

**Back to *Bakke*: Defining the Strict Scrutiny Test for Affirmative Action Policies
Aimed at Achieving Diversity in the Classroom.**

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“You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘You are free to compete with all the others,’ and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.”¹

The United State Supreme Court’s recent review of affirmative action admissions policies in *Grutter v. Bollinger*² and *Gratz v. Bollinger*³ confirms that Equal Protection Challenges to affirmative action programs aimed at improving diversity in the classroom are subject to a different strict scrutiny test than are challenges to programs aimed at achieving racial equality in the workplace. Since the first challenge to an affirmative action program over 25 years ago, the Court has required that a race-conscious program not be upheld under the Constitution unless it passes the strict scrutiny test.⁴ Justice Powell first articulated the strict scrutiny test in *University of California at Davis v. Bakke*,⁵ writing that a race-conscious program survives strict scrutiny if it is “precisely tailored to serve a compelling interest.”⁶ Post-*Bakke* challenges more clearly defined the test, requiring state or federal entities defending any race-

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¹ President Lyndon B. Johnson, in his June 4, 1965, Howard University speech, “To Fulfill These Rights,” reprinted in a letter to the editor, Joseph A. Califano Jr., Letter to the Editor, *L.B.J. on Race Equality*, N.Y. TIMES, June 29, 2003, at A22. The writer was special assistant to President Johnson, 1965-69.

² 123 S. Ct. 2325 (2003).

³ 123 S. Ct. 2411 (2003).

⁴ See *infra* Part I. A.

⁵ 438 U.S. 265 (1978).

⁶ *Id.* at 299.

conscious program to demonstrate that there was a compelling governmental interest in the program, and to establish that the program was narrowly tailored to meet that interest.⁷

The *Bakke* case considered whether the affirmative action admissions program at the University of California at Davis (“UC Davis”) violated the Equal Protection Clause by granting preferential treatment in its admissions decisions to applicants of color.⁸ Justice Powell, writing for a plurality of the Court, identified a compelling governmental interest in achieving diversity in the classroom, but found – along with four of his brethren – that the UC Davis program was not narrowly tailored to meet that objective.⁹ Following *Bakke*, the Court heard a series of affirmative action challenges, all of which considered the constitutionality of affirmative action programs aimed at providing greater racial equality in the workplace.¹⁰ Through these cases, the Court identified a compelling governmental interest in remedying past effects of present discrimination, and more formally promulgated the narrowly tailored test to allow for ease of evaluation of these programs.¹¹

The post-*Bakke* challenges implicitly suggested the Court’s willingness to treat programs aimed at achieving diversity in the classroom differently from those designed to enhance equality in the workplace. But the Court’s failure to put its imprimatur on Justice Powell’s decision had unfortunate results. Because the Court never used the workplace challenges as an opportunity to endorse Justice Powell’s plurality decision in *Bakke*, a split developed in the circuits concerning whether Justice Powell’s definition of a compelling governmental interest in achieving diversity in the classroom was binding on lower courts.

⁷ See *infra* Part II.

⁸ *Bakke*, 438 U.S. 265 (1978).

⁹ *Id.* at 307-10.

¹⁰ See, e.g., *Richmond v. Croson*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *United States v. Paradise*, 480 U.S. 149 (1987); see Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 J.C. & U.L. 895 (1996).

¹¹ See *infra* Part I. A. 2.

The *Grutter* and *Gratz* decisions, which presented the Court with the first post-*Bakke* challenge to affirmative action programs aimed at achieving diversity in the classroom, offered the Court an opportunity to endorse Justice Powell's decision. In reviewing challenges to two affirmative action admissions policies, the Court confirmed that there is a compelling governmental interest in achieving diversity in the classroom.¹² Of equal import, while reviewing the challenged programs, the court articulated a "narrowly tailored" test that is, arguably, more appropriate for evaluating challenges to affirmative action programs aimed at achieving diversity in the classroom than those designed to increase racial equality in the workplace.¹³

This article will identify the new strict scrutiny test, and will consider the reason for creating a separate definition of strict scrutiny for evaluating affirmative action policies that achieve diversity in the classroom. Part I of the article will review constitutional challenges to affirmative action policies prior to *Grutter* and *Gratz*, and will discuss the split in the circuits that resulted from the Court's failure to endorse Justice Powell's definition of a compelling governmental interest in *Bakke*. Part II will provide an analysis of the *Grutter* and *Gratz* decisions, with a particular focus on each Court's discussion of the strict scrutiny test. Part III will define the Court's strict scrutiny test for evaluating affirmative action admission policies, and will highlight why it is appropriate to use separate tests for challenges to affirmative action programs aimed at achieving diversity in the workplace and those aimed at achieving diversity in education.

Part I: A Brief History of Challenges to Affirmative Action Programs and Policies

¹² See *Grutter*, 123 S. Ct. at 2338; See *Gratz*, 123 S. Ct. 2411.

¹³ See generally *Grutter*, 123 S. Ct. at 2337-40; see *Gratz*, 123 S. Ct. at 2426-28.

A. The Supreme Court's Application of the Strict Scrutiny Test.

1. *Challenges to affirmative action admissions policies.*

Because race-conscious affirmative action policies potentially granted preferential treatment to one class of people, opponents began challenging the policies, arguing that the policies violate the Equal Protection Clause.¹⁴ The Supreme Court first considered an affirmative action program in *Regents of the University of California v. Bakke*.¹⁵ Allen Bakke, a white male, unsuccessfully applied for admission to the University of California at Davis

¹⁴ See *supra* note 10 and accompanying text.

¹⁵ 438 U.S. 265 (1978).

Equal Protection Challenges to post-secondary school admissions policies have shaped the form that such policies take. Schools initially adopted race-conscious admissions policies in response to the civil rights movement and the practical realities of admitting minority students under the objective-based criteria upon which colleges and universities relied. See Leslie Yalof Garfield & Kelly Levi, *Finding Success in the Cauldron of Competition: The Effectiveness of Academic Support Programs*, __ BYU J. PUB. L. __ (2004). As a practical and time-saving matter, most admissions committees based acceptance to their institution on a student's objective standardized test score and his or her grade point average. See *id.* The large volume of applications to higher education institutions necessitated the need to create automatic admit and automatic rejection categories, which were defined in terms of a score that was based on an applicants score on standardized tests and/or an applicants grade point average from his or her prior academic institution. See *id.*

Unfortunately, as major studies conclude, under-represented minority groups do not perform as well on standardized tests as do members of the majority. See *id.* Consequently, admissions to schools that heavily weighted standardized tests in their admissions process rarely admitted students of color. In order to admit a diverse class, schools were faced with three options: (1) disregard the standardized tests entirely, (2) lower the floor for acceptable score on the standardized test, or (3) create what came to be called race-conscious admissions policies as a means to admit students who would not have been admitted under the strict objective standards. See *id.* Under option three, race would be considered a "plus" that admissions committees would add to the student's objective test scores. See *id.*

At the time, option one seemed entirely impractical. Admissions committees had neither the time nor the resources to review every application that was submitted. Moreover, the standardized test score, although criticized, provided, and still provides, a reasonable threshold for review of applications, therefore making the application review process slightly more manageable. See *id.* Option two was quickly disregarded because, in the minds of academicians, lowering the floor of the acceptable test score would decrease the mean score of the class. To those who subscribe that these test scores are objective, the scores reflect one's academic ability and intellectual prowess; a lower mean would result in top schools diminishing the "eliteness" of their entering class.

Thus, schools were left with option three and, beginning in the mid-1970s, schools began to devise their own race-conscious admissions programs as a means to admit more under-represented minority applicants. See *id.* These programs followed Justice Powell's edict in *University of California v. Bakke*, that post-secondary school and graduate school admissions programs could consider race as a factor in its admissions process. Consequently, schools began admitting students whose admissions files suggested that they were likely to become successful in their professional life, whose objective criteria, such as SAT, LSAT, or GMAT and grade point average, were not competitive with the majority of the entering class. See *id.* These affirmative action admissions policies, also considered race-conscious admissions programs, provided another vehicle for enhancing minority representation in the classroom. See *id.*

(“Davis”) Medical School in 1973 and 1974.¹⁶ He challenged the school’s 1973 admission policy, adopted in an effort to diversify its entering class, on the grounds that it operated to exclude him from the school on the basis of his race. Bakke challenged the policy as violating the Equal Protection Clause,¹⁷ the California Constitution,¹⁸ and Title VI of the Civil Rights Act of 1964 (“Title VI”).¹⁹

At the time, Davis employed a bifurcated admissions policy. One committee considered non-minority applicants who had achieved a minimum 2.5 undergraduate GPA (“UGPA”).²⁰ Another committee considered all minority candidates, regardless of their objective scores.²¹ The school set aside a certain number of seats for applicants in each of

¹⁶ Bakke, 438 U.S. at 266. In 1973, Mr. Bakke received a benchmark score of 468/500, but his application was late, and after his application was completed, no applicants in the general admission pool were admitted with a score below 470/500. *Id.* at 276. At that time four seats in the special admission program were open, although Mr. Bakke was not considered for these seats. *Id.* Mr. Bakke wrote to the Associate Dean and Chairman of the Admissions Committee, Dr. George H. Lowrey, to protest the admissions quotas. *Id.* In 1974, Mr. Bakke applied early and received high marks from a student interviewer, but received low marks from the faculty interviewer who, coincidentally, was Dr. Lowrey. *Id.* at 277. Dr. Lowrey gave him his lowest score of 86, making his total score 549/600 (there was one additional interviewer in 1974, so the total score was 600, as opposed to 500 in 1973). *Id.* at 277. Under the special admission program, applicants were admitted with significantly lower credentials than Mr. Bakke. *Id.* at 277.

¹⁷ U.S. CONST. AMEND. XIV, § 1 reads: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¹⁸ CAL. CONST. ART. I, § 7, reads: A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

¹⁹ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1989), reads: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

²⁰ Bakke, 438 U.S. at 275.

²¹ *Id.* at 274-75. Each applicant in the non-minority group was evaluated on the basis of his or her UGPA, MCAT score, and observations made during a personal interview conducted by a member of the Admissions Committee. The Committee automatically rejected non-minority applicants whose UGPA fell below 2.5. *Id.* at 265. In contrast, the committee referred minority student applications to a Special Admissions Committee comprised mainly of members of minority groups. This Committee rated minority applicants in a manner similar to the applicants in the general applicant pool, except that a 2.5 UGPA did not serve as a ground for summary rejection. *Id.* at 275. Thus, all minority applicants were considered for admission by the Special Admissions Committee, regardless of their UGPA. *Id.*

With the exception of the minimum UGPA for non-minorities, students were evaluated for admissions based on the same general criteria. However, each of the two Admissions Committees operated in a vacuum and did not compare its applicants to the other applicant group. The Special Admissions Committee did not rate or compare minority applicants to the non-minority applicants but could accept or reject applicants based on failure to meet course requirements or other specific deficiencies. The Special Admissions

the groups.²² Individuals from the general applicant pool could not fill seats from the minority applicant pool, even if seats were available.²³ Bakke claimed that the policy, which allowed the school to set aside a certain number of places for minority applicants with lower objective test scores than his own, was tantamount to a quota.²⁴ The trial court found that Davis' admission policy was a racial quota and held that it violated the California and United States Constitutions, as well as Title VI.²⁵ The California Supreme Court affirmed this.²⁶ Upon the state's appeal, the Supreme Court of the United States granted *certiorari*.²⁷

The Supreme Court, considering both the Equal Protection Clause and Title VI, affirmed the California Supreme Court's decision.²⁸ The Court subjected the Davis program to the most exacting evaluation. According to the Majority, "the Constitution guarantees that when a program touches upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear... is precisely tailored to serve a

Committee continued to recommend applicants until the number set by faculty vote were admitted. *Id.* at 273-75.

²² Bakke, 438 U.S. at 275. In 1968, when the overall class size was 50, the faculty set aside eight seats for minorities. In 1971, the overall class size was expanded to 100, and in 1973, the number of seats set aside for minorities was expanded to sixteen. *Id.*

²³ *Id.* at 272-76.

²⁴ *Id.* at 277-78. When Davis rejected Bakke in 1973, four seats reserved for applicants from the minority pool were unfilled, while the seats for the general admission pool were filled. *Id.* at 266. Following the second rejection, Allen Bakke sued Davis and the Regents of the University of California in state court. *See generally* Garfield, *supra* note 10.

²⁵ Bakke, 438 U.S. at 278-79. In reaching its conclusion, the trial court emphasized that minority applicants in the program were rated only against one another and that 16 places out of the class of 100 were reserved exclusively for minorities. *Id.* at 279.

²⁶ Bakke v. Regents of the Univ. of Cal., 553 P.2d 1152 (1976). The California Supreme Court ordered UC Davis to admit Mr. Bakke to the Medical School, since the school was unable to demonstrate that the Plaintiff would not have been admitted in the absence of the challenged program. *Id.* at 1172. Applying strict scrutiny, it concluded that the program violated the Equal Protection Clause because it was not the least intrusive means of achieving the school's compelling goals. *Id.* at 1167.

²⁷ Bakke, 438 U.S. at 281.

²⁸ Bakke, 438 U.S. 265. A Majority of the Supreme Court agreed that Davis must admit Bakke. At the Supreme Court level, UC Davis maintained that there was no private right of action under Title VI. *Id.* at 283-84. However, although the Court reached its decision based on the Equal Protection argument, it still recognized that a private right of action might exist under Title VI. *Id.* Because the issue was not argued or decided below, the Court chose not to address "this difficult issue." *Id.* at 283. The Court also did not address the issue of whether private Plaintiffs under Title VI must exhaust administrative remedies prior to bringing legal action. *Id.* at 283-84.

compelling governmental interest.”²⁹ This language became the embodiment of the strict scrutiny test.

The Court, in a highly fractionalized opinion, struck down the Davis policy. Justice Powell was chosen to write the Majority opinion. He concluded that the Davis program violated both Title VI and the Equal Protection Clause. Applying the strict scrutiny test,³⁰ Justice Powell found that there was a compelling governmental interest in attaining a diverse student body.³¹ A diverse student body contributing to a robust exchange of ideas is a constitutionally-permissible goal on which a race-conscious university admissions program may be predicated.³² However, although the Constitution does not bar admission policies from introducing race as a factor in the selection process, Justice Powell concluded that the program was not narrowly tailored, and that preferring members of any one group for no reason other than race or ethnic origin is discrimination on its own.³³ The Davis admissions policy, which set aside a specific number of seats for students in identified minority groups, unfairly benefited the interest of a victimized group at the expense of other innocent

²⁹ *Bakke*, 438 U.S. at 299 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938).

³⁰ *Id.* at 299. Justice Powell also wrote that “in order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is ‘necessary ... to the accomplishment’ of its purpose or the safeguarding of its interest.” *Id.* at 305 (quoting *In re Griffiths*, 413 U.S. 717, 721-22 (1973)); see also *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964).

³¹ Attainment of a diverse student body is related to academic freedom. *Bakke*, 438 U.S. at 311-12.

³² *Id.* Justice Powell noted that educational excellence is widely believed to be promoted by a diverse student body. *Id.* at 313-14.

³³ *Id.* at 207. (“We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”) *Id.*

Title VI clearly establishes that where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by federally-funded institutions, race-conscious action is required to accomplish the remedial objectives of Title VI. *Id.* at 307-09. Justices Brennan, White, Marshall, and Blackmun agreed with this, stating that “[Title VI] does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment.” *Id.* at 328.

individuals and, therefore, violated the Equal Protection Clause.³⁴ Additionally, its practice of having separate admissions subcommittees review minority and non-minority candidates inappropriately insulated applicants from comparison against the entire admissions pool.³⁵ For these reasons, Justice Powell concluded that the Davis admissions policy was constitutionally impermissible.

Justice Powell's opinion acknowledged that the Majority viewed the Davis admissions policy as seeking to achieve a goal that is of paramount importance to the fulfillment of its mission and, in fact, as serving an important governmental interest.³⁶ Justice Powell's opinion endorsed the policy of considering race as a "plus" in instances where an affirmative action admissions policy is free from clear goals or quotas.³⁷ Indeed, a majority of the Court recognized the University's right to select students who would best contribute to the "robust exchange of ideas."³⁸ However, ethnic diversity is only one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body.³⁹

³⁴ *Id.* at 307. Justice Powell upheld the California Supreme Court's decision that the special admissions program was unlawful, and that Mr. Bakke was to be admitted to Medical School; however, it reversed the decision enjoining the Medical School from considering race in admissions. *Id.* at 324-25. Chief Justice Burger, and Justices Stewart, Rehnquist, and Stevens, in a concurring opinion, agreed that the policy was unlawful because it unfairly favored one group over another. *Id.* Justices Brennan, White, Marshall, and Blackmun concurred in the holding and dissented in part, as they did not believe that Allen Bakke should be admitted to the Medical School or that quotas should be maintained. *Id.* at 379. They joined in Parts I and V-C, and White joined in part III-A. *Id.* at 328. Along with Justice Powell, Justices Brennan, White, Marshall, and Blackmun upheld the use of race in the admissions process, while Justices Burger, Stevens, Rehnquist, and Stewart considered the issue irrelevant to this case. See Ron Simmons, *Affirmative Action: Conflict and Change in Higher Education After Bakke* 1-2 (1982).

³⁵ Bakke, 438 U.S. at 315.

³⁶ *Id.*

³⁷ *Id.* at 317. For example, assume two applicants, one minority and one non-minority, have the same UGPA and MCAT scores. Under Justice Powell's opinion, an admissions committee can offer admission to the minority applicant before it offers admission to the non-minority applicant, since a diversity viewpoint "plus" UGPA and MCAT score is of more value to the school than a non-diversity viewpoint and the same "objective" test scores.

³⁸ *Id.* at 312-13.

³⁹ *Id.* at 314. The Court acknowledged that the importance of diversity may be greater at the undergraduate level than at the medical school level, where the focus is on "professional competency," but concluded that the "contribution of diversity is substantial" even at this level, because doctors provide services to a

Chief Justice Burger, and Justices Stevens, Stewart, and Rehnquist, joined in Justice Powell's conclusion that the program was invalid, based on the conclusion that the program violated Title VI, and thus there was no need to evaluate the program under the Equal Protection Clause.⁴⁰ However, while not agreeing outright with Justice Powell's compelling "governmental interest" definition, the plurality's acknowledgement of a university's right to achieve a heterogeneous student body suggests a tacit agreement. Of the Justices' lead opinion, Justices Brennan, White, Marshall, and Blackmun were in the minority, concluding that Title VI permits federally-funded entities to enact programs or policies that assist minority groups to gain equal access to programs more easily available to Caucasians. However, Title VI and the Civil Rights Act do not take precedence over the constitutional protection of the Equal Rights Clause, and thus such programs or policies are valid only to the extent that they are coterminous with the Fourteenth Amendment. Thus, because four Justices chose to limit the extent of their agreement with Justice Powell's conclusion, Justice Powell's scrutiny of the Davis Policy under the Equal Protection Clause became, in a sense, a Majority of one.

2. Challenges to affirmative action programs aimed at achieving diversity in the workplace.

The constitutionality of affirmative action admissions policies lay dormant for quite some time following the *Bakke* decision. However, beginning in 1987, the Court reviewed a series of challenges to affirmative action policies in the workplace. These cases, read

"heterogeneous population." *Id.* at 313-14. The Court also noted that while law schools focus on gaining legal skills and knowledge, this focus "cannot be effective in isolation from the individuals and institutions with which the law interacts." *Bakke*, 438 U.S. at 314 (*quoting* *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

⁴⁰ Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist joined in his conclusion that the program was invalid, however, they did not consider the constitutional issue since they concluded that the program violated Title VI. *See generally id.* at 408-22.

together, articulated clear guidelines for the application of the strict scrutiny test,⁴¹ and confirmed that courts must apply the test when reviewing challenges to state or federal affirmative action programs.⁴²

In the first post-*Bakke* decision to consider the constitutionality of affirmative action admission policies, Justice Powell, again writing for the Plurality, took the opportunity to reaffirm the requirement that these programs pass the strict scrutiny test before a court may pronounce them as constitutional. In *Wygant v. Jackson Bd. of Education*,⁴³ Justice Powell⁴⁴ referred to his language in *Bakke* to enunciate the present strict scrutiny test. The *Wygant* Court considered a collective bargaining agreement between the Board of Education and a teachers' union that provided for layoffs by seniority, where the percentage of minorities laid off would exceed the percentage of minorities employed at the time.⁴⁵ Justice Powell wrote that where race-based programs are concerned, the racial classification must be justified by "a compelling state purpose and the means chosen by the state to effectuate that purpose must be narrowly tailored."⁴⁶

While *Wygant* reaffirmed the requirement of applying strict scrutiny to race-conscious policies, it did little to further define the test for future application. The Court took the opportunity to more clearly define strict scrutiny the following year, when it decided *United States v. Paradise*.⁴⁷ *Paradise* considered the constitutionality of a one-black-to-one-white

⁴¹ See generally *United States v. Paradise*, 480 U.S. 149 (1987).

⁴² See *Richmond v. Croson*, 488 U.S. 469 (1989) (holding that courts must apply the strict scrutiny test to judicial review of state and local government affirmative action programs); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (mandating the use of strict scrutiny test for federal race-based preference programs.) See generally, Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 J.C. & U.L. 895 (1996).

⁴³ 476 U.S. 267 (1986).

⁴⁴ Chief Justice Burger and Justices Rehnquist and O'Connor joined the opinion.

⁴⁵ 476 U.S. at 274. The Board of Education justified this race-based policy on the need for diverse role models for its students. *Id.*

⁴⁶ *Id.* at 267.

⁴⁷ 480 U.S. 149 (1987).

promotion plan that the Alabama Department of Public Safety adopted pursuant to a District Court consent decree.⁴⁸ Since its mandate to promote some state troopers based on race was a race-conscious policy, the Court applied a strict scrutiny standard.⁴⁹ The Court would uphold the decree only if the policy was “narrowly tailored to achieve a compelling governmental interest.”⁵⁰ Relying on *Wygant*, Justice Brennan acknowledged that there is a compelling governmental interest in remedying present effects of past discrimination.⁵¹ However, because the Court had not previously defined precisely what “narrowly tailored” meant, it availed itself of the opportunity to provide further guidance to future courts and articulated the narrowly tailored element of the strict scrutiny test. The Justices unanimously concluded that the appropriate considerations for finding whether a race-based program was narrowly tailored included: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship between the numerical goals and the relevant labor market; and (4) the impact of the relief on the rights of third parties.⁵²

⁴⁸ *Id.* The consent decree required the Department of Public Safety to institute this plan as an interim measure to ensure the promotion of black state troopers. *Id.* The plan followed years of court battles and ineffective consent decrees in response to the Department’s “systematic and perpetual” discrimination against black state troopers. *Id.* at 153. Appellants challenged the consent decree, claiming the plan granted preferential treatment to Black state troopers, thereby violating the Equal Protection Clause. *Id.* at 150.

⁴⁹ *Id.* at 167.

⁵⁰ The Justices agreed that the circumstances preceding the need for the consent decree, and the lower court’s decision to issue the decree, sufficiently demonstrated a compelling governmental interest in remedying past and present discrimination by a state actor. *Id.* at 185. Justice Brennan, with whom Justices Marshall, Blackmun, and Powell joined, concluded that even under a strict scrutiny analysis, the one-black-to-one-white promotion requirement was permissible under the Equal Protection Clause. *Id.* at 186. Justice Powell, joined by Justice Stevens, concurred. These five Justices found that the one-black-to-one-white hiring program was narrowly tailored to achieve the goal of remedying proven discrimination. *Id.*

⁵¹ *Paradise*, 480 U.S. at 183-85.

⁵² *Id.* at 171; *see also* *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 487 (1986) (POWELL, J., concurring in part and concurring in judgment). The Court held that the one-for-one promotion policy was justified by compelling governmental interest in present effects of past discriminatory exclusion of African-American police officers. The Majority further concluded,

[w]hen considered in light of these factors, it was amply established, and we find that the one-for-one promotion requirement was narrowly tailored to serve its several purposes, both as applied to the initial set of promotions to the rank of corporal and as a continuing contingent order with respect to the upper ranks.

Following *Paradise*, for the next 15 years, the Court continued to consider a series of affirmative action challenges, all of which considered state or federal policies aimed at eradicating discrimination in the employment sector. When reading these together with *Wygant*, *Paradise*, and *Bakke*, one could articulate a clear understanding of the Court’s meaning of “strict scrutiny.” The goals of eradicating present effects of past discrimination,⁵³ or of achieving diversity in the classroom, could support a compelling governmental interest.⁵⁴ The Court also provided a further understanding of the meaning of each of the four prongs of the *Paradise* narrowly tailored test.

Regarding the first prong of the test, the necessity of the relief and the efficacy of alternative remedies, the Court concluded that it would not uphold a benign race-based remedial policy unless the policy was the least intrusive and most effective means to achieve the goals of the entity’s program.⁵⁵ In determining whether a program satisfies this element, the Court would consider the purpose the program is designed to serve, the policy reasons for the program, and the availability of alternative relief.⁵⁶ The Court has made clear that an

Paradise, 480 U.S. at 171-72. The consent decrees demonstrated the necessity of the relief. *Id.* at 171. “The remedy imposed here is an effective, temporary, and flexible measure. It applies only if qualified [B]lacks are available, only if the Department has an objective need to make promotions, and only if the Department fails to implement a promotion procedure that does not have an adverse impact on [B]lacks.” *Id.* at 185. This Court should not second-guess the lower court’s carefully considered choice of the figure necessary to achieve its many purposes, especially when that figure is hedged about with specific qualifying measures designed to prevent any unfair impact that might arise from rigid application.

⁵³ See, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); see also *Richmond v. Croson Co.*, 488 U.S. 469 (1989); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁵⁴ *Bakke*, 438 U.S. at 314-15.

⁵⁵ See generally *Bakke*, 438 U.S. at 266.

⁵⁶ See, *Paradise*, 480 U.S. at 170-74. See *Garfield*, *supra* note 10 at n.114-118. The Court has held that relief is necessary where a federally-funded entity predicates professional advancement on tests that yield a variable achievement rate for different races or ethnicities. See *Guardians Ass’n v. Civil Service Comm. of N.Y.*, 463 U.S. 582, (1983). For example, *Guardians Association v. Civil Service Commission of New York*, considered the necessity for an alternative to an examination-based police hiring program. Petitioners, Black and Hispanic police officers, were appointed to the New York City Police Department (NYPD) upon passing the examinations administered for entry level appointments. *Id.* As a group, the test scores of Black and Hispanic police officers were well below the test scores of non-minority candidates. *Id.* Since appointments were made based on test scores, the examinations caused Blacks and Hispanics to be hired later than most non-minority candidates. *Id.* at 582. The NYPD also fired police officers on a last-hired first-fired basis. Thus, more often

affirmative action policy will not be deemed “flexible, waivable, and temporary in nature” unless it is easily adaptable to changing governmental needs (flexible), easily terminated when not needed (waivable), and limited in duration (temporary).⁵⁷ In analyzing the “relationship of numerical goals to relevant population,” a reviewing court must consider the numerical relationship between an entity’s goals for its race-based program and the desired end of the program.⁵⁸ The court may find that the program’s numerical goals bear a reasonable relationship to the relevant population when the policy’s goals are measured against a population more closely tied to the particular group of individuals the policy seeks to benefit.⁵⁹ Finally, the requirement that the policy not favor one group over another is really a rule-based definition of the Equal Protection Clause. Congress adopted the Equal Protection Clause to ensure that minorities, particularly African-Americans, were not denied equal treatment under the law.⁶⁰ However, as programs and policies aimed at benefiting African-Americans and other minorities became more popular, particularly following

than not, Blacks and Hispanics were fired first. *Id.* at 565-86. The Court concluded that the performance on the examination yielded a disproportionate representation of Blacks and Hispanics on the police force.

Consequently, there was a need for relief from the discriminatory effect of the standardized examination.

⁵⁷ See *Paradise*, 480 U.S. at 178; *City of Richmond v. Croson*, 488 U.S. 469 (1989). In *Croson*, the Court struck down the Minority Business Enterprise legislation since it did not have either a specific termination date or, at a minimum, a provision for reviewing the legislation. *Id.* The *Paradise* Court found the one-black-to-one-white hiring plan met the second element of the narrowly tailored test, since the district court mandated the hiring program only for as long as the department continued to prohibit minorities from being promoted. *Id.* at 178. Additionally, under the consent decree, the court could easily eliminate the program once Alabama’s Department of Public Safety promoted a reasonable number of Black and Hispanic troopers by no longer mandating the state’s method of promotion. *Id.* at 163-64. Thus, a program or policy will pass the second element of the narrowly tailored test if the reviewing court can identify a termination provision with a quick method of eliminating the policy once the federally funded entity meets the goals of the policy or program.

The Court will conclude that a need for relief exists when an “objective” test yields a discriminatory result. *Id.* at 171. The Court has also found a need for relief from educational policies that result in discrimination or separation by race. See *United States v. Fordice*, 112 S. Ct. 2727, 2743 (1992). Thus, it is likely that where the Court finds that “objective” tests infringe on the rights of individuals to advance based on race, the Court will find that relief is necessary and must be achieved in the least intrusive manner.

⁵⁸ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1985). Statistical proof as evidence of its remedial purpose supplies the court with a means for determining that the entity offering the remedial policy had a “firm basis for concluding that remedial action was appropriate.” *Id.* at 292.

⁵⁹ *Croson*, 488 U.S. at 469.

⁶⁰ *Bakke*, 438 U.S. at 286. The Equal Protection Clause became a vehicle to ensure that African-Americans received “the same rights and opportunities that white people take for granted.” *Id.* at 287.

Congressional enactment of the Civil Rights Act, the Court began to use the Equal Protection Clause to safeguard the treatment white males previously took for granted.

Following *Paradise*, the Court considered a series of challenges to affirmative action programs, all of which were focused on the constitutional validity of programs aimed at eradicating discrimination in the workplace. In each case, the Court defined compelling governmental interest as supported by the eradication of present effects of past discrimination. Because these challenges all centered on race-conscious cases aimed at improving diversity in the workplace, the Court did not have the opportunity to endorse Justice Powell's finding that the need for diversity in the classroom supports a compelling governmental interest. Opponents of affirmative action admissions policies seized upon the Court's omission and challenged affirmative action admission policies on the grounds that they were not supported by a compelling need to eradicate present effects of past discrimination.

B. Challenges to Affirmative Action Admission Policies in the Circuit Courts.

In 1992, almost 15 years after the *Bakke* decision, individuals began a new round of challenges to affirmative action admissions policies. This time, the circuit courts became the battleground for evaluating whether such policies were permissible under the Constitution. The first major post-*Bakke* challenge was fought in the Fifth Circuit, in *Hopwood v. Texas*.⁶¹

Cheryl Hopwood, a single, Caucasian mother of two severely handicapped children, along with two other non-minority applicants, applied to and was rejected from the University of Texas Law School ("UT") in 1992.⁶² At the time, UT used a dual admission

⁶¹ 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

⁶² Cheryl Hopwood and three other Caucasian applicants were rejected from the school. *Id.* at 564. All four

policy to ensure its entering class was diverse in, among other things, race and ethnicity.⁶³ All applicants were reviewed in a similar manner. When rendering their decision, committee members were asked to consider such factors as undergraduate GPA, LSAT score, undergraduate major, race, gender, past work experience, and other relevant characteristics. The chairman of the admissions committee assigned one subcommittee to consider non-minority applicants and another subcommittee to consider minority applicants.⁶⁴ Consequently, when reviewing a particular file, a member of the minority subcommittee could not consider a particular application with reference to a diverse group, since he or she did not consider non-minority applications. Each of the Plaintiffs' applications reflected LSAT and undergraduate grade scores that were inferior to non-minority applicants,⁶⁵ but were superior to many minority candidates accepted to the law school that year.⁶⁶

had a marginal application, so their LSAT and undergraduate grade scores were not sufficient for acceptance under the school's general admissions policy. *Id.* at 563-67. However, each of these applicant's test scores and grades were superior to many minority candidates accepted to the Law School that year. *Id.* at 563 n.32.

⁶³ The court noted that the diversity admission policy was not entirely voluntary, because UT adopted the policy in response to the Office for Civil Rights (OCR) Texas plan. Nonetheless, the court concluded that under an Equal Protection analysis, the same level of scrutiny applied to race-conscious affirmative action plans adopted pursuant to a consent agreement, whether or not such plans were voluntarily adopted. Thus, the court would uphold the policy if it met the Supreme Court's requirement that (1) there was a compelling governmental interest, and (2) the policy was narrowly tailored to achieve the goals of that interest. *Id.* at 569 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)); see also *Richmond v. Croson Co.*, 488 U.S. 469 (1989); *Bakke*, 438 U.S. at 299.

⁶⁴ UT had two separate reviewing sub-committees. *Hopwood*, 861 F. Supp. at 562. The Chair of the Admissions Committee set a different presumptive admission or denial Texas Index ("TI") number for minorities, who were reviewed by one sub-committee and for non-minorities, who were reviewed by a separate sub-committee. *Id.* at 561. The Admissions Committee based acceptance to UT for all applicants on an index number that is a function of each applicant's combined undergraduate grade point average ("UGPA") and LSAT score. *Id.* at 557 n.9. The Chair of the Admissions Committee initially reviewed all applications regardless of the applicant's residency, race or ethnic heritage, and then set a number below which students were presumptively denied admission, and another number above which students were automatically admitted to the school. *Id.* at 560-61. The sub-committees reviewed applicants with numbers between the automatic admission and the automatic rejection numbers. *Id.* at 561. The admissions office divided non-minority files into groups of 30. Three members of the non-minority sub-committee reviewed each non-minority applicant on an individual basis. In contrast, the entire minority sub-committee reviewed each minority applicant as a group. In theory, each member of the minority sub-committee was to be part of the sub-committee to review non-minority files; however, one member of the minority sub-committee did not review non-minority applications. *Id.* at 562.

⁶⁵ The denied applicants were all white Texas residents. *Id.* at 564. Cheryl J. Hopwood had a TI of 199, and

Following their rejection, a Texas lawyer contacted these and other applicants whom the school had rejected regarding a class-action suit. Plaintiffs agreed and permitted the lawyer to file a lawsuit on their behalf.⁶⁷ The applicants challenged UT's 1992 admission policy as violating the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the 1964 Civil Rights Act.⁶⁸

In August 1994, the United States District Court for the Western District of Texas found that the policy failed under the strict scrutiny test.⁶⁹ The court, relying on Justice Powell's opinion in *Bakke*, found that a compelling governmental interest existed in the school's 1992 admissions policy, since the school's efforts were limited to "seeking the educational benefits that flow from having a diverse student body and to addressing the

Kenneth Elliott, Douglas Carvell, and David Rogers each had a TI of 197. *Id.* at 564-67. UT contested the ripeness of the claims of Hopwood and Elliott, because neither was actually denied admission. *Id.* at 567. Moreover, UT maintained that all four applicants lacked standing because they could not demonstrate that they would have been granted admission in the absence of the challenged admissions policy. *Id.* Because the Plaintiffs were not considered for admission in a manner similar to minority students, the court ruled the applicants had standing to bring their claim. *Id.* at 567-568. *See also Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993).

⁶⁶ Hopwood, 861 F. Supp. at 563 n.32. Cheryl Hopwood's UGPA was 3.8 and her LSAT was 39. *Id.* at 564. Her father passed away when she was a young child. While in high school, Hopwood was offered admission into Princeton, Penn State and Temple. She declined admission, however, because she had to pay for her own education and work while attending both high school and college. *Id.* at 564 n.40. At the time of her application, she was married to a military serviceman and had two children, one of whom died at birth and the other who was diagnosed with severe birth defects. Sam Howe Verhovek, *For 4 Whites Who Sued University, Race is the Common Thread*, N.Y. TIMES, March 23, 1996, at A6. Hopwood declined to include any of this information in her application to UT. Hopwood, 861 F. Supp. at 564, n.38. She did, however, submit a letter to the Law School on January 22, 1992, requesting that if she were admitted, she would only be able to attend the school on a limited basis in her first year, due to the needs of her severely handicapped daughter. *Id.* at 564. Kenneth Elliott's UGPA was 2.98 and his LSAT was 167. He is a certified public accountant, and since receiving his undergraduate degree, Elliott has worked as an auditor or examiner for state agencies. *Id.* at 565. Douglas Carvell's UGPA was 3.28. *Id.* at 566. After taking the LSAT twice, the first score being in the 61st percentile and the second in the 91st, his average score placed him in the 76th percentile. *Id.* at 566 n.47. In a letter of recommendation contained in Carvell's admissions file, a professor from Hendrix College complimented Carvell's intellect, but described his performance as "uneven, disappointing, and mediocre." *Id.* at 566. David Rogers attained a UGPA of 3.13 and an LSAT score of 166. In 1985, Rogers was dismissed from the University of Texas (undergraduate program) due to poor scholastic performance. He then attended the University of Houston-Downtown, where he received his degree in professional writing in 1990. *Id.* at 567.

⁶⁷ The lawyer, Steven W. Smith, became familiar with the case following his own investigation into what he perceived to be reverse discrimination. Under the Texas Open Records Act, Smith obtained the names of dozens of applicants with relatively high UGPAs and LSAT scores, and mailed them letters requesting them to serve as Plaintiffs in this case. Hopwood, Elliott, Carvell, and Rogers brought suit with Smith as their lawyer. Verhovek, *supra* note 66, at A6.

⁶⁸ Hopwood, 861 F. Supp. at 553.

present effects of past discriminatory practices.”⁷⁰ The court rejected the policy, however, because it was not narrowly tailored to meet the goals of achieving a diverse class.⁷¹ Ms. Hopwood and her co-Plaintiffs appealed the decision to the Fifth Circuit. The Court of Appeals permitted the law school to reconstitute its admissions policy, allowing it to consider race as a factor in admissions decisions, but requiring the school to review minority and non-minority candidates as a group.

A divided court⁷² overturned the lower court decision, permitting UT to reconstitute its 1992 admissions policy, and struck down the policy as violating the Equal Protection Clause of the Fourteenth Amendment.⁷³ A majority of the panel broadly ruled that UT may not use race as a factor in law school admissions, and suggested that every school in its jurisdiction is prohibited from doing the same.⁷⁴ The Majority rejected

⁶⁹ *Id.* at 584-85.

⁷⁰ *Id.* at 570 (*quoting* Bakke, 438 U.S. at 313). In other words, the compelling governmental interest was supported by both the need to diversify the school’s entering class and the present effects of past discrimination. The court concluded that without the diversity admission policy, UT would not have achieved a diverse student body. *Id.* at 572. Recent Office of Civil Rights findings, coupled with the State’s “long history of discriminating against [B]lacks and Mexican Americans” and UT’s history of racial discrimination, were sufficient evidence to establish that the remedial purpose of UT’s diversity admission policy constituted a compelling governmental interest. *Id.* at 572.

⁷¹ *Id.* at 579. The court found that the diversity admission policy met the first three prongs of the narrowly tailored test. *Id.* at 569-78. First, UT sufficiently demonstrated that the race-based admissions policy was necessary, since it was impossible to achieve diversity without an affirmative action admission policy. *Id.* at 573. Second, the program was temporary in nature because the objective of UT was to narrow the gap progressively so that at some point in time, UT would no longer need a diversity admission policy. *Id.* at 575. Third, UT’s goals for minority enrollment as a percent of total enrollment bore a reasonable relationship to the percent of minority college graduates in Texas. *Id.* Ultimately, the court held that the diversity admission policy violated the Fourteenth Amendment because it failed to afford each individual applicant a comparison with the entire pool of applicants. *Id.* at 579. The court recognized the laudable and imperative goal of diversity in the education system. Moreover, it agreed with Justice Powell that race or ethnicity could be considered a “plus” factor in a school’s consideration of a particular applicant. *Id.* at 577. The court noted that when weighing non-traditional factors in the admissions decision, it is permissible for an admissions committee to choose an applicant with a lower LSAT and/or UGPA. Such an applicant may be preferable based on qualifications that include non-objective factors. *Id.* Thus, the court ruled in a manner consistent with *Bakke*, holding that race can be a factor in considering a candidate’s application for admission, so long as a school does not use race to meet goals or to set quotas.

⁷² It was a 2 to 1 ruling. Judge Jerry Smith delivered the opinion of the court, with Judge Weiner filing a specially occurring opinion.

⁷³ Hopwood v. Texas, 78 F.3d 932, 934-35 (5th Cir. 1996).

⁷⁴ *Id.* at 962. The panel also dismissed an appeal requesting intervention in the case by two Black student groups for lack of jurisdiction. *Id.* at 959.

Justice Powell's holding in *Bakke*⁷⁵ that there is a compelling governmental interest in the attainment of a diverse student body. The judges wrote that Justice Powell's opinion in *Bakke* was not binding, since it was not the general consensus of the Court.⁷⁶

The *Hopwood* Majority's rejection of Justice Powell's decision in *Bakke* prompted many to speculate that the Supreme Court would take *certiorari* following UT's appeal. On July 1, 1996, however, the Supreme Court denied the state's petition for *certiorari*,⁷⁷ thereby letting the Fifth Circuit decision stand. Although there was no opinion accompanying the decision,⁷⁸ Justice Ginsburg wrote a brief concurrence, joined by Justice Souter. Justice Ginsburg explained her decision to deny *certiorari* was based on a finding that UT had already changed its 1992 admissions policy to reflect the District Court decision, making the issue moot.⁷⁹ She suggested, however, that there would be a time in the future when the Court would address "the important question raised in this opinion."⁸⁰

⁷⁵ 438 U.S. 265 (1978).

⁷⁶ *Hopwood*, 78 F.3d at 944. In order to establish a compelling governmental interest, the judges looked to the Supreme Court's definition of a compelling governmental interest in Title VII employment discrimination cases. The judges would only find a compelling governmental interest if there were present effects of past discrimination. *Id.* at 949. As evidence of the present effects of past discrimination, the lower court relied on the Office of Civil Rights findings of discrimination throughout the Law School and the entire UT system. In contrast, the Fifth Circuit Majority defined the proper unit for analysis of the effects of discrimination as the Law School. *Id.* At UT, the judges held, there were no recognizable present effects of the Law School's past discrimination. *Id.* at 951. The Majority concluded that since UT could not show prior discrimination by the Law School, it could not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body. *Id.* at 962. In a concurring opinion, Judge Weiner agreed that the 1992 UT admissions policy did not pass strict scrutiny. *Id.* at 966. The UT policy was not narrowly tailored to achieve diversity, since it set one TI range for African-Americans, a different range for Mexican-Americans, and a different range for other races. *Id.* at 936. However, Judge Weiner disagreed with the Majority, saying that diversity could never support a compelling governmental interest. *Id.* at 962. He wrote that Supreme Court precedent supports the proposition that achieving diversity in a public graduate or professional school could be a compelling governmental interest. *Id.* at 964. Ultimately, Judge Weiner wrote that the definition and application of a compelling governmental interest where education is concerned should be left to constitutional interpretation, and he perceived "no 'compelling' reason to rush in where the Supreme Court fears – or at least declines – to tread." *Id.* at 965.

⁷⁷ *Texas v. Hopwood*, 116 S. Ct. 2581 (1996).

⁷⁸ *Id.* (writing, "Petition for writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit denied.").

⁷⁹ *Id.*

⁸⁰ *Id.* at 2582 (stating, "we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition."). Justice Ginsburg's concurrence in the denial of *certiorari* suggests that the definition of a compelling governmental interest in educational race-based programs remains

In the years following *Hopwood*, new affirmative action challenges in the federal courts attempted to force the Court, both directly and indirectly, to resolve the critical question of whether Justice Powell's plurality definition of the compelling governmental interest prong of the strict scrutiny test was binding. Many of these challenges stalled in the District Courts.⁸¹ Between 2000 and 2002, however, four cases reached various Courts of Appeals on the merits of whether the affirmative action admissions policies of post-secondary institutions violated the Equal Protection Clause of the United States Constitution. The holdings of these cases created a clear split among the Circuits, which ultimately forced the Supreme Court to resolve the issue of the weight of Justice Powell's opinion in *Bakke*.

In *Smith v. University of Washington Law School*,⁸² the Ninth Circuit ruled Justice Powell's opinion in *Bakke* was binding on its court, and that "the attainment of a diverse

open to Supreme Court consideration.

⁸¹ See *Texas v. Lesage*, 528 U.S. 18 (1999). Most stalled because of lack of standing. In the only affirmative action case to reach the Supreme Court since *Bakke* in 1971, prior to the recent ascension of *Gratz*, 123 S. Ct. 2411 (2003) and *Grutter*, 123 S. Ct. 2325 (2003), the Court was unable to issue a ruling on the merits of the University of Texas' admissions policy; rather the Court held that "where there is no allegation of an on-going or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability." *Lesage*, 528 U.S. at 21. Not only did the Supreme Court rely on the school's showing that *Lesage* was denied admission for race-neutral reasons, the Court also relied on *Hopwood v. Texas*, 861 F.Supp. 551 (1994), in part, to find that *Lesage* lacked standing to pursue his discrimination claim. *Lesage*, 528 U.S. at 22. The University of Texas did not deny that the year *Lesage* applied, the school considered race at some point during its admissions process. *Id.* at 19. However, the decision in *Hopwood* being binding on the Texas school, the Supreme Court was satisfied that *Lesage* was barred from seeking forward-looking relief. *Id.* at 22. Although the Supreme Court was not in a position to evaluate the University of Texas' use of race in its admissions policy given its finding that *Lesage* lacked standing, its reliance on *Hopwood* in issuing this ruling added a hint of legitimacy to *Hopwood* itself.

Despite that an affirmative action case has reached Court of Appeals in nearly every circuit, many have applied the Supreme Court's holding in *Lesage* to sidestep the issue of whether race-conscious admissions policies are constitutional. In both *Farmer v. Ramsay*, 43 Fed. Appx. 547 (2002), and *Wooden v. Bd. of Regents of the Univ. Sys. of Georgia*, 247 F.3d 1262 (2001), the court held that the respective Plaintiffs lacked standing to pursue the issue. Rather than examine either schools' admitted use of race in its admissions policy, the courts spent much of their opinion recounting the Plaintiffs' applications and the race-neutral reasons that the schools rejected the applicants. See generally *Farmer*, 43 Fed. Appx. 547 (2002); see generally *Wooden*, 247 F.3d 1262 (2001). Thus, these cases have added little to the discussion of whether race-conscious admissions programs are constitutionally permissible.

⁸² 233 F.3d 1188 (9th Cir. 2000), cert. denied, 532 U.S. 1051 (2001).

student body is a constitutionally permissible goal for an institution of higher education.”⁸³ In 1997, three Caucasian applicants⁸⁴ to the Law School challenged the school’s affirmative action admissions policy on the grounds that it violated 42 U.S.C. §§ 1981, 1983, and 2000d.⁸⁵ Plaintiffs, and the University of Washington (“UW”), as defendant, stipulated that from 1994 to 1998 the law school had used race as a criterion in its admissions process, so that it could ensure that it would enroll a diverse entering class.⁸⁶ In 1998, the State of Washington adopted I-200,⁸⁷ which precluded schools from granting “preferential treatment” to any individual “on the basis of race.”⁸⁸ In response, the President of the University issued a directive, and UW voluntarily refrained from using race as a factor in its

⁸³ *Id.* at 1197.

The district court correctly decided that Justice Powell’s opinion in *Bakke* described the law and would require a determination that a properly-designed and operated race-conscious admissions program at the Law School of the University of Washington would not be in violation of Title VI or the Fourteenth Amendment. It was also correct when it determined that *Bakke* has not been overruled by the Supreme Court. Thus, at our level of the judicial system, Justice Powell’s opinion remains the law.

However, the Law School has encountered a peripeteia in its own state; it is bound by I-200, which precludes it from granting ‘preferential treatment’ to any individual ‘on the basis of race.’ That has rendered Smith’s request for prospective relief moot because we [should] not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith [should] be presumed in the absence of a showing to the contrary....’

Bakke, 438 U.S. at 318-19.

⁸⁴ On July 1, 1997, Katuria Smith, Angela Rock, and Michael Pyle filed suit against the Law School, alleging illegal discrimination against Caucasians and others on the basis of their race, which resulted in their being denied admission to the Law School. From at least 1994 to December of 1998, the Law School did use race as a criterion in its admissions process, so that it could assure the enrollment of a diverse student body. There is no dispute about that. Katuria Smith was denied admission in 1994, but she attended another law school and obtained her law degree there. Angela Rock was denied admission in 1995. She, too, attended another law school and obtained her law degree. Michael Pyle was denied admission in 1996, but when he reapplied in 1999 [after the Law School terminated its overt racial policy], he was admitted. Smith, 233 F.3d at 1191-92.

⁸⁵ *Id.* at 1191.

⁸⁶ *Id.*

⁸⁷ Wash. Rev. Code § 49.60.400(1).

⁸⁸ Smith, 233 F.3d at 1192. On November 3, 1998, the State of Washington passed Initiative Measure 200, which stipulated in part that, “the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Wash. Rev. Code § 49.60.400(1).

admissions policy.⁸⁹ Because of the Law School’s voluntary decision to comply with I-200, UW argued to the District Court that the issue was moot. Plaintiffs argued that the claims were not moot because of the uncertainty of how the Law School would actually interpret and apply I-200.⁹⁰ The District Court issued an order granting the motion to dismiss the claims for injunctive and declaratory relief, since the issue was now moot due to the State’s adoption of I-200.

The court made the necessary findings under 28 U.S.C. § 1292(b) and designated two controlling questions of law for the Ninth Circuit to resolve: “(1) whether educational diversity is a compelling governmental interest that meets the requirement of ‘strict scrutiny’ for race-conscious measures under the Fourteenth Amendment to the United States Constitution; and (2) whether race may be considered only for remedial purposes.”⁹¹ Plaintiffs appealed both the denial of injunctive relief and the issue on the merits.⁹² The Ninth Circuit granted both applications.⁹³

As to the first issue, the court found that the claim was indeed moot in light of I-200.⁹⁴ The court then considered the District Court’s decision to deny the Plaintiffs’ partial summary judgment motion, which found that under *Bakke* and its progeny, “race could be

⁸⁹ Smith, 233 F.3d at 1192.

The new admission policy did retain a diversity clause, which stated that “[i]mportant academic objectives are furthered by... students... from diverse background[s]” and then went on to set out a non-exhaustive list of factors as indicative of diversity including ‘persevering or personal adversity or other social hardships; having lived in a foreign country or spoken a language other than English at home; career goals...; employment history; educational background...; evidence of and potential for leadership...; special talents...; geographic diversity or unique life experiences.’ Race itself, along with color and national origin, were excluded from the list.

Id.

⁹⁰ *Id.*

⁹¹ *Id.* at 1192.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Smith, 233 F.3d at 1193. The court found that the district court had properly determined that it could offer no relief of a prospective nature once I-200 and its aftermath had accomplished all that a judgment could accomplish. The court noted that time and events, including societal opinion, outstripped the court

used as a factor in educational admissions decisions, even where that was not done for remedial purposes.”⁹⁵ In upholding the District Court’s finding that UW could consider race as a factor in its admissions policy, Judge Fernandez acknowledged that the Supreme Court clearly required that any affirmative action admissions policy was subject to the strictest scrutiny, and would not be permissible unless it was narrowly tailored to meet a compelling governmental interest.⁹⁶ Adopting the language from Justice Powell’s opinion, Judge Fernandez concluded, “[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination,”⁹⁷ and the attainment of a diverse student body “is a constitutionally permissible goal for an institution of higher education.”⁹⁸ Thus, “ethnic diversity” can be “one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”⁹⁹ Ultimately, the court concluded that the Plaintiffs’ claims for declaratory and injunctive relief were moot, and therefore never considered the issue of whether UW’s program was narrowly tailored.¹⁰⁰

In 2001, following *Smith*, the Eleventh Circuit came to the contrary conclusion regarding the validity of Justice Powell’s opinion in *Bakke*. In *Johnson v. Board of Regents for the University of Georgia*,¹⁰¹ the Court considered an appeal from the District Court, which held that the University of Georgia’s (“UGA”) policy of awarding a fixed numerical bonus to non-white and male applicants, which it did not give to white and female applicants, was

processes. *Id.*

⁹⁵ *Id.* at 1196.

⁹⁶ *Id.* at 1197.

⁹⁷ *Id.* (quoting *Bakke*, 438 U.S. 265, 307 (1978)).

⁹⁸ *Id.* (quoting *Bakke* 438 U.S. 265, 311-312 (1978)).

⁹⁹ *Bakke*, 438 U.S. 265 at 314. “It has declared that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” *Smith*, 233 F.3d at 1199 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

¹⁰⁰ *See id.* at 1195.

unconstitutional.¹⁰² On appeal to the Eleventh Circuit, UGA argued that the school's policy should be upheld because it was narrowly tailored to meet what Justice Powell acknowledged in *Bakke* as a compelling governmental interest in admitting a diverse class.¹⁰³ The Majority concluded that Justice Powell's opinion in *Bakke* was not binding under *Marks v. United States*,¹⁰⁴ which held that "when a fragmented Court decides a case... the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."¹⁰⁵ Applying a *Marks*-type analysis, the *Johnson* Court concluded, similarly to *Hopwood*, that Justice Powell's decision, read with Justice Brennan's concurrence, supported the very narrow principle that race could never be a factor in admissions policies.¹⁰⁶ For these reasons, the Eleventh Circuit clearly articulated its conclusion that Justice Powell's decision was not binding on its court.¹⁰⁷

Despite its findings, the court was still willing to uphold the policy if it passed the strict scrutiny test, as articulated in *Paradise*. First, UGA had to demonstrate that its policy was designed to eradicate present effects of past discrimination.¹⁰⁸ Secondly, the school had to prove that its policy was narrowly tailored to meet the stated compelling governmental interest.

The *Johnson* court was the first to note that the *Paradise* test, while useful, was not ideal for evaluating an affirmative action admissions policy. Because neither the Eleventh Circuit or the Supreme Court "has had occasion to define the contours of the narrow

¹⁰¹ 263 F.3d 1234 (11th Cir. 2001).

¹⁰² 106 F. Supp. 2d 1362 (S.D. Ga. 2000).

¹⁰³ *Johnson*, 263 F.3d at 1245.

¹⁰⁴ 430 U.S. 188 (1977).

¹⁰⁵ *Johnson*, 263 F.3d at 1245 (*quoting* *Marks*, 430 U.S. at 193).

¹⁰⁶ *Johnson*, 263 F.3d at 1248.

¹⁰⁷ *Id.* at 1245. "Simply put, Justice Powell's opinion does not establish student body diversity as a compelling interest for purposes of this case." *Id.* at 1249. The Court also said, "We need not, and do not, resolve in this opinion whether student body diversity ever may be a compelling interest supporting a university's consideration of race in its admissions process." *Id.* at 1244.

tailoring inquiry in a case involving a university's race-conscious admissions policy,"¹⁰⁹ the court took it upon itself to propose a modified *Paradise* test, which better suited evaluating race-conscious policies set to achieve diversity in the classroom. Under the *Johnson* test,

a court evaluating a school admissions program designed to serve a compelling interest in obtaining the educational benefits associated with a diverse student body should examine: (1) whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity. The foregoing factors essentially correspond to all of the factors adopted in *Paradise* (other than duration) for affirmative action plans generally.¹¹⁰

Ultimately, the court struck down UGA's policy as failing the narrowly tailored test. Its policy of awarding diversity "bonus" points to certain applicants granted a disproportionate benefit to non-white applicants.¹¹¹ The court advanced solid reasons for its modification of the *Paradise* test. At the outset, inquiring into "the relationship between the numerical goal and the percentage of minority group members in the relevant population" may be unhelpful where the university does not target a specific number of minority applicants for admission."¹¹² In addition, "a limited inquiry into "the flexibility of the policy" may not adequately reflect the paramount importance of the requirement that, to serve validly the end of diversity, a race-conscious admissions policy...assess each applicant as an individual rather than a member of a particular racial group."¹¹³ Ultimately Judge Marcus, writing for

¹⁰⁸ *Id.* at 1252. Burden lay with party proposing the program. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1253.

¹¹¹ *Id.* at 1254.

¹¹² *Id.* at 1252.

¹¹³ *Id.* Judge Marcus further wrote, "Similarly, while it may be constitutionally acceptable in limited circumstances for 'innocent' members of a once-favored racial group to bear some burden when a defendant seeks to remediate its past discrimination, this view of competing racial groups has no meaning when a

the Majority, advanced that the *Paradise* narrowly tailored test was inappropriate for considering challenges to affirmative action admission policies.

The same year that the Eleventh Circuit decided *Johnson*, the Sixth Circuit was faced with two appeals concerning affirmative action admissions policies: one at the undergraduate level and one at the graduate level of the University of Michigan. The first challenge, *Gratz v. Bollinger*, was filed by a Caucasian female and a Caucasian male, each of whom were denied admission to the University of Michigan's School of Literature Arts and Science ("LSA").¹¹⁴ Jennifer Gratz and Patrick Hamacher challenged LSA's admissions policy, alleging that it improperly used race as a factor, in violation of 42 USC §§ 1981 and 1983, and the Equal Protection Clause of the Fourteenth Amendment.¹¹⁵

The Faculty at the University of Michigan had adopted its admissions policy to accomplish its stated goal of admitting a diverse class, for the benefit of all students in the classroom.¹¹⁶ From 1995 to 1998, LSA's admissions policy specifically "protected" a certain number of spots for minority candidates.¹¹⁷ In 1999, LSA modified its admissions program. The school used a 150-point scale, which it called a SCUGA scale, to rate applicants.¹¹⁸ Students received a certain number of points for scholarship, curriculum, under-represented minority status, geographical location, and alumni relation. Students were assigned 20 points

university's professed goal is to create a diverse student body, and the burden imposed by a racial preference intended to achieve diversity cannot so readily be justified on this basis." *Id.*

¹¹⁴ *Gratz v. Bollinger*, 183 F.R.D. 209, 210 (E.D. Mich. 1998). The complaint was filed on 10/14/97. *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Gratz v. Bollinger*, 122 F.Supp. 2d 811, 814 (E.D. Mich. 2000).

¹¹⁷ *Id.* at 826-27. "Grids" were used to help review applicants; there were separate grids for minority and non-minority students. *Id.* at 827. On these grids, SAT scores were represented on the horizontal axis and high school grade point average on the vertical axis. *Id.* at 826. The admissions office would plot an applicant's SAT and High School GPA on the grid to determine whether the applicant should be reviewed for admission. *Id.* at 826-27. The LSA used a rolling admissions policy, which meant that as applications were being received, applicants were continuously being accepted and enrolled. The rolling admissions made it more difficult for the LSA to ensure that a critical mass of minority applicants were accepted. *Id.* at 831. To rectify this problem, they reserved a specific number of seats for minority students, which guaranteed that there would be enough minority students in the incoming class. *Id.*

¹¹⁸ *Gratz*, 122 F.Supp. 2d at 827-29. The SCUGA factors were: S-socioeconomic status, C-curriculum, U-

if they were under-represented minorities.¹¹⁹ LSA did not set aside a fixed number of seats for applicants.¹²⁰

The admissions committee reviewed only applicants who attained a certain SCUGA number.¹²¹ Once an applicant earned enough points to make it to the individual review phase of the admissions policy, the committee disregarded the applicant's SCUGA score. Rather, it paid particular attention to the qualities that would make the candidate a suitable student for matriculation at the school.¹²² LSA also had a policy of allowing counselors to "flag" applications of certain students who would otherwise not have passed the first selection procedure, allowing for a limited number of applicants, who did not have the necessary SCUGA score, to be considered in the individual review phase of the admissions proceedings.¹²³

The trial court, following the Supreme Court's mandate, considered whether LSA's declared goal of achieving a racially diverse class was a compelling governmental interest, and whether the SCUGA number system was narrowly tailored to meet that interest. The District Court rejected the 1995-1998 plan,¹²⁴ but held that the SCUGA plan, which was

underrepresented minority, G-geography, A-alumni.

¹¹⁹ *Id.* at 827.

¹²⁰ *See id.* at 825.

¹²¹ *See* Gratz, 123 S.Ct. at 2419.

¹²² *See id.* at 2420. Under the 1999 admissions program,

Counselors may flag an applicant for review by the committee if he or she is academically prepared, has a [certain] selection index score..., and possesses one of several qualities valued by the University. These qualities include "high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and under-represented race, ethnicity, or geography."

Id. at 2432. "[I]n 'rare circumstances,' an admissions counselor may flag an applicant with a selection index score below the designated levels if the counselor has reason to believe from reading the entire file that the score does not reflect the applicant's true promise." *Id.*

¹²³ Gratz, 122 F.Supp. 2d at 827.

¹²⁴ *Id.* at 831-33. The Court held that the admissions plan from 1995-1998 was not narrowly tailored. *Id.* There were separate grids for minorities and because of that, a certain number of non-minority students would be automatically rejected without even having their applications examined. *Id.* at 832-33. The Court held that the separate grids might not be constitutionally impermissible on their face, but when combined with the automatic exclusions and the seats that were reserved for minorities, the program was unconstitutional. *Id.* at 833.

adopted in 1999, was indeed narrowly tailored to meet a compelling governmental interest of achieving a diverse classroom.¹²⁵ Plaintiffs appealed to the Sixth Circuit.

Concurrent with the Court's consideration of *Gratz*, Barbara Grutter challenged the University of Michigan Law School's ("Law School") admissions policy.¹²⁶ The Law School's 1992 admissions policy called for enrollment of a "critical mass of minority students" as a means of ensuring a diverse student body.¹²⁷ Under the written policy, the school gave considerable weight to an applicant's undergraduate GPA and his or her Law School Admissions Test ("LSAT") scores.¹²⁸ Applicants who were not automatically admitted or rejected based on objective scores were sent to the committee for review. According to the Law School's written policy, those reviewing applications for admission were encouraged to consider factors including recommendations, quality of one's

¹²⁵ *Gratz*, 122 F.Supp. 2d at 831-33. The LSA defended their program as narrowly tailored to achieve the compelling interest of diversity. *Id.* at 816. The Defendant-Intervenors presented a separate justification for the program. They maintained that the admissions program was additionally constitutional as a remedy for the past and current effects of racial discrimination. *Id.* The Court held this was not a compelling interest. The Court held that the legal standard was that the discrimination must be "identified discrimination." *Gratz v. Bollinger*, 135 F.Supp.2d 790, 792-92 (E.D. Mich. 2001). There must be a strong basis in the evidence that the remedial action is necessary before the affirmative action program can be used. *Id.* at 793-94. A generalized assertion of past discrimination is not enough. *Id.* at 793. When the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of persuasion. *Id.* The Plaintiffs initially argued that since the school maintains that their program is intended to achieve diversity, the Defendant-Intervenors could not say that it is to rectify past discrimination. *Id.* at 794-95. The Court disagreed and said that in affirmative action cases, you must look beyond the articulated reason and see if it is genuine; the Defendant-Intervenors were allowed to present evidence on this issue. *Id.* The Defendant-Intervenors presented evidence about past and present racial discrimination and hostility. The Court believed that there was racial hostility on campus, but that there was not enough evidence that the University was a participant in it and it did not meet the level of a compelling interest, which would justify an affirmative action program. *Id.* at 792-802.

¹²⁶ *Grutter v. Bollinger*, 137 F.Supp. 2d 821, 823 (E.D. Mich. 2001).

¹²⁷ *Id.* at 832. The Law School's admissions policy was adopted in 1992 and it expresses the school's desire "to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year.... Collectively, we seek a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Id.* at 825. The policy stated that while grades would be a factor, the rationale for admitting students with lower scores was because they "may help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Id.* at 827. The School hoped that "[b]y enrolling a 'critical mass' of minority students, we have ensured their ability to make unique contributions to the character of the Law School." *Id.* at 828.

¹²⁸ *Grutter*, 137 F.Supp. 2d at 825-26. The objective factors of each candidate were initially evaluated on a grid with an applicant's undergraduate GPA plotted on a vertical axis and his or her LSAT score plotted on a horizontal axis. As an applicant's objective numbers move to the upper right of the grid, his or her chances of

undergraduate institution, essays, course selection, and whether the applicant had a perspective or experience that would contribute to a diverse student body.¹²⁹ The policy highlighted examples of those who could offer varying perspectives, including a concert pianist, someone who spoke five languages, or a member of an underrepresented minority group.¹³⁰

The United States District Court for the Eastern District of Michigan, Southern Division, subjected the Law School's admissions policy to strict scrutiny. The court concluded that Justice Powell's majority opinion in *Bakke* was not binding, and therefore the Law School's mission of admitting a diverse class was not a compelling governmental interest to justify including race in the list of non-objective factors that could contribute to an applicant's success.¹³¹ The U.S. District Court further found that the admissions policy was not narrowly tailored, concluding that the Law School's goal of admitting a "critical mass" was practically indistinguishable from a quota, and was such an amorphous figure that a program could never be narrowly tailored to achieve it.¹³² Judge Friedman issued an injunction prohibiting the Law School from considering race in its admissions policy.¹³³ In

admission increase. *Id.*

¹²⁹ *Id.* at 826.

¹³⁰ *Id.* at 826-27.

¹³¹ *Id.* at 848-49. The Defendants argued that *Bakke* stands for the conclusion that diversity is a compelling government interest, but the court disagreed. *Id.* at 844. The court held that *Bakke* is not binding, because Justice Powell's opinion was not joined by any other Justices, and recent Supreme Court cases have not looked favorably on racial classifications. *Id.* at 844-46. The court agreed that diversity does have important educational benefits, but felt that a distinction needs to be drawn between viewpoint diversity and racial diversity. *Id.* at 849. The court felt that viewpoint diversity provides benefits but that the connection between race and viewpoint is tenuous. *Id.* Therefore, racial diversity is not a compelling interest. *Id.*

¹³² *Id.* at 851. The court found that the school's policy was not narrowly tailored because: 1) since "critical mass" is such an amorphous figure, there is no way that a program can be narrowly tailored to achieve it; 2) the use of race is not limited in time and the Supreme Court has been highly critical of programs that are not limited in duration; 3) the school's desire to achieve a critical mass is practically indistinguishable from a quota system; 4) there is no logical reason why the school gave preferences to some minorities and not to others such as Arabs and southern and eastern Europeans; and 5) the Law School has apparently failed to investigate alternative means for achieving minority enrollment. *Id.* at 850-52.

¹³³ *Grutter v. Bollinger*, 137 F.Supp.2d 874 (E.D. Mich. 2001). After the *Grutter* decision, the University Defendants petitioned the District Court for a stay of the injunction while the case was appealed. *Id.* at 874. The District Court per Judge Friedman denied the motion. *Id.* The District Court denied the motion because:

response to the District Court decision, the Law School petitioned the Sixth Circuit.¹³⁴ The Court of Appeals heard the *Grutter* appeal *en banc* on the same day as *Gratz*.¹³⁵

The main issues before the Sixth Circuit were whether the District Court erred in concluding that Justice Powell's opinion was not binding¹³⁶ and, if so, whether the Law School's admissions policy passed constitutional muster under Powell's reasoning in *Bakke*.¹³⁷ As to the first issue, the Sixth Circuit concluded that the District Court improperly applied a *Marks* analysis to the plurality opinion in *Bakke*.¹³⁸ In *Bakke*, Justice Brennan's concurrence, which was joined by three other Justices, signaled his agreement with Justice Powell that diversifying a student body could be a compelling governmental interest.¹³⁹ Furthermore, the Court found that its subsequent treatment of *Bakke*, in cases like *Metro Broadcasting, Inc. v. F.C.C.*,¹⁴⁰ supports the conclusion that Powell's position in *Bakke* represents the holding of the case.¹⁴¹ Justice Martin held that since, under a *Marks* analysis,

1) the Defendants did not show the existence of serious questions about the merits of the decision; 2) the Law School did not show a certain and immediate threat of irreparable harm; and 3) the interests of the other parties and the public weigh against granting the stay of the injunction. *Id.*

¹³⁴ *Grutter v. Bollinger*, 247 F.3d 631 (6th Cir. 2001). The United States Court of Appeals, Sixth Circuit, reversed the District Court because: 1) there were serious questions about the merits of the case because the District Courts in *Grutter* and *Gratz* had different interpretations about the meaning of *Bakke*, and they are both before the Sixth Circuit on appeal; and 2) the Law School did show irreparable harm because there would be a tremendous disruption of their admissions selection process for the class of 2001-2002. *Id.* at 633.

¹³⁵ *Gratz v. Bollinger*, 123 S. Ct. 2411, 2422 (2003).

¹³⁶ *Grutter v. Bollinger*, 288 F.3d 732, 738-39 (6th Cir. 2002).

¹³⁷ *Id.* at 746.

¹³⁸ *Id.* at 739-40. Justice Martin, writing for the Majority, cited *Mark's* holding that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result can enjoy the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* at 739.

¹³⁹ *Id.* at 741. The Sixth Circuit explained that Justice Brennan's concurring opinion in *Bakke*, used intermediate scrutiny, while Justice Powell used strict scrutiny. *Id.* Since the set of constitutionally permissible uses of race under intermediate scrutiny necessarily include those permissible under strict scrutiny, Justice Powell's opinion would allow the most limited use of race. Therefore, it was the narrowest rationale that supported the opinion and is the binding precedent. *Id.*

¹⁴⁰ 497 U.S. 547 (1990).

¹⁴¹ *Grutter*, 288 F.3d at 743. The Sixth Circuit felt that their interpretation of Justice Brennan's position in *Bakke* was correct because in *Metro Broadcasting*, Justice Brennan wrote an opinion that cited *Bakke* for the proposition that "'a diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which race-conscious university admissions program may be predicated." *Id.* at 743 (citing *Metro Broad., Inc., v. FCC*, 497 U.S. 547, 568).

Justice Powell's decision in *Bakke* is binding on the courts, it should remain the law until the Supreme Court expressly overrules it.¹⁴²

Once the Sixth Circuit concluded that the District Court misapplied controlling law, it considered whether, under *Bakke*, the Law School's admissions policy was narrowly tailored to meet the compelling governmental interest of admitting a diverse entering class. The court recognized that the Law School's admissions policy closely tracked the Harvard Plan, which the *Bakke* Court suggested would pass strict scrutiny.¹⁴³ Specifically, the Law School policy did not use quotas, only considered race, ethnicity, and other soft variables as potential "plus" factors in an applicant's file, and read and evaluated each applicant individually.¹⁴⁴ For these reasons, it was narrowly tailored. The court further considered the school's policy of weekly reviews of the race and ethnicity of the admitted applicants. The goal of this practice, according to the Law School, was to ensure that the school enrolled a "critical mass" of underrepresented minority students, so that a few wouldn't feel isolated or as though they must be the spokesperson for an entire group of people.¹⁴⁵ Enrolling a critical mass, the Law School offered, ensured that the entire class would obtain the benefits of an academically diverse student body.¹⁴⁶ Ultimately, the Sixth Circuit Court was satisfied that a "critical mass" did not equal a quota, and the court upheld the Law School's admissions policy.¹⁴⁷

¹⁴² *Id.* at 743-44.

¹⁴³ *Id.* at 744. The court held that the Law School used race only as a "plus," which closely mirrored the Harvard Plan cited favorably in *Bakke*, and was therefore narrowly tailored. *Id.* In *Bakke*, Justice Powell held that the Harvard Plan was constitutional because race was only utilized as a "plus," but did not insulate a minority applicant from comparison with other applicants. *Bakke*, 438 U.S. at 316.

¹⁴⁴ Grutter, 288 F.3d at 744-46.

¹⁴⁵ *Id.* at 737.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 747. The Plaintiffs alleged that the so-called "critical mass" was in reality a disguised quota because it always resulted in a range of 10-17% minority students. *Id.* The Sixth Circuit disagreed and held that the Law School had no fixed goal or target. *Id.* at 747-48. The court felt that *Bakke* allows schools to pay some attention to race and that relying on *Bakke*, over a period of time, will always result in a percentage range of minority students. *Id.* at 748. The court concluded:

The petitioners from the *Grutter* case filed a writ of *certiorari* to the Supreme Court following the Sixth Circuit decision.¹⁴⁸ The Court granted *certiorari* on December 2, 2002. The *Gratz* petitioners also asked the Court to grant *certiorari*, even though the Sixth Circuit had not yet rendered an opinion in that case, so that the Court could address the constitutionality of affirmative action admissions policies “in a wider range of circumstances.”¹⁴⁹ On December 2, 2002, the Supreme Court granted their petition for *certiorari*.¹⁵⁰

Part II: The Supreme Court’s Recent Application of the Strict Scrutiny Test to Affirmative Action Admission Policies: the *Gratz* and *Grutter* Decisions.

On June 23, 2003, the Supreme Court of the United States issued separate opinions in the *Grutter* and *Gratz* cases.¹⁵¹ Because the Plaintiffs in each case challenged the respective affirmative action admissions policies as violating the Equal Protection Clause, the Court reviewed each policy under the strict scrutiny test. The policies, therefore, would only withstand a constitutional challenge if the schools could “demonstrate that the use of race in [their] current admissions program[s] employ ‘narrowly tailored measures that further compelling governmental interests’.”¹⁵² Both the *Grutter* and *Gratz* Courts swiftly accepted, as binding, Justice Powell’s Majority opinion in *Bakke*, and presumed that there was a

In light of (1) the overwhelming testimony by Law School Professors, admissions counselors and deans that the Law School does not employ a quota or otherwise reserve seats for under-represented minority applicants and (2) Justice Powell’s instruction that lower courts presume that academic institutions act in good faith in operating their “plus” programs, we simply cannot conclude that the Law School is using the “functional equivalent” of the Davis Medical School quota struck down in *Bakke*.

Id.

¹⁴⁸ *Grutter v. Bollinger*, 123 S. Ct. 617 (2002).

¹⁴⁹ *Gratz v. Bollinger*, 123 S. Ct. 2411, 2422.

¹⁵⁰ *Gratz v. Bollinger*, 537 U.S. 1044 (2002).

¹⁵¹ *Gratz v. Bollinger*, 123 S. Ct. 2411 (2002); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2002).

compelling governmental interest in achieving a diverse entering class.¹⁵³ The opinions differed, however, in their ultimate conclusions regarding whether each school's policy was narrowly tailored to meet that compelling governmental interest.

The *Gratz* Court struck down LSA's admissions policy because it was not narrowly tailored to meet the compelling governmental interest of achieving a diverse student body.¹⁵⁴

¹⁵² *Gratz*, 123 S. Ct. at 2427; *Grutter*, 123 S. Ct. at 2337-38.

¹⁵³ The lower courts had taken considerable time in their opinions to discuss whether *Bakke* was binding precedent and reached varying conclusions. In *Grutter*, the Sixth Circuit of the United States Court of Appeals held that *Bakke* was binding precedent using the Supreme Court's *Marks* analysis. *Grutter*, 288 F.3d 732, 739-43. In *Gratz*, the United States District Court, Eastern District of Michigan, Southern Division, similarly held that Powell's opinion from *Bakke* was binding. *Gratz*, 122 F.Supp. 2d 811, 819-20. Conversely, in *Grutter*, the District Court held that Powell's opinion from *Bakke* was not binding precedent. 137 F.Supp. 2d 821, 844-50 (E.D. Mich. 2001), *rev'd by* 288 F.3d 732 (6th Cir. 2002). Despite all of the controversy and varying opinions among the lower courts, the Supreme Court did not spend a significant amount of time addressing the issue in their opinion. The Court simply stated that "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 123 S. Ct. 2325, 2337 (2003).

¹⁵⁴ *Gratz v. Bollinger*, 123 S. Ct. 2411, 2411, 2416 (2003). Before the Supreme Court addressed the merits of the case, they spent considerable time discussing whether the Plaintiff had standing to bring the case. *Id.* at 2414-15. In his dissenting opinion, Justice Stevens – who was joined by Justice Souter – contended that the case should be dismissed because the Plaintiffs lacked standing. Since the Petitioners had already enrolled at other universities before the complaint was filed, they would not benefit from the judgment and therefore lacked standing. *Id.* at 2434. Jennifer Gratz applied to the LSA for the 1995-1996 class, but when she was wait-listed, she decided to attend the University of Michigan at Dearborn, which she graduated from in 1999. *Id.* Patrick Hamacher applied to the LSA for the 1997-1998 class, but when he was wait-listed he decided to attend Michigan State University and graduated in 2001. *Id.* Hamacher alleged that he intended to apply to transfer to the LSA if the admissions policies were altered. *Id.* When the petitioners applied for class action certification under FRCP 23(b) to seek declaratory and injunctive relief, the University challenged their petition by pointing out that Hamacher suffered "no threat of imminent injury" and could therefore not be a class representative. *Gratz*, 123 S. Ct. at 2434. The District Court disagreed and held that Hamacher had standing to seek injunctive relief because of his intent to transfer. *Id.* In the subsequent case, the Court held that the LSA's admissions policies from 1995-1998 (which were in place when the petitioners applied) were unconstitutional, while the new policy for 1999-2000 was constitutional. *Id.* at 2435. When the petitioners sought *certiorari* on the ruling for the policy from 1999-2000, the LSA did not cross-motion for a review of the ruling on the policies for 1995-1998. *Id.* Justice Stevens held, therefore, that the only part of the case before the Court is the District Court's judgment upholding the LSA's new policies. *Id.* Justice Stevens held that petitioners had standing to seek damages for wrongful denial of their applications, but that these past damages did not impose standing to seek injunctive relief for future third parties because one must show that one personally faces an imminent threat of future injury. *Id.* Justice Stevens did not believe that Hamacher's intent to transfer conveyed standing because 1) there is no evidence that he actually applied to transfer; 2) the transfer policy was not addressed by the District Court and is not before the Supreme Court, and differs significantly from the normal admissions policy including the fact that it does not use the point system; and 3) the differences in the policies make it unlikely that an injunctive modification of the freshman admissions policies would affect the transfer policy. *Gratz*, 123 S. Ct. at 2436-37. Justice Stevens also held that the class action certification did not grant standing because the class representatives must still show that they have been personally injured. *Id.* at 2437-38.

The Majority opinion, written by Chief Justice Rehnquist, disagreed and held that the Plaintiffs do have standing. The Majority held that it is not determinative for the issue of standing whether Hamacher actually applied to transfer. *Id.* at 2422. The Majority pointed out that Stevens' questioning of the issue directly

Writing for the Majority,¹⁵⁵ Chief Justice Rehnquist found that the fatal flaw in the University's admissions policy was its failure to provide an individual review of each candidate.¹⁵⁶ LSA's policy of automatically distributing 20 points to every applicant from the "under-represented minority" applicant pool had the result of treating race as an absolute, "which could jettison a member of an underrepresented group into the accept[ed] category, regardless of the experiences or qualities that race had contributed to the development of the individual."¹⁵⁷

In reaching its conclusion, the Supreme Court failed to specifically rely on the four-pronged narrowly tailored test it had previously articulated in *Paradise*. Instead, it relied on Justice Powell's language in *Bakke*, which it decided prior to *Paradise* as controlling of the issue.¹⁵⁸ LSA's policy went beyond the spirit of Justice Powell's edict that race can be considered a factor in admissions, since it failed to allow for interpretation of "individual qualities or experience not dependent upon race but sometimes associated with it."¹⁵⁹ Therefore, the program was not narrowly drawn in a constitutionally permissible way.

conflicted with the finding of fact made by the District Court, which held Hamacher "intends to transfer to the University of Michigan when defendants cease the use of race as an admission preference." *Id.* The Majority also held that it was well established that intent can be relevant to standing in the context of Equal Protection challenges. *Id.* Since Hamacher was ready to transfer if the LSA stopped using race, he had standing to seek injunctive relief with respect to the LSA's use of race in undergraduate admissions. *Id.* at 2423. The Majority also disagreed with Justice Stevens about the differences between the admissions policies. *Id.* The Petitioners were challenging the use of race in undergraduate admissions and sought injunctive relief prohibiting the use of race. The District Court certified the class and found that Hamacher was a valid class representative. *Id.* at 2424. The differences in the policies were not that great and when the University challenged Hamacher's standing they did not raise the issue of the differences in the policies. The Majority held that Hamacher had standing to seek injunctive relief. *Id.* at 2422.

¹⁵⁵ Joined by Justices O'Connor, Kennedy, Scalia, and Thomas.

¹⁵⁶ *Id.* at 2431. "[T]he Court finds that the University's current policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve educational diversity." *Id.* at 2415.

¹⁵⁷ *Id.*

¹⁵⁸ "In *Bakke*, Justice Powell's opinion emphasized that when using race in admissions each applicant had to be considered as an individual." Gratz, 123 S. Ct. at 2415. In this case, the LSA automatically gave 20 points to all minority applicants. *Id.* at 2431. This automatic granting of points to all minority applicants precluded the individualized review that Powell cited in *Bakke*. *Id.*

¹⁵⁹ *Id.* at 2429 (*quoting* Bakke, 98 S. Ct. 2733, 2765 (1978)). Again relying on Justice Powell's opinion in *Bakke*, the District Court determined that the admissions program the LSA began using in 1999 is a narrowly tailored

The Majority found LSA's policy flawed, since the individual review was provided only after admissions counselors automatically assigned points to a candidate.¹⁶⁰ They rejected the University's concern that the volume of applications made it impractical for LSA to use an admissions system primarily based on individual review, and thus automatic assignment was the only means to efficiently consider the volume of applicants it received each year.¹⁶¹ In response, the Court wrote, "the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."¹⁶²

In her concurrence, Justice O'Connor elaborated on the fatal flaw of LSA's policy. LSA's practice of assigning points to applicants merely because they are members of a particular class precluded the committee from considering the effect race had on the individual, and his or her ability to contribute to meaningful class discussion.¹⁶³ Under LSA's policy, "under-represented minority" status had the effect of almost guaranteeing acceptance to the school, rather than serving as a contributing factor in the decision-making process. Justice O'Connor acknowledged that an applicant could acquire a significant number of

means of achieving the University's interest in the educational benefits that flow from a racially and ethnically diverse student body. *See Gratz*, 122 F.Supp.2d 811. Chief Justice Rehnquist rejected LSA's argument that the policy's individual review system, which was triggered after the points were assigned, satisfied the Court's requirement that a narrowly tailored policy allow for individual review. *Gratz*, 123 S. Ct. at 2429-31. Under LSA's policy, admissions officials could flag applicants whom they believed were worthy of personal consideration. *Id.* at 2432. Once an application was flagged, the reviewing committee could look at the application as a whole, and ignore the points that had been assigned. *Id.*

¹⁶⁰ *Id.* at 2430. The Court held that the possibility of committee review "is of little comfort under our strict scrutiny analysis." *Id.* at 2429. There was not enough information in the record to know how many applicants were actually "flagged," but the Court felt that it was undisputed that the individual consideration was "the exception and not the rule." *Id.* It also did not satisfy strict scrutiny because the individualized review of the committee only occurred after the LSA distributed "the University's version of a 'plus' that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant." *Id.* at 2430.

¹⁶¹ *Gratz*, 123 S. Ct. at 2430.

¹⁶² *Id.*

¹⁶³ *Id.* at 2432-33. The LSA's automatic award of points did not satisfy the requirements of providing the individualized consideration. *Id.* This is in contrast to the Law School's program, which O'Connor held constitutional because each application was read completely and considered individually, and therefore race was only used as a "plus." *Grutter*, 123 S. Ct. at 2342-43.

points through the other factors in the applicant’s SCUGA score,¹⁶⁴ but noted that the points assigned for those other categories were significantly lower than those assigned for race. Consequently, “[e]ven the most outstanding national high school leader could never receive more than five points for his or her accomplishments – a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race.”¹⁶⁵ For these reasons, “the current non-individualized mechanical system,” Justice O’Connor wrote, “is flawed and fails under the narrowly tailored test.”¹⁶⁶

Justice Thomas, in his concurring opinion, found LSA’s policy flawed because “it awards all underrepresented minorities the same racial preference.”¹⁶⁷ The policy failed to permit admissions counselors the ability to identify and consider non-racial distinctions among underrepresented minority applicants.¹⁶⁸ Ultimately, Justice Thomas would have gone further than his brethren and, potentially, even overruled *Bakke*.¹⁶⁹ According to Justice Thomas, “a State’s use of racial discrimination in higher education admissions is categorically prohibited under the Equal Protection Clause.”¹⁷⁰

Justice Souter filed a dissenting opinion, and would have likely upheld LSA’s policy.¹⁷¹ Noting the holdings in *Bakke* and *Grutter*, Justice Souter wrote,

the Court has acknowledged that there is a [compelling governmental interest in achieving] diversity and that race can be considered a plus in the

¹⁶⁴ See supra note 117 and accompanying text.

¹⁶⁵ Gratz, 123 S. Ct. at 2432.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See *id.*

¹⁷⁰ Gratz, 123 S. Ct. at 2433.

¹⁷¹ *Id.* at 2438-39. Justice Ginsburg joined Part II of the dissent. *Id.* Justice Souter agreed with Justice Stevens that the Plaintiffs in the case did not have standing. *Id.* However, unlike Justice Stevens, Justice Souter continued his dissent and held that despite the fact that the Plaintiffs did not have standing, if he looked at the merits of the case, he would still dissent from the Court’s opinion. *Id.* Justice Souter held that if the LSA’s admissions program had been challenged by a Plaintiff with proper Article III standing, he would have affirmed the District Court’s summary judgment for the LSA. *Id.* at 2442. However, since he held that the Plaintiffs did not have standing, he would vacate the judgment for lack of proper jurisdiction and dissented from the Majority opinion. *Id.*

admissions process in order to achieve that diversity. Awarding value requires a school to consider race in a way that increases the applicant's chances of acceptance.¹⁷²

Justice Souter chose not to address the issue of whether LSA's policy was narrowly tailored, and criticized the rest of the Court for passing on that issue. According to Justice Souter, the issue before the Court was essentially moot because the Plaintiff who brought the suit was a transfer student, and not subject to LSA's entering class admissions policy.¹⁷³

Justice Ginsburg's dissent focused more on the need to correct past inequality than it did on the need for diversity in the classroom.¹⁷⁴ She wrote, "[t]he stain of generations of racial oppression is still visible in our society."¹⁷⁵ As a result, she argued, there is a compelling need for such policies, and wide latitude should be given when interpreting whether the policies are narrowly tailored.¹⁷⁶ Therefore, Justice Ginsburg found "no constitutional [infirmities]."¹⁷⁷ The policy does not "constrict admissions opportunities"¹⁷⁸ for those who are not members of an under-represented class, and every applicant admitted under LSA's plan was qualified to attend the University of Michigan. Ultimately, Justice Ginsburg acknowledged, schools will continue to use measures to ensure a diverse entering class but, in her opinion, the *Gratz* decision will force these schools to cloak their means of

¹⁷² *Gratz*, 123 S. Ct. at 2431-32. Justice Souter felt that "college admission is not left entirely to inarticulate intuition," and therefore it is proper to assign "some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. *Id.* Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes by its 'holistic review.'" *Id.* at 2441 (*quoting* Grutter, 123 S. Ct., at 2343).

¹⁷³ *Id.* at 2442. "The further question whether the freshman admissions plan is narrowly tailored to achieving student body diversity remains legally irrelevant to Hamacher and should await a Plaintiff who is actually hurt by it." *Id.* at 2439.

¹⁷⁴ *Gratz*, 123 S. Ct. at 2443. In Footnotes 1-9 of her dissenting opinion, Justice Ginsburg provided extensive studies and statistical evidence about the effects of discrimination. *Id.* at 2443-44.

¹⁷⁵ *Id.* at 2446.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 2445.

¹⁷⁸ *Id.*

encouraging diversity in seemingly neutral clothes.¹⁷⁹ For these reason, Justice Ginsburg concluded that the Majority opinion is not a sound one.

Although the *Gratz* Court opinions did not specifically reference it, the Majority opinion, the concurrences, and the dissents resonated with aspects of the *Paradise* test. The Majority tacitly employed the first prong of the *Paradise* test by finding that there might be alternative methods to achieve diversity at the School, and therefore, alternative means to achieve the stated goals might be available. The Court's concern with the program's mechanical method of assigning numbers invokes the flexibility prong. Under the *Paradise* test, a program fails the second prong if it cannot easily ebb and flow with the changing demographics. Both Justice O'Connor and Chief Justice Rehnquist criticized LSA's policy for its strict concrete assignment of numbers, and its failure to re-evaluate the numerical system throughout the duration of the program. Justice Thomas also criticized LSA's policy as being inflexible.

Justice Ginsburg, in her dissent, made clear reference to the first prong of the *Paradise* narrowly tailored test. Her concern that present effects of past discrimination remain in the classroom supported her position that the necessity for relief and the efficacy of other alternatives supported the clear mandate for LSA's admissions program. Thus, while the Court did not specifically rely on the *Paradise* test in its analysis, its principles seemed to serve as the foundation for many of the Justice's conclusions.

The Court continued its evaluation of affirmative action admissions policies on the same day it decided *Gratz*, when it considered *Grutter v. Bollinger*. Again, the court subjected

¹⁷⁹ See *Gratz*, 123 S. Ct. at 2446. Justice Ginsburg felt that if schools could not specifically look at race and still have their admissions program be constitutional, they would look for alternate ways to include race in admissions decisions. *Id.* For example, schools could ask applicants to write about "cultural traditions" in their essays or ask if English is their second language. *Id.* Applicants could also attempt to take advantage of their race by highlighting associations in minority group organizations or Hispanic family surnames. *Id.* Teachers

the policy to strict scrutiny, and again it relied on the principles of the *Paradise* test, without making clear reference to it. In *Grutter v. Bollinger*, a divided Court upheld the Law School's admissions policy.¹⁸⁰ The Court first reaffirmed past decisions, which found a compelling governmental interest in admitting a diverse entering class.¹⁸¹ Furthermore, the Court found that the Law School's policy was narrowly tailored to meet that interest, since it allowed members of the admissions committee to individually review individual applicants in a way that considered race and ethnicity among a host of diversity factors.¹⁸²

The Majority reaffirmed Justice Powell's conclusion in *Bakke*, that achieving diversity in education supports a finding of a compelling governmental interest.¹⁸³ Justice O'Connor, writing for the Majority, observed that, in the Court's view, "attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent [in] a showing to the contrary."¹⁸⁴ The Law School properly articulated a compelling governmental interest, by stating in its mission statement the need to admit a "critical mass" in order to assemble a class that is broadly diverse.¹⁸⁵ The Court also found that the compelling governmental interests in a diverse classroom transcended the classroom to apply to society as a whole.¹⁸⁶ They found that the "skills

could also try to mention an applicant's race in their letters of recommendations. *Id.*

¹⁸⁰ *Grutter v. Bollinger*, 123 S. Ct. 2325, 2325-31. Justice O'Connor wrote the Majority opinion, which was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* at 2330. Justices Scalia and Thomas joined in part. *Id.*

¹⁸¹ *Id.* at 2329-30.

¹⁸² *Id.* at 2342.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 2339 (*quoting* *Bakke*, 438 U.S. 265, 313). Justice O'Connor held that the benefits from diversity "are substantial," as shown by the District Court. *Id.* Achieving diversity helps promote "cross-racial understanding" breaks down stereotypes, and lets students better understand people from other races. *Id.* at 2339-40. These benefits of diversity were also asserted by the *amici*, including major American businesses, and high-ranking retired officers and civilian officials from the United States Military. *Id.* at 2340.

¹⁸⁵ *Id.* at 2339.

¹⁸⁶ *Id.* at 2340.

needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints.”¹⁸⁷

Once the Majority was satisfied that the Law School's interest in promoting diversity sufficiently demonstrated a compelling state interest, it turned its attention to whether the policy was narrowly tailored to meet that interest. Again, the Court did not specifically rely on all four prongs of the *Paradise* test. Rather, the Majority acknowledged the need for a modified version of the *Paradise* test, holding that the “inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education.”¹⁸⁸ Consequently, the Court found that in order to pass the narrowly tailored test, the party defending an affirmative action admissions program need only demonstrate that the program was flexible and non-mechanical, and limited in its duration.

The Court first considered the flexibility of the program. Specifically, the court looked at whether the Law School program employed a quota system or some other means that insulated each category of applicants from all other applicants.¹⁸⁹ The ideal policy, according to the Majority, would be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant and place them on the same footing for consideration, although not necessarily according them the same weight.”¹⁹⁰ The Law School's policy made race or ethnicity a factor that could contribute to making an applicant qualified for admission to the law school, but neither race nor ethnicity were elevated to such significant status that it would have the effect of ensuring automatic

¹⁸⁷ *Id.* The Court also adopted the Military's conclusion that “a highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.” *Id.* (from amicus curie).

¹⁸⁸ *Id.* at 2341

¹⁸⁹ *Id.* at 2342 (*citing* Bakke, 438 U.S. 265 (1978)).

¹⁹⁰ Grutter, 123 S. Ct. at 2343 (*quoting* Bakke, 438 U.S. at 317).

acceptance.¹⁹¹ The Law School's decision to consider race or ethnicity as one of several factors of import supported one reason why the Court found that the program was narrowly tailored.

The Court next turned its attention to whether the Law School policy's mission of seeking a "critical mass" would mean that the policy was too broad in scope to be narrowly tailored. The Court's dissenters argued that the goal of seeking a "critical mass" was really nothing more than a disguised quota.¹⁹² The Majority disagreed.¹⁹³ Any policy that gives some sort of preferential treatment to a particular category of persons would, indeed, be less than ideal, and one could always speculate that there are more restrictive alternatives to achieving the goal of a diverse classroom.¹⁹⁴ However, the Majority felt sufficiently comfortable that the Law School had adopted a workable and constitutionally permissible program.

Finally, recalling the language of many of its earlier strict scrutiny cases, the Court considered whether the Law School policy was narrowly drawn and sufficiently effective to achieve its goals. The Majority recognized that, while one might be able to hypothesize alternatives to the Law School's policy, the policy before the Court met the strict scrutiny test.¹⁹⁵ However, Justice O'Connor wrote, narrowly tailored "does not require exhaustion of

¹⁹¹ *Id.* at 2344-45. Justice O'Connor found significant similarities between the Law School's policy and the Harvard Plan, to which Justice Powell referred in *Bakke* as constitutionally permissible. *Id.* at 2342-44. Both plans adequately ensure that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. *Id.* Neither the Harvard Plan, nor the Law School's admissions policy, identified either race or ethnicity as the single characteristic that would ensure diversity. *Id.*

¹⁹² *Id.* at 2363. Chief Justice Rehnquist, with whom Justices Scalia, Kennedy, and Thomas join, dissenting.

¹⁹³ "The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota." Grutter, 123 S. Ct. at 2343. "[T]here is of course 'some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.' [S]ome attention to numbers' without more, does not transform a flexible admissions system into a rigid quota." *Id.* (quoting *Bakke*, 438 U.S. 265, 323).

¹⁹⁴ *Id.* at 2346.

¹⁹⁵ *Id.* at 2344-45. The Court agreed with the Court of Appeals that the school had considered race-neutral alternatives. *Id.* at 2345. The District Court had proposed race-neutral alternatives like using a lottery system,

every conceivable race-neutral alternative,”¹⁹⁶ and thus the policy passed the strict scrutiny test.¹⁹⁷

While the Majority found that a policy that considers race or ethnicity as one factor among several factors to be narrowly tailored, it expressed its concern that schools continue to use such policies *ad infinitum*.¹⁹⁸ “In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews . . .”¹⁹⁹ Justice O’Connor wrote that the Court “expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”²⁰⁰

Justices Ginsburg and Breyer concurred with the Court’s finding that the Law School’s policy did not violate the Equal Protection Clause, but they took issue with the “sunset provision” of Justice O’Connor’s decision.²⁰¹ Each Justice expressed concern with the language of the court. Justice Ginsburg expressed concern that the provision was optimistic, but not realistic.²⁰² She wrote, “One may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”²⁰³

decreasing the school’s reliance on grades and test scores, or automatically admitting a certain percentage from each high school. *Id.* The court rejected these alternatives; the lottery system would not work because it precluded the individualized review that is required. *Id.* Requiring the Law School to lower its standards would be to drastically change the school and require it to sacrifice a vital part of its educational mission. *Id.* Automatically admitting a certain top percentage of each high school class would also not work because they also precluded individualized review and the court did not understand how it could be applied to graduate level schools. *Id.*

¹⁹⁶ *Id.* at 2344.

¹⁹⁷ *See id.* at 2344-45.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 2346.

²⁰⁰ *Id.* at 2347.

²⁰¹ *Id.* at 2347-48.

²⁰² *See id.*

²⁰³ *Id.* at 2348.

Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy each filed a separate opinion in which they concurred in part and dissented in part. Both Justice Thomas and Justice Scalia's opinions suggest that they would never uphold an admissions policy that granted racial preferences.²⁰⁴ Justice Thomas concurred with that part of the Court's holding that he interpreted to require "that racial discrimination in higher education admissions would be illegal in 25 years."²⁰⁵ He disagreed, however, with the Court's decision to uphold the Law School's compelling interest in maintaining a diverse entering class.²⁰⁶ Thomas looked at the Law School's policy from a pragmatic standpoint. The Law School's need to use race as a plus in admissions, was derived from its desire to admit an elite entering class.²⁰⁷ As a general matter, non-minority students significantly outperformed under-represented minorities on objective tests, hence the need for the "plus" in the admissions policy. If, however, the Law School chose to admit a majority of the student body with objective test scores, it would not need to give under-represented minorities a "plus" in the admissions process.²⁰⁸ There was no compelling state interest in having an elite Law School, Justice Thomas maintained, and for this reason the policy should have been struck down.

²⁰⁴ *Id.* at 2350-51. They concur in part with Rehnquist, who says, "I agree with the Court that, 'in the limited circumstance when drawing racial distinctions is permissible,' the government must ensure that its means are narrowly tailored to achieve a compelling state interest." *Id.* at 2365.

²⁰⁵ *Id.* at 2350.

²⁰⁶ *Id.* at 2351.

²⁰⁷ *Id.* at 2353-54.

²⁰⁸ *Id.* at 2373. Justice Thomas mentioned "objective test scores" in his dissent, but either did not take notice of or does not believe in racial biases in standardized test scores. *See id.* at 2371.

About 80 to 85 percent of the places in the entering class are given to applicants in the upper range of Law School Admissions Test scores and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity. With respect to the remaining 15 to 20 percent of the seats, race is likely outcome determinative for many members of minority groups. That is, where the competition becomes tight and where any given applicant's chance of admission is far smaller if he or she lacks minority status. At this point the numerical concept of critical mass has the real potential to compromise individual review.

Id. at 2371.

Chief Justice Rehnquist, in his dissent, provided little guidance toward what he thought the Law School could have done to assure that the program was narrowly tailored.²⁰⁹ His dissent, however, paid careful attention to, in his opinion, the inflexibility of the program, particularly the relationship between the number of under-represented minority students who applied to the Law School, and the number who were accepted. According to the Chief Justice,

the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups, and the percentage of the admitted applicants who are members of these same groups, is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers."²¹⁰

The mathematical precision in which Justice Rehnquist believed the Law School had engaged was problematic, as it was tantamount to a quota.²¹¹ For this reason, Rehnquist would have struck down the Law School program.

The *Grutter* Majority reached its conclusion based on a somewhat clearly articulated, narrowly tailored test, separate and apart from the one adopted by the *Paradise* Court. Although the Court definitively articulated its test, one can cull from the various opinions certain requirements that the court will insist upon before declaring an affirmative action

²⁰⁹ See *Grutter*, 123 S. Ct. 2325.

²¹⁰ *Id.* at 2368.

[F]rom 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School [was] admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case, how can this possibly constitute a 'critical mass' of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans.

Id. at 2666-67.

admission policy constitutionally valid. Justice O'Connor and Chief Justice Rehnquist demanded proof that the program was both flexible and necessary. Justice O'Connor's durational requirement confirmed the additional need to find that any such program is temporary in nature. Justice Ginsburg, in her dissent, confirmed the need for a durational requirement, but disagreed with the specific time limit upon which the Majority relied in this case. Read together along with *Gratz*, the various Court opinions tie up nicely to create a blueprint for considering future constitutional challenges to affirmative action admission policies.

Part III: Defining the Strict Scrutiny Test for Affirmative Action Admission Programs.

The use of race in the admissions process mandates a strict scrutiny test “calibrated to fit its own distinct issues.”²¹² The body of law that articulates the appropriate test was largely developed in response to Equal Protection Challenges in the workplace.²¹³ With the exception of *Bakke*, the Court did not consider Equal Protection challenges to programs aimed at ensuring a diverse classroom until *Grutter* and *Gratz*. In the workplace environment, the Court will find a compelling governmental interest in a program that was created to remedy present effects of past discrimination.²¹⁴ The program is narrowly tailored if it meets the four prongs of the *Paradise* test. But where admitting students into educational institutions is concerned, the body of case law, starting with *Bakke* and developed through

²¹¹ *See id.* at 2368-69.

²¹² *Id.* at 2365.

²¹³ *See* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *Richmond v. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

²¹⁴ *See supra* Part I B.

Grutter and *Gratz* poses a slightly different evaluation of both the compelling governmental interest and the narrowly tailored prongs of the compelling governmental interest test.

Read together, *Bakke*, *Grutter* and *Gratz*, define a construct for drafting a constitutionally permissible race-preference admission policy that would withstand strict scrutiny. Under these most recent cases, the Court will find a compelling governmental interest if there is proof of a need for diversity in the classroom; the program will pass the narrowly tailored test if there is proof that (1) it is the least intrusive and most efficient means to achieve the goals of the program or policy and (2) it is “flexible and non-mechanical”²¹⁵ and of the *Gratz* Court is limited in duration.²¹⁶

A. The Classroom Diversity Strict-Scrutiny Test: A New Test for Evaluating Affirmative Action Admission Policies.

1. *The Compelling Governmental Interest Test*

Both *Grutter* and *Gratz* stand for the proposition that Justice Powell’s plurality decision finding diversity in education as a compelling governmental interest, is the “law of the land.”²¹⁷ The decisions rejected the Fifth and Eleventh Circuits findings that, under *Marks*, Justice Powell’s definition of a compelling governmental interest was not binding on the courts.²¹⁸ In each case, eight of the nine Justices found that diversity can serve as a

²¹⁵ *Grutter*, 123 S. Ct. at 2342 (*citing* *Bakke*, 438 U.S. at 315-16).

²¹⁶ *Grutter*, 123 S. Ct. at 2346. “Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.” *Id.*; *see also* Rhenquist’s dissent. “We have emphasized that we will consider ‘the planned duration of the remedy’ in determining whether a race-conscious program is constitutional. *Fullilove*, 448 U.S. at 510 (Powell, J. concurring); *see also* *United States v. Paradise*, 480 U.S. 149, 171 (1987) (“In determining whether race-conscious remedies are appropriate, we look to several factors, including the . . . duration of the relief.”) *Id.* at 2369.

²¹⁷ *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

²¹⁸ *See supra* note 76 and 107. Note that both Hopwood and Johnson limited their opinion to the precedential weight of Justice Powell’s opinion. Neither discussed the justification of whether diversity supports a compelling governmental interest.

compelling state interest justifying race-conscious decisions in education.²¹⁹ Justice Thomas was, arguably, the only exception among the brethren on this point.²²⁰

Even Justice Thomas' dissents in both *Grutter* and *Gratz*, each of which cogently articulated the assertion that any affirmative action admission policy must fail under the Equal Protection Clause, leave room to interpret an instance where there could be a compelling governmental interest in admitting a diverse class.²²¹ Justice Thomas suggested in *Grutter* that there is some merit in achieving a diverse student body, writing that classroom aesthetics yield educational benefits.²²² It was the manner in which each school achieved the benefits, more than the benefits themselves with which he took issue.²²³

The need for a different definition of a compelling governmental interest in programs or policies that promote diversity in the classroom, versus those that promote diversity in the workplace, is predicated on the notion that all individuals benefit from a diverse learning environment,²²⁴ whereas under a capitalist system, promotion or advancement in the workplace is to the benefit of the one being promoted and to the exclusion of those left behind. There is clearly a strong societal value to promoting underrepresented minorities in the workplace. Advancing members of a particular race or

²¹⁹ *Grutter*, 123 S. Ct. at 2338-41; *Gratz*, 123 S. Ct. at 2426-27.

²²⁰ *Gratz* 123 S. Ct. at 2433, *Grutter*, 123 S. Ct. at 2350-65.

²²¹ Although in *Gratz*, Justice Thomas provides a somewhat cursory concurrence to the Court's extensive opinion, in *Grutter*, he dedicates significant time to defining a compelling governmental interest in the context of education. In *Grutter*, he acknowledges that there is a compelling governmental interest to remedy present effects of past discrimination. *See Grutter*, 123 S. Ct. at 2351. If he were to agree with Justice Ginsburg's concurrence, maintaining that discrimination based on race remains alive in our land, then he would have to support a finding of a compelling governmental interest to permit race-conscious admissions policies.

²²² *Grutter*, 123 S. Ct. at 2353.

²²³ Justice Thomas found that had the school relaxed its credentials, it could have achieved its goals. But, in the interest of creating an elite institution, the school needed to adopt the preferential treatment. *Id.* This argument rests on the premise that minority applicants perform less well on the LSAT. *See* Leslie Yalof Garfield, *The Academic Support Student in the Year 2010*, 69 UNIV. MO. KAN. CITY L. REV. 491 (2001). If a school is to base its admissions on LSAT and wants only those applicants who achieved the highest scores on the standardized test, then, because of the disproportionate performance of non-minorities, the applicant pool is highly skewed and not as many minority applicants fall in that range. If Michigan relaxed its median LSAT score, then more minority applicants would fall within the school's target applicant pool.

ethnicity can create positive role models for future generations and pave the way to more success in those groups, ultimately rendering the need for affirmative action policies unnecessary. However, the Framers of the Equal Protection Clause did not draft it to serve as a guarantor that society create role models or promote the social good by developing a truly homogenous workplace.²²⁵ “The central purpose of the Equal Protection Clause ... is the prevention of official conduct discriminating on the basis of race,”²²⁶ and thus, it cannot be used as a means to merely promote a more homogenous society for society’s sake. Thus, because there is no demonstrable benefit to those who may lose a job that is given to a member of an under-represented minority class, the compelling governmental interest test, when evaluated for purposes of ensuring fairness in the workplace, is limited to instances where the defending party can demonstrate proof of present effects of past discrimination.

In education, however, as Justice Powell nicely articulated, the benefits of education flow both ways.²²⁷ Legal education is a prime example of Justice Powell’s edict. The goal of

²²⁴ See *Bakke*, 438 U.S. at 313. (“the benefits of diversity in education flow both ways.”)

²²⁵ A prime example of this might be President Johnson’s appointment of Justice Thurgood Marshall to the Supreme Court in 1967. His past experiences and viewpoints shaped many important cases and, more importantly, his visibility and his sage wisdom made him a valuable role model to younger African-Americans.

²²⁶ *Washington v. Davis*, 426 U.S. 229, 239 (1976). See also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247 (1995) (“[T]he primary purpose of the Equal Protection Clause was to end discrimination against the former slaves). See *Associated General Contractors of Cal., Inc. v. San Francisco*, 813 F.2d 922 (9th Cir. 1987) (striking down racial preference under strict scrutiny while upholding gender preference under intermediate scrutiny).

²²⁷ See *Bakke*, 438 U.S. at 313. Many Members of the Court have recognized the compelling governmental interest in achieving diversity in the classroom.

In *Metro Broadcasting*, the Court considered the validity of F.C.C. policies granting preferential treatment based on race. Justice Brennan, writing for the majority, wrote, “a ‘diverse student body’ contributing to a ‘robust exchange of ideas’ is a ‘constitutionally permissible goal.’” 497 U.S. at 567. In *Wygant*, where the Court reversed a decision upholding a bargaining agreement that limited the number of minority teachers the Board of Education would layoff in order to preserve the ratio of minority to non-minority faculty, four Justices recognized the compelling governmental interest in diversifying education. Justice O’Connor in her concurrence wrote that the “state interest in the promotion of racial diversity [in education] has been found sufficiently compelling.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1989). Justices Marshall, Brennan, and Blackmun in their dissent agreed with Justice O’Connor that the state has a compelling governmental interest in diversifying education.

Id.

Garfield, *supra* note 10 at 913-914.

teaching future lawyers is to empower them with the ability to review a particular set of facts from many angles.²²⁸ When students of color bring their past, varied experiences to the classroom, it allows others to hear and consider perspectives they might not have considered on their own. To be sure, there is a societal value to having different cultures work side-by-side too. Diversity promotes tolerance, harmony and greater understanding of those around us. But the Equal Protection Clause is not designed to promote tolerance, it is designed to promote fairness. A future law client will get the best and most fair representation from someone who has had the benefit of a premier education. That education, the Justices seem to argue, is derived from a student who is taught in a classroom where ideas and experiences are varied and shared.²²⁹ For this reason, the need to promote diversity in the classroom is a proper justification of a compelling governmental interest.

2. The Narrowly Tailored Test.

The *Grutter* and *Gratz* decisions evidence that the Court has adopted an alternative to the *Paradise* narrowly tailored test for application to race-based programs aimed at promoting diversity in the classroom.²³⁰ Like its predecessor Courts, the Justices in *Grutter* and *Gratz* put no burden on the defendants to prove that their programs were the most narrowly tailored, since “narrowly tailoring does not require exhaustion of every conceivable race neutral

²²⁸ “Attaining a diverse student body is at the heart of the law School’s proper institutional mission.” *Grutter*, 123 S. Ct. at 2329. *See also* *Sweat v. Painter*, 339 U.S. 629, 634 (1950) (“legal learning is ineffective in isolation from the individuals and institutions with which the law interacts.”)

²²⁹ *See generally* *Grutter*, 123 S. Ct. 2325; *Gratz*, 123 S. Ct. 2411.

²³⁰ “[The strict scrutiny] inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education.” *Grutter*, 123 S. Ct. at 2341. “[W]e adhere to *Adarand’s* teaching that the very purpose of strict scrutiny is to take such ‘relevant differences into account.’ *Id.* at 2342 (*quoting* *Adarand*, 515 U.S. at 228). *But see* Justice Kennedy’s dissent (suggesting that the Majority “abandoned” the strict scrutiny test). *Id.* at 2374.

alternative.”²³¹ An educational admissions program is narrowly tailored, however if (1) it is the least intrusive and most effective means to achieve the goals of the program, (2) it is “flexible and non-mechanical”²³² and limited in duration.²³³

The need for a different narrowly tailored test between race-conscious programs aimed at achieving diversity in the classroom and those programs aimed at achieving diversity in the workplace, is compelling in light of the varying goals of each. Judge Marcus, in *Johnson*, acknowledged that the “*Paradise* factors should be adjusted slightly to take better account of the unique issues raised by the use of race to achieve diversity in University admissions.”²³⁴ Judge Marcus proposed a four-pronged test that mirrored, yet slightly modified, the *Paradise* test.²³⁵ Neither the *Grutter* nor the *Gratz* Court specifically recalled Judge Marcus’ remarks; however, the two opinions reached a similar conclusion recognizing, through the manner in which it analyzed each case, the need for a new test. However, while Judge Marcus called for a test that mirrors the *Paradise* test, an interpretation of the *Grutter* and *Gratz* decisions, read together with *Bakke*, yields a new narrowly tailored test, distinct in

²³¹ *Id.* at 2344. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (“a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (“... plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently ‘narrowly tailored’”).

²³² *Grutter*, 123 S. Ct. at 2342 (*citing* *Bakke*, 438 U.S. at 315-16).

²³³ *Id.* at 2346.

²³⁴ *Johnson*, 263 F.3d at 1252.

²³⁵ *Id.* at 1253.

a court evaluating a school admissions program designed to serve a compelling interest in obtaining the educational benefits associated with a diverse student body should examine: (1) whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity. The foregoing factors essentially correspond to all of the factors adopted in *Paradise* (other than duration) for affirmative action plans generally.

Id.

some ways from the Court's narrowly tailored test for affirmative action programs aimed at eliminating discrimination in the workplace.

(a) *The program is the least intrusive and most effective means to achieve the goals of the program.*

Each decision evidenced that the Court will require proof that the proposed program was the least intrusive and most efficient means of accomplishing the programs goal.²³⁶ The *Grutter* Majority acknowledged that “the means chosen must fit “th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”²³⁷ In *Gratz*, respondents argued that drawing the least intrusive program would be unduly burdensome, given the multitude of applications received each year.²³⁸ The Court's swift rejection of their argument indicates further support for the assertion that it will require the most precise, least intrusive means of achieving diversity in the classroom, regardless of any demonstrable needs to the contrary.

(2) *The program is “flexible and non-mechanical” and limited in duration.*

According to Justice O'Connor in *Grutter*,

When using race as a “plus” factor in university admissions, [the] equal protection Clause requires that a university's admissions program remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.²³⁹

²³⁶ “[The] government is still ‘constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.’” *Grutter* at 2341 (*citing* *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal quotation marks and citation omitted)).

²³⁷ *Id.* (*citing* *Richmond v. Croson Co.*, 488 U.S. at 493 (plurality opinion)).

²³⁸ *See supra* notes 158-60 and accompanying text.

²³⁹ *Grutter*, 123 S. Ct. at 2341.

A program passes the flexible prong of the narrowly tailored test, therefore, if it “considers all pertinent elements of diversity in light of the particular qualifications of [an] applicant and . . . place[s] them on the same footing for consideration, although not necessarily according them the same weight.”²⁴⁰ This flexible approach enables a school to “take into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.”²⁴¹

In essence, a flexible program is one that provides for “individualized non-mechanical review.”²⁴² When considering whether a program passes the flexible prong of the narrowly tailored test, the Court is likely to consider the ability of admission committee members to evaluate individuals against all other applicants in a given year, and the thought or credit granted for non-objective criteria that may contribute to a diverse learning experience, not because of membership in a particular class, but rather because of personal experience. The Court cautions that programs that are mechanical in nature, assigning numbers or scores to certain attributes, must necessarily fail the flexibility prong of the narrowly tailored test, as they have the potential to result in quotas, which are strictly prohibited.²⁴³

Justice Souter, in his dissent in *Gratz*, defined a quota as a something that “insulates all non-minority candidates from competition from certain seats.”²⁴⁴ The Court has labeled as quotas a program that sets aside a certain number of admission spots for students based

²⁴⁰ Bakke at U.S. 317, 98 S.Ct. 2733.

²⁴¹ Grutter, 123 S.Ct. at 2344.

²⁴² *Id.* at 2342.

²⁴³ *Id.* Opponents of the Law School’s program argued that the goal of achieving a critical mass was tantamount to setting a quota. The Majority of the Court, however, clearly disagreed finding that “‘some attention to numbers,’ without more, does not transform a flexible admissions system into a rigid quota.” *Id.* at 2343.

²⁴⁴ Gratz, 123 S. Ct. at 2440 (*quoting* Bakke, 438 U.S. at 317).

on membership in particular groups²⁴⁵ and a program that assigns points to applicants based exclusively on membership in those groups.²⁴⁶ In each of these programs, the school's policy had the effect of giving applicants who are members of a particular racial or ethnic group, a mathematical advantage over other applicants, which often resulted in automatic admission, precluding the need for committee review. Consequently, the use of quotas such as the ones challenged in *Bakke* and *Gratz*, prohibit admissions committees from meaningful consideration of factors other than race, which could contribute to diversity in the classroom. The Court termed any program that resulted in a lack of meaningful comparison between individual applicants as inflexible and mechanical, and therefore constitutionally prohibited under the Equal Protection Clause.²⁴⁷

Despite its recognition that admissions policies must necessarily pay “some attention to numbers”²⁴⁸ the Court has struck down the use of numerical goals, calling such an instrument a quota. In *Bakke*, Justice Powell wrote that “there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students to be admitted”²⁴⁹ But in each of the affirmative action admission cases, the Courts were swift to reject the need for setting particular numbers to achieve diversity. In *Bakke*, a majority of the Court held that goals and quotas are never permissible in enacting race-conscious programs,²⁵⁰ and ultimately struck down the University of California at Davis Medical School admissions program as violating of the Equal Protection Clause because it set aside a specific number of seats for

²⁴⁵ *Bakke*, 438 U.S. 285.

²⁴⁶ *See supra* notes 113-124 and accompanying text.

²⁴⁷ *See supra* notes 15-40, 113-124 and accompanying text.

²⁴⁸ *Gratz*, 123 S. Ct. at 2349.

²⁴⁹ *Gratz*, 123 S. Ct. at 2343 (*quoting* *Bakke*, 438 U.S. 265, 323).

²⁵⁰ *See supra* notes 15-40 and accompanying text.

minority applicants.²⁵¹ The Majority in *Gratz*, raised concerns because LSA’s policy of automatically assigning points to applicants, who are members of a particular racial or ethnic groups, had the effect of giving those applicants a mathematical advantage over other applicants, thereby, arguably, creating easier access to acceptance into the University.²⁵²

In addition to proving that the program is flexible, under the second prong of the *Paradise* test, the defending party must establish that the challenged program is limited in duration. The *Grutter* Court placed an affirmative duty on courts to limit constitutionally permissible race-conscious programs to those with a limited duration. Justice O’Connor wrote in *Grutter* “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.”²⁵³ “Accordingly, race-conscious admissions policies must be limited in time.”²⁵⁴ In the context of achieving diversity in the classroom, “the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”²⁵⁵

²⁵¹ See *supra* notes 15-40 and accompanying text.

²⁵² See *supra* notes 113-124 and accompanying text. *But see* Souter dissent in *Gratz* (“The record does not describe a system with a quota like the one struck down in *Bakke*, which ‘insulate[d]’ all nonminority candidates from competition in certain seats). *Gratz*, 123 S. Ct. 2440 (*quoting* *Bakke*, 438 U.S. at 317).

²⁵³ *Grutter*, 123 S. Ct. at 2346 (*quoting* *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

²⁵⁴ *Id.* Justice O’Connor writes,

This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all “race-conscious programs must have reasonable durational limits.

Id.

²⁵⁵ *Id.* In *Grutter*, the Majority, arguably, called for the abolishment of affirmative action admission policies within the next twenty-five years. Justice Ginsburg, in her concurrence took exception to the Majority’s mandate, writing that Justice Ginsburg’s concurrence in *Grutter* supports the notion that the language must be read as discretionary. She wrote that “[f]rom today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset race-conscious.” *Id.* at 2348. See also Thomas (dissenting) (“While I agree that in 25 years the practice of the Law School will be illegal, they are, for the reasons I have given, illegal now). *Id.* at 2364.

The *Gratz* Court never fully considered the issue of whether LSA's policy failed the durational requirement of the narrowly tailored test. The *Grutter* Court, however, supported the Law School's program under the durational requirement, in part because the Law School in its Brief to the Court conceded, all "race-conscious programs must have reasonable durational limits."²⁵⁶ In addition, the 1992 admission policy, upon which the lawsuit was based, called for a periodic review to assess whether the program was meeting its stated goals. The Law School's identifiable goal of rendering its own program unnecessary in the future was sufficient for the Court to find it met the limited in duration requirement.

B. The Appropriateness of the Classroom Diversity Strict-Scrutiny Test.

At the outset, the new strict-scrutiny test is really just a reaffirmation and further interpretation of *Bakke*, particularly when defining a compelling governmental interest. The Court's ruling serves to quash the split in the Circuits created by the *Smith*, *Johnson*, and *Hopwood* courts. *Grutter* and *Gratz* formalize an identifiable compelling governmental interest in achieving diversity in education. Post-*Grutter* and *Gratz*, courts charged with evaluating the constitutionality of race-based programs must find a compelling governmental interest in those programs if they are designed to remedy present effects of past discrimination in the workplace,²⁵⁷ or to achieve diversity in the classroom.²⁵⁸

The narrowly tailored prong of the classroom diversity strict scrutiny test for affirmative action admissions programs is rightfully distinguishable from the *Paradise* test. The classroom diversity test retains only the first and second prongs of the *Paradise* test; the courts must consider (1) the necessity of the relief and the efficacy of alternative remedies,

²⁵⁶ *Grutter*, 123 S. Ct. at 2370 (quoting Brief for Respondents Bollinger et al. at 32).

²⁵⁷ See *supra* Part I. A. 2.

²⁵⁸ See *supra* Part I. B. and II.

and (2) the flexibility of the program and the duration of the relief. The other two prongs of the *Paradise* narrowly tailored test do not, as Justice Marcus suggests in *Johnson*, allow for a fair evaluation of the unique set of circumstances presented when reviewing race-conscious programs aimed at achieving diversity in the classroom.²⁵⁹

The first prong of the *Paradise* test, wherein the necessity for the relief and the efficacy of alternative remedies are considered, really relates to the demonstrable need for achieving the stated goals of the program and proof that the proposed program will meet those goals, regardless of whether the program is aimed at eradicating discrimination in the workplace or those aimed at achieving diversity in education. Both types of programs are designed to reach the same end, which is to meet the stated goals of the Fourteenth Amendment, that governmental programs impact on individual citizens equally. The commonalities of these two types of programs support the need to retain the first prong of the *Paradise* test.

The second prong of the *Paradise* test, which requires the program to be flexible, waivable, and temporary in nature, is also relevant to programs designed to achieve diversity in the classroom. Under this prong, the Court has stated, an affirmative action program must be easily adaptable to changing needs (flexible); easily terminated when not needed (waivable); and limited in duration (temporary).²⁶⁰ As a general matter, the Court has found that a program is “flexible” when it includes the ability to consider race, ethnicity or gender as one of several criteria. For example, in *Johnson v. Transportation Agency*,²⁶¹ the Court considered a challenge to a county affirmative action program that allowed the County to consider an applicant’s gender or race for purpose the of remedying the under-

²⁵⁹ *Johnson*, 263 F.3d at 1252.

²⁶⁰ *See Paradise*, 480 U.S. at 178; *Garfield*, *supra* note 10 at 916.

²⁶¹ *Johnson v. Transportation Agency, Santa Clara County*, Cal. 480 U.S. 616 (1987)

representation of women and minorities in traditionally segregated job categories. The plan, the Court held, “represents a moderate, flexible, case by case approach to effecting a gradual improvement in the representation of minorities and women in the Agency’s work force...”²⁶² Courts have found that those programs that are easily terminated or provided for periodic review met the durational requirement, while those programs that did not include a provision for termination were invalid. In *Croson*, the Court struck down the Minority Business Enterprise legislation since it did not have either a specific termination date or, at a minimum, a provision for reviewing the legislation.²⁶³ The *Paradise* court, in contrast, found the one-black-to-one-white hiring plan sufficiently limited in duration since the District Court mandated the hiring program only for as long as the department continued to prohibit minorities from being promoted.²⁶⁴ Additionally, under the consent decree, the court could easily eliminate the program once Alabama’s Department of Public Safety promoted a reasonable number of Black and Hispanic troopers by no longer mandating the state’s method of promotion. Finally in *Grutter*, the Court held that the Law School Program was sufficiently temporary in nature, the Program provided for periodic faculty review, and it was easy to terminate once the School found that it no longer needed to consider race as a factor to achieve diversity.²⁶⁵

The need for an assessment of the flexibility and duration of a program transcends the fundamental goals that a race-conscious program seeks to achieve. Regardless of whether the programs exist to eradicate present effects of past discrimination in the workplace, or achieve diversity in the classroom, because these programs give some type of preference to members of a particular class they are designed in a manner that potentially

²⁶² *Id.* at 642.

²⁶³ *Richmond v. Croson*, 488 U.S. 469 (1989).

²⁶⁴ *Paradise*, 480 U.S. at 178.

infringes on another's rights under the Equal Protection Clause. The higher purpose of these programs and policies is to achieve a status-quo that no longer requires any infringement. For this reason, it is necessary that the Court always consider the ability to limit and change both workplace-oriented and education-oriented race-conscious programs as they become less necessary.

The third and fourth prongs of the *Paradise* test are less necessary for evaluating the permissibility of affirmative action admission policies under the equal protection clause. The third prong of the test – the relationship of numerical goals to the relevant population – applies where the entity offering the program has set a numerical goal for achieving diversity. For example, in *Croson*, the Court considered legislation that required primary contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to Minority Business Enterprises.²⁶⁶ The Richmond Legislature chose the numerical goal of 30% based on the percentage of minorities in the general population.²⁶⁷ The Court found that since the City's goal of 30% minority sub-contractors reflected the general population and not the relevant population of minority contractors in the area, it did not meet the third element of the narrowly tailored test.²⁶⁸ The *Paradise* court held that the one-black-to-one-white hiring scheme was valid because the goal of the program was measured against the non-white population in the relevant work force.²⁶⁹

In education, the use of numerical goals is impermissible since setting goals for the number of seats a school might want to fill with minority candidates is tantamount to setting a quota. Both the *Grutter* and *Gratz* courts make clear that the only purpose for evaluating

²⁶⁵ *Grutter*, 123 S. Ct. at 2346.

²⁶⁶ *Richmond v. Croson*, 488 U.S. at 507.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Paradise*, 480 U.S. at 177-78.

numbers is to ensure that the programs do not result in a *de facto* quota system.²⁷⁰ To be sure, as Justice O'Connor recognized in *Grutter*, any program aimed at increasing diversity is necessarily going to require a numbers assessment.²⁷¹ Such numbers assessments, however, must be for the sole purpose of ensuring that the program does not include numerical goals. As the Majority in *Bakke* found, goals and quotas are never permissible in enacting race-conscious programs.²⁷²

The fourth prong – that the policy may not favor one group over another – is arguably, an inappropriate consideration for affirmative action admission policies mostly because *Bakke* established, and *Grutter* and *Gratz* reaffirmed, that the benefits of diversity in education favor all parties in an equal manner.²⁷³ To be sure, the Court has upheld programs aimed at ending past discrimination in the workplace where the program creates a slight burden on one party in comparison to another. For example, the *Paradise* court held that the one-black-to-one-white hiring requirement did not pose an unacceptable burden on white males because the program did not absolutely bar any non-minority individual's advancement; it merely postponed the white males' advancement.²⁷⁴ However, in *Paradise*, the Court also found that the advancement of black candidates was to the detriment to Caucasian police academy applicants.²⁷⁵ In contrast, the Court has concluded that there is an equal benefit to any participant in the classroom, regardless of race or ethnicity. Under this reasoning, arguably, all individuals are "favored" by constitutionally permissible affirmative

²⁷⁰ See *supra* Part II. Justice Thomas, in his dissent in *Grutter*, wrote that the "concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas." *Grutter*, 123 S. Ct. at 2371.

²⁷¹ See *supra* notes 179-210 and accompanying text.

²⁷² See *supra* notes 15-40 and accompanying text.

²⁷³ See *supra* Part I. A. 1 and Part II and accompanying notes.

²⁷⁴ *Paradise*, 480 U.S. at 182-83. The Court noted that, under the program, fifty percent of those promoted were non-minority, there were no layoffs, and the basic requirement that black troopers must be qualified still remained. *Id.* at 182-83. The Court concluded that these provisions safeguarded the program against providing unequal treatment for individuals. *Id.* at 183.

action admission policies. Therefore, consideration of whether a program favors one group over another is unnecessary when evaluating the constitutionality of programs and policies aimed at achieving diversity in the classroom. Thus, the fourth prong of the *Paradise* test is not applicable.

Conclusion

The “relevant differences”²⁷⁶ between achieving diversity in the workplace and achieving diversity in the classroom demand different strict scrutiny tests. The Court’s decision to hear the *Grutter* and *Gratz* cases following a 25-year silence on the issue of the constitutionality of affirmative action admission policies provided the necessary forum for articulating a new test. The classroom diversity strict scrutiny test retains the broad requirements of its predecessor test, which was largely based on evaluating affirmative action programs and policies aimed at achieving equality in the workplace. Any race-conscious program or policy must be narrowly tailored to achieve a compelling governmental interest in order to withstand a Constitutional challenge. The classroom diversity test varies most significantly from the former test in the manner in which it defines the elements of the narrowly tailored prong. An interpretation of the *Grutter* and *Gratz* rulings reveals that the four-pronged *Paradise* narrowly tailored test is too expansive for evaluating race-conscious admissions policies. Where education is concerned, a defending party need only demonstrate that the program is (1) the least intrusive and most effective means to achieve the goals of the program and (2) flexible and limited in duration.²⁷⁷

The Court, in passing judgment on the University of Michigan’s different admission policies, provided guidance into what satisfies each prong of the classroom diversity strict

²⁷⁵ *Id.* See *supra* note 274.

²⁷⁶ *Grutter*, 123 S. Ct. at 2341-42 (*quoting* *Adarand*, 115 U.S. at 228).

²⁷⁷ *Grutter*, 123 S. Ct. at 2342, 2362.

scrutiny test.²⁷⁸ The Court affirmed Justice Powell's pronouncement in *Bakke* that diversity in the classroom serves a compelling governmental interest.²⁷⁹ Moreover, the Courts found admissions policies that allow for individual review meet the flexible prong of the narrowly tailored test whereas policies that assign points to membership in a particular class are not flexible, whereas programs.²⁸⁰ Finally, a program that is easily terminated is sufficiently limited in duration.²⁸¹

The new strict scrutiny test is appropriate since it more accurately reflects the goals, benefits, and limitations of an affirmative action program aimed at achieving diversity in the classroom than did the old test, which was developed in response to challenges in the workplace. At the outset, the test recognizes the wide-reaching educational benefit that these policies have to both members of a particular underrepresented class and to members of the majority. The new test also disbands with the requirement that the program or policy evaluate numerical goals, recognizing that the use of numerical goals is never appropriate in educational admissions decisions.

The need for a new strict scrutiny test for race-conscious programs aimed at achieving diversity in the classroom provides a much-desired window of opportunity for proponents of affirmative action admissions policies. The Court's de facto articulation of this new test, and its findings under the test, provide solid guidelines for schools to develop workable programs in the future. More importantly, the Court's adoption of the new strict scrutiny test, and its decision to uphold an affirmative action admission policy under the test, confirm its commitment to continued use of race-conscious programs aimed at achieving diversity in the classroom.

²⁷⁸ See *supra* Part III. B and accompanying footnotes.

²⁷⁹ See generally Gratz, 123 S. Ct. 2411.

²⁸⁰ Gratz, 123 S. Ct. at 2430.

²⁸¹ See *Paradise*, 480 U.S. at 178; Garfield, *supra* note 10 at 916.