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Grutter v. Bollinger: Race as a Factor in Public Higher Education Admissions Policies

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Grutter v. Bollinger: Race as a Factor in Public Higher Education Admissions Policies

In *Grutter v. Bollinger*,[1] the United States Supreme Court held that the University of Michigan Law School's goal of student body diversity was a compelling interest.[2] The Court concluded that the Law School's narrowly tailored race-based admissions program was not prohibited by the Equal Protection Clause because it furthered "a compelling interest in obtaining the educational benefits that flow from a diverse student body."[3] This decision was unexpected in light of affirmative action rulings which have limited the use of race in admission programs.[4]

I. FACTUAL BACKGROUND

Barbara Grutter, a white Michigan resident, applied to the University of Michigan Law School ("the Law School") in 1996 with a 3.8 grade point average and a 161 LSAT score. The Law School initially found

1. 123 S. Ct. 2325 (2003).
2. *Id.* at 2339.
3. *Id.* at 2347.
4. *See* Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000); Johnson v. Bd. of Regents of the Univ. Sys. of Ga., 263 F.3d 1234 (11th Cir. 2001).

Grutter admissible, then placed her on a waiting list, and subsequently rejected her application. Grutter filed suit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994 and President of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991 until 1998). Grutter claimed that the Law School violated the Fourteenth Amendment[5] by discriminating against her on the basis of race.[6] Grutter alleged that the Law School "had no compelling interest to justify its use of race in the admission process."[7]

The district court conducted a bench trial on the degree to which race was a factor in the Law School's admissions decisions and whether the Law School's consideration of race in admissions decisions constituted a race-based double standard. The court concluded that the Law School's race-based admissions program was unconstitutional.[8] The district court applied strict scrutiny as the reviewing standard.[9] The court found that the Law School's goal of assembling a diverse student body was not a compelling interest because *Regents of the University of California v. Bakke*[10] did not recognize it as such.[11] The district court determined that even if student body diversity was a compelling interest, the Law School's use of race in its admissions program was not narrowly tailored.[12] The Law School's use of race was not clearly defined, and no termination point was established.[13] The Law School also failed to find an alternative solution to increasing minority enrollment.[14] The district court granted the petitioner's request for declaratory relief and

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5. U.S. CONST. amend. XIV.

6. *Grutter*, 123 S. Ct. at 2332-33; Grutter v. Bollinger, 137 F. Supp. 2d 821, 823-24 (E.D. Mich. 2001).

7. *Grutter*, 123 S. Ct. at 2333.

8. *Grutter*, 137 F. Supp. 2d at 823-25, 871.

9. *Id.* at 843 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny")).

10. 438 U.S. 265 (1978).

11. *Grutter*, 137 F. Supp. 2d at 844. The district court determined the Court in *Bakke* did not hold student body diversity was a compelling governmental interest. *Id.*

12. *Id.* at 850.

13. *Id.* at 851 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989) (determining that racial classifications are temporary measures to reach the goal of equality)).

14. *Id.* at 852 (citing *J.A. Croson Co.*, 488 U.S. at 507 (ruling that the city's failure to adopt race-neutral means to increase minority business participation in city contracting was not narrow tailoring)).

enjoined the Law School from using race as a factor in its admissions decisions.[15]

The court of appeals, sitting en banc, reversed the district court's judgment and vacated the injunction.[16] The court concluded that Justice Powell's opinion in *Bakke*, which ruled that student body diversity was a compelling state interest, was binding authority.[17] The court determined Justice Powell's opinion was *Bakke's* holding because it authorized the most restricted use of race, and it was the narrowest rationale from *Bakke*.[18] The court of appeals ruled that the Law School's use of race as a "plus factor" was similar to the Harvard College plan approved by Justice Powell because the admissions program did not use a quota, there was no separate admissions program for minority applicants, and factors other than race were considered to contribute to academic diversity.[19] The court held that the Law School's use of race was narrowly tailored because it was modeled after the Harvard plan.[20]

The Supreme Court granted certiorari because the courts of appeals disagreed on this question of national significance.[21] The Court endorsed Justice Powell's opinion in *Bakke* that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[22] The Court adopted strict scrutiny to decide the case because it was the applicable reviewing standard for all racial classifications.[23] In a 5-4 decision, the Court affirmed the court of appeals decision and determined that the Law School's goal of attaining a diverse student body was a compelling interest.[24] The Court held

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15. *Id.* at 872.

16. Grutter v. Bollinger, 288 F.3d 732, 752 (6th Cir. 2002).

17. *Id.* at 739. Justice Powell wrote his own opinion which was joined in part by two groups of concurring Justices, but for different reasons. Justice Powell's opinion was joined in part by Justices Stevens, Stewart, Rehnquist and Chief Justice Burger on his ruling that the Medical School's program was unconstitutional; however, the concurring Justices used a Title VI analysis rather than Powell's strict scrutiny analysis to reach their conclusion. Justices Brennan, White, Marshall, and Blackmun concurred with Justice Powell in determining that race can be used in the admissions process for student body diversity. Unlike Powell, the Justices determined that the Medical School's admissions program was constitutional under an intermediate scrutiny analysis. *Id.* at 325-26, 411.

18. *Id.* at 741 (citing Marks v. United States, 430 U.S. 188, 193 (1977) (concluding that "when 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'")).

19. *Id.* at 746-47.

20. *Id.* at 746.

21. *Grutter*, 123 S. Ct. at 2335.

22. *Id.* at 2337.

23. *Id.* at 2337-38 (quoting *Adarand Constructors*, 515 U.S. at 217).

24. *Id.* at 2339.

that the Law School's race-based admissions program did not violate the Equal Protection Clause because it was narrowly tailored, and the educational benefits from a diverse student body were a compelling interest.[25]

II. LEGAL BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment[26] provides that "no state shall . . . deny to any person within its jurisdiction equal protection of the laws."[27] Generally, the Fourteenth Amendment protects persons, not groups.[28] Justice Powell in *Regents of the University of California v. Bakke*[29] determined that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[30]

The Court has struggled with this proposition as applied to affirmative action programs. Affirmative action is defined as actions which seek to eliminate current discrimination, remedy the effects of prior discrimination, and programs which help prevent future discrimination.[31] Affirmative action programs have been used to remedy the effects of prior discrimination in employment practices, contract procurement, and higher education.[32] However, affirmative action in public higher education, specifically the use of race as a factor in the admissions process, has been most controversial.

A. *The Development of Race as a Factor in Admissions Programs*

In *DeFunis v. Odegaard*,[33] DeFunis, a white male, was denied admission to the University of Washington Law School ("Law School")

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25. *Id.* at 2347.
26. U.S. CONST. amend. XIV § 2.
27. *Id.*
28. *Id.*
29. 438 U.S. 265 (1978).
30. *Id.* at 289-90.
31. BLACKS LAW DICTIONARY 60 (7th ed. 1999).
32. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980) (holding that Congress could mandate state and local government compliance with a minority set-aside program under its commerce power); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding that a state or local subdivision has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (holding that a state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin).
33. 416 U.S. 312 (1974).

in 1971. The Supreme Court held that the case was moot because DeFunis was later admitted to the Law School under its revised admissions program, and he was in his final year of law school when the case was reviewed.[34] Despite this holding, Justice Douglas in his dissent stated the case should have been determined on its merits because the use of race in university admissions was a significant issue.[35]

The Law School's admissions process used an index called the Predicted First Year Average ("Average"), a formula combining an applicant's Law School Admission Test ("LSAT") score and his grades in the last two years of college.[36] The admissions committee attached less weight to the Average in reviewing minority applicants.[37] Further, minority applicants were assigned to a separate admissions committee from the general applicants.[38] Minority applicants were only compared competitively with other minority applicants; they were never compared with non-minority applicants.[39] Thirty-six out of thirty-seven admitted minority applicants had an Average lower than DeFunis.[40] The Law School's counsel admitted that if the enrolled minority applicants were considered in the same pool as non-minority applicants, they would never have been admitted.[41]

Justice Douglas determined that the admissions policy limited the number of seats DeFunis could compete for based solely on his race.[42] He concluded the Law School should be subject to strict scrutiny because it used racial classifications in its admissions process.[43] Justice Douglas further stated that the purpose of the Fourteenth Amendment was to "eliminate all official state sources of invidious racial discrimination in the States."[44] He opined that reviewing each application

34. *Id.* at 314-19.

35. *Id.* at 320 (Douglas, J., dissenting).

36. *Id.* at 321 (Douglas, J., dissenting).

37. *Id.* at 324 (Douglas, J., dissenting).

38. *Id.* at 323 (Douglas, J., dissenting). The Law School had two groups of admissions applicants: One general group and one minority admissions group. The Law School's application contained an optional question where an applicant could indicate their "dominant" ethnic origin. The answer to this question was the sole basis for placement in the minority admissions group. *Id.* at 320-21.

39. *Id.* at 323 (Douglas, J., dissenting).

40. *Id.* at 324 (Douglas, J., dissenting).

41. *Id.* at 325 (Douglas, J., dissenting).

42. *Id.* at 333 (Douglas, J., dissenting).

43. *Id.* (Douglas, J., dissenting).

44. *Id.* at 334 (Douglas, J., dissenting) (quoting Loving v. Virginia, 388 U.S. 1, 10 (1966)).

without regard to an applicant's race would keep the admissions process consistent with the Equal Protection Clause.[45]

In *Regents of the University of California v. Bakke*,[46] the Medical School of the University of California at Davis ("Medical School") had a special admissions program consisting of a separate admissions system for minority and disadvantaged applicants.[47] The special admissions program had a separate committee, whose members were mostly from minority groups. The Medical School's entering class had seats for one hundred students. Sixteen seats were reserved for minority applicants. Allan Bakke, a white male who applied twice to the Medical School, was considered under the general admissions program. Bakke filed suit in the Superior Court of California after his second rejection, alleging that the Medical School's special admissions program violated the Equal Protection Clause.[48] The trial court ruled that "the special program operated as a racial quota because minority applicants . . . were rated only against one another."[49] The court did not order the Medical School to admit Bakke.[50] Bakke appealed to the Supreme Court of California, which applied strict scrutiny.[51] The state supreme court held that the special admissions program was not the least intrusive means for the Medical School to achieve its goals of integrating the medical profession and increasing the number of physicians serving minority groups.[52] The court ordered Bakke to be admitted to the Medical School; however, the order was stayed because the Supreme Court granted certiorari because of the important constitutional issue.[53]

Justice Powell concluded that a "[s]tate has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[54]

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45. *Id.* (Douglas, J., dissenting).

46. 438 U.S. 265 (1978).

47. *Id.* at 272-74. The Medical School opened in 1968. Its first year class had fifty students. In 1971 the first year class increased to one hundred students. The faculty created the special admissions program to increase the number of disadvantaged students in each class. In 1973 the special admissions program was open to applicants who indicated on the application form they wished to be considered as "economically and/or educationally disadvantaged." In 1974 the question was whether the applicant wanted to be considered as an applicant from a minority group. The minority groups included blacks, Chicanos, Asians, and American Indians. *Id.*

48. *Id.* at 272-79.

49. *Id.* at 278.

50. *Id.* at 279.

51. *Id.*

52. *Id.*

53. *Id.* at 281.

54. *Id.* at 320.

Justice Powell used strict scrutiny because the special admissions program classified applicants based on their race and ethnic background, which was a suspect classification.[55] He reasoned that race alone, in conjunction with a quota assigned to the admissions process, was not a necessary means to achieving diversity.[56] Justice Powell argued that restricting the focus to ethnic diversity would hinder the attainment of complete diversity.[57] However, he supported a diversity admissions program like Harvard College's, where race "[did] not insulate the individual from comparison with other candidates for the available seats."[58] In Harvard's program, race and ethnic background were positive attributes in an applicant's file, but all other diversity elements were considered.[59] This placed all applicants on "the same footing for consideration, although not necessarily according them the same weight."[60] Justice Powell determined that the Medical School's admissions program violated the Fourteenth Amendment's Equal Protection Clause because it only focused on ethnic diversity.[61] Universities must consider factors other than race in attaining student body diversity.[62]

Four justices, led by Justice Brennan, determined that the Medical School's admissions program was constitutional and that race can be used in university admissions.[63] Justice Brennan opined that "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'"[64] Using this intermediate scrutiny level, he concluded that

> [the Medical School's] articulated purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and

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55. *Id.* at 305.
56. *Id.* at 315.
57. *Id.*
58. *Id.* at 317.
59. *Id.*
60. *Id.*
61. *Id.* at 326. Justice Powell determined that Bakke was entitled to an injunction, which required the Medical School to admit him. *Id.* at 321.
62. *Id.*
63. *Id.* at 325-26 (Brennan, J., concurring in part, dissenting in part). The justices reversed the order requiring the Medical School to admit Bakke. *Id.* at 379.
64. *Id.* at 359 (Brennan, J., concurring in part, dissenting in part) (quoting Califano v. Webster, 430 U.S. 313, 317 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976)).

> chronic, and that handicap of past discrimination is impeding access of minorities to the Medical School.[65]

Justice Brennan reasoned that prior cases established that state governments can use race-based programs to repair the current effects of prior discrimination.[66] He determined that the Medical School's admissions program was valid under this test because of the under-representation of minority doctors in the country, and the history of intentional discrimination against minorities in education.[67] Further, Justice Brennan saw no difference between the Harvard College program "plus factor" and Davis's set aside program because they both achieved the same purpose, but the Harvard program was less obvious to the public.[68]

Four justices, led by Justice Stevens, determined that the Medical School's admissions program violated Title VI of the Civil Rights Act[69] because it excluded Bakke based on his race.[70] Title VI provides protection for individuals excluded from federally funded programs on account of their race or ethnicity.[71] The dissenters avoided the constitutional issue because they determined that the case should be decided on a statutory basis.[72] Justice Stevens reasoned that the Medical School violated Title VI when it denied Bakke admission because it was receiving federal funding.[73]

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65. *Id.* at 362 (Brennan, J., concurring in part, dissenting in part).

66. *Id.* at 369 (Brennan, J., concurring in part, dissenting in part). *See* Green v. County Sch. Bd., 391 U.S. 430 (1968) (holding that a public body engaged in racial discrimination cannot bring itself into Equal Protection Clause compliance simply by ending its unlawful acts and adopting a race-neutral stance); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (holding that racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions); Franks v. Bowman Transp. Co., 42 U.S. 747 (1976) (concluding that Congress has required or authorized race-conscious action to put individuals impacted by past discrimination in a position they might have otherwise enjoyed).

67. *Bakke*, 438 U.S. at 369-70 (Brennan, J., concurring in part, dissenting in part).

68. *Id.* at 379 (Brennan, J., concurring in part, dissenting in part).

69. Civil Rights Act of 1964, § 601, 42 U.S.C. §§ 2000d-1 to -7 (2003).

70. *Bakke*, 438 U.S. at 412 (Stevens J., concurring in part, dissenting in part). The justices affirmed the lower courts judgment to order the Medical School to admit Bakke. *Id.* at 421.

71. Civil Rights Act of 1964, § 601, 42 U.S.C. §§ 2000d-1 to -7.

72. *Bakke*, 438 U.S. at 412-13 (Stevens, J., concurring in part, dissenting in part). Justice Stevens opined that the constitutionality of the Medical School's program under the Fourteenth Amendment should only be decided if the Medical School's programs survived the Title VI analysis.

73. *Id.* at 418 (Stevens J., concurring in part, dissenting in part).

B. Modern Affirmative Action Cases Interpreting Justice Powell's Opinion in Bakke

The Ninth Circuit Court of Appeals in *Smith v. University of Washington Law School*[74] adopted Justice Powell's opinion in *Bakke* that university race-based admissions programs serve a compelling interest when the goal is educational diversity.[75] In this case, plaintiffs, white applicants to the University of Washington Law School ("Law School"), were denied admission and brought suit alleging that their denials were due to racially discriminatory admissions policies. The Law School used race as a criteria in its admissions program from 1994 to 1998, and plaintiffs were denied admission during this time period.[76] Smith appealed from district court orders dated February 10, 1999 and February 12, 1999, which denied her motion for partial summary judgment.[77]

The district court denied Smith's motion for partial summary judgment because it determined that "under Supreme Court precedent race could be used as a factor in educational admissions decisions, even where [it] was not done for remedial purposes."[78] The court of appeals concluded the district court correctly followed Justice Powell's opinion in *Bakke* in applying the following principles: (1) strict scrutiny applies to race-based classifications; (2) numerical goals based on race are invalid; (3) eliminating the effects of prior discrimination is a legitimate and substantial interest; and (4) attaining a goal of student body diversity in public higher education is constitutionally valid.[79] The court of appeals determined ethnic diversity used in conjunction with other factors could be used to attain student body diversity.[80]

In deciding which *Bakke* opinion to adopt, the court of appeals followed the rationale 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

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74. 233 F.3d 1188 (9th Cir. 2000).

75. *Id.* at 1201.

76. *Id.* at 1191-92. On November 3, 1998, the State of Washington passed Initiative Measure 200, Wash. Rev. Code. § 49.60.400(1) (1998), which prohibited the state from discriminating on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting. Pursuant to the directive, the Law School removed the use of race from its admissions program. *Id.* at 1192.

77. *Id.* at 1192.

78. *Id.* at 1196.

79. *Id.* at 1197.

80. *Id.*

grounds.'"[81] The court of appeals determined that "Justice Powell's analysis is the narrowest footing upon which a race-conscious decision making process could stand."[82] The court then concurred with the district court, which decided Justice Powell's opinion in *Bakke* was the current law.[83] The court of appeals concluded that properly designed race-based admissions programs did not violate the Fourteenth Amendment.[84]

The Fifth Circuit Court of Appeals in *Hopwood v. Texas*[85] (*Hopwood III*) limited the reach of Justice Powell's ruling in *Bakke*.[86] In the prior case, *Hopwood v. Texas*,[87] (*Hopwood II*) the panel held that

> [the Law School] may not use race as a factor in deciding which applicants to admit (1) in order to achieve a diverse student body, (2) to combat the perceived effects of a hostile environment at the law school, (3) to alleviate the law school's poor reputation in the minority community, or (4) to eliminate any present effects of past discrimination by actors other than the law school.[88]

The panel remanded the case, instructing the law school to use a reasonable race-blind system.[89] *Hopwood III* is an appeal from the case which was remanded in *Hopwood II*.[90]

The University of Texas School of Law ("Law School") gave racial preferences in its admissions program to increase the enrollment of certain minorities.[91] Cheryl Hopwood applied for admission to the Law School in 1992. The Law School used the Texas Index ("TI") score, which is determined independently by the Law School Data Assembly Service ("LSDAS"). It included an applicant's undergraduate grade point average ("GPA") and their Law School Admissions Test ("LSAT") score. The Law School had three categories for the applicants based on their TI score: (1) presumptive admit, (2) discretionary zone, and (3) presump-

81. *Id.* at 1199 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).
82. *Id.* at 1200.
83. *Id.* at 1201.
84. *Id.*
85. 236 F.3d 256 (5th Cir. 2000) (*Hopwood III*).
86. *Id.* at 275-76.
87. 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (*Hopwood II*).
88. *Hopwood III*, 236 F.3d at 273 (citing *Hopwood II*, 78 F.3d at 962).
89. *Id.* at 261.
90. *Hopwood II*, 78 F.3d at 935.
91. *Id.* at 934.

tive denial.[92] The TI ranges used for the three categories were lower for minority applicants than non-minority applicants.[93]

Hopwood's TI score placed her in the presumptive admit category; however, she was downgraded to the discretionary zone because the noncompetitive nature of her community college and because her undergraduate university inflated her GPA. She was placed on a waiting list after a review by the admissions committee. Hopwood was ultimately denied admission. Professor Wellborn, the Law School's expert witness, testified Hopwood likely would not have been admitted in a race-blind program because there were stronger candidates available.[94] The court of appeals concluded that the district court correctly found that Hopwood would not have had a reasonable chance of admission to the Law School under a color-blind admissions system.[95]

On appeal in *Hopwood III*, Texas asserted that the *Hopwood II* panel's justifications were clearly erroneous because the Law School had a compelling interest in remedying the present effects of past discrimination, and it had a compelling interest in obtaining a diverse student body.[96] The court in *Hopwood III* determined that the Supreme Court has established that "the government can, consistent with the Constitution, use racial preferences under particular circumstances to remedy the present effects of past discrimination."[97] However, it ruled that the limits the *Hopwood II* panel placed on the Law School were valid because there was no controlling rationale in *Bakke* defining the circumstances when a government could use racial preferences.[98]

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92. *Id.* at 935-36. Professor Stanley Johanson, chair of the admissions committee in 1992, had the sole responsibility for setting the criteria for the three admissions categories. Most applicants in the presumptive admit category were admitted to the law school with minimal review by the admissions committee. Professor Johanson reviewed all presumptive admit applications, and he had the discretion to lower them to the discretionary zone for further review if he found anything questionable. Applicants in the presumptive denial category also received minimal review; however, the admissions committee had discretion to upgrade the applicant if they believed his TI score did not reflect the applicant's potential in law school. Most presumptive denial applicants were rejected. Applicants in the discretionary zone were subject to the most scrutiny by the admissions committee. There was a separate process for minority and non-minority applicants in the discretionary zone. Their applications were processed by a three-person minority subcommittee which gave each candidate extensive evaluation and discussion. *Id.* at 935-37.

93. *Id.* at 936. The minority applicants included those who designated themselves as Mexican-Americans or African-American blacks on the application form.

94. *Hopwood III*, 236 F.3d at 266-72.

95. *Id.* at 272.

96. *Id.* at 272-74.

97. *Id.* at 273.

98. *Id.* at 275.

Therefore, the *Hopwood II* panel had the freedom to decide which *Bakke* rationale to follow.[99] The *Hopwood II* panel concluded that race-based programs, which sought to attain student body diversity, were unconstitutional.[100] Although this went against Justice Powell's opinion in *Bakke*, the court in *Hopwood III* decided it could not say "that [the decision] conflict[ed] with any portion of *Bakke* that [was] binding on this court."[101]

Justice Powell's *Bakke* ruling was further limited by the Eleventh Circuit Court of Appeals in *Johnson v. Board of Regents of the University of Georgia*.[102] The University of Georgia ("UGA") had a freshman admissions policy which assigned a fixed numerical bonus to non-white applicants and male applicants. Applicants admitted in the initial stage were selected solely on objective academic criteria. The remaining applicants were evaluated using the Total Student Index ("TSI"), which was based on a weighted combination of academic, extracurricular, demographic, including race and gender, and other factors. Applicants whose TSI scores were a certain threshold were automatically admitted. Three white females, who were denied admission at the TSI stage under the race-based policy, brought suit.[103]

The district court held that UGA's freshman admissions policy was unconstitutional because "student body diversity [was] not a compelling interest sufficient to withstand the strict scrutiny that courts must apply to government decision making based on race."[104] The court determined *Bakke* was not binding precedent; therefore, student body diversity was not a compelling interest.[105] The district court granted

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99. *Id.*

100. *Id.*

101. *Id.*

102. 263 F.3d 1234 (11th Cir. 2001).

103. *Id.* at 1239-42. At the TSI stage, academic factors accounted for 5.40 points (approximately 67 percent of the maximum points available). Leadership/activity or other factors accounted for 1.5 points (18 percent of the available total). Three demographic factors were considered for up to 1.25 additional points (15 percent of the maximum available). These included race/ethnicity (non-Caucasian), gender (male), and Georgia residency. Overall, only one other TSI factor, SAT score or ACT equivalent between 1200-1660, was worth more than the race factor. *Id.*

104. *Id.* at 1237.

105. *Id.* at 1239. UGA wanted the court to use Justice Powell's opinion as the majority decision in *Bakke*. UGA asserted its program was similar to the Harvard program endorsed by Justice Powell and was constitutional. The district court determined Powell's discussion on the Harvard program was dicta and was not endorsed by any other justices. Therefore, it was not binding precedent to the court. The district court used the analysis in *Adarand Constructors, Inc. v. Pena* that: (1) racial classifications used for non-remedial purposes are suspect, (2) race-conscious programs must meet a compelling interest, and (3)

summary judgment in plaintiffs' favor because UGA's admissions policy violated Title VI and the Equal Protection Clause.[106] UGA appealed the decision.[107]

The court of appeals applied strict scrutiny in deciding the case because "[classifications] of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'"[108] The court determined that Justice Powell's opinion in *Bakke* was persuasive; however, it was not binding precedent because a Supreme Court majority had never held that student body diversity was a compelling interest that justified the use of race in admissions programs.[109] The holding from *Bakke* that the court followed was that student body diversity was an important interest, but the interest was not a compelling one that would withstand strict scrutiny.[110] The court of appeals reasoned that "the status of student body diversity as a compelling interest justifying a racial preference in university admission is an open question in the Supreme Court . . . ."[111] The court of appeals then developed its own test for determining whether a school's admissions program served a compelling interest:

> (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.[112]

The court of appeals held that UGA's freshman admissions policy was unconstitutional because it was not narrowly tailored.[113] UGA did not consider other ways to achieve student body diversity, and its use of race

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a majority of the Supreme Court had not determined that student body diversity in higher education is a compelling interest. 515 U.S. 200, 227 (1995). Johnson v. Bd. of Regents of the Univ. Sys. of Ga., 106 F. Supp. 2d 1362, 1368-69, 1371 (S.D. Ga. 2000).

106. *Johnson*, 263 F.3d at 1242.

107. *Id.*

108. *Id.* at 1243 (quoting Shaw v. Reno, 509 U.S. 630, 643 (1993) (*Shaw I*) (quoting Hirabayahsi v. United States, 320 U.S. 81, 100 (1943)).

109. *Id.* at 1248.

110. *Id.* at 1247.

111. *Id.* at 1250.

112. *Id.* at 1253.

113. *Id.* at 1254.

was inflexible and disproportionately advantaged certain racial groups.[114]

III. COURT'S RATIONALE

In *Grutter v. Bollinger*,[115] the Supreme Court granted certiorari to resolve the conflict among the courts of appeals concerning whether race can be a factor in university admissions.[116] The Court adopted strict scrutiny as the reviewing standard because "all governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."[117] The Court interpreted this to mean that only narrowly tailored race-based classifications, which furthered compelling governmental interests, were constitutional.[118] The Court further determined that not all governmental uses of race were invalidated by strict scrutiny.[119] The Court reasoned that the purpose of strict scrutiny was to ensure governmental uses of race were pursuing important goals.[120]

The Law School "assert[ed] only one justification for their use of race in the admissions process: obtaining 'the educational benefits that flow from a diverse student body.'"[121] The Court deferred to the Law School's educational judgment in holding that its goal of student body diversity was a compelling interest.[122] The Court reasoned that courts have traditionally given a degree of deference to universities to make their own decisions regarding admissions policies.[123] The Court presumed that the Law School's goal of attaining a diverse student body was done in good faith and that it was the Law School's proper institutional mission.[124]

The Law School enrolled a "critical mass" of minority students to achieve its goal of assembling a diverse and academically qualified class.[125] It defined a "critical mass" as "meaningful numbers" or

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114. *Id.* at 1255.
115. 123 S. Ct. 2325 (2003).
116. *Id.* at 2335.
117. *Id.* at 2337 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).
118. *Grutter*, 123 S. Ct. at 2337-38.
119. *Id.* at 2338.
120. *Id.*
121. *Id.* (quoting Brief for Respondents Bollinger et al. *Grutter* (No. 02-241)).
122. *Id.* at 2339.
123. *Id.*
124. *Id.*
125. *Id.*

"meaningful representation."[126] This meant "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated,"[127] or "numbers such that underrepresented minority students do not feel . . . like spokespersons for their race."[128] The Court determined that the educational benefits produced by "critical mass" diversity were substantial.[129] The Court believed the policy promoted "cross-racial understanding, help[ed] to break down racial stereotypes and enable[d] [students] to better understand persons of different races."[130] The Court cited expert studies and reports introduced at trial that discussed the benefits of student body diversity including: Promoting learning, preparing students for increased diversity in the workforce and society, and better preparing students as professionals.[131] The Court also cited amicus curiae briefs filed by major American businesses and high-ranking retired officers and civilian leaders of the United States military which detailed diversity's real benefits.[132] It reasoned that law schools train a large number of the nation's future leaders; therefore, access to a legal education must include qualified individuals from every racial and ethnic background.[133]

Furthermore, the Court approved of the Law School's flexible use of race in its admissions process.[134] It determined that the Law School's goal of attaining a "critical mass" of underrepresented minority students did not create a quota system.[135] The Law School neither reserved a fixed number of seats for minorities, nor insulated minorities from comparison with the general admissions pool, which are both indicators of quotas.[136] The Law School's admissions process ensured that each applicant was individually scrutinized.[137] It gave serious consideration to each applicant's possible contribution to a diverse learning environ-

126. *Id.* at 2333.
127. *Id.*
128. *Id.* at 2333-34.
129. *Id.* at 2339.
130. *Id.* at 2339-40.
131. *Id.* at 2340.
132. *Id. See* Brief of Amicus Curiae 3M et al. at 4-5, 123 S. Ct. 2325 (2003) (no. 02-241); Brief of Amicus Curiae General Motors Corp. at 3-4, 123 S. Ct. 2325 (2003) (no. 02-241); Brief of Amicus Curiae Julius W. Becton, Jr. et al. at 27, 123 S. Ct. 2325 (2003) (no. 02-241).
133. *Grutter*, 123 S. Ct. at 2341 (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)).
134. *Id.* at 2343-44.
135. *Id.* at 2342.
136. *Id.*
137. *Id.* at 2343.

ment.[138] The Court determined that the Law School's admissions program was similar to the Harvard program endorsed by Justice Powell in *Bakke*, which flexibly considered all diversity elements in equal footing for each applicant.[139] Moreover, like the Harvard program, the Law School's race-based admissions program ensured all factors contributing to diversity, including race, were considered in the admissions decision.[140] Non-minority applicants with grades and test scores lower than underrepresented minorities were frequently admitted to the Law School.[141] This proved that the Law School gave weight to non-racial diversity factors.[142] The Court determined that a narrowly tailored admissions program does not "'unduly burden individuals who are not members of the favored racial and ethnic groups.'"[143] Because the Law School considered race among other diversity factors, and it was not a quota system, the Court concluded it did not unduly harm non-minority applicants and was narrowly tailored.[144]

IV. IMPLICATIONS

In the twenty-five years since *Regents of the University of California v. Bakke*,[145] federal courts have struggled to interpret the fractured Court's holding regarding race-based admissions programs in public higher education. Some circuits adopted Justice Powell's opinion in *Bakke* and allowed race-based admissions programs, while others declared these programs unconstitutional.[146] By following Justice Powell's opinion in *Bakke*, the Supreme Court in *Grutter v. Bollinger*[147] ended the confusion and validated his conclusion that race-based admissions programs are constitutional where the goal is student body diversity.[148]

Prior to the decision in *Grutter*, the most recent Supreme Court case regarding diversity in higher education was the splintered decision in

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138. *Id.*
139. *Id.* at 2343-44.
140. *Id.* at 2344.
141. *Id.*
142. *Id.*
143. *Id.* at 2345 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).
144. *Id.* at 2345-46.
145. 438 U.S. 265 (1978).
146. *See* Johnson v. Bd. of Regents of the Univ. Sys. of Ga., 263 F.3d 1234 (11th Cir. 2001); Smith v. Univ. of Washington, 233 F.3d 1188 (9th Cir. 2000); Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000).
147. 123 S. Ct. 2325 (2003).
148. *Id.* at 2347.

Bakke. Federal courts had no concrete authority to follow when reviewing race-based admissions programs resulting in different regions following different laws based on what their circuit decided. The decision in *Grutter* settles the question of whether race can be used as a diversity factor and will help streamline admissions programs nationwide. The Court provided a majority holding, unlike *Bakke*, that race-based admissions programs are constitutional.[149] The Court also provided guidelines on how to achieve a constitutional program.[150] Furthermore, the Court ended years of dissention by endorsing Justice Powell's opinion in *Bakke*.[151] The Court conclusively ended debate about which opinion in *Bakke* constitutes the Court's holding. It is now undisputed that race-based admissions programs seeking the achievement of student body diversity are constitutional.[152]

In response to the Court's holding, public universities nationwide are reviewing their admissions policies and either reinstating race-based admissions programs, or aligning their current race-based admissions programs with the Court's guidelines.[153] Public higher education facilities must also align their public financial aid programs, recruiting, outreach, and retention programs with the decision in *Grutter* because race has been used as a factor in these areas.[154] Public higher education institutions must now ensure that they articulate a legal justification for their race-based admissions programs.[155] An automatic point distribution for minority applicants, like the policy in *Gratz v. Bollinger*,[156] is not an acceptable race-based admissions program.[157] Race-based admissions programs must contain holistic reviews for each applicant, where race is not the only diversity factor, and all students are in the same admissions pool.[158] The Court particularly emphasized that each institution must tie its race-based program to its educational goals.[159]

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149. *Id.*

150. *Id.* at 2346.

151. *Id.* at 2337.

152. *Id.* at 2347.

153. Jonathan R. Alger, Assistant General Counsel, University of Michigan, Ann Arbor, Michigan, *Diversity Issues and the Affirmative Action Debate after Grutter and Gratz*, 1 (Sept. 13, 2003).

154. *Id.*

155. *Id.* at 4.

156. 123 S. Ct. 2411 (2003).

157. *See supra* note 153, at 1.

158. *See supra* note 153, at 5.

159. Memorandum from Ad Hoc Committee on Policy Issues, to Dean of Vanderbilt University Law School 5 (Aug. 19, 2003) (on record with author).

Race-based admissions programs are not yet safe from the Court's scrutiny. Justice O'Connor opined that such programs will no longer be necessary in twenty-five years.[160] This expected termination is not a concrete life expectancy. Twenty-five years have passed since the opinion in *Bakke*, but the Supreme Court concluded that race-based admissions programs are still necessary.[161] For the Court to expect such programs to be unnecessary in twenty-five years is unrealistic based on the current status of race in America. For such an expectation to be fulfilled, the number of qualified minority applicants interested in higher education must be increased.[162] This requires public higher education institutions to work in conjunction with other institutions to address educational preparedness for students in K-12 programs, and examine other barriers in educational achievement.[163] The decision in *Grutter* is a step in the right direction because the Court recognized the importance of diversity in higher education; however, it will take more than a Supreme Court decision to repair the lack of diversity in public higher education.

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160. *Grutter*, 123 S. Ct. at 2347.

161. *Id.* at 2346.

162. Mark V. Tushnet, *The Supreme Court on Affirmative Action*, THE NEWSLETTER (Association of American Law Schools, Washington, D.C.), Aug. 2003, at 3.

163. *See supra* note 153, at 15.