The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in *Gratz* and *Grutter* of Race-Based Decisionmaking by Individualized Discretion

by David Crump*

Just as Gaul was divided into three parts, the Supreme Court's doctrine known as strict scrutiny is divided into two elements. First, there is the requirement that a State identify a "compelling governmental interest" that supports the State's use of race as a discriminant. Second, and just as important, there is the requirement that the State's action be "narrowly tailored" to advance that compelling interest. Both parts of the test are essential, because each performs a different and necessary function.

This article concerns the second prong of strict scrutiny, the narrow tailoring requirement, as the Supreme Court has recently applied that doctrine in its affirmative action decisions. The thesis of the article is simple. A compelling governmental interest does exist to support limited use of race-based decisionmaking such as that in the *Grutter* and *Gratz* cases. This article characterizes the compelling interest as active nondiscrimination. But the Supreme Court's analysis in those cases of the second requirement, that of narrow tailoring, is weak and unpersuasive. Indeed, the Court missed the point.

The narrow tailoring requirement is the Rodney Dangerfield of the strict scrutiny test. Mr. Dangerfield, as many well-informed Americans know, is a comedian who frequently intones, "I tell ya, I don't get no respect." Unfortunately, neither does narrow tailoring. In *Grutter* and *Gratz*, the majority seemed to explain what narrow tailoring is not, rather than explaining what it is. Perhaps the reason is that cases concerning race are contentious, and after fighting its way through the first issue–whether the State's action implicates a compelling interest--many courts seem to suffer a letdown. Or, perhaps the reason is that the narrow tailoring question is multidimensional and

complex, and it is the more difficult issue of the two. Finally, there is the possibility that the reason is that the narrow tailoring requirement was discovered much later in the Supreme Court's jurisprudence than the compelling interest requirement, and it has not been developed as fully.

This article begins by describing the *Gratz* and *Grutter* cases, with particular attention to the majority's treatment of narrow tailoring in *Grutter*. It then examines the compelling governmental interest question in *Grutter* and *Gratz*. Here, the article examines three theories that might be advanced to support the finding of a compelling interest: viewpoint diversity, racial diversity, and nondiscrimination. Next, the article analyzes the narrow tailoring question. It first asks, what does narrow tailoring mean? Then, given the majority opinion in *Gratz*, the article analyzes the question whether administrative discretion can amount to narrow tailoring. It also considers alternative means of achieving the State's legitimate objectives in cases such as *Grutter* or *Gratz*.

A final section summarizes the author's conclusions. First, viewpoint diversity and pure racial diversity should not, in and of themselves, be regarded as compelling governmental interests. This conclusion does not provide much of an answer, however, because the article concludes that there is compelling government interest in nondiscrimination, and that nondiscrimination is not a passive achievement. It requires purposeful conduct, or in other words affirmative effort, which in turn implicates attention to racial patterns in the State's distribution of benefits. The article also concludes, however, that the Supreme Court's majority did not begin to wrestle with the difficult issues involved in the second issue, concerning narrow tailoring. The meaning of narrow tailoring should be defined more clearly, as the legitimate achievement of the State's compelling objectives with minimal probability of improper practices. A license to state functionaries to use racial discriminants in decisionmaking, at their discretion, unconstrained by law, does not meet this definition. None of the alternatives is perfect, but the article concludes that by this test, there are

some that are more narrowly tailored.

I. THE GRUTTER AND GRATZ CASES

A. Gratz v. Bollinger: Declaring Unconstitutional Michigan's Fixed-point System for Undergraduate Admissions

Michigan's undergraduate College of Literature, Science, and the Arts denied admission to Jennifer Gratz and another applicant. Both were qualified, and indeed Gratz was highly qualified. It seems certain that both would have achieved admission had they been members of minority groups to which Michigan afforded preferences. These two applicants filed suit, alleging that Michigan's undergraduate admissions process had denied them the equal protection of the law.

The undergraduate college considered multiple factors in its admissions decisions, including high school grades, standardized test scores, high school "quality," curriculum strength, geography, alumni relationships, leadership, and race. The guidelines changed from year to year, but at the relevant time, the college used a fixed-point system that assigned each applicant a number for each factor. A total score of 100 meant that admission was guaranteed. The college labeled African-Americans, Hispanics, and Native Americans "underrepresented minorities," and it awarded each member of these groups 20 points automatically on the basis of race. By way of comparison, a perfect SAT score earned the applicant only 15 points. The undisputed result was that the college admitted virtually every applicant from these favored groups.

(1) Chief Justice Rehnquist's Opinion for the Court: Michigan's Policy Served a Compelling Interest, but It Was Not Narrowly Tailored. The Supreme Court held that the college's admissions policy violated the Equal Protection Clause. First, the Court relied on its decision in a companion case, *Grutter v. Bollinger*, to hold that racial diversity could supply a compelling state interest, as Michigan had argued. But from that point forward, the college's arguments failed. In an

opinion by Chief Justice Rehnquist, the Court held that the college's automatic point system was not narrowly tailored to serve its compelling interest, and therefore it could not survive strict scrutiny.

In reaching this decision, the Court relied on Justice Powell's earlier opinion in *Bakke v. Board of Regents,* again by citing *Grutter*, which had relied on that decision. In *Bakke*, the Court had split three ways. Four members of the Court had concluded that the University of California's admissions system, which presumptively set aside given numbers of admissions for specified minority groups, was illegal. Four justices would have upheld it. Justice Powell, who wrote the opinion that decided the case, had reasoned that "race . . . may be deemed a 'plus' in a particular applicant's file," but that California's system was not narrowly tailored, and therefore violated the Constitution, because it did not require individualized review of the relative importance of race in each application.

The Chief Justice concluded that Michigan's award of an automatic 20 points based on race similarly failed the narrow tailoring requirement. As in *Bakke*, the race of a "particular [minority] applicant" could alone become decisive. Michigan's system also allowed some applicants to be "flagged" for individual review, but the Chief Justice asserted that this practice only "emphasized the flaws" in Michigan's policy. Flagging was the exception rather than the rule, so that race remained decisive in virtually all cases, and furthermore, the 20 point addition was fixed and automatic rather than individualized. The Chief Justice's opinion rejected the College's argument that the volume of applications made individual review impractical. He concluded that arguments about administrative difficulties could not salvage an otherwise unconstitutional system.

(2) Other Opinions: Justice O'Connor's and Justice Thomas's Concurrences and Justice Souter's Dissent. Justice O'Connor concurred in the Court's opinion, but she also wrote separately; and since Justice O'Connor also wrote the Court's opinion in the companion case, *Grutter*, her

concurrence arguably assumes a greater-than-usual significance. Justice O'Connor, joined in relevant part by Justice Breyer, emphasized the invariability of Michigan's point system. It assigned "*every* underrepresented minority applicant the same, *automatic* 20 -point bonus without consideration of the particular background, experiences, or qualities of each individual applicant." As a result, the Michigan undergraduate system was a "nonindividualized, mechanical" one. Justice O'Connor added that Michigan could "modify its system" so that it provided individual consideration. By implication, Justice O'Connor thus indicated the possibility that a less rigid point system might pass the constitutional test: for example, one that assigned a presumptive figure or a guideline number on account of race but required individualized adjustment according to applicants' "backgrounds, experiences, or qualities."

Justice Thomas concurred only because the Court's opinion "correctly applies our precedents, including . . . *Grutter* " Otherwise, he remained convinced that racial distinctions in university admissions were "categorically prohibited by the Equal Protection Clause." Justice Thomas also advanced an additional reason for rejecting the undergraduate admissions system: failure to consider "nonracial distinctions among nonrepresented minority applicants." This failure was important because the State "may not racially discriminate [among] the [favored] groups." In turn, this criticism apparently meant that a policy permitting favoritism among groups for invidious reasons is not narrowly tailored. This is an insight to which this article will return in its third section, below.

Justice Souter dissented, because he concluded that the Michigan undergraduate policy was constitutional. "The record does not describe a system with a quota like the one struck down in *Bakke*." There were no minority set-aside admissions. The Michigan approach conformed to Justice Powell's *Bakke* reasoning because it considered "all pertinent elements . . . in light of the particular qualifications of each applicant and placed each factor "on the same footing for consideration,

although not necessarily according them the same weight."

The majority's objection to Michigan's point system was unpersuasive, according to Justice Souter. The Chief Justice's criticism of Michigan's "use of points" must have meant either that points were inherently improper or that the number of race-based points that Michigan assigned was excessive. Justice Souter rejected these objections because a diversity strategy necessarily meant that race must "increase[ ] some applicants' chances for admission," and "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." The college simply had used "a numbered scale" to reach exactly the same object "that the law school [in *Grutter*] accomplishes in its 'holistic reviews'." The assignment of points did not imply any absence of individualized review. Every applicant received a score that differed from that of most others and that reflected the applicant's own unique combination of qualities. Other systems that were not based on points, Justice Souter reasoned, might also survive constitutional scrutiny, but some presented "the disadvantage of deliberate obfuscation." Non-point methods might enable a university to reach the same result that Michigan had reached "without saying directly what they are doing or why they were doing it." Equal protection law, he concluded, should not degenerate into a charade in which "the winners are the ones who hide the ball." This article will return to this argument in its third section, below.

B. Grutter v. Bollinger; Upholding the Michigan Law School's Discretionary Use of Race by "Holistic Review"

Barbara Grutter was a Caucasian resident of Michigan with a 3.8 undergraduate grade point average and a 161 LSAT score, both of which probably placed her near the highest ranks of applicants to the Michigan Law School. The Law School, however, denied her admission. She therefore filed suit, alleging that the law School had used race as a 'predominant" factor, one that gave certain applicants "a significantly greater chance of admission" because of their membership in

certain minority groups. She alleged that Michigan "had no compelling interest to support this policy."

The evidence showed that the Law School's admissions policy required individualized review of applicants' files, and it treated race as a factor for consideration, although it did not assign it a quantitative value. Michigan personnel testified that the Law School did not target any particular numbers or quotas, although the admissions director did consult daily reports to ensure a "critical mass" of minority enrollments. Certain minority groups, "such as Asians and Jews," were not afforded any preference, allegedly because they were not underrepresented. Plaintiff Grutter's evidence showed statistically that race was an "extremely strong factor" in the Law School's admissions, although not a "predominant" one. Defendants' evidence showed that without race-conscious remedies, the composite enrollment of all underrepresented minorities would be limited to 4 percent, which defendants argued did not supply a critical mass.

(1) Justice O'Connor's Opinion for the Court: Racial Diversity as a Compelling Interest Narrowly Targeted by the Law School's Individualized, Discretionary, and Holistic Review. Justice O'Connor began the Court's opinion by citing and explaining the *Bakke* decision. There, Justice Powell had considered that "the attainment of a diverse student body" was a compelling governmental interest. No other member of the Court had concurred then in Justice Powell's reasoning, and none had done so since. The *Grutter* Court decided, however, to endorse Justice Powell's diversity rationale for reasons that Justice O'Connor developed in her opinion.

The Court began its justification of the diversity rationale by "deferring" to the university's educational judgment. It supported this deference by invoking a tradition of self-governance in universities, which allegedly provided a means of safeguarding First Amendment values "within constitutionally prescribed limits." The Court explained that deference was needed because of

"complex educational judgments" that were peculiarly "within the expertise of the university." Somewhat oxymoronically, the Court asserted that this deference did not mean that its scrutiny would be any less strict.

The Law Schools' idea of diversity, according to the Court, did not consist of matching minority enrollees to any "specified percentage." That would amount to pure "racial balancing," which would have been unconstitutional if achieved for its own sake. Instead, the Law School allegedly sought a "critical mass" of minority students, meaning significant enough numbers of minority group members to achieve educational benefits. "These benefits," the Court asserted, "are substantial." They allegedly included classroom discussion that was "livelier and more spirited," or in other words a diversity of viewpoints, according to the Court. The benefits also included "cross-racial understanding" and increased ability to deal with persons of other ethnicities. Furthermore, as a distinct goal, the Court pointed out that the benefits also included diversity in the nation's educated citizenry. Business-related amici had asserted that a racially diverse leadership population could better manage a diverse work force, and military commanders, "[b]ased on [their] decades of experience," had said that a "racially diverse officer corps . . . is essential to the military's ability to fulfill its [principal] mission." This diverse officer corps, in turn, came largely from universities with diverse student bodies.

Next, Justice O'Connor concluded that the Law school's program was narrowly tailored. The program conformed to Justice Powell's ideal of the use of race as a "plus factor," but without "insulat[ing] the individual from comparison with other candidates." Narrow tailoring, said the Court, was designed 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 illegal prejudice or stereotype." A discretionary, individualized system according to Justice O'Connor, could be

"flexible enough" to consider "all pertinent elements." For this reason, the Law School's program did not "unduly harm or stigmatize nonminority applicants, except to the extent that "there are serious problems of justice connected with the idea of preference itself." Unfortunately, Justice O'Connor did not analyze the possibility of harm or stigma to *minority* applicants who were not favored by Michigan's policy, such as Cuban-Americans, Arab-Americans, or to mention two that the Court also mentioned, "Asians and Jews." Justice Kennedy's dissent documented indications that Michigan fostered discrimination of this kind, but again unfortunately, Justice O'Connor ignored this part of the record.

In a related section of her opinion, Justice O'Connor rejected Grutter's argument that the Law School's policy was not narrowly tailored because it failed to use "race-neutral" methods. The Court considered two race-neutral ideas: "a lottery system" and "decreasing the emphasis . . . on [GPA and LSAT]." These alternatives, as Justice O'Connor saw them, "would require a dramatic sacrifice" of diversity or academic quality. "Narrow tailoring does not require exhaustion of every conceivable race neutral alternative." Nor did it require a university to compromise its own goals, such as its "reputation for excellence." Unfortunately, although Justice O'Connor thus considered two transparently flawed alternatives (first, a lottery, and second, decreased reliance on academic achievement or aptitude)--two proposals, in other words, that obviously would reduce academic quality--the Court omitted from its analysis every single one of the many serious alternatives that might not need to reduce quality, such as the alternatives catalogued later in this article. For this reason, Justice O'Connor's apparent conclusion that "narrower" alternatives were not appropriate is unpersuasive.

Finally, Justice O'Connor evaluated the durational aspect of the Law Schools' program. In prior decisions, the Court had held that race-conscious remedies must be limited in time. This

requirement, said the Court, also applied to university admissions. Again, however, Justice O'Connor's approach was one of deference. "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." With that, the court installed an eye-popping durational limit: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

(2) Justice Ginsburg's Concurrence and the Dissents of the Chief Justice and Justices Thomas, Scalia, and Kennedy. Justice Ginsburg, joined by Justice Breyer, concurred in Justice O'Connor's opinion for the Court. But she wrote separately to emphasize that "conscious and unconscious race bias . . . remain alive in our land." Therefore, "special and concrete measures" should be taken to "ensure the adequate development and protection of certain racial groups." The concept of "active" nondiscrimination, which this article will advance in its next section, is related to Justice Ginsburg's reasoning, although this article departs from the Court's holding in which she concurred.

The Chief Justice, joined by three other Justices, dissented. He argued that the Law School's program actually "bears no relation" to the goal of achieving "critical masses" of members of underrepresented minority groups. Instead, as the dissenters saw it, the program amounted to a "naked effort to achieve racial balancing." Enrollment of Native Americans, for example, had "dropped to as low as *three* such students," and arguments that this number corresponded to a critical mass were "simply absurd." But for all their failure to conform to a critical mass, according to the Chief Justice, the Law School's minority enrollments correlated to the potential applicant pool so closely as to justify the inference that racial balancing was the real objective.

Furthermore, the Chief Justice demonstrated how the Law School's program could be used,

and (according to the Chief Justice's reasoning) was used, to accomplish discrimination against members of some minority groups that the Law School purported to assist. To sustain its argument that its program was not composed of quotas designed to achieve mere racial balancing, the Law School had pointed out that it sometimes accepted minority applicants with lower academic scores "than underrepresented minority applicants who are rejected." This was true, but the numbers did not heap unmixed praise on the Law School, because these rejected minority applicants with higher scores, the Chief Justice showed, were disproportionately, indeed overwhelmingly, Hispanic. Specifically, fully 56 high-scoring rejected applicants out of 67 were Hispanic, compared to only 6 who were African-American. The Chief Justice's implication is clear and unpleasant. The Law School's alleged attempt to achieve a critical mass of Hispanics actually resulted, instead, in pervasive discrimination against Hispanics. In fact, the Law School–while recognizing that Hispanics were, in its politically correct words, among "the groups most isolated by racial barriers in our country," actually had itself erected those kinds of barriers by inexplicably "capp[ing] out" Hispanic admissions. This article will return to this argument in Part III, below. In fact, the article will argue that this kind of discrimination against certain minorities to advance others is a probable, perhaps even an inevitable, result of a system based upon invisible discretion, such as the policy used by the Michigan Law School.

Justice Thomas began his dissent by quoting a passage from Frederick Douglas to the effect that America should "[d]o nothing with [African-Americans]" except to let them stand or fall "on [their] own legs," because "your interference is doing [African-Americans] positive injury." Justice Thomas then asserted, "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'." Justice Thomas then proceeded systematically to

critique each inference drawn by the Court from this statement. An "elite law school" was hardly a "pressing public necessity." Neither was racial balance for its own sake. The majority had blurred the distinction between the (illegal) goal of mere racial balancing and the goal of alleged "educational benefits" arising from a diversity of viewpoints, which also should be illegal because it stereotyped minority group members as reflecting a certain unified viewpoint. The Court's deference to academic expertise, Justice Thomas argued, was inconsistent with its precedents. The Court's real rationale was the "benighted notions" that one could tell when racial discrimination benefits (rather than hurts) minority group members and that racial distinctions are necessary to remedy social ills. "I must contest the notion that the Law School's discrimination benefits those admitted as a result of it," Justice Thomas concluded.

Finally, Justice Kennedy critiqued both the Court's compelling interest rationale and its conclusion that the Law School's policy was narrowly tailored. Agreeing with the Chief Justice, he concluded that racial balancing was the Law School's real goal. And in passages that relate closely to the conclusion of this article, he demonstrated that invidious discrimination against certain underrepresented minorities was the pervasive result, a demonstration that tends to rebut narrow tailoring. For example, the record contained evidence that Law School faculty members were "'breathtakingly cynical' in deciding who would qualify as a member of underrepresented minorities." Justice Kennedy offered one choice example from an apparent multitude in the record, involving debates about whether Cuban-Americans counted as Hispanics. An anti-Cuban professor "objected on the ground that Cubans were Republicans"(!) Regrettably, Justice O'Connor's majority opinion offers no analysis, or even mention, of this phenomenon noticed by Justice Kennedy.

Justice Kennedy's dissent provides factual support for one of the major conclusions of this article, which is that a system of wide-open discretion to consider race, such as that used by the Law

School, is likely to lead to invidious discrimination. Justice Kennedy did not note, as he might have, the infinite possibilities for routine but invisible discrimination that the anti-Cuban professor's (unusual) visible remark shows were likely to have occurred silently in the Law School's system of unchecked discretion. His agreement with the Chief Justice about discrimination against Hispanics shows that Justice Kennedy knew these possibilities were real. Furthermore, Justice Kennedy's dissent reveals an even uglier reality. The anti-Cuban professor's remark obviously contravenes the core of the Fourteenth Amendment. The unintended consequence of Justice O'Connor's majority opinion, however, is that the kind of reasoning indulged in by the anti-Cuban professor is a necessary first step in an admissions system like that used by Michigan's Law School. Worse yet, as this article will argue in its third section below, the Court's opinion in *Grutter* means that every decisionmaker on the admissions committee is invited to, and indeed must, invisibly and unaccountably vote his or her idiosyncratic racial prejudices.

II. THE COMPELLING GOVERNMENTAL INTEREST REQUIREMENT

The concept of a compelling governmental interest is deceptively self-evident. Its own words define it. It is an interest that is compelling, or extremely important, or has sometimes been said, of the "first order." The Court has given examples, such as the temporary but immediate prevention of serious violence, as in the use of short-term separation of race-based groups of inmates in a prison that is at the edge of riot. But despite its apparent simplicity, the idea of a compelling interest becomes ambiguous under the pressure of argument. First, different issues are more important (and more compelling) to different people. Second, most goals of government are at least legitimate, and any legitimate issue can appear compelling if affected by circumstances that are exigent enough. Sanitation becomes compelling during a pandemic, and administrative costs arguably seem compelling when governments approach bankruptcy. And third, the evaluation of compelling

interests can be obfuscated by the influence of rhetoric. Words that are used to describe an allegedly compelling interest can make it sound more universally important than it is. Analysis of the compelling interest question must dodge all of these obstacles. It must rise above political differences about what is important, ignore temporal pressures, and rip away rhetoric to determine the true consequences of addressing (or not addressing) the proposed compelling interest with a racial remedy.

Here, this article will examine three theories that might be said to underlie affirmative action of the kind at issue in *Grutter* and *Gratz*: first, a theory of viewpoint diversity; second, one of racial diversity for its own sake; and finally, a third theory, which this article calls "nondiscrimination." The article finds reasons to reject the first two rationales, those of viewpoint diversity and racial diversity. But the third rationale, that of nondiscrimination, survives examination as a genuinely compelling interest. And in the end, this article will argue that the choice among theories does not make much difference. Nondiscrimination requires attention to racial composition, and it requires (or at least allows) conscious purpose to achieve distributive justice. Since the article thus will conclude that a compelling governmental interest underlying affirmative action does exist, the question of constitutional legitimacy in cases like *Grutter*and *Gratz* instead will center upon the second (and more difficult) issue: that of narrow tailoring, which the article will treat later, in its third section.

A. The Viewpoint Diversity Theory

One theory that underlies some arguments in favor of affirmative action is that the real objective is a diversity of viewpoints, which allegedly results from inclusion of representative segments of all groups in the population. The theory begins with the observation that members of racial minorities often can describe unique experiences, such as unjust deprivation of benefits,

exposure to ghettos, injurious rhetoric, and other disadvantages of discrimination. The argument, then, is that bringing these different voices into a classroom, or a broadcasting station or military unit, will result in better rounded discussion. It also will prepare members of all races to defend their viewpoints against overstatement.

It is impossible to say that there is nothing to this argument if made as a statistical assertion. Members of minority groups are statistically more likely to have been victims of overt discrimination and also to have been targets of subtler disadvantages such as marginal arrests or unemployment. Furthermore, polls establish that African Americans and Caucasians have radically different, and indeed curiously and interestingly different, views of the phenomenon that we call racial discrimination. The Caucasian majority view, it seems, is that a finding of racial discrimination requires proof of intent, so that unconscious or unintended racial disparities are not, by definition, the result of such discrimination. The African-American majority view is that racism is defined by results, and it is seen in racially unfair or disparate decisions produced by the operations of institutions, even if those institutions are free from racially defined rules or deliberately discriminating individuals. The government's interest in encouraging exploration of viewpoint diversity of this kind is legitimate.

The trouble is, the attribution of characteristics to individuals on the basis of statistics and polls is anathema to the equal protection of the law. The viewpoint diversity theory amounts to the taking of average among different groups and attributing these averages to all members. It is the kind of stereotyping that the Court has rightly rejected. In particular, the viewpoint diversity theory discounts the different viewpoints held by different individuals. To put it simplistically, the theory assumes that Clarence Thomas and Jesse Jackson are fungible, and so are Henry Cisneros and Linda Chavez. The Reverend Al Sharpton can substitute for Ward Connally in a debate, and he will fit

directly into the role. The results of this kind of thinking are not merely silly; they contravene the Fourteenth Amendment. That Amendment protects people who are members of groups, but what it protects them from is precisely group membership stereotyping in ways that harm them as individuals.

Furthermore, if the objective really were viewpoint diversity, it could be addressed by more direct and possibly more effective means. In constitutional law classes, few students quibble with the holding in *Brown v. Board of Education*, although the arguments are there to be made (and have been made); even fewer advance the libertarian argument in favor of pornography. Perhaps these debates in law school would be different if viewpoint diversity were directly a goal of admissions. Poverty law issues might be illuminated by the presence of people who have experienced poverty, for example, and this result could be achieved with fewer constitutional difficulties than are involved in racial remedies. But universities have not successfully sought out the poor. In fact, the viewpoints of poor persons are systematically absent from higher education. In law schools, so are the arguments of conservatives and libertarians. If law schools really sought viewpoint diversity, they could achieve it by more direct means, such as by affirmatively admitting poor people, conservatives, libertarians, and for that matter, persons with strongly expressed radical viewpoints about race, such as those of social philosopher (and quarterback-sack champion) The Reverend Reggie Smith, who identifies integration as a major source of disadvantages for African-Americans. Law faculties have not uniformly supported these kinds of diversity, however, and in fact, the theory of viewpoint discrimination can be used (and *is* used) instead to preserve sameness of viewpoint, as we shall see later in this article.

The majority in *Grutter*uses some rhetoric that might suggest that it bases its decision on viewpoint diversity, but it generally avoids this theory. This approach is consistent with Justice

O'Connor's past opinions. Viewpoint diversity is not a sound support for affirmative action, and the Court's avoidance of this theory is appropriate.

B. Pure Racial Diversity

Instead of viewpoint diversity, the *Grutter* majority advanced a different, but related theory: that of racial diversity as an end in itself. Racial diversity, the argument goes, adds to debate by enhancing viewpoint diversity, but it also does much more. It insures that both majority and minority must deal with each other and therefore accommodate each other. It minimizes prejudice and discrimination. It provides for racially diverse leadership, both within the academy and in later life. Military objectives, which often figure prominently in compelling interest cases, are said (by military commanders themselves) to require a racially diverse officer corps, which in turn is dependent upon racial diversity in universities and graduate schools. Racial diversity also provides an important kind of distributive justice, by visibly insuring that disadvantaged members of minority groups are entitled to the benefits of the society on an equal basis. This theory of direct racial diversity, as opposed to viewpoint diversity, forms the backbone of the majority's reasoning on the compelling interest question in *Grutter* and *Gratz*. It is a bolder, simpler, and more honest approach than the politically correct (but indirect and ultimately unpersuasive) rhetoric of viewpoint diversity. It involves a frank and unapologetic use of race as a discriminant. But precisely because of its boldness, this direct approach is more open to question.

An explanation of the difficulty in an objective of direct racial diversity might begin with an insight expressed by Justice Stewart, in his dissent in *Fullilove v. Klutznick*. A direct policy of racial preferences, as Justice Stewart saw it, meant that "our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white." Justice Stewart saw historic analogs in Jim Crow laws, which distinguished

black from white individuals by bloodline percentages for the purpose of discrimination, and in the practices of fascist countries that did the same thing with racial and other minorities. "Today's decision is wrong," said Justice Stewart, "for the same reason that *Plessy [v. Ferguson*, the separate-but-equal decision] was wrong. That is, under our Constitution, the government may never act to the detriment of a person solely because of that person's race." Racial categorizations of this kind–this individual is black, and that individual is white–not only are difficult to make in some individual cases, they are offensive when used directly to distribute benefits among individuals. There are methods of assuring nondiscrimination that do not require the categorization of individuals into racial pigeonholes for the purpose of dividing the pie.

Furthermore, racial categorization immediately invites abuses. Identifying individuals by race for the purpose of giving advantages to some of them easily can undergo a metamorphosis, it becomes discrimination against minority groups. This is precisely what happened in the Michigan Law School program upon which *Grutter* is based. Justice Kennedy publicized a single example, but an eye-popping one, from the apparent variety of abuses in the record. The Michigan law faculty debated–actually debated–whether Cuban-Americans should be classified as Hispanics for preferential treatment, or whether they should be treated without a preference, which is to say disadvantaged, owing to their national origin. One professor actually "objected on the grounds that Cubans were Republicans." The full record contains many more such gems, and this was only one. The goal of people such as this professor is not diversity, but sameness; it is not racial diversity, but the opposite.

Perhaps more enlightened and less prejudiced faculty members could have handled this particular issue in a manner less offensive to the Fourteenth Amendment. But there is a related, and unavoidable difficulty that also is illustrated by the isolation of Cuban-Americans in the Michigan

debate. The racial diversity approach will necessarily and unavoidably lead to discrimination against individuals who are members of disfavored minorities. If Cuban-Americans are not Hispanics and therefore not protected by Michigan's affirmative program, or even if they are, what about other groups? Muslims and Iranian-Americans, although they sometimes have suffered vicious discrimination, provide a different voice, and contribute to ethnic diversity, but ethnic preferences may mean that they are disadvantaged by a shrunken acceptance pool. The acceptance of "too many" Asian-Americans in some areas of the country may lead to the de-listing of this minority as a favored group, meaning that Vietnamese-Americans and Chinese Americans find university admissions more difficult to obtain. Furthermore, the direct racial diversity theory enables (and indeed encourages) decisionmakers at Michigan or elsewhere to discriminate against other types of minority groups than those defined by race, including those that are more closely identified with viewpoints. For example, if I were counseling a potential applicant to Michigan's law school, I would say, "You were undergraduate president of 'Students for Bush'? Carefully eliminate any reference to *that* from your application!" But if the applicant had headed up "Students for Gore"? I would advise, "Be sure to put that one prominently on your application, front and center!"

This reasoning does not exhaust the arguments against direct racial diversity as a pure goal. We have not yet mentioned the individual impact upon a person such as Grutter or Gratz that is imposed by the Michigan policies. If the Fourteenth Amendment protects individuals at all from disadvantageous treatment based upon their group membership, this too is a serious problem. Also, there are other disadvantages, perhaps of lesser constitutional cognisance, that arise from secondary effects of racial classifications, such as the messages that they send. We should not be surprised if race-driven admissions produce a student body that discounts the competence of minority group admittees. This perception, although it is to be expected, is unfair, at least to minority group

members whose admission did not depend upon affirmative action. And there is an even more indirect but perhaps more damaging message from racial diversity as a goal, and that is that racial discriminants legitimately can be used as casually and cynically as the Michigan law faculty sometimes used them.

These difficulties with a direct policy of racial diversity, however, do not answer the question whether affirmative action reflects a compelling State interest. One can defend affirmative action by a policy of nondiscrimination. And ultimately, it does not matter greatly whether one accepts or rejects the racial diversity theory that the Court actually used to find a compelling interest in *Gratz* and *Grutter*, because a complete view of nondiscrimination requires affirmative effort at least to some degree. And therefore, the constitutional legitimacy of affirmative action eventually will require confrontation of the second question, that of narrow tailoring.

C. Nondiscrimination as a Compelling Interest Underlying Affirmative Action

(1) The Idea of Active Nondiscrimination. Here, this article takes a different turn, one that defies categorization as either liberal or conservative. With due consciousness of the inexactitude of these classifications, one might assert (loosely) that the "liberal" view supports affirmative action on diversity grounds. The "conservative" view, to the extent that it is susceptible of definition, rejects both affirmative action and diversity, and it insists on government neutrality toward race. This article avoids both views and instead advances a policy that it will call "nondiscrimination," or better yet, "active" nondiscrimination.

This approach differs from the putative liberal position because it is targeted at distributive justice rather than diversity. It is important to emphasize, however, that this active concept of nondiscrimination also differs sharply from the position ascribed to some conservatives. Nondiscrimination, here, means an active effort to overcome the effects of prejudice. It implies a

decisionmaking structure that achieves distributive justice rather than ignoring it. It is not a passive stance, as mere neutrality might suggest, but instead insists on action–"affirmative" action, in fact–that produces results. Nondiscrimination of this kind depends on objective verification, because a policy that cannot be measured sacrifices a great deal of its meaning.

Ironically, objective testing of nondiscrimination will bring our reasoning here to a position that seems to have come full circle, although it has not. Active nondiscrimination should be verified by an examination of racial distribution. In other words, achievement of the goal is to be determined by something closely akin to the putative liberal objective: something very much like . . . *well*, racial diversity. If the composition of the state's premier law school is virtually one hundred percent white and male, and if no credible, neutral explanation of this phenomenon can be advanced, the State's achievement of nondiversity is incomplete. The unexplained absence of diversity is important not for its own sake, but because it suggests that the State's policies are not truly nondiscriminatory.

This theory of nondiscrimination, then, does not depend upon a goal of viewpoint diversity, or of racial diversity. But perhaps its independence from these values as "goals" does not make as much difference as might appear, because active nondiscrimination depends on conscious distributive justice, which is to say verifiable results. And those, in turn, depend upon an examination of the racial composition of groups that receive governmental benefits. This paradox, however, does not mean that the reasoning supporting this concept of nondiscrimination has reached full circle, however much it may seem to have done so. Verifying results by comparing diversities is not the same thing as distributing benefits directly on the basis of race. Choosing among alternative criteria for acceptance with a consciousness of their varied racial impacts is not the same thing as distinguishing among applicants by categorizing their races. This model of nondiscrimination does not necessarily depend upon rigorously classifying individuals by race. It does not have to require

applicants to check a box describing themselves as African-American, or Hispanic (other), or, as many individuals might see themselves, as members of mixed or multiple races. It does not mean that government is saddled with figuring out the undefinable and elusive level of a "critical mass."

The idea of objective measurement does mean that the recipients of government benefits must be surveyed at some point to determine racial patterns in distribution. But this information need not become a direct discriminant among individuals. It does not have to be used for the purpose of parceling out benefits to particular members of certain defined groups. Instead, government can collect these data to determine whether its achievement of distributive justice, or of diversity if you will, is real.

Armed with this information, then, decisionmakers such as an admissions committee can adjust its choice of approaches according to the projected achievement of the goal of distributive equality or nondiscrimination. Past performance and ongoing trends can inform this projection. A distribution of acceptances that is not skewed radically from the potentially qualifying population pool means that aggressive measures are not indicated. Thus, the current distribution of women and men in law schools can lead, consistently with nondiscrimination, to a policy of conscious nonaction. Women and men are admitted to many law schools in roughly equivalent numbers. The distribution of women and men in engineering schools is a different matter. It calls for an inquiry into neutral reasons, and if those cannot be credibly articulated, it may call for affirmative effort to achieve nondiscrimination. Also, the degree to which results differ from rough expectations also indicates the aggressiveness that the choice of action should exhibit. Mildly unrepresentative distributions should call for mild remedies or none at all. Serious discrepancies, such as the not-so-hypothetical example of a virtually all-male, all white law school, should call for more aggressive measures.

This issue of relative aggressiveness, however, is only tangentially related to the compelling

interest issue. The prospect of a virtually all-male, all-white law school, hypothetically unexplainable by any neutral phenomenon, raises the constitutional question of racial equality. This article will argue that this prospect corresponds to a compelling governmental interest in active redress to achieve nondiscrimination. The question of more or less aggressive means is tied more closely to the narrow tailoring issue. This article will therefore postpone consideration of the choice among alternatives until it takes up the narrow-tailoring question.

(2) Distinguishing Active Nondiscrimination from Neutrality and from Racial Balancing for Its Own Sake: The Example of Washington v. Davis. Another way to explain active nondiscrimination is to provide an example of what it is not. In *Washington v. Davis*, the District of Columbia used a written personnel test in hiring new police officers. Two African-American applicants who had been rejected on the basis of procedures that included this test claimed that it violated the Equal Protection Clause. The test had not been validated, and the plaintiffs argued that it excluded a disproportionate number of black applicants while bearing no relationship to job performance. The court of appeals applied a three-part test established in *Griggs v. Duke Power Company*, which was an earlier Supreme Court decision interpreting Title VII of the Civil Rights Act of 1968. Specifically, the Court of Appeals held that the District of Columbia had the burden of demonstrating job relevance whenever it used any decisionmaking procedure that produced disparate racial impact in employment, and its failure to do so in this case was evidence of an equal protection violation.

The Supreme Court reversed. Holdings interpreting acts of Congress such as Title VII, it concluded, were not determinative of the meaning of the Constitution. The Court held instead that an equal protection violation "must ultimately be traced to a racially discriminatory *purpose*." A racially disparate impact was not enough, unless it sufficed to demonstrate "*intentional*"

discrimination. Thus, the apparent fact that the District's test disproportionately eliminated black applicants was of no constitutional significance, even when added to the alleged fact that the test did not serve any useful end. A "racially neutral" policy is not unconstitutional merely because it results in racial disparity that the government cannot objectively justify. *Washington v. Davis* seems to signal that if governmental officers are ignorant of purposeless racial disparity produced by the policies that they have adopted, or even if they know but are indifferent, they do not violate the Constitution so long as they did not intend to bring about such a result.

But *Washington v. Davis* does not hold that this brand of government neutrality should be constitutionally required. The decision does not mean that the District of Columbia's choices were wise, or right, or constitutionally mandated. *Washington v. Davis* leaves open the possibility that the District could have generated and evaluated alternatives and revised its hiring methods to minimize purposeless racial disparity. In doing so, it would examine the validity of its approaches and compare its results to those expected from a pool of applicants in the absence of racial differentiation. It is this kind of effort that qualifies as active nondiscrimination.

It should be added that the step of objective verification by comparisons of racial composition should serve as a check against racial prejudice, not as a means of achieving any particular racial distribution as an end in itself. Active nondiscrimination constitutionally cannot imply racial balancing for its own sake, but for three reasons, it need not, if properly exercised. First, objective verification allows for race to be used in choosing the method of distribution, and not necessarily as a direct determinant of actual distributions. Second, objective verification does not disallow racially disparate results when they can be justified by nondiscriminatory explanations. As an obvious example, governmental efforts to combat sickle-cell anemia and Tay-Sachs disease disproportionately benefit African-Americans and Jewish Americans, respectively, but these efforts

are not unconstitutional because there is a nondiscriminatory explanation. Third, objective verification should not seek exact conformity to results expected from racially distributed populations, but only assurance that the government's methods are not so seriously and unexplainably skewed as to indicate racial prejudice. It should lead only to the choice of one alternative that is acceptable under *Washington v. Davis* over another that is also acceptable but that produces a significant unjustified disparity.

(3) Nondiscrimination as a Constitutional Value of the First Magnitude. The importance of achieving verifiable results in the arena of racial equality does seem to rise to the level of a first-rank governmental interest. Its importance can be judged by objective criteria. Specifically, it transcends political philosophies, and it is not a mere temporary problem in this nation. Nor is it malleable enough to be aggrandized or shrunk by rhetoric. It has involved blood and tears, and it still does.

First, as to the universality and permanence of this issue: Racial equality was the objective of a now-infamous compromise in the original Constitutional Convention. It was a factor underlying the Missouri Compromise as well as the ill-fated Dred Scott decision. Our bloodiest Civil War followed, and although there are many non-racial explanations for that war, some historians see racial injustice as a contributing if not essential cause, and the pattern of slave States and free ones in the warring camps is too clear to have reflected randomness or coincidence. Reconstruction and the most significant postwar constitutional amendments came after that.

In more modern times, the issue has been reflected in *Brown v. Board of Education* and in landmark Congressional enactments in 1964, 1968, and thereafter. The aftermath of *Brown* saw the Supreme Court almost desperately demanding just results rather than mere rhetoric: a plan that "works" was the requirement, and a plan that works "now." Racial equality has featured prominently

as an issue on the Court's docket virtually every year since, culminating in the decisions in *Gratz* and *Grutter* in 2003.

As a civics review, this history will edify few Americans, but it is more than a civics review. This article has attempted an objective definition of a compelling interest as one that transcends political philosophies, temporal constraints, and rhetorical tricks. A review of evidence of the kind contained in this history would be useful whenever a court attempts to identify a compelling interest. Furthermore, this compelling interest justifies a conscious legislative choice among alternatives to achieve actual results, not mere neutrality. Rhetoric of equality without results has, at times, proved worse than no rhetoric at all, causing racial unrest, disturbance, violence, and riot, and resulting in death, massive losses of wealth, and major political reactions.

(3) Nondiscrimination as Opposed to Neutrality. The more difficult question, however, does not concern racial equality as a constitutional value. Rather, it concerns the constitutional permissibility of active efforts to assure equal results, as opposed to neutrality. There is great appeal to the concept of government as impartial referee, guaranteeing a fair decisionmaking process rather than touching the scale to assure results. Neutrality, then, is the natural conservative position.

Again, however, the history is relevant, and it points in another direction. The Supreme Court at times has demanded action to correct racial inequality, not merely to superintend its neglect. (At times, the Court's approaches to the problem have been less than optimal, but that is a point that has been made adequately elsewhere, and it does not negate the appropriateness of the effort.) Congress has acted affirmatively to mandate results not required by the unaided Constitution, such as in its legislation requiring nondiscrimination in public accommodations provided by private persons. This latter example must be qualified by recognition of the effect of section 5 of the Fourteenth Amendment, which specifically grants enforcement power to Congress, and by the Supreme Court's

treatment of the Amendment as a limit upon racial remedies enacted by the States. This kind of legislation does, however, demonstrate the importance of the underlying governmental interest.

There are Supreme Court landmarks, furthermore, that actually impose affirmative nondiscrimination duties upon the States, albeit without these precise words. In the San Francisco laundry case, *Yick Wo v. Hopkins*, the Court required the city to dismantle a system of laundry permitting that licensed the establishments of Caucasians at a high rate, while licensing those of Asian-Americans at a much lower rate. From the statistical evidence, the Court inferred the presence of unconstitutional discrimination. The rhetoric of the opinion is that of neutrality, in that the Court explained its conclusion by an inference of intentional discrimination. But the Court did not, and from the evidence could not have managed to, identify any individual whose racial prejudice had caused the discrepancy. Nor was there any rule or identifiable policy that was related to the result. In effect, the Court inferred unconstitutional discrimination from distributive results that differed from those to be expected from a distribution corresponding to the pool of ostensibly qualified applicants, in the absence of a credible nonracial explanation. More to the point, the Court's charge to the city did not permit neutral preservation of the status quo. Instead, it required the city to act affirmatively to achieve nondiscrimination.

For the individual decisionmaker, this model of nondiscrimination as an active, conscious choice is consistent with the psychology of prejudice. To take just two of the mechanisms of bias, decisionmaking can be adversely affected by fallacies known as "anchoring" and "availability." Anchoring is the acceptance of early-formed hypotheses coupled with the failure to re-examine them in light of later-acquired evidence. Availability refers to the tendency to consider only the evidence that most easily can be collected and analyzed. Flat-earth believers are an example of the fallacy of availability, refusing to infer anything from facts beyond the horizon. An illustration of the fallacy of

anchoring can be found in the remarkable persistence of the earth-centered Ptolemaic universe, even after overwhelming evidence supported the Copernican solar system.

The point is that these kinds of prejudice are best addressed by a rigorous insistence upon purposeful effort to counteract them. The decisionmaker needs first to consciously take notice of these biases. Then, the decisionmaker can follow a convention of due diligence to overcome them. For example, an employee who has limited experience with Hispanic, Asian-American, or for that matter Caucasian employees can expressly consider his or her original assumptions about these groups of people when interviewing a new prospect. The employer then can overcome anchoring by examining whether those assumptions should be replaced by better hypotheses that reflect more specific evidence, collected about this individual employee. The employer also can counteract the fallacy of availability by consciously recognizing that the applicant's ethnicity alone is a fallacious basis for decision, but that it tempts the mind toward prejudice primarily because it is easily identified; it is available. And the employer can overcome this bias by deliberately looking for evidence that is less obviously available but more closely on point, such as the quality of the applicant's test scores, references, experience, and interview responses.

These anti-bias practices do not result from neglect. Instead, they require effort. Parallel kinds of biases can lead to racially skewed results in organizations such as businesses and government entities. Affirmative action to avoid this result, then, is appropriate, as in the San Francisco laundry case. Businesses and government, after all, have choices among policies, internal cultures, rules, and employees, and they can exercise these choices to maximize the effects of racial exclusion or to minimize them.

Some advocates of government neutrality have adopted principled stances against any of these kinds of efforts. An opinion by one Attorney General of Texas, for example, interpreted then-

existing constitutional decisions to prohibit even racially responsive advertising, outreach, or recruiting designed to produce more African-American applicants to higher education institutions. The existing decisions did not address this issue and certainly did not require it, and the Attorney General's conclusion was demonstrably absurd. Imagine a state college that historically has expended recruiting efforts at certain traditional high schools but comes to realize that it has concentrated on all-white schools, and it therefore consciously changes to visit majority-black ones as well. Or, imagine a law school that elicits few black applicants because it has advertised only among predominantly white institutions, and so it adjusts by adding recruitment at historically black colleges. My law school, the University of Houston, recruits consciously at Prairie View A&M University as part of a policy that seeks racial diversity in applications. One could argue that such a policy is constitutionally required; it seems outlandish to argue, as did the Attorney General, that the policy is unlawful as a violation of strict neutrality–especially since a contrary policy of recruiting only by tradition (anchoring) or familiarity (availability) seems itself less than neutral.

This example–race-conscious recruiting–involves a relatively mild form of affirmative action, but it is a type of affirmative action nevertheless. It has fewer disadvantages than some race-conscious programs since it does not require the categorization of applicants by race and does not use any such categorization to extend or deny benefits to any individual. In some situations, this mild remedy may be sufficient. In others, it may not; but in either event, it illustrates the case in favor of affirmative nondiscrimination: that is, the conscious effort to achieve results that conform to distributive justice. There may be some persons who would conclude that targeted recruiting of this kind is permissible, but that no more expansive remedy can be. To admit the legitimacy of race-consciousness in dissemination of information, however, is to admit that race-consciousness in at least some forms of affirmative action serves a sufficiently important governmental interest to satisfy

the compelling interest requirement. The conclusion that more expansive approaches are illegitimate is really a question not of goals but of means. It raises the more difficult question: whether the chosen means is "narrowly tailored" to achieve the goal of nondiscrimination. It is to that question, the determinative question in *Gratz* and *Grutter*, that this article now turns.

III. THE SECOND REQUIREMENT: NARROW TAILORING

A. What Is Meant by Narrow Tailoring?

This article has referred to the narrow tailoring requirement as the "Rodney Dangerfield" of the strict scrutiny approach, because it "don't get no respect." In fact, when the Supreme Court first introduced strict scrutiny, in *Korematsu v. United States*, it insisted upon finding a compelling governmental interest, very much as a current decision might, but it omitted completely any requirement of narrow tailoring. The *Korematsu* decision justly has been criticized, then and now, as reaching a result that hardly conforms to any fair concept of equal protection. The unpersuasiveness of the opinion persists in spite of the forcefulness of the majority's conclusion that the government's objective, which was the prevention of espionage and sabotage during a world war, qualified as a compelling interest. Arguably, the flaw in the opinion concerns the issue of narrow tailoring.

In *Korematsu*, the petitioner was an American citizen of Japanese descent. He was convicted in federal district court for remaining in San Leandro, California, contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, United States Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that "military area." No question was raised as to petitioner's loyalty to the United States. The Court "note[d], to begin with," that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Therefore, "courts must subject them to the most rigid scrutiny." Racial classifications, said the Court, could sometimes be justified by "[p]ressing public necessity,"

but "racial antagonism never" could provide an adequate rationale. In fact, "Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety" could constitutionally justify the exclusion. This was the west coast, however, and the time was a few months after the Japanese attack on Pearl Harbor. An enemy invasion of the mainland was not merely anticipated but in some quarters expected. No less than the future of civilization was at stake in the military campaign that produced *Korematsu*. Even from the distance of more than a half century later, it seems dubious to argue otherwise than that what the Court called "the national defense and safety" in such a time qualified as a compelling interest.

But with this conclusion, the Court's analysis largely was finished. The Court did not recognize a requirement that government action at issue reflect "narrow tailoring" to serve the asserted compelling governmental interest . To be sure, the Court did refer to "the judgment of the military authorities and of Congress" that the exclusion order was appropriate. And it explained that an exclusion based upon race "was deemed necessary because of the presence of an unascertained number of disloyal members of the group." The military authorities charged by Congress with declaring exclusions had settled upon a "finding . . . that it was impossible to bring about an immediate segregation of the disloyal from the loyal." But "[h]ardships are a part of war, and war is an aggregation of hardships." Furthermore, "[C]itizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier."

The opinion would have been more satisfying if the Court had explicitly considered whether the government's action was chosen among alternatives as the one most likely to achieve the government's objectives with the least infringement upon civil liberties. Some people, even at the time, might have perceived less drastic alternatives. "Approximately 5,000 American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce

allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan." The alternative of beginning with exclusion of these self-identified individuals would have been less drastic, although it would not completely have solved the problem of "immediate segregation of the disloyal from the loyal." Furthermore, the exclusion order that Korematsu was accused of violating was part of a single system of curfew, exclusion, and internment, by which Korematsu was required to remain in an "assembly or relocation center." The Court did not consider whether the lesser remedy of excluding him from the west coast, as opposed to interning him, provided a more narrowly tailored alternative. Given the cataclysmic events that shaped the climate of opinion, as well as the practical difficulties of identifying potential spies or saboteurs quickly enough for the exigencies of war, it seems unlikely that the Court's decision would have been otherwise even if the Justices had carefully considered the narrowly tailored issue. But it is possible; and in any event it would have established a better jurisprudence. The compelling interest requirement was easy to supply, but it did not provide the answer in *Korematsu*. It was the narrow tailoring issue, the more difficult question, that really decided the case, and the Court gave it no respect.

Since *Korematsu*, the Court's treatment of the narrow tailoring issue has been uneven. In some cases, such as *Fullilove v. Klutznick*, analysis of the narrow tailoring goal has been more explicit and careful than that of the compelling interest requirement. In *Fullilove*, the Court upheld a minority business set-aside enacted under Congress's section 5 powers, in part by emphasizing the "flexible" nature of waiver provisions and the small size of the set-aside. But in other cases, the Court has provided only brief and conclusory treatment of the narrow tailoring issues, and in a few of its decisions, the Court has even restated the test to avoid narrow tailoring altogether. For example, *Metro Broadcasting, Inc. v. FCC* concerned racial preferences in the assignment of broadcast licenses. There, the Court watered down the narrow-tailoring standard to a requirement that the

preference be only "substantially related" to the governmental goal. And as part of its reasons for upholding the Commission, the Court said that it was bound to give "great weight to the decisions of . . . the Commission." In *Metro*, in other words, the Court transformed the narrow tailoring requirement into a reduced standard, and furthermore, a major reason that the government prevailed was that the Court withheld scrutiny even under this lesser requirement.

There is a pattern in these cases. As this article has earlier observed, government actions almost always proceed from an impulse toward some sort of legitimate purpose. And political views, temporary crises, and rhetoric make most legitimate interests seem "compelling," at least sometimes. In *Korematsu*, *Fullilove*, and *Metro Broadcasting*, it is not difficult to construct persuasive arguments that national defense, racial justice in employment, and a properly functioning system of public broadcasting, respectively, all qualify as compelling governmental interests. Some people might regard that question in each case as a no-brainer. The narrow tailoring question is the more difficult issue, and its treatment is the real basis of decision in many such cases.

So it was in *Gratz* and *Grutter*, at least if the conclusion of this article is accepted. The proper treatment of racial equality in matters of distributive justice, this article has argued, is a compelling interest. If a state university other than the University of Michigan were to find itself with an all-white, all-male student body, many people might consider it compellingly important that the university address this distribution in a manner conscious of the racial impact of its actions. Many would see this conclusion as easy. But these same observers might differ sharply about the kinds of actions by the university that might be appropriate. Some would accept only the narrowest tailoring, while others would advocate broader government action. In other words, nondiscrimination, or active efforts to assure racial equality in distributive justice, is the easier question in a case such as *Gratz* or *Grutter* The narrow tailoring issue is the more difficult one, and

it is the one that decides the case.

The Court's response to this challenge in *Gratz* and *Grutter*is disappointing. In the first place, the majority's analysis fails to articulate a meaningful definition of narrow tailoring. The Court spent more effort explaining what narrow tailoring was not, than explaining what it was. It convincing established that narrow tailoring does not require absolute perfection. The State is not required to sacrifice its legitimate objectives to achieve narrow tailoring. The Court also accurately described the academic admissions process as a complex inquiry requiring the intangible weighing of ostensibly incommensurate factors. The Court also explained, again convincingly, that a State might sensibly consider a degree of discretion be appropriate in academic admissions decisions. None of these observations, however, is particularly useful in understanding what narrow tailoring means, as opposed to what it does not mean.

The only positive definition of narrow tailoring that the Court offered in *Grutter*was the statement that the "purpose" of this requirement is "to insure that 'the means chosen "fit" . . . th[e] compelling goals so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" The Court then observed that a "quota system" does not qualify and that race or ethnicity in academic admissions may be considered "only as a 'plus' in a particular applicant's file." The Court summarized these ideas by saying that an admissions program is narrowly tailored if it is "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." With that, the Court proceeded directly to its conclusion: "We find that the law school's admission program bears the hallmarks of a narrowly tailored plan."

This approach to narrow tailoring is inadequate because it allows not only narrow tailoring,

but loose, broad, sloppy tailoring as well, to meet its purported standard. Given the preliminary conclusion, by definition, that the Court already has found a compelling interest, rarely is the "motive for the classification" going to be "illegitimate racial prejudice or stereotype." The State may have been motivated by a compelling interest, in other words, but nevertheless achieved it through administrative means with adverse racial consequences; still, if the State did not intend those consequences, possibly because it ignored them, the State's "motive" remains pure. But indifference to unequal consequences in such a case hardly sounds like narrow tailoring. As for the Court's requirement that narrow tailoring must be "flexible enough" to consider all relevant factors with each individual on the same footing but without the same weight, this description can apply equally well to a narrowly tailored program or to one that allows consideration of race with wide-open discretion. (And indeed, wide-open discretion to consider race according to the individual preferences of administrators is exactly what the University of Michigan adopted, and what the Supreme Court's reasoning permitted.)

The Court could have done much better in defining this important part of the strict scrutiny test. In fact, the Court has done better in some of its decisions, although they concern other constitutional principles than equal protection. For example, in *Broaderick v. Oklahoma*, the Court considered the First Amendment overbreadth doctrine. This doctrine actually involves a step that is closely analogous to narrow tailoring. Its specific purpose, in fact, is to insure that laws that incidentally restrict or discourage protected speech do so as narrowly as possible–i.e., that they are narrowly tailored to achieve the State's legitimate interests. The Court's statement of its test in *Broaderick* was short and precisely stated, even though it is difficult to parse. As the Court put it, to be unconstitutional, "the overbreadth of a statute must be not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

This test is easy to state and easily applied once it is understood, even though it requires some work to understand. In essence, the test compares the "overbreadth of a statute," or in other words its harmful effect on protected speech, to the "statute's plainly legitimate sweep," or in other words to its proper operation (to prohibit conduct that the State is permitted to prohibit). It is only when the comparison shows that "overbreadth," or harmful effects, are "substantial" when judged "in relation to" the statute's "plainly legitimate sweep," that the statute is unconstitutional. In other words, the imposition of a significant harmful impact upon protected speech, to achieve the prohibition of a minor range of disfavored conduct, is unconstitutional. It is unconstitutional for the same reason that using a Howitzer to kill a fly is excessive. On the other hand, if the impact of a statute falls largely upon conduct that the State is permitted to prohibit, and if the discouragement of protected speech is incidental (or, in the terms used by the Court, if it is not "substantial"), the statute is constitutional.

A similar approach to narrow tailoring in the racial context would ask whether the "overbreadth" of the State's program, defined as license to indulge in harmful uses of race as a discriminant, is "substantial," when compared to the program's "plainly legitimate sweep," or its potential for advancing the State's compelling interest in active nondiscrimination. This approach would regard as unconstitutional a program that permitted administrators to make invidious decisions on racial grounds, at least if the need for doing so to achieve the State's legitimate objectives was absent. On the other hand, it would uphold a program of affirmative action that allowed real achievement of racial justice through distributive equality with minimal opportunities for invidious discrimination. The Court's mushy intonations about "motive," "stereotyping," and "flexibility" were worse than unhelpful; they were signposts in the wrong direction, not closely relevant to the requirement of narrow tailoring. If the Court had turned its attention instead to considering the meaning of narrow tailoring, for which an approach similar to that in the Court's own

Broaderick decision seems well suited, it would have followed a sharply different line of analysis.

B. Does Unchecked Discretion Amount to Narrow Tailoring?

In most areas of government, people who care about civil rights would be astounded by the idea of telling state officials, "You may indulge yourselves in unlimited, unstructured discretion while using race in whatever way you choose, as a discriminant for or against individual citizens." Desegregation decrees, for example, did not encourage local superintendents to weigh the attributes of individual students against their races in assigning them to high schools. Likewise, it would be troublesome to empower social workers to choose, on any basis satisfactory to them, whether to facilitate interracial adoptions, disfavor them, or uniformly oppose them. Similarly, a racial disproportion in the number of prison inmates would not justify giving discretion to judges or probation officers to consider individual convicts' races and to weigh them against other sentencing factors in unstructured ways chosen by the decisionmakers. (This is so, no matter how crucial, compelling, or important it may be to achieve racial equality in sentencing.) This kind of unstructured discretion, however, is precisely the authority that the Court in *Grutter* gave to the members of the admissions committee of the University of Michigan Law School. In this respect, *Grutter* is a constitutional aberration.

Supporters of the *Grutter* decision have claimed that the admissions process is different from other kinds of distributive decisionmaking. And indeed, it is different from some kinds of government business. But the question remains whether it is different in a meaningful way, one that should lead to a sharply different use of race as a discriminant from that which would be allowed in most other contexts. There are at least two ways in which law school admissions arguably can be differentiated from other kinds of decisions. First, it is said that admissions involves the balancing of multiple, incommensurate, competing factors. The nature of admissions is such that many of these

factors cannot be reduced absolutely to formulas, and they remain a matter of weighing intangibles according to individualized discretion–or so the argument goes. A second argument is that discretion in affirmative action decisions is done for good purposes: to achieve viewpoint diversity, or racial diversity, or as this article would put it, to achieve active nondiscrimination.

The point that these arguments miss, however, is that race is different from other factors, and while distinctions based on an infinite number of other discriminants may be permissible, those based upon race usually are not. It is perfectly acceptable for an employer to say, "I considered this applicant on an individualized basis, and my decision not to extend an offer of employment was substantially motivated by the applicant's *lack of experience*," but it is *impermissible* to say, "My individualized decision not to hire was *substantially motivated by race*." Sentencing disparity is a problem, but it would be constitutionally inappropriate for a judge to explain, "I used my discretion to sentence this defendant to a lengthy term of imprisonment, based in part on the defendant's race." And it does not help to say, in defense of such a racist sentencing policy, "Well, but I did it in an individualized way, and I considered race only along with all other relevant factors." It should not be necessary to emphasize, but it bears repeating, that decisions based upon race are one of the most sensitive issues addressed by the Constitution. Decisions based upon other factors are not the objects of sensitive constitutional regulation. Administrators can wisely or foolishly, but completely constitutionally, use unlimited discretion to consider LSAT scores, college grades, prior employment, commitment to the law, leadership in sororities or fraternities, legacy, or recommendations by prominent alumni, however persuasive or not these factors may be to any given Supreme Court justice. But not race. The apologists for *Grutter* miss this terribly basic point when they argue the permissibility of indeterminate balancing of non-racial factors as important in the process.

A great deal of Justice O'Connor's majority opinion is devoted to description of the admissions process, emphasis of its individualized nature, and defense of its indeterminate, multi-factor balancing. To the extend the multiple factors do not implicate serious constitutional values, Justice O'Connor's reasoning is on target. For a factor that the Constitution generally prohibits as a discriminant, such as race, however, Justice O'Connor should have looked for more.

The argument that discretionary consideration of race is acceptable because it is done for good purposes, also, is ultimately unpersuasive. Open discretion to consider race, such as that exercised by the professors on Michigan's admissions committee, can be used in a constitutionally acceptable manner, or it can be used in a manner that amounts to invidious discrimination. The faculty member who counseled against any preference for Cubans, partly on the ground that Cubans were likely to be Republicans, furnishes an example. Dennis Shields, the administrator in charge of Michigan's program at the relevant time, has since pointed out that he attempted to prevent irresponsible remarks of this kind. Dean Shields is a careful and conscientious individual, and he eloquently supports the Michigan program. He was correct, of course, to discourage these kinds of expressions by the Michigan faculty. But it is not the expression of these kind of bigoted beliefs that is the biggest problem. Instead, the biggest problem is action based on *unexpressed* bigotry of this kind. Discretion, especially unchecked, unmeasured, unguided discretion, allows, permits, and indeed encourages professors who dislike Cuban-Americans to vote their preferences freely, while concealing their unconstitutional action simply by doing what the Supreme Court licensed them to do by their invisible consideration of race.

Many Americans, those with and without customary hyphens, have reason to fear a system of government decisionmaking based upon unrestricted consideration of their ethnicities. Anti-Semitic committee members, faced with a decision to admit either a Jewish-surnamed American or a

Spanish-surnamed applicant, can act on their prejudices without detection simply by voting to admit the Spanished-surnamed individual. Or, committee members biased against Hispanics can do the opposite, equally invisibly. Arab- and Muslim-Americans are the objects of serious bias, and a committee member so inclined can invisibly enforce this inclination by voting for an African-American over an Arab-American or Muslim. For that matter, committee members disposed by prejudice against Spanish-surnamed individuals or African-Americans can freely exercise their predilections by voting for Caucasians or Asian-Americans. One can presume that a faculty member who speaks against Cuban-Americans because of their statistically likely political affiliations will exercise this choice. But most of those who do so will *not* announce what they are doing for the world to see and hear.

The problem is not merely that the individualized-discretion model permits this kind of invisible, invidious decisionmaking. It *requires* it. To exercise this kind of discretion, one must define favored and, by implication, less favored categories and must assign individuals to those categories. In *Fullilove v. Klutznick*, for example, the affirmative action program at issue was a set-aside that benefitted "African-Americans, Spanish-speaking persons, Asian-Americans, Indians, Eskimos, and Aleuts." The list did not include, for example, Arab-Americans. To compose such a list, an administrator must consider group membership. Although the faculty member who disfavored Cubans, and who explained why, may have contravened the very core of the Fourteenth Amendment, Justice O'Connor's opinion actually encourages this kind of reasoning. In fact, it requires it. Composing a hierarchy of "good" and "bad' (or "less good") ethnicities, based on nothing but the individual administrator's own prejudices, is an essential first step to exercising race-based decisionmaking reflecting only unlimited, unguided, unregulated discretion. Even though the Court should not have permitted action based on his statement, the professor who spoke against Cuban-

Americans, paradoxically, was doing nothing more than what the Supreme Court implicitly says he should have done.

These are not new ideas. Kenneth Culp Davis, who served an earlier generation as the world's greatest thinker on administrative law, championed the elimination of unnecessary discretion from the administrative process. Davis was not talking about administrative discretion targeted at constitutionally sensitive matters such as race in particular. Instead, he was concerned about issues involving ordinary legal decisions, not those of particular constitutional significance, such as processes governing labor disputes, environmental permitting, or driver's license revocations. His advice should be especially persuasive when the issue involves discretion to commit constitutional violations. Davis also recognized that discretion could not be eliminated completely, because numerical rules cannot answer all questions in a categorical way. Some discretion must remain, said Davis. But–and Davis hammered away at this–the remaining discretion should be "structured, checked, and confined." Unstructured discretion to consider race, in any manner that seems appropriate to a given administrator, is the opposite of Davis's prescription. To conclude that such an administrative model is "narrowly tailored" to minimize the misuse of race, as the Supreme Court did, is to make strict scrutiny unrecognizable.

In an earlier section, this article suggested a test for narrow tailoring: comparing the likelihood of proper use with the potential for misuse and extending approval only if the latter is not substantial in relation to the former. Race-based affirmative action by unrestricted discretionary decisionmaking has high potential for misuse. The Cuban-Republican example provides an instance of actual misuse, and invidious (but invisible) discrimination of other kinds undoubtedly occurred at the University of Michigan. As we have seen, the discretionary model invites, or rather requires, stereotypically based decisions. Although dissenting justices, particularly Justice Kennedy, pointed

out this possibility, Justice O'Connor's majority opinion did not answer it–or deal with it at all. In fact, Justice O'Connor never mentioned the anti-Cuban professor or the likelihood of other, similar behaviors by members of this "breathtakingly cynical" faculty. Perhaps that is because there is not a way to answer the criticism.

The undergraduate Michigan program at issue in *Gratz*, involving a fixed point system, should have been regarded as constitutionally superior to the unlimited discretion model in *Grutter* *Gratz* involved a twenty-point preference for certain minority applicants, an advantage that seems particularly significant in light of the assignment of only fifteen points, or five fewer, for a perfect SAT score. At least in such a system the invidious exercise of discretion has been "structured, confined, and checked," to use Davis's phrase. An administrator prejudiced against Arab-Americans will find that prejudice far more difficult to enforce in a fixed-point system like the undergraduate Michigan program in *Gratz*. Furthermore, the system struck down in *Gratz* has the advantage of making the level of the preference visible, so that it can be analyzed, critiqued, and reconsidered. By way of contrast, how can we know whether the Michigan Law School Committee that used invisible discretion to exclude Barbara Grutter actually used what amounted to a twenty-point preference addendum? Or, whether the law school actually used a forty-point preference? Perhaps a sophisticated statistical analysis would tell us. Perhaps a convincing showing that, in actual practice, more than twenty points would be necessary to produce the results reached by the University of Michigan Law School, might persuade a court that the program was unconstitutional. But that showing will be difficult to make, because of the deliberate invisibility of most invidious discrimination in such a system.

The point system used in the undergraduate program struck down in *Gratz* should instead have been preferred because it makes the racial remedy visible, and it facilitates adjustment.

Unfortunately, we are unlikely ever to have convincing evidence of the actual size of the preference in the law school program at issue in *Gratz*. Furthermore, a fixed-point program would have discouraged individual decisions influenced by prejudice against Arab-Americans, Jewish-Americans, Cuban-Americans, or any other particular group (or at least, it would lump them together with others who are disadvantaged only by the absence of ethnically awarded points). The Michigan undergraduate plan adjudicated in *Gratz* hardly seems a model of narrow tailoring, but it is less offensive in that regard than the open-discretion program that the Court upheld in *Grutter*.

C. Analyzing Alternative Approaches: Evaluating Narrowness of Tailoring

There are alternative methods that do not require these kinds of abuses of race as a discriminant. The concept of narrow tailoring invites the question: "'narrow' compared to what?" This obvious question should have prompted the Supreme Court to identify and compare other methods, some of which might be more narrowly tailored while at the same time achieving the State's compelling interest in active nondiscrimination as well or nearly as well as Michigan's methods. But the Court did not perform this analysis. Instead, the Court contented itself with observing that the State is not required to sacrifice its other legitimate objectives, without explaining, examining, or even identifying any alternate methods at all.

This article divides the alternatives into two groups. First, there are alternatives that do not require individual assignment of racial preferences. Most of these methods do depend upon race consciousness in some way. They do not, however, require categorizing individuals by race for the purpose of granting them more or less of the State's benefits on a person-by-person basis. Thus, they avoid the "odious" practice that Justice Stewart rightly criticized in his *Fullilove* dissent. Second, there are alternatives that do require the pigeonholing of individuals in racial categories. These methods include nondiscretionary and partly discretionary alternatives as well as the method that the

Supreme Court approved: that of granting decisionmakers wide-open, unlimited, and invisible discretion to treat race according to their personal preferences.

Some alternatives are much less constitutionally suspect than others. Some of them may have limited effects in achieving the goals that the University of Michigan targeted, but others are more powerful. There are many alternatives, and there are many possible combinations of alternatives.

(1) Alternatives That Do Not Require Awards of Preferences Based upon the Races of Individual Applicants. The least active alternative is one that Daniel Patrick Moynihan characterized as (1) "*benign neglect*." Taken literally (and not necessarily in the way that Moynihan intended), this phrase suggests a policy of ignoring race, ignoring even the results of existing policies that produce disparate racial impact, and distributing benefits in a manner that, if it happens to be racially skewed, is not intended (or known) to be discriminatory. Few people concerned about active nondiscrimination would choose this method–unless, of course, the system in question has already reached a state of full nondiscrimination. The distribution of women and men in law schools, for example, probably comes close to mirroring the qualified applicant pool, and therefore, few law schools today administer aggressive affirmative action based on gender. Race, however, is a different matter.

A second non-individualized alternative is (2) *outreach*. This method involves race consciousness with respect to both the school's own racial composition and the racial characteristics of applicant sources. Some schools, for example, send recruiters to predominantly black or Latino high schools (or colleges, in the case of post-graduate schools). Although it is race-conscious, this method does not require the labeling of applicants as black or white on an individual basis, nor does it mean that a Cuban-American, Jewish American, or Arab-American needs to fear discrimination of

the kind observed at the University of Michigan Law School.

A third method is what might be called (3) "*aggressive outreach*." A school that is serious about active nondiscrimination, but that chooses to use narrowly tailored policies to achieve it, might do more than mere episodic outreach. A University could partner with predominantly black high schools, for example, or a graduate or professional school could do so with historically black colleges. The University of Houston Law Center puts considerable effort into recruiting students from Prairie View A&M, a historically black college. Could the Law Center go farther, by establishing a permanent office on the Prairie View campus? Could one of the Law Center's professors offer a course titled "The Legal Process," similar to the one I took as an undergraduate, but offer it at Prairie View A&M?

These methods require greater effort than most existing outreach, and they may not work everywhere–not every State has historically black colleges. But Emory could partner in this manner with Spellman, Georgetown with Howard, and even the University of Michigan Law School could do something along these lines. At the least, the Supreme Court should have considered whether *some* schools could have tried this method before authorizing complete discretion in race-based decisions among individuals. The constitutional values are sensitive, and the stakes are high, in avoiding the kinds of expressed and invisible ethnic stereotyping that the University of Michigan Law School's method encouraged.

A completely different approach is to (4) *adjust non-racial admissions criteria*. For example, I have always believed that participation in competitive activities should be treated as an important discretionary variable in admissions. This criterion would include competitive sports, but it also would include debate, competing in the Miss Iowa pageant (as one of my more capable former students did), or, following the example of my law school dean, competitive ballroom dancing. The

practice of law is emotionally difficult, and it requires toleration of failure even while expending maximum effort. Those who have never competed at anything lack a basic preparatory experience for the law, even if they have obtained acceptable grades in secondary schools. Law schools would do well to consider this issue in admissions, because to date, law schools have produced a profession that is decidedly unhappy with itself–and extraordinarily maladapted to its essential activities. Whether emphasizing competition (or leadership) in discretionary admissions would produce equality in racial terms is unclear, but given the stakes, the idea would be worth a try–or at least, analysis by the Supreme Court. Law schools could easily implement the change by adding two provisions to the application, asking prospective students to "describe all the competitive experiences [or, leadership positions] in which you have participated since elementary school," together with expansive definitions and examples of "leadership positions" and "competitive experiences."

A related alternative, one that unquestionably produces dramatic results, might be called (5) *top of the class*. A university, for example, can accept all students who rank within the top ten percent of their high school classes. Some state universities have implemented this method, in fact, with great success in the achievement of active nondiscrimination, all without significant decrease in other academic criteria. Top-of-the-class is a race-conscious remedy in the sense that universities that have adopted it have done so for the purpose of distributing admissions more broadly across racial and ethnic classifications. Predominantly black or Hispanic high schools produce disproportionate percentages of top-ten black or Hispanic applicants, and this racial impact is precisely what these universities have targeted. But this particular race-conscious remedy does not involve classifying individuals by race. It does not imply any need to distribute benefits according to person-by-person ethnic pigeonholes. And most importantly, it does not enable bigots, like some at the University of Michigan Law School, to implement their prejudices, either expressly or invisibly.

The stakes are high, and the Supreme Court should have considered or at least mentioned this narrower alternative.

(6) *Targeted benefits* are another race-conscious but narrowly tailored alternative. The University of Michigan Law School could, for example, have advertised at historically black colleges that it would award significant scholastic aid to graduates of those colleges who obtained admission. If Michigan had made these financial-aid decisions at the college rather than the applicant level, this method, although it would have considered race, would have avoided racial classification of individuals as well as the kinds of invidious discrimination that surfaced at Michigan.

The Supreme Court gave no direct consideration to alternatives such as these six methods. Its only treatment of the issue was to observe that the State was not required to sacrifice other legitimate objectives for the sake of achieving its compelling interest in racial equality. This remark was not only off the point; it was uncalled for, and it denigrated the many fine universities that have achieve racial equality without sacrifice of other objectives.

Rice University, for example, is one of the nation's "top" educational institutions, to borrow the Supreme Court's phraseology. As an educational value, in fact, Rice may be *the* top university in the nation; it is in a class by itself. Rice's student body is 7.3 percent black and 11.3 percent Hispanic. The University has reached this level of nondiscrimination by active means, but without classifying individuals by race for admissions preferences. Yet, there is no suggestion that Rice has slipped in academic quality or prestige, and indeed, the evidence is to the contrary: Rice has maintained its top position. Recently, some Rice officials have suggested that the University should adopt the discretionary methods that the Supreme Court approved in *Grutter* A firestorm of criticism prompted Rice's general counsel to point out that it was "premature" to attack the University "for something we haven't done yet." Rice does not need the methods used at Michigan to

achieve active nondiscrimination together with the highest level of academic quality.

If the Michigan Law School had wanted, it could have achieved the same thing. It could have done so by using a seventh method, which would have consisted of (7) *combining all of the acceptable alternatives*. It could have increased its outreach, including aggressive outreach of the ind described in this article. It could have partnered with historically black colleges. It could have opened admissions to students in the top percentages of those colleges. It could have targeted its admissions criteria to achieve a different racial impact. And the Supreme Court could have improved its opinion, if not its holding, by considering whether Michigan could have achieved what Rice has achieved by these methods.

(2) Alternatives That Award Preferences Based upon the Races of Individual Applicants. There also are alternative race-conscious remedies that require consideration of race on an individual-by-individual basis. These alternatives, like those in the previous section, are numerous. Some are more likely to produce racial impact that others, and some are more narrowly tailored than others. Some do not require open, invisible discretion to consider race, even though they involve the application of race-based criteria to individuals; and these remedies arguably are more narrowly tailored than purely discretionary methods.

One method, paralleling but different from the ones described above, is (8) *to award individual benefits* such as scholastic aid directly on the basis of race. At least one school has implemented a program of this kind, apparently with dramatic effects. This method is race-conscious, with individual impact, but it does not require open, invisible discretion to discriminate at the individual level in admissions.

A school also might wish to use (9) a *fixed point system*, like the one that the University of Michigan undergraduate program employed. The Supreme Court disapproved this method in *Gratz.*

In fact, the size of the preference in *Gratz* was an eye-popper: a spectacular twenty-point racial lagniappe that exceeded the fifteen points obtainable for a perfect LSAT score. Michigan's undergraduate method cried out for invalidation for this reason alone. But fixed points used in more reasonable ratios could avoid the ugly prospect of individual-by-individual decisions based on race, and they would discourage invidious discrimination against members of non-favored groups: Cuban-Americans, Jewish Americans, or Arab-Americans. Fixed point systems are visible, and they facilitate the adjustment of excessive preferences.

The final pure strategy that this article will recognize is (9) *open discretion in the treatment of race*: the method approved in *Grutter*. This alternative should have been a last resort, for the reasons that this article already have given. Also, this pure-discretion method leads to consideration of a related, mixed strategy: (10) *structured, limited, and guided discretion*. A school could admit most of its students (say, three-quarters of them), without considering applicant's races, reserving racial consideration to the smaller portion of qualified applicants. This proposal probably describes the results that prevail as a matter of practice in a pure-discretion system, but explicit reservation of race to only a portion of the class would avoid invidious treatment of the majority of applicants and allow more focused examination of the rest.

Furthermore, discretion to consider race could be checked and limited by other kinds of rules and policies. The faculty could, for example, adopt a rule such as, "Consideration of an applicant's race or ethnicity shall not account for more than ten percent of the admission decision for any one individual." This sort of policy would require each committee member to understand and interpret it. Its effects would remain invisible, and its enforcement would be difficult. But such a rule should not cause any harm to the admissions process, and perhaps it could do some good, even at the Michigan Law School, when considered in good faith by conscientious professors.

And finally, there is the possibility of (11) *a combination of methods*, consisting of both individual consideration of race and simultaneous use of non-individual methods. The University of Michigan could, for example, have begun its affirmative action program by using outreach–or better yet, by making the effort to employ what this article calls aggressive outreach. It could have partnered with heavily black institutions, and it could have adopted a policy that presumptively admitted a certain percentage of the top graduates of those institutions. If the Law School remained concerned about degradation of academic quality, it could have limited this rule to the top ten percent, or the top five percent, perhaps with a required minimum for grades and LSAT scores. It could have used scholastic aid, targeted either at minority institutions or minority applicants, to enhance the effect of these basic race-based remedies. If these methods were not enough, it would have been better if the Law School had been permitted to adopt a modest presumptive preference, say a five-point increase in applicant score, although the Supreme Court's reasoning in *Gratz* seems to disallow this method. Finally, if the Law School felt that it still had not achieved an acceptable level of active nondiscrimination and that it needed to award decisionmakers discretion to consider the races of individuals, it could have confined, structured, and checked that discretion in any number of ways.

Instead, the University of Michigan Law School preferred the method of affording unmeasured discretion to people whom the record in *Grutter* shows were "breathtakingly cynical." The Supreme Court approved this choice by romanticizing "individualized' race-based decisionmaking as narrowly tailored. And unfortunately, the Court gave this approval without consideration either of the misuses that made invisible discretion at Michigan anything but narrowly tailored, and without consideration of alternatives that are better targeted.

CONCLUSION

Race-conscious remedies are like chemotherapy. Both are drastic treatments, although both are necessary in some limited circumstances; and even when they are necessary, care should be taken that they are not over-used. Most of us would not want to undergo chemotherapy without a compelling reason, such as a diagnosis of cancer. We would be unhappy with a physician who merely announced, "Well, I don't know whether you have cancer or not, and I don't really care; let's subject you to chemotherapy just in case." The requirement of a compelling governmental interest serves the same function in strict scrutiny as a diagnosis of cancer does in the decision to use chemotherapy.

But this is not the end of the decision, whether it involves chemotherapy or affirmative action. Most of us would want the strength and duration of chemotherapy to conform as closely as possible to that which is necessary to achieve remission. Even if perfection is impossible, no one would expect his or her doctor to say, "Let's just let the lab tech administer the dosage that seems right in the lab tech's discretion." The narrow tailoring requirement does for strict scrutiny what the dosage decision does for chemotherapy.

In *Grutter*, the Supreme Court missed the diagnostic indicators of a compelling governmental interest by basing its decision upon diversity. Neither the viewpoint diversity theory nor the direct racial diversity theory is persuasive (although the latter may be less stereotypical and more honest). But happily, the court's misplaced reasoning, here, makes little difference in the outcome. There is a compelling governmental interest at stake in cases like *Grutter* and *Gratz*. This article describes that compelling interest as nondiscrimination, or more accurately, as active nondiscrimination. A theory of active nondiscrimination means that a State should not be limited to ignoring racial disparity. Instead, state officials should consider it important to choose among alternatives with a consciousness of their racial impacts in an effort to conform to racial equality. Furthermore, the law

should encourage state officials to verify their achievement of nondiscrimination by comparing actual results to the probable pool of acceptable citizens who apply for the government's largesse. This theory superficially resembles justifications based upon diversity, because it requires government to consider race in distribution. But active nondiscrimination is not a diversity approach, because it does not use race as a discriminant among individuals.

The government's interest in this active kind of nondiscrimination is compelling. Objective indicators demonstrate its importance. In considering whether an interest is compelling, a court should evaluate whether it transcends political philosophies, is not susceptible to exaggeration by the exigencies of the times, and is not subject to manipulation by mere rhetoric. The interest in nondiscrimination–not merely in neutrality, but in actual distributive justice in matters of race–is very important in the United States. All three objective criteria mark it as a goal of the first rank.

But the question of dosage remains even when chemotherapy is indicated, and frequently, no doubt, dosage will prove to be the harder question. Likewise, narrow tailoring remains to be decided even after a compelling interest has been identified. And narrow tailoring, like dosage, will often pose the harder question. Here, the Supreme Court's approach in *Grutter*and *Gratz* does matter. Unfortunately, it is here that the Court's reasoning is most disappointing.

To begin with, the Court performed poorly in defining what narrow tailoring is about. The majority spent most of its effort explaining what narrow tailoring is not, and little in defining what it is. To the extent the Court made attempts at definition by emphasizing such ideas as "motive," it did not differentiate narrow tailoring from sloppiness. A race-conscious remedy may resemble a meat axe more than a scalpel, but it still may proceed from admirable motives. The Court would have done better if it had borrowed a simple test with analogous purposes from its First Amendment jurisprudence. Such a test would compare the legitimate effects of the State's policy with its abuses

and apply the narrow tailoring stamp of approval only if the abuses are small in comparison to the legitimate effects of the policy.

Measured by this standard, the Court's upholding in *Grutter* of the Michig an Law School admissions system is unfortunate. The Court's deferential treatment of multifactor balancing in this system led it to express a sentimental but unjustified preference for "individualized" race-based decisionmaking. The majority failed to consider disturbing demonstrations in the record that what it actually approved was not the romantic notion of individualized admissions that the Court wished for. Instead, the Court gave individual administrators unlimited and invisible discretion to consider race in whatever ways their idiosyncratic inclinations led them.

Discretion permits invidious discrimination. This is not a new insight; it traces at least to influential writers on administrative law in the century past. Such is the result of *Grutter*. A decisionmaker such as the one at Michigan who expressly argued for higher barriers against Cuban Americans because they "are Republicans," can indulge this prejudice to his or her heart's content in the strange world created by Justice O'Connor's opinion. Many Americans of various ethnicities that have been targets of racial animosity can find much to fear in this approach. And the problem is not solved by an injunction to Michigan professors to keep quiet about their prejudices. The larger problem involves *unexpressed* bias; an anti-Cuban professor who serves on an admissions committee can carry out his or her prejudices silently in a regime of discretion just by voting them. In fact, this is what the Michigan policy requires: a hierarchy of racial preferences, formed individually by each member of the committee, that guides each one's invisible use of race as a discriminant. The assignment of some value to each race–a vaguely defined scale, perhaps, but a scale nonetheless–is a necessary first step in the assignment of values to human beings on the basis of their races. An ugly paradox results. The anti-Cuban remark made by the Michigan professor may have been offensive,

and it may have attacked the most fundamental values protected by the Fourteenth Amendment, but the thought that this professor expressed shows exactly the kind of decisionmaking process that Justice O'Connor's concept of individualized decisionmaking invites–and indeed requires.

There are alternatives. In fact, there are many alternatives, and some of them offer the prospect of dramatic results without the disadvantages of the regime that the Court approved in *Grutter* It seems anomalous to approve a method with so much room for invidious decisions –and to call it narrowly tailored, even–without identifying and evaluating alternatives that limit the prospect of determinations based on invisible prejudices. These more narrowly tailored methods have enabled some schools, such as Rice University, solidly to achieve active nondiscrimination (or diversity, if one prefers) without the application of discretionary prejudices to individuals and without any slippage in academic quality. Even the fixed-point system used by the Michigan undergraduate school and struck down in *Gratz* would have been preferable to the romantic model of individualized race-conscious decisionmaking that the Supreme Court approved in *Grutter* That decision is a signpost in the wrong direction.