits a college or university to take racial or national origin into account when awarding financial aid if the aid is necessary to overcome effects of past institutional discrimination.¹⁵ Affirmative action in higher education was before the Congress in 1998, when the full House defeated (by a 249 to 171 vote) a bill to prohibit federal aid to colleges and universities that consider race, ethnicity, or sex in the admission process.

The *Bakke* ruling in 1978 launched the contemporary constitutional debate over state-sponsored affirmative action. A “notable lack of unanimity” was evident from the six separate opinions filed in that case. One four-Justice plurality in *Bakke* voted to strike down as a violation of Title VI a special admissions program of the University of California at Davis medical school which set-aside sixteen of one hundred positions in each incoming class for minority students, where the institution itself was not shown to have discriminated in the past. Another bloc of four Justices argued that racial classifications designed to further remedial purposes were foreclosed neither by the Constitution nor the Civil Rights Act and would have upheld the minority admissions quota. Justice Powell added a fifth vote to each camp by condemning the Davis program on equal protection grounds while endorsing the nonexclusive consideration of race as an admissions criterion to foster student diversity.

In Justice Powell’s view, neither the state’s asserted interest in remedying “societal discrimination,” nor of providing “role models” for minority students was sufficiently “compelling” to warrant the use of a “suspect” racial classification in the admission process. But the attainment of a “diverse student body” was, for Justice Powell, “clearly a permissible goal for an institution of higher education” since diversity of minority viewpoints furthered “academic freedom,” a “special concern of the First Amendment.”¹⁶ Accordingly, race could be considered by a university as a “plus” or “one element of a range of factors”—even if it “tipped the scale” among qualified applicants – as long as it “did not insulate the individual from comparison with all the other candidates for the available seats.”¹⁷ The “quota” in *Bakke* was infirm, however, since it defined diversity only in racial terms and absolutely excluded non-minorities from a given number of seats. By two 5-to-4 votes, therefore, the Supreme Court affirmed the lower court order admitting *Bakke* but reversed the judicial ban on consideration of race in admissions.

¹³42 U.S.C. 2000d et seq.

¹⁴44 Fed. Reg. 58,509 (Oct. 10, 1979).

¹⁵59 Fed. Reg. 8756 (Feb. 23, 1994). See also Letter from Judith A. Winston, General Counsel, United States Department of Education, to College and University Counsel, July 30, 1996 (reaffirming that it is permissible in appropriate circumstances for colleges and universities to consider race in admissions decisions and granting financial aid).

¹⁶Id. at 311-12.

¹⁷Id. at 317.

Bakke was followed by *Wygant v. Jackson Board of Education*,¹⁸ where a divided Court ruled unconstitutional the provision of a collective bargaining agreement that protected minority public school teachers from layoff at the expense of more senior white faculty members. While holding the specific layoff preference for minority teachers unconstitutional, seven *Wygant* Justices seemed to agree in principle that a governmental employer is not prohibited by the Equal Protection Clause from all race-conscious affirmative action to remedy its own past discrimination. Another series of decisions approved of congressionally mandated racial preferences to allocate the benefits of contracts on federally sponsored public works projects,¹⁹ and in the design of certain broadcast licensing schemes,²⁰ while condemning similar actions taken by local governmental entities to promote public contracting opportunities for minority entrepreneurs.²¹ However, in each of these cases, the Justices failed to achieve a consensus on most issues, with bare majorities, pluralities, or--as in *Bakke*--a single Justice, determining the “law” of the case.

By the mid-1980's, the Supreme Court had approved the temporary remedial use of race- or gender-conscious selection criteria by private employers under Title VII of the 1964 Civil Rights Act.²² These measures were deemed a proper remedy for “manifest racial imbalance” in “traditionally segregated” job categories, if voluntarily adopted by the employer,²³ or for entrenched patterns of “egregious and longstanding” discrimination by the employer, if imposed by judicial decree.²⁴ In either circumstance, however, the Court required proof of remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Thus, a “firm basis” in evidence, as revealed by a “manifest imbalance”--or “historic,” “persistent,” and “egregious” underrepresentation--of minorities or women in affected job categories was deemed an essential predicate to preferential affirmative action. Second, but of equal importance, all racial preferences in employment were to be judged in terms of their adverse impact on “identifiable” non-minority group members. Remedies that protected minorities from layoff, for example, were most suspect and unlikely to pass legal or constitutional muster if they displaced more senior white workers. But the consideration of race or gender as a “plus” factor in employment decisions, when it did not unduly hinder or “trammel” the “legitimate expectations” of non-minority employees, won ready judicial acceptance.²⁵ Affirmative action preferences, however, had to be sufficiently flexible, temporary in duration, and “narrowly tailored” to avoid becoming rigid “quotas.”

¹⁸476 U.S. 267 (1986).

¹⁹Fullilove v. Klutznick, 448 U.S. 448 (1980).

²⁰Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

²¹City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

²²42 U.S.C. §§ 2000e et seq.

²³United Steelworkers v. Weber, 443 U.S. 193 (1979).

²⁴Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).

²⁵United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transportation Agency, 480 U.S. 616 (1987).

Not until 1989, however, did a majority of the Justices resolve the proper constitutional standard for review of governmental classifications by race enacted for a remedial or other “benign” legislative purpose. Disputes prior to *City of Richmond v. J.A. Croson*²⁶ yielded divergent views as to whether state affirmative action measures for the benefit of racial minorities were subject to the same “strict scrutiny” as applied to “invidious” racial discrimination under the Equal Protection Clause, an “intermediate” standard resembling the test for gender-based classifications, or simple rationality. In *Croson*, a 5 to 4 majority settled on strict scrutiny to invalidate a 30% set-aside of city contracts for minority-owned businesses because the program was not “narrowly tailored” to a “compelling” governmental interest. While “race-conscious” remedies could be legislated in response to proven past discrimination by the affected governmental entities, “racial balancing” untailed to “specific” and “identified” evidence of minority exclusion was impermissible. *Croson* suggested, however, that because of its unique equal protection enforcement authority, a constitutional standard more tolerant of racial line-drawing may apply to Congress. This conclusion was reinforced a year later when, in *Metro Broadcasting, Inc. v. FCC*,²⁷ the Court upheld certain minority broadcast licensing schemes approved by Congress to promote the “important” governmental interest in “broadcast diversity.”

The two-tiered approach to equal protection analysis of governmental affirmative action was short-lived. In *Adarand Constructors, Inc. v. Peña*,²⁸ the Court applied “strict scrutiny” to a federal transportation program of financial incentives for prime contractors who subcontracted to firms owned by “socially and economically disadvantaged individuals,” defined so as to prefer members of designated racial minorities. Although the Court refrained from deciding the constitutional merits of the particular program before it, and remanded for further proceedings below, it determined that all “racial classifications” by government at any level must be justified by a “compelling governmental interest” and “narrowly tailored” to that end. But the majority opinion, by Justice O’Connor, sought to “dispel the notion” that “strict scrutiny is `strict in theory, but fatal in fact,’” by acknowledging a role for Congress as architect of remedies for discrimination nationwide. “The unhappy persistence of both the practices and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response to it.” No further guidance is provided, however, as to the scope of remedial power remaining in congressional hands, or of the conditions required for its exercise. Bottom line, *Adarand* suggests that racial preferences in federal law or policy are a remedy of last resort and, as discussed *infra*, must be adequately justified and narrowly drawn to pass constitutional muster.

The Court applied the *Adarand* rule in *Miller v. Johnson*.²⁹ In *Miller*, the Court reviewed a congressional redistricting plan for the State of Georgia. The plan, adopted at the insistence of the Justice Department, was designed to create three

²⁶488 U.S. 469 (1989).

²⁷497 U.S. 547 (1990).

²⁸515 U.S. 200 (1995).

²⁹515 U.S. 900 (1995).

congressional districts that had a majority of African-American residents. The Court reversed its traditional deference to remedial race-conscious apportionment³⁰ and held that while race could be considered in redistricting, the Justice Department's policy of making race the predominant factor failed the strict scrutiny test. The *Miller* holding was revisited in *Bush v. Vera*³¹ and *Shaw v. Hunt*,³² both of which affirmed *Miller's* essential holding by sustaining challenges to race-based redistricting plans.

Recent Legal Developments

Student Diversity in Higher Educational Admissions.

The emphasis in *Adarand* on past discrimination prompted an upsurge in judicial challenges to educational diversity as an independent justification for student and faculty affirmative action. The notion that diversity could rise to the level of a compelling interest in the educational setting sprang a quarter century ago from Justice Powell's opinion in the *Bakke* case. While concluding that a state medical school could not set-aside a certain number of seats for minority applicants, Justice Powell opined that a diverse student body may serve educators' legitimate interest in promoting the "robust" exchange of ideas. He cautioned, however, that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which ethnic origin is but a single though important element."³³

Justice Powell split the difference between two four-Justice pluralities in *Bakke*. One camp, led by Justice Stevens, struck down the admissions quota on statutory civil rights grounds. Another led by Justice Brennan would have upheld the medical school's policy as a remedy for societal discrimination. Justice Powell held the "dual admissions" procedure to be unconstitutional, and ordered Bakke's admission. But, he concluded, that the state's interest in educational diversity could warrant consideration of students' race in certain circumstances. For Justice Powell, a diverse student body fostered the "robust" exchange of ideas and academic freedom deserving of constitutional protection.

Justice Powell's theory of diversity as a compelling governmental interest did not turn on race alone. He pointed with approval to the "Harvard Plan," which defined diversity in terms of a broad array of factors and characteristics. Thus, an applicant's race could be deemed a "plus" factor. It was considered on a par with personal talents, leadership qualities, family background, or any other factor contributing to a diverse student body. However, the race of a candidate could not be the "sole" or "determinative" factor. No other Justice joined in the Powell opinion

³⁰See, e.g. *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 161 (1977); *Shaw v. Reno*, 509 U.S. 630, 658-75 (1993)(White J., dissenting).

³¹517 U.S. 952 (1996).

³²517 U.S. 899 (1996).

³³*Bakke*, 438 U.S. at 315.

Although Justice Powell's opinion announced the judgment of the Court, no other *Bakke* Justices joined him on that point. Justice Powell ruled the "dual admission program" at issue to be unconstitutional and the white male plaintiff entitled to admission, while four other Justices reached the same result on statutory rather than constitutional grounds. Another four Justice plurality concluded that the challenged policy was lawful, but agreed with Justice Powell that the state court had erred by holding that an applicant's race could never be taken into account. Only Justice Powell, therefore, expressed the view that the attainment of a diverse student body could be a compelling state interest.

For nearly two decades, colleges and universities relied on the Powell opinion in *Bakke* to support race-conscious student diversity policies. Consideration of race in admissions, which took various forms, stood pretty much unchallenged until *Hopwood v. State of Texas*.³⁴ A panel of the Fifth Circuit repudiated the Powell diversity rationale when it voided a special admission program of the University of Texas law school. Unlike *Bakke*, the Texas program entailed no explicit racial quota. But, in other respects, it was a classic dual track system: one standard for blacks and Hispanics, another for everyone else, and cutoff scores for minorities were lower. The Powell opinion was not binding precedent, the *Hopwood* panel ruled, since it was not joined by any other justice. Thus, race could be considered in admissions only to remedy past discrimination by the law school itself, which was not shown in *Hopwood*.

Two other federal circuit courts, besides the Sixth Circuit Michigan case, have looked at race-based college admissions since *Bakke*. *Johnson v. Board of Regents*³⁵ struck down the award of "racial bonus" points to minority students as one of 12 factors – academic and nonacademic – considered for freshman admissions to the University of Georgia. The Eleventh Circuit majority was skeptical of the Powell opinion but did not take a stand on the diversity issue. Instead, the program failed the second requirement of strict scrutiny. It was not "narrowly tailored." That is, it "mechanically awards an arbitrary 'diversity' bonus to each and every non-white applicant at a decisive stage in the admissions process." At the same time, the policy arbitrarily limited the number of nonracial factors that could be considered, all at the expense of white applicants, even those whose social or economic background and personal traits would promote "experiential" diversity. On the other hand, the Ninth Circuit upheld the minority law school admissions program at the University of Washington on the basis of *Bakke*. The appeals court in *Smith v. University of Washington Law School*³⁶ concluded that the four Brennan Justices who approved of the racial quota in *Bakke* "would have embraced [the diversity rationale] if need be." Justice Powell's opinion thus became the "narrowest footing" for approval of race in admission and was the "holding" of *Bakke*.

³⁴95 F.3d 53 (5th Cir.), cert. denied No. 95-1773, 116 S. Ct. 2581 (1996).

³⁵263 F.3d 1234 (11th Cir. 2001).

³⁶233 F.3d 1188 (9th Cir. 2000).

Post-*Bakke* appeals courts, guided by *Marks v. United States*,³⁷ sliced and diced the various opinions in *Bakke* to come up with a controlling rationale. In *Marks*, the Supreme Court ruled that when a majority of Justices are unable to agree on a controlling rationale, the holding of the Court is the position of those Justices concurring in the judgment on the narrowest grounds. The pro-diversity circuits concluded that the Powell opinion approving race as a “plus” factor was narrower than the Brennan rationale, which would have upheld the race quota in *Bakke* on a societal discrimination theory. The opposing circuits had generally reasoned otherwise or concluded that the competing *Bakke* opinions defy rational comparison so that absent a majority consensus, the Powell opinion was without controlling weight. In no way bound by *Bakke*, Supreme Court review of the Michigan cases augured fundamental reexamination of issues raised by that earlier precedent.

The University of Michigan Admissions Policy.

The judicial divide over the student diversity policies deepened with the Michigan case. That case is really two cases. One federal district court in *Grutter* originally struck down the student diversity policy of the University of Michigan Law School. Another judge upheld a procedure awarding points to “underrepresented minority” applicants to the undergraduate school.³⁸ Based on *Bakke*, the Sixth Circuit reversed *Grutter* and permitted the Law School to consider race in admissions.³⁹ The Supreme Court granted *certiorari* in *Grutter* and agreed to review *Gratz* prior to judgment by the Sixth Circuit.

Undergraduate admission to the University of Michigan had been based on a point system or “student selection index.” A total possible 150 points could be awarded for factors, academic and otherwise, that made up the selection index. Academic factors accounted for up to 110 points, including 12 for standardized test performance. By comparison, 20 points could be awarded for one, but only one, of the following: membership in an underrepresented minority group, socioeconomic disadvantage, or athletics. Applicants could receive one to four points for “legacy” or alumni relationships, three points for personal essay, and five points for community leadership and service, six points for in-state residency, etc. In practice, students at the extremes of academic performance were typically admitted or rejected on that basis alone. But for the middle range of qualified applicants, these other factors were often determinative. Finally, counselors could “flag” applications for review by the Admissions Review Committee, where any factor important to the freshman class composition – race included – was not adequately reflected in the selection index score.

In upholding this policy, the district court in *Gratz* found that *Bakke* and the University’s own evidence demonstrating the educational benefits of racial and ethnic diversity established a compelling state interest. And the award of 20 points for minority status was not a “quota” or “dual track” system, as in *Bakke*, but only a

³⁷430 U.S. 188 (1977).

³⁸*Gratz v. Bollinger*, 122 F. Supp. 811 (E.D. Mich. 2000).

³⁹*Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

“plus factor,” to be weighed against others in the selection process. Thus, the constitutional demand for “narrow tailoring” was satisfied. The *Gratz* district court also concluded that “vigorous minority recruitment” and other race-neutral alternatives to the current policy would not yield a “sufficiently diverse student body.”

Generally setting the bar for admission to the Michigan Law School was a “selection index” based on applicants’ composite LSAT score and undergraduate GPA. A 1992 policy statement, however, made an explicit commitment to “racial and ethnic diversity,” seeking to enroll a “critical mass” of black, Mexican-American, and Native American students. The objective was to enroll minority students in sufficient numbers to enable their participation in classroom discussions without feeling “isolated or like spokesmen for their race.” To foster, “distinctive perspectives and experiences,” admission officers consider a range of “soft variables” – e.g. talents, interests, experiences, and “underrepresented minority” status – in their admissions decisions. In the course of each year’s admissions process, the record showed, minority admission rates were regularly reported to track “the racial composition of the developing class.” The 1992 policy replaced an earlier “special admissions program,” which set a written goal of 10-12% minority enrollment and lower academic requirements for those groups. The district court in *Grutter* made several key findings: there is a “heavy emphasis” on race in the law school admissions process; that over a period of time (1992- 1998) minorities ranged from 11% to 17% of each incoming class; and that large numbers of minority students were admitted with index scores the same as or lower than unsuccessful white applicants.

Writing for the Sixth Circuit majority, Judge Martin adopted the Powell position in *Bakke* to find that the law school had a compelling interest in achieving a racially diverse student body, and that its admission’s policy was “narrowly tailored” to that end. “Soft variables” were found to treat each applicant as an individual and to be “virtually indistinguishable” from “plus factors” and the Harvard Plan approved by Justice Powell in *Bakke*. The law school’s policy “did not set-aside or reserve” seats on the basis of race. Rather, in pursuit of a “critical mass,” the policy was designed to ensure that a “meaningful number” of minority students were able “to contribute to classroom dialogue without feeling isolated.” The majority opinion further emphasized that the admissions program was “flexible,” with no “fixed goal or target;” that it did not use “separate tracks” for minority and nonminority candidates; and did not function as a “quota system.”

Supreme Court Review of the Michigan Cases.

Without waiting for a final appeals court decision, the Supreme Court agreed to review the *Gratz* undergraduate admissions case in tandem with the Sixth Circuit ruling in *Grutter* on December 2, 2002. Oral arguments were heard on April 1, 2003. Following a reportedly intense debate within the Bush Administration, the Department of Justice filed briefs amicus curiae on January 16, 2003 opposing the

affirmative action admissions policies of the University of Michigan and advocating race neutral alternative plans for achieving a diverse student body.⁴⁰

The Justice Department's Legal Position.

The Justice Department entered the debate when it filed the government's briefs in support of the white students rejected for admission in *Grutter* and *Gratz*. It did not attack *Bakke*, in so many words, nor did it question the educational benefits of diversity in the academic setting. Instead, the thrust of the government's argument was that Michigan undergraduate and law school admissions policies failed the constitutional narrow tailoring requirement because they ignored race neutral alternatives. Specifically, the briefs contended, "percentage plans" in Texas, Florida, and California that guarantee admission to top high school graduates in those states, regardless of race, have succeeded in achieving the "paramount interest" of the state to insure "open" and "equal access" to all students. Alternatively, "experiential diversity," like that urged by Judge Boggs' dissent in *Grutter*, was advocated as a way to achieve "genuine" diversity of "experiences and viewpoints." Consideration of "numerous race neutral factors" – e.g. work and family history, talents, leadership potential, socioeconomic status, etc. – for each candidate, the government argued, avoided constitutional objection and provided better proxies for student diversity than race.

In contrast, Michigan's 1999 undergraduate admissions policy was condemned by the government in *Gratz* for providing an "enormous inflexible bonus" to preferred minority applicants "without regard to their background, academic performance, or life experiences. . ." By "flagging" minority applications for individualized review "solely" because of race, while automatically rejecting other equally qualified candidates, the current plan created a "dual admissions system." The change from an "open quota system" of grids in 1995-1998 to a "race-based bonus" a year later, the brief argued, was one of "mechanics, and not the substance" in the selection process. "After all, adding 20 points has no independent significance apart from its effect on the number of preferred minority students admitted. Selecting the 'correct' race-based bonus generates the 'correct' number of minority students." And simply "disguis[ing] its racial quota" did not change the "overwhelming" importance of race in the process of "admitting virtually every qualified under-represented minority applicant, while denying admission to non-preferred applicants with the same or better qualifications based solely on their race."⁴¹

Similarly, in *Grutter*, the quest for a "critical mass" of minority students in law school admissions was opposed by the government as the "functional equivalent" of a quota system and because the university ignores race neutral alternatives. In particular, the Justice brief pointed to a "remarkable degree of consistency" in

⁴⁰Brief for the United States As Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*, No. 02-241 (filed 1-17-2003); *Id.* *Gratz v. Bollinger*, No. 02-516 (filed 1-17-2003).

⁴¹*Gratz* brief, pp. 21- 26.

minority enrollment from 1995 to 1998 – between 44 and 47 students per year – coupled with certain administrative aspects of the admissions process.

Respondents’ race-based pursuit of a predetermined ‘critical mass’ is not meaningfully different from the strict numerical quotas this Court invalidated in *Bakke*. Variations in the ultimate number of enrolled minorities have more to do with respondents’ inability to predict rates of acceptance with absolute precision than it does to any true flexibility that would meaningfully distance the program from more traditional quotas. The Dean and the Director of Admissions consult ‘daily admissions reports’ that reflect ‘how many students from various racial groups have applied, how many have been accepted, how many have been placed on the waiting list, and how many have paid a deposit.’ . . . The fact that the Law School enrolls minorities in percentages ‘roughly equal’ to their percentages in the applicant pool ‘supports the inference that [it] seeks to allocate [places in an entering class] based on race. . . . After all, if the ‘critical mass’ were truly an undefined number or percentage, as the Law School claims, actual enrollment figures for preferred minority applicants would not consistently reflect their percentages in the total applicant pool.’⁴²

According to the Justice briefs, other factors further contradicted claims by the University to a “narrowly tailored” admissions policy. Thus, the government argued, Michigan permits racial preferences “in perpetuity;” its current policies are “inflexible” in “mechanically” awarding an “enormous” and “disproportionate” weight to race over “other factors related to educational diversity;” and they “unfairly burden innocent third parties” by “accepting favored minority candidates who have lesser objective qualifications.”⁴³

While the briefs were circumspect on the question of racial diversity and *Bakke* as precedent, a few clues as to the government’s position were evident. Noting the current state of judicial disarray, in a passing footnote, the *Grutter* brief dismissed the quest for *Bakke*’s meaning as “not useful,” instead urging the court to “resolve the constitutionality of race-admissions standards by focusing on the availability of race-neutral alternatives.”⁴⁴ Also, in describing the “important and entirely legitimate government objective” of insuring that public educational institutions are “open and accessible” to all persons, the Justice briefs departed from *Bakke*’s constitutional notion of educational diversity as a “compelling” state interest. Finally, in *Grutter*, the government voiced skepticism for the empirical basis of Michigan’s admissions policies, arguing that “[t]he Law School’s rationale for seeking diversity has not always been consistent.” And, further, “[i]f all a university ‘need do is find. . . report[s],’ studies, or recommendations ‘to enact’ a race-based admissions policy, ‘the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity.’”⁴⁵

⁴²Grutter brief at pp 28-29, 30.

⁴³Gratz brief, pp.27 -31; Grutter brief, pp. 33-37.

⁴⁴Grutter brief, pp15-16, n.4.

⁴⁵Id., p. 32, n. 8.

Oral Arguments.

Oral arguments before the Supreme Court on April 1, 2003 offered few real surprises. Justice O'Connor appeared the key vote going in, and she remained so coming out. Three Justices – Rehnquist, Scalia, and Kennedy – seemed distinctly unsympathetic to the University's case. Each branded the undergraduate and/or law school admissions policy with the dreaded “q” word – i.e. “quota” or “disguised quota” – at some point during the two hour argument. Sparse questioning by Justice Thomas was less revealing. But judging from his prior opinions on the same subject, he seemed a reliable fourth vote for any Rehnquist-led plurality.

On the other side, Justices Souter and Ginsburg tried to head off an attack by the Solicitor General (SG), who joined the petitioners' campaign against the University admissions policies. Several former and retired military officers filed an *amicus curiae* brief in support of current race-conscious admissions policies of the U.S. armed services academies. Asked to reconcile this brief with the Justice Department's own position, the SG observed only that the issues were different, given the constitutional deference generally accorded the military in governing its own affairs. Justice Breyer's questioning also seemed to signal acceptance of diversity in higher education as a compelling state interest. Some greater skepticism of the Michigan policy was voiced by Justice Stevens, who also voted to outlaw racial considerations in the *Bakke* case.

Justice O'Connor was sympathetic to the University's position that racial diversity has a valuable role to play in the educational process, and the world of work in a global economy. She expressed impatience with the petitioners' “absolutist” position, noting past cases where the Court had approved of voluntary affirmative action by employers. But the lack of a “sunset” or time limit on the consideration of race for diversity purposes prompted misgivings on her part. Justice O'Connor, therefore, appeared ready to approach the Michigan policies from the narrow tailoring angle – for example, by requiring further consideration of race neutral alternatives – and preserve some “wobble room” for use of “race conscious” diversity programs – at least temporarily – where all else fails.

The Supreme Court handed down its rulings in *Grutter* and *Gratz* on June 23, 2003. Writing for the majority in the former was Justice O'Connor, who was joined by Justices Stevens, Souter, Ginsburg, and Breyer in upholding the Law School admissions policy. Chief Justice Rehnquist authored an opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined, striking down the University's undergraduate racial admissions program. Justice Breyer added a sixth vote to invalidate the racial bonus system in *Gratz*, but declined to join the majority opinion.

The *Grutter* Decision.

A notable aspect of the *Grutter* majority opinion was the degree to which it echoed the Powell rationale from *Bakke*. Settling, for the present, the doctrinal imbroglio that had consumed so much recent lower court attention, Justice O'Connor quoted extensively from Justice Powell's opinion, finding it to be the “touchstone for constitutional analysis of race-conscious admissions policies.” But

her opinion was not without its own possible doctrinal innovations. Overarching much of her reasoning were two paramount themes, that drew considerable criticism from Justice Thomas and his fellow dissenters. First, in applying “strict scrutiny” to the racial aspects of the Law School admissions program, Justice O’Connor stressed the situational nature of constitutional interpretation, taking “relevant differences into account.” Thus, the majority opines, “[c]ontext matters when reviewing race-based governmental action” for equal protection purposes and “[n]ot every decision influenced by race is equally objectionable,” but may depend upon “the importance and the sincerity of the reasons advanced by the governmental decisionmaker” for that particular use of race. Second, and equally significant, was the deference accorded to the judgment of educational decisionmakers in defining the scope of their academic mission, even in regard to matters of racial and ethnic diversity. “[U]niversities occupy a special niche in our constitutional tradition,” Justice O’Connor states, such that “[t]he Law School’s educational judgment . . . that diversity is essential to its educational mission is one to which we defer.” Institutional “good faith” would be “presumed” in the absence of contrary evidence. Justice Thomas’ dissent, joined by Justice Scalia, took particular exception to what he viewed as “the fundamentally flawed proposition that racial discrimination can be contextualized” – deemed “compelling” for one purpose but not another – or that strict scrutiny permits “any sort of deference” to “the Law School’s conclusion that its racial experimentation leads to educational benefits.” Indeed, the dissenters found such deference to be “antithetical” to the level of searching review demanded by strict scrutiny.

Satisfied that the Law School had “compelling” reasons for pursuing a racially diverse student body, the Court moved to the second phase of strict scrutiny analysis. “Narrow tailoring,” as noted, requires a close fit between “means” and “end” when the state draws any distinction based on race. In *Grutter*, the concept of “critical mass,” so troubling to several Justices at oral argument, won the majority’s approval as “necessary to further its compelling interest in securing the educational benefits of a diverse student body.” In this portion of her opinion, Justice O’Connor draws chapter and verse from the standards articulated by Justice Powell in *Bakke*.

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.

Justice O’Connor drew a key distinction between forbidden “quotas” and permitted “goals,” exonerating the Law School’s admission program from constitutional jeopardy. She observes that both approaches pay “some attention to numbers.” But while the former are “fixed” and “reserved exclusively for certain minority groups,” the opinion continues, the Law School’s “goal of attaining a critical mass” of minority students required only a “good faith effort” by the institution. In addition, Justice O’Connor notes, minority Law School enrollment between 1993 and 2000 varied from 13.5 to 20.1 percent, “a range inconsistent with a quota.” Responding,

in his separate dissent, the Chief Justice objected that the notion of a “critical mass” was a “sham,” or subterfuge for “racial balancing,” since it did not explain disparities in the proportion of the three minority groups admitted under its auspices.

Other factors further persuaded the Court that the Law School admissions process was narrowly tailored. By avoiding racial or ethnic “bonuses,” the policy permitted consideration of “all pertinent elements of diversity,” racial and nonracial, in “a highly individualized, holistic review of each applicant’s file.” Justice O’Connor also found that “race neutral alternatives” had been “sufficiently considered” by the Law School, although few specific examples are provided. Importantly, however, the opinion makes plain that “exhaustion” of “every conceivable alternative” is not constitutionally required, only a “serious good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” Consequently, the Law School was not required to consider a lottery or lowering of traditional academic benchmarks – GPA and LSAT scores – for all applicants since “these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.” And, because the admissions program was based on individual assessment of all pertinent elements of diversity, it did not “unduly burden” non-minority applicants. Nonetheless, as she had during oral argument, Justice O’Connor emphasized the need for “reasonable durational provisions,” and “periodic reviews” by institutions conducting such programs. To drive home the point, the majority concludes with a general admonition. “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

Besides Justices Thomas and Scalia, and the Chief Justice, another dissenting opinion was filed by Justice Kennedy, who agreed with his brethren that the “constancy” of minority admissions over a period of years “raised a suspicion” of racial balancing that the Law School was required by the rigors of strict scrutiny to rebut. Arguing from different statistics than the majority, he found “little deviation among admitted minority students from 1995 to 1998,” which “fluctuated only by 0.3% from 13.5% to 13.8” and “at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range.” In addition, he contended, the use of daily reports on minority admissions near the end of the process shifted the focus from individualized review of each applicant to institutional concerns for the numerical objective defined by a “critical mass.” For these reasons, he agreed with his fellow dissenters that deference to the Law School in this situation was “antithetical to strict scrutiny, not consistent with it.”

The Gratz Decision.

The four *Grutter* dissenters were joined by Justices O’Conner and Breyer in striking down the racial bonus system for undergraduate admissions in *Gratz*. Basically, the same factors that saved the Law School policy, by their absence, conspired to condemn the undergraduate program, in the eyes of the majority. Since the university’s “compelling” interest in racial student diversity was settled in *Grutter*, the companion case focused on the reasons why the automatic award of 20 admission points to minority applicants failed the narrow tailoring aspect of strict scrutiny analysis. Relying, again, on the Powell rationale in *Bakke*, the policy was deemed more than a “plus” factor, as it denied each applicant “individualized

consideration” by making race “decisive” for “virtually every minimally qualified underrepresented minority applicant.” Nor did the procedure for “flagging” individual applications for additional review rescue the policy since “such consideration is the exception and not the rule,” occurring – if at all – only after the “bulk of admission decisions” are made based on the point system. The opinion of the Chief Justice rejected the University’s argument based on “administrative convenience,” that the volume of freshman applications makes it “impractical” to apply a more individualized review. “[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.” Finally, the majority makes plain that its constitutional holding in *Gratz* is fully applicable to private colleges and universities pursuant to the federal civil rights laws. “We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI [of the 1964 Civil Rights Act].”

Justice O’Connor, concurring in *Gratz*, emphasized the “mechanical” and “automatic” nature of the selection index scoring, which distinguished it from the Law School program, and made impossible any “nuanced judgments” concerning “the particular background, experiences, or qualities of each particular candidate.” She agreed that the Admissions Review Committee was “kind of an afterthought,” particularly since the record was barren of evidence concerning its methods of operation and “how the decisions are actually made.”

Dissenting opinions were filed jointly, by Justices Stevens and Souter, and separately by Justice Ginsburg. The former argued on technical grounds that since the named petitioners had already enrolled in other schools, and were not presently seeking freshman admission at the university, they lacked standing to seek prospective relief and the appeal should be dismissed. But Justice Souter argued separately on the merits that the Michigan undergraduate admission program was sufficiently different from the racial quota in *Bakke* to be constitutionally acceptable. At the very least, he felt, a more appropriate course would be to remand the case for further development of the record to determine whether the entire “admissions process, including review by the [Admissions Review Committee], results in individualized review sufficient to meet the Court’s standards.” Justice Ginsburg found “no constitutional infirmity” in the Michigan program since only “qualified” applicants are admitted, the current policy is not intended “to limit or decrease” admissions of any racial or ethnic group, and admissions of nonminority groups is not “unduly restricted.” More broadly, she opined that government decisionmakers may properly distinguish between policies of inclusion and exclusion, because the former are more likely to comport with constitutional imperatives of individual equality.

Racial Student Assignments to Public Elementary and Secondary Schools.

The constitutionality of race-conscious admissions to magnet or alternative schools, designed to promote elementary and secondary school desegregation, has also been before the courts. A federal court in 1974 found the Boston schools to be

unlawfully segregated and ordered into effect a desegregation plan requiring, *inter alia*, a thirty-five percent set-aside for admission of black and Hispanic students to the city's three "examination" schools.⁴⁶ This policy was revised to eliminate the set-aside after a successful equal protection challenge was brought in 1996 by a white student who was denied admission to the famed Boston Latin School.⁴⁷ Under the new policy, half of the available seats at each school was awarded solely on the basis of students' composite scores, derived from grade point averages and entrance examination scores. The other half was also awarded according to composite score rankings, but in conjunction with "flexible racial/ethnic guidelines." The guidelines required that these seats be allocated by composite rank score in proportion to the racial and ethnic composition of each school's remaining qualified applicant pool. A white student denied admission for the 1997-98 academic year, despite higher qualifications than several admitted minority students, challenged the guidelines on equal protection grounds.

In *Wessman v. Gittens*,⁴⁸ the First Circuit reversed a judgment in favor of the Boston School Committee, which had adopted the two-track admissions policy. The district court had applied strict scrutiny, but nonetheless concluded that the policy was constitutional based on the school system's compelling interests in diversity and in "overcoming the vestiges of past discrimination and avoiding the re-segregation of the Boston Public Schools." According to the appeals court, however, the School Committee had not produced sufficient evidence to demonstrate a compelling interest in either goal or that the admissions policy was narrowly tailored to those ends. First, there was no "solid and compelling evidence" that student diversity was "in any way tied to the vigorous exchange of ideas," nor that any achievement gap between minority and non-minority students amounted to "vestiges" of the system's past discrimination. The policy also swept "too broadly" by dividing individuals into "only five groups — blacks, whites, Hispanic, Asians, and Native Americans — without recognizing that none is monolithic." Thus, even assuming *arguendo* that diversity might, in some circumstances, be sufficiently compelling to justify race-conscious actions, "the School Committee's flexible racial/ethnic guidelines appear to be less a means of attaining diversity in any constitutionally relevant sense and more a means of racial balancing," which is neither "a legitimate [n]or necessary means of advancing the lofty principles credited in the policy."⁴⁹

In a pair of recent decisions, the Fourth Circuit invalidated affirmative action policies for admission of minority students to magnet schools in Arlington County, Va. and Montgomery County, Md. Because neither policy was found to satisfy the "narrow tailoring" aspect of strict scrutiny as required by *Adarand*, however, it was unnecessary for the court to decide whether educational diversity may be a "compelling interest" justifying race based admissions in other circumstances. At

⁴⁶See *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974).

⁴⁷See *McLaughlin v. Boston School Committee*, 938 F. Supp. 1001 (D.Mass. 1996).

⁴⁸160 F.3d 790 (1st Cir. 1998).

⁴⁹160 F.3d at 799.

issue in the Arlington County case, *Tuttle v. Arlington County School Board*,⁵⁰ was a “sequential, weighted random lottery” system developed in response to prior litigation which took account of three factors – low-income background, the applicant’s primary language, and race or ethnicity – in determining admission to three county magnet schools. The probabilities associated with each applicant’s lottery number were weighted, so that members of under-represented groups, as defined by any of those factors, had an increased probability of selection. In the Montgomery County case, *Eisenberg v. Montgomery County Public Schools*,⁵¹ school officials considered a variety of factors, including a “diversity profile” of affected schools, when deciding whether to grant applications for transfer from a student’s assigned school to another county public school. The diversity profile, in effect, precluded transfer of students of a particular racial or ethnic background – white, black, Asian or Hispanic – from any school where the percentage of that group in the student body had declined over the preceding three years and was under-represented when compared to the county as a whole. In both cases, the challenged policy led to white students being denied admission to schools of their choice for racial reasons tied to student diversity.

While the Arlington County school system, earlier in its history, had been found to be *de jure* segregated and was required to desegregate by judicial decree, Montgomery County had never been subject to court supervised desegregation. Rather, the Maryland district had dismantled its formerly segregated schools by voluntary means, one aspect of which included implementation of a magnet school program. In neither case, however, did the Fourth Circuit attribute a remedial purpose to the diversity interest asserted by the school board, but found that the admissions and transfer policies in question were an exercise in “racial balancing.” In so doing, the appeals court sidestepped deciding whether racial diversity in education could ever be a “compelling” state interest, proceeding instead to find the challenged policies failed the narrow tailoring aspect of *Adarand* analysis. In the Arlington case, the school board was found to have disregarded “one or more race-neutral policies” recommended by an advisory committee as alternatives to promote diversity. The duration of the plan was criticized for being “in perpetuity” and without “a logical stopping point.” Although the weighted lottery did not “set-aside” positions for minorities, according to the court, the practical effect was the same since it “skew[ed] the odds of selection” in their favor to achieve classroom diversity “in proportions that approximate the distribution of students from [racial] groups in the district’s overall student population.” Finally, the plan lacked flexibility and impermissibly burdened “innocent third parties” who are denied admission for racial or ethnic reasons. Montgomery County’s race-conscious transfer policy was characterized by the court as “mere racial balancing in a pure form” due to many of the same failings and because it was not directed at the correction of any past constitutional wrongs.

The County annually ascertains the percentage of enrolled public school students by race on a county-wide basis, and then does the same for each school. It then assigns a numbered category for each race at each school, and administers the

⁵⁰189 F.3d 431 (4th Cir. 1999), cert. denied 120 S.Ct 1420 (2000).

⁵¹197 F.3d 123 (4th Cir. 1999), cert. denied 120 S.Ct 1420 (2000).

transfer policy so that the race and percentage in each school to which students are assigned by residence is compared to the percentage of that race in the countywide system. The transfer policy is administered with an object toward maintaining this percentage of racial balance in each school. . . . Although the transfer policy does not necessarily apply ‘hard and fast quotas,’ its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.⁵²

Montgomery County officials were directed to eliminate the consideration of race from student transfer decisions, while in the Arlington case, further proceedings in the district court were ordered to review alternative admissions policies.

On April 15, 2002, the U.S. Supreme Court denied review of the Fourth Circuit *en banc* decision in *Belk v. Charlotte Mecklenburg Board of Education*.⁵³ The appeals court there affirmed a finding that “all vestiges of past discrimination” had been erased from the school system where student busing was first approved by the Supreme Court as a desegregation remedy. Because of its newly achieved “unitary status,” the district court had relinquished jurisdiction of the desegregation case and ordered the school district to stop “assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides or other means that deny students an equal footing based on race.” The specific target of Judge Potter’s order was the race-conscious policy for admission of students to the magnet school program operated by the district for desegregation purposes. After nearly three decades of court-enforced desegregation, a white parent sued the school district, charging that his daughter had twice been denied admittance to a magnet school because she was not black. Six other white parents joined the case, arguing that the school district had been successfully rid of segregation and with it any constitutional justification for race-based preferences.

Judge Potter agreed, calling the argument for continuing the desegregation process a “bizarre posture” and the focus on racial diversity a “social experiment.” The policy of allocating available magnet school spaces to reflect the racial student makeup of the district as a whole was condemned by the court as “nothing more than a means for racial balancing,” which could not be justified by a “litany of generalizations lauding the benefits of racial diversity.” A majority of the *en banc* appellate court affirmed that the school district had eliminated the “last vestiges” of unconstitutional segregation to the fullest extent “practicable.” Any remaining racial concentrations, therefore, were a consequence of factors – namely residential segregation – beyond the power of school authorities or the courts to control. In a unitary setting, the magnet admissions process could not clear the first hurdle by showing a compelling governmental interest, and the school district could not make “any further use of race-based lotteries, preferences, and set-asides in student assignment.” A slightly different majority ruled that the school board could not be held liable for its use of race in assigning students to magnet schools since the program had originated in a then valid desegregate order. But if the same plan were

⁵²Id. at 133.

⁵³269 F.3d 305 (4th Cir. 2001), cert. denied, 70 USLW 3482 (S.Ct. 4-15-2002).

adopted after the district is declared unitary, it would clearly be unconstitutional under *Tuttle* and *Eisenberg* (*supra*), these judges opined.

The diversity issue has also arisen in another educational setting. The University of California operates a popular elementary school as a “laboratory” to research urban education and “to foster a more effective educational system primarily for urban elementary students.” Beyond basic research, the school develops new techniques for educating students in multi-cultural urban settings and conducts seminars, workshops, and teacher training programs throughout the state. The school considers applicants’ race and ethnicity to obtain adequate cross-samples of the general population and thus to maintain “the scientific credibility of its educational studies.” The plaintiff in *Hunter v. Regents of the University of California*⁵⁴ challenged the school’s admissions policy as an equal protection violation. While perhaps not tantamount to a diversity rationale, the Ninth Circuit nonetheless agreed with the district court judge that the state’s interest in “operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools” was compelling even absent any purpose of remedying past discrimination.

The challenges posed by California’s increasingly diverse population intensify the state’s interest in improving urban public schools. Cultural and economic differences in the classroom pose special difficulties for public school teachers. In his decision, Judge Kenyon noted that defendants presented ‘an exhaustive list of such issues and challenges [that] includes limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children.’ [An expert witness] stated that ‘[t]here is no more pressing problem, facing California, or indeed the nation, than urban education; for it is in the urban school system that the majority of California’s future citizens will be educated (either well or poorly), creating the basic fabric for the society of the future.’ . . . Given this record, the district court concluded, and we agree, that ‘the defendants’ interest in operating a research-oriented elementary school is compelling.’⁵⁵

Given the demographics of California’s urban population, and the necessity of creating a multi-cultural laboratory setting, the consideration of race for admission to the school was deemed “narrowly tailored” since “it would not be possible, nor would it be reasonable, to require defendants to attempt to obtain an ethnically diverse representative sample of students without specific racial target and classifications.”⁵⁶

Faculty Diversity. Corollary issues concerning faculty diversity have also been before the courts recently, including the *Piscataway* case, which was dismissed as moot by the Supreme Court after the parties reached an out-of-court settlement.

⁵⁴1999 WL 694865 (9th Cir. 9-9-99).

⁵⁵*Id.* at pp 2-3.

⁵⁶*Id.* at 4.

The appeal from *Taxman v. Board of Education of Piscataway Township*⁵⁷ had asked the High Court to consider whether a local school board's desire to promote faculty diversity could legally justify its decision to protect a black teacher from layoff, while dismissing an equally qualified white colleague, in the absence of a showing of past discrimination or a "manifest" racial imbalance in its workforce. Two teachers, one white, the other black, were hired on the same day in 1980 and were deemed equally qualified for their positions in the business education department when a reduction in force became necessary eight years later. Minority teachers were not underrepresented on the overall faculty--constituting 9.5 % of the district's teachers versus 5.8 % of the relevant county labor pool--and no evidence of past discrimination by the school district was presented at trial. A "coin toss" had traditionally been used to determine retention rights among similarly situated employees in the past. But because only one black teacher was among the business department's ten-member staff, the school district relied on its affirmative action policy to retain the minority employee rather than her white colleague in the interests of promoting racial diversity.

An *en banc* majority of the Third Circuit determined that however laudable the school board's objective might be, laying off a white teacher "solely" on the basis of race to achieve faculty diversity exceeded the bounds of controlling Supreme Court precedent. Title VII rulings in *Weber* and *Johnson (supra)* permitted employers to make employment decisions based on race or gender in order to redress a "manifest" imbalance of minorities and women in "traditionally segregated job categories." But judicial teachings generally caution against affirmative action measures that "unnecessarily trammel" or frustrate the "legitimate and firmly rooted expectation in continued employment" of affected non-minorities. In its 1986 *Wygant* decision, the Court voided race-based layoff protection for minority public school teachers because of its immediate adverse impact on "identifiable" senior white employees. Consequently, while applauding the board's commitment to racial diversity, the *Taxman* appellate opinion rejected the non-remedial educational purposes asserted by the board for its affirmative action plan because "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." And because the entire burden of the board's plan fell upon the white teacher whose interests were "unnecessarily trammelled" by the loss of her job, the race-based policy violated Title VII.

On March 9, 1998, the Supreme Court declined to review the legality of a "minority bonus policy" in an affirmative action plan established for Nevada's public colleges to redress a lack of minority faculty members. In *Farmer v. University and Community College Systems of Nevada*,⁵⁸ the plaintiff had been one of three finalists for a faculty position in the sociology department which the university awarded to a black male candidate from Uganda with "comparable" qualifications. The university's minority bonus policy, which the Nevada Supreme Court described as an "unwritten amendment" to its affirmative action plan, allowed a department to hire an additional faculty member following the initial placement of a minority candidate.

⁵⁷91 F.3d 1547 (3d Cir. 1996), appeal dismissed sub nom. U.S. v. Board of Education of the Township of Piscataway, 118 S. Ct. 595 (1998).

⁵⁸930 P.2d 730 (Nev. 1997), cert. denied No. 97-1104, 118 S. Ct 1186 (1998).

As a consequence, plaintiff was hired by the sociology department a year later, but at a lesser salary than the earlier-hired black candidate. The differential was defended by the university as reflecting a pay premium necessary “to prevent[] a bidding war between two prestigious universities slated to interview [the black candidate].” Farmer challenged both the hiring and pay decisions by the university as race and sex discrimination prohibited by Title VII and the Equal Pay Act.

The state supreme court reversed a jury verdict for the plaintiff and upheld the university's affirmative action hiring policy on both federal constitutional and statutory grounds. First, according to the court, race was only one factor considered by the university--along with educational background, publishing, teaching experience, etc.--in evaluating applicants. In contrast to *Piscataway*, the university faculty was a “white enclave” with only 1 % black members, a factor persuading the court that the university had a “compelling interest in fostering a culturally and ethnically diverse faculty” under standards laid out by the *Bakke* and *Weber* cases.

Here, in addition to considerations of race, the University based its employment decision on such criteria as educational background, publishing, teaching experience, and areas of specialization. This satisfies *Bakke's* commands that race must be only one of several factors used in evaluating applicants. We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court.

Thus, severe minority underrepresentation on the university faculty combined with the employer's consideration of relative qualifications in addition to race distinguished *Piscataway*, the Nevada court felt, and conformed the case to Justice Powell's *Bakke* opinion. In addition, the impact of the initial minority hire was mitigated by affording the disappointed white applicant a subsequent position created pursuant to informal practice or custom under the affirmative action policy.

Conclusion

The Michigan cases resolved an issue that had vexed the lower federal courts for a quarter century. Historically, judicial insistence on strict scrutiny has largely condemned governmental distinctions based on race except in the most narrowly circumscribed remedial or national security circumstances. To the short list of governmental interests sufficiently “compelling” to warrant race-based decisionmaking a majority of the Court has now added the pursuit of diversity in higher education. But this expansion is not without qualification and may require further judicial elaboration before its implications are fully known. Significant here is Justice O'Connor's emphasis upon contextualism when applying strict judicial review and deference to the judgment of educators in the formulation of diversity policies. Any such policy, it now seems, must be sufficiently flexible to permit individualized assessment of each applicant on a range of factors – academic and nonacademic – which may include, but not be dominated by, race or ethnicity. Affording greater latitude, however, the good faith of the institution is “presumed,” absent sufficient contrary evidence.

But the seeds of future controversy may lie in questions arguably raised but not fully addressed by the latest rulings. As outlined by Justice Scalia in his *Grutter* dissent:

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 admission tracks’ . . . 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.’ . . . And still other suits may claim that the institution’s racial preferences have gone below or above the mystical *Grutter*- approved ‘critical mass.’

Claims of a *de facto* quota system, or breach of “good faith,” may be more readily alleged than proven after *Grutter*, however. The argument in *Grutter* boiled down to a battle of statistics. Thus, the University pointed to percentage variability, year to year, in minority admissions over a relevant period and the marginal impact on the admission chances of nonminorities. It dubbed this the “causation fallacy.” In selective admissions, the competition is so intense that even without affirmative action, it argued, the overwhelming majority of rejected white applicants still would not gain admission. Conversely, the *Grutter* dissenters cited other statistics indicating the decisive weight of race in the admissions process. Marginally qualified minority candidates were many times more likely to be admitted than non-minorities of like qualifications.⁵⁹ Nonetheless, for the *Grutter* majority, race only amounted to a “plus” factor in the “critical mass” calculus, and educational officials’ *bona fides* was presumed. Accordingly, any future diversity challenge may be futile unless statistics of this sort are supported by direct evidence of school officials’ intent to camouflage their actions so as to evade constitutional limitations.

Also unanswered by the Court’s latest rulings is the constitutional status of racially exclusive diversity policies not directly involving admissions. Thus, the legality of race-based scholarship and financial aid, recruitment and outreach, or college preparation courses that exclusively target minority populations may pose next generation issues after *Grutter* and *Gratz*. Arguably, such programs may not so severely impact opportunities for nonminority students as where the admissions

⁵⁹Framing this debate were findings from a 1998 study compiled by Derek Bok and William Bowen, former presidents of Harvard and Princeton, respectively, of 80,000 black and white students at 28 of the nation’s most selective institutions. Bowen and Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998). At the extremes of academic performance, rejection and acceptance rate for minority and non-minorities were close to the same. In middle ranges (1100 to 1300 SATs), minorities were three or four times more likely to be accepted than a comparable non-minority. If all racial preferences were eliminated, however, the rate of white student admissions would improve only slightly, from 25% (a 1-in-4 chance) to 26.5%. The reason: white applicants vastly outnumber minorities, only a few of whom are actually admitted. Thus, while the advantage to preferred minorities may be great, the University of Michigan argued, the burden on white applicants is relatively small. Petitioners in the Michigan cases, however, countered that equal protection is an individual right to compete on an equal footing that does not depend on the aggregate impact of the admissions process on white and minority applicants as groups.

decision is involved, better enabling them to withstand the Court's strict scrutiny analysis. Scholarship and financial aid, however, may present a closer question since attendance, in many circumstances, is impossible without it. Ultimately, the outcome may depend on the extent to which institutional assistance is available from other funding sources for nonminority students excluded from race-based programs. A 1994 policy guidance by the Department of Education may provide direction for race-conscious financial aid programs.⁶⁰

Beyond education, issues may inevitably arise concerning the implications of *Grutter* on efforts to achieve racial diversity in other social and economic spheres. Justice O'Connor's opinion noted the "special niche" occupied by universities, in matters of educational policy, particularly when preparing students for military service or to compete in a multicultural and global economy. As *amicus* briefs in the Michigan cases attest, corporate America's interest in developing a racially diverse workforce may be no less keen. To date, the Court has permitted race-conscious hiring criteria by private employers under Title VII, either as a remedy for past discrimination or to redress a "conspicuous racial imbalance in traditionally segregated job categories,"⁶¹ but refused to find that a state's interest in faculty diversity to provide teacher "role models" was sufficiently compelling to warrant a race-conscious layoff policy.⁶² Lower courts are similarly divided, though a few have applied an "operational need analysis" to uphold police force diversity policies, recognizing "that 'a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves,' may constitute a compelling state interest."⁶³ But current standards under the federal civil rights laws generally allow for consideration of race in hiring and promotion decisions only in response to demonstrable evidence of past discrimination by the employer or within the affected industry. No rule of deference like that extended to educational institutions has been recognized for employers, nor is one necessarily implied by the Michigan cases.

Finally, a note on race-neutral alternatives, and the position taken by the United States in *Grutter*. Siding with the petitioners, as *amicus curiae*, the Justice

⁶⁰59 Fed. Reg. 8756, 8757 (2-23-1994)(indicating that "a college may use race or national origin as a condition of eligibility in awarding financial aid if this use is narrowly tailored, or in other words, if it is necessary to further its interest in diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria").

⁶¹United Steelworkers of America v. Weber, 443 U.S. 179 (1979). In Johnson v. Transportation Agency, 480 U.S. 616 (1980), the Court extended this analysis to gender-conscious affirmative action programs in regard to use of a "plus" factor in hiring and promotion decisions.

⁶²Wygant v. Board of Education, 476 U.S. 267 (1986).

⁶³Patrolmen's Benevolent Assoc. v. City of New York, 310 F.3d 43, 52 (quoting Barhold v. Rodriguez, 863 F.2d 233, 238 (2d Cir. 1988); Reynolds v. City of Chicago, 296 F.3d 524 (7th Cir. 2002). See also Cotter v. City of Boston, 323 F.3d 160, 172 n. 10 (1st Cir. 2003)(declining to address question of compelling interest but expressing sympathy for "the argument that communities place more trust in a diverse police force and that the resulting trust reduces crime rates and improves policing").

Department noted the importance of diversity in education, but refrained from supporting or opposing *Bakke*. As noted *supra*, the Administration argued instead that the admissions policies are not narrowly tailored because the University ignores race-neutral alternatives. Specifically, the brief pointed to socioeconomic status and “percentage plans” in Texas, Florida, and California that guarantee admission to top graduates from every state high school, regardless of race. The University, however, replied that such programs are counterproductive and would not work in Michigan. Justice O’Connor, in *Grutter*, generally agreed, for several reasons. First, in her view, percentage plans depend upon and would actually perpetuate racial segregation to operate effectively; in this sense, they are not race-neutral at all. Second, they would encourage minority students to stay in inferior schools rather than seek better education in more competitive environments. Third, she found, such plans would not work at all in the law school or at the graduate level. And, by basing admission solely on academic standing, these plans conflict with the “holistic” approach endorsed by the majority, which individually considers each student.

In addition to percentage plans, educational authorities have experimented with other forms “alternative action,” or policies designed to promote racial diversity without relying on racial preferences. “Class-based” affirmative action, for example, takes socioeconomic status or family educational background of applicants into account. Florida has replaced race and ethnicity with other socio-economic and geographical proxies for diversity; increased the state’s need-based financial aid program; sought to improve the state’s lowest performing primary and secondary schools; and provided free SAT prep courses at those schools. California state schools have targeted financial aid programs towards underprivileged neighborhoods as a means of reaching minority students. Another approach considers “diversity” or “hardship” essays in which applicants describe challenging life experiences such as poverty, English as a second language, or having a family member in prison. Some reformers advocate targeting additional resources to underperforming elementary and secondary schools as a way to address the root causes of minority underrepresentation in higher education.

Whether academic institutions may completely avoid the constitutional shoals by adopting such “race-neutral” plans to increase minority admissions may not be fully answered by the Court’s latest rulings. By avoiding the use of explicit racial classifications and dual track admission policies, these efforts are far less susceptible to facial challenge as an equal protection violation. Programs involving the explicit consideration of race remain most at risk. But policies that employ nonracial factors as a proxy for race may be vulnerable if the purpose or intent is to benefit minority groups. In *Washington v. Davis*,⁶⁴ and related rulings,⁶⁵ the Supreme Court

⁶⁴426 U.S. 229 (1976).

⁶⁵Cf. *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). In *Feeney*, the Court upheld a state law giving a preference to veterans for civil service employment, which had a significant discriminatory effect against female applicants. Notwithstanding the obvious impact of such a preference, the Court upheld it on the ground that “[d]iscriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at

(continued...)

determined that a race neutral law with a disparate racial impact on minority groups is subject to strict scrutiny if it is enacted with a racially discriminatory purpose. Racial motive was made a constitutional “touchstone” for equal protection analysis, and whether reflected by a racial classification, or other evidence of discriminatory purpose, strict scrutiny was triggered by evidence of such intent. Similarly, alternatives to traditional racial diversity policies may not escape strict judicial scrutiny if an objecting non-minority applicant is able to show that the plan was racially motivated – to aid racial or ethnic minorities – and fails to provide the “holistic” and “individualized” review mandated by *Grutter* and *Gratz*. The same limitations may apply to private institutions, which are immune from constitutional limitations, under Title VI of the 1964 Civil Rights Act.

⁶⁵(...continued)

least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Id.* at 279. Although *Feeney* involved a claim of sex-based discrimination, the test there announced for determining whether a purpose is “discriminatory” with respect to a particular trait has been applied to claims of racial discrimination as well. See *Hernandez v. New York*, 500 U.S. 352, 360 (1991).