

# Grutter v. Bollinger's Strict Scrutiny Dichotomy: Diversity is a Compelling State Interest, but the University of Michigan Law School's Admissions Plan is Not Narrowly Tailored

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# **GRUTTER V. BOLLINGER'S STRICT SCRUTINY DICHOTOMY: DIVERSITY IS A COMPELLING STATE INTEREST, BUT THE UNIVERSITY OF MICHIGAN LAW SCHOOL'S ADMISSIONS PLAN IS NOT NARROWLY TAILORED**

## I. INTRODUCTION

After twenty-five years of increasing speculation and obfuscation surrounding the Supreme Court's decision in *Regents of the University of California v. Bakke*,<sup>1</sup> the Supreme Court revisited the issue of affirmative action in higher education in a pair of 2003 cases arising out of the admissions policies at the University of Michigan.<sup>2</sup> The Court's affirmative action jurisprudence between *Bakke* and the 2003 University of Michigan cases seemed to erode many of the principles enunciated by Justice Powell in his decisive *Bakke* opinion.<sup>3</sup> What is more, appellate courts reviewing university affirmative action admissions programs expressed lingering doubts about the precedential weight of Justice Powell's opinion.<sup>4</sup> The Court granted certiorari in *Grutter v. Bollinger* and *Gratz v. Bollinger* "to resolve the disagreement . . . on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."<sup>5</sup>

The Court in *Grutter* correctly concluded that diversity is a compelling state interest;<sup>6</sup> however, this Comment argues that the Court erred in concluding that the University of Michigan Law School's admissions program

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1. 438 U.S. 265 (1978); see *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000).

2. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

3. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

4. See *Hopwood*, 78 F.3d at 974; *Smith*, 233 F.3d at 1200-01.

5. *Grutter*, 539 U.S. at 322. Challenges to governmentally created race-based classifications are subjected by courts to the strict scrutiny standard. *Croson*, 488 U.S. at 505-06. The strict scrutiny standard contains two prongs: (1) the government must advance a compelling state interest for creating its race-based classifications; and (2) the classifications must be narrowly tailored to achieve the compelling interest. *Id.*

6. *Grutter*, 539 U.S. at 328.

was narrowly tailored to achieve diversity. Accordingly, the Court should have struck down the school's program as unconstitutional.

Michigan's admissions plan does not conform to the mandates of narrow tailoring for two reasons. First, the plan is impermissibly underinclusive.<sup>7</sup> Second, Michigan failed to sufficiently consider race-neutral alternatives before installing its race-based plan<sup>8</sup> and failed to identify a deadline on which it would cease accounting for prospective students' race when evaluating their suitability for admission.<sup>9</sup> Moreover, to conclude that Michigan had indeed properly considered race-neutral alternatives to its program and that it would no longer consider race in admissions when "practicable,"<sup>10</sup> the Court disregarded the federal district court's findings of fact, and instead yielded to Michigan's "academic freedom" to choose its class of students.<sup>11</sup> The Court's deference to the school is misplaced; the Constitution does not permit a public university to invoke its First Amendment "academic freedom" to do what is otherwise prohibited by the Fourteenth Amendment.<sup>12</sup>

Economic affirmative action plans present a remedy to the problems bedeviling race-based affirmative action programs such as the one at issue in *Grutter*. First, economic affirmative action plans provide greater inclusiveness than race-based plans because all individuals from depressed socio-economic backgrounds may qualify for preference regardless of their race. Second, economic affirmative action programs counteract the problems inherent in the subjective evaluation of whether universities sufficiently considered race-neutral alternatives before adopting race-based plans because such plans are already intrinsically race neutral. Third, educational and legal benefits attend economic affirmative action programs. For instance, such programs serve the goal of providing equal opportunity of education.<sup>13</sup> Additionally, because racial minorities comprise a disproportionate number of the nation's poor, universities seeking to obtain the compelling state interest of student body diversity may be able to do so through race-neutral, class-based admissions programs.<sup>14</sup> Finally, economic affirmative action programs supply universities the legal benefit of likely having challenges to such programs reviewed under the rational basis review standard rather than the

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7. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 851-52 (E.D. Mich. 2001).

8. *Id.* at 852.

9. *Id.* at 851.

10. *Grutter*, 539 U.S. at 343.

11. *Id.* at 339-40.

12. *Id.* at 363 (Thomas, J., concurring in part and dissenting in part).

13. See *id.* at 331-32 (majority opinion).

14. See *infra* Part VI.B.

more stringent strict scrutiny standard.<sup>15</sup>

This Comment will examine the alternate outcomes courts have reached when applying strict scrutiny to the diversity rationale offered by institutions of higher education as a justification for creating racial classifications. Part II probes court decisions ruling on the constitutionality of admissions programs that classify students based on race where educational diversity was invoked as a justification for such classifications. Part III asserts that beyond the policy rationales, educational diversity is a compelling interest rooted in constitutional precepts. Part IV examines the divergent findings of the federal district court and the Supreme Court in *Grutter* on the question of whether the University of Michigan Law School's admissions plan is narrowly tailored to achieve student body diversity. Part V explains that the Supreme Court should have found the admissions plan at issue in *Grutter* unconstitutional because it is not sufficiently narrowly tailored to achieve educational diversity. Part VI offers an alternative to the admissions plan at issue in *Grutter*, contending that an admissions plan that creates predominately socio-economic classifications, rather than racial classifications, is indeed narrowly tailored. Finally, Part VII contains this Comment's conclusions.

## II. THE DIVERSITY CONTROVERSY: IS STUDENT BODY DIVERSITY A COMPELLING STATE INTEREST?

Part II traces three leading cases in which diversity was invoked as a compelling state interest to justify a university's creation of racial classifications for its admissions plan. The Court first examined the question in *Bakke*, where diversity was accepted as a compelling state interest.<sup>16</sup> Eighteen years later, however, in *Hopwood v. Texas*, the Fifth Circuit concluded that the Court's intervening affirmative action decisions had eviscerated *Bakke's* conclusion, and thus rejected diversity as a compelling state interest.<sup>17</sup> The federal district court in *Grutter* embraced the Fifth Circuit's reasoning to also conclude diversity does not constitute a compelling interest.<sup>18</sup> But the Supreme Court overruled the federal district court in *Grutter* to provide the final word on the question: The Court reaffirmed *Bakke's* conclusion that educational diversity remains a compelling state interest in the context of higher education.<sup>19</sup>

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15. See *Korematsu v. United States*, 323 U.S. 214 (1944).

16. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (opinion of Powell, J.).

17. See *Hopwood v. Texas*, 78 F.3d 932, 944-48 (5th Cir. 1996).

18. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 847-50 (E.D. Mich. 2001).

19. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

A. Regents of the University of California v. Bakke: *The Constitution "Clearly" Permits Universities to Use Racial Preferences to Obtain a Diverse Student Body*

After Alan Bakke was twice denied admission into the University of California at Davis Medical School ("UC-Davis"), he brought suit alleging the school's admissions program—which reserved sixteen slots out of a class of 100 for members of certain minority groups—violated his equal protection rights.<sup>20</sup> The university advanced the following four justifications for its special admissions program: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession";<sup>21</sup> (2) countering the effects of societal discrimination; (3) increasing the number of physicians who will practice in communities currently underserved; and (4) obtaining the educational benefits that flow from an ethnically diverse student body.<sup>22</sup>

The *Bakke* Court splintered into three factions, resulting in the absence of a controlling majority opinion.<sup>23</sup> Four of the Justices declined to reach the constitutional question and struck down the admissions program at issue on

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20. *Bakke*, 438 U.S. at 276-79.

21. *Id.* at 306 (quoting Brief for Petitioner at 32, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811)).

22. *Id.*

23. The *Bakke* Court divided into three camps. Justice Stevens issued an opinion that was joined by Chief Justice Burger and Justices Stewart and Rehnquist. *Id.* at 408 (Stevens, J., concurring in the judgment in part and dissenting in part). These four Justices voted to strike down UC-Davis's admissions program on grounds that it violated Title VI of the Civil Rights Act of 1964. *Id.* at 421. Accordingly, the Stevens four did not evaluate the constitutionality of the program. *Id.* at 412.

A second group of four Justices—Justices Brennan, White, Marshall, and Blackmun—submitted a joint opinion in which they concluded that both Title VI and the Constitution permitted UC-Davis to "take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice." *Id.* at 325 (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in the judgment in part and dissenting in part). The Brennan group joined the portion of Justice Powell's opinion that reversed the California Supreme Court's holding that an educational institution may never consider an applicant's race. *Id.* at 320.

However, Justice Powell joined the Stevens group in ruling that the UC-Davis program was ultimately unlawful, albeit on different grounds. *Id.* at 320 (opinion of Powell, J.). While the Stevens group declared the program unlawful as a violation of federal law, *see id.* at 421 (Stevens, J., concurring in the judgment in part and dissenting in part), Justice Powell found the program constitutionally problematic because the quota system did not constitute a narrowly tailored means for achieving student body diversity, *id.* at 320 (opinion of Powell, J.). In a separate tie-breaking opinion, Justice Powell announced that public universities have a compelling interest in maintaining a diverse student body. *Id.* at 311.

statutory grounds;<sup>24</sup> a group of four other Justices would have upheld the program as a justifiable remedy for “disadvantages cast on minorities by past racial prejudice”,<sup>25</sup> and Justice Powell, while joining four of his colleagues in voting to strike down the program, wrote for himself in finding the admissions program unconstitutional on equal protection grounds.<sup>26</sup> Justice Powell reasoned that, while diversity was a sufficiently compelling justification for creating limited racial classifications, the UC-Davis admissions program was unconstitutional because it was not sufficiently narrowly tailored to achieve educational diversity.<sup>27</sup>

Justice Powell’s decisive opinion began by identifying that strict scrutiny is the appropriate standard by which to evaluate racial classifications.<sup>28</sup> “Racial and ethnic distinctions of any sort,” he declared, “are inherently suspect and thus call for the most exacting judicial examination.”<sup>29</sup> Thus, the Court required UC-Davis to show that the racial classifications contained in its special admissions program were justified by a “constitutionally permissible and substantial” purpose and that the use of those classifications was necessary to achieve the school’s purpose.<sup>30</sup>

Under the strict scrutiny standard, Justice Powell accepted only the fourth rationale as constitutionally permissible.<sup>31</sup> Justice Powell held that an institution of higher education’s goal of achieving a diverse student body was “clearly” permitted by the Constitution.<sup>32</sup> The First Amendment preserves a university’s academic freedom to choose its teaching methods, curriculum, faculty, and students.<sup>33</sup> Academic freedom prevails in the “atmosphere of ‘speculation, experiment and creation’” resulting from the “robust exchange

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24. *Id.* at 408 (Stevens, J., concurring in the judgment in part and dissenting in part).

25. *Id.* at 325 (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in the judgment in part and dissenting in part).

26. *Id.* at 320 (opinion of Powell, J.).

27. *Id.* at 314-19.

28. *See id.* at 290-91.

29. *Id.* at 291.

30. *Id.* at 305.

31. *Id.* at 311-12. As to the first rationale, Justice Powell said that the purpose of obtaining a specified percentage of racial and ethnic minorities for no reason other than their race or ethnic origin is “facially invalid” as “discrimination for its own sake.” *Id.* at 307. In dismissing the second rationale, he called the interest of “ameliorating[] or eliminating . . . the disabling effects of identified discrimination . . . an amorphous concept . . . that may be ageless in its reach into the past.” *Id.* Finally, Justice Powell discarded the proffered interest of improving health-care services and access to under-served communities because UC-Davis presented no evidence that its special admissions program furthered that interest. *Id.* at 311.

32. *Id.* at 311-12.

33. *Id.* at 312.

of ideas” produced by a diverse student body.<sup>34</sup>

While Justice Powell embraced racial diversity as a compelling interest, he and a majority of the Court struck down the UC-Davis admissions plan as unconstitutional because the plan’s racial classifications did not promote that interest.<sup>35</sup> Justice Powell wrote, “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. [UC-Davis’s] special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.”<sup>36</sup> Hence, the UC-Davis program was marred by the fact that sixteen seats were insulated from the possibility of being filled by nonminority students, and therefore all applicants could not compete for every available seat. Simply, UC-Davis’s quota plan failed constitutional litmus because it disregarded individual rights protected by the Fourteenth Amendment.<sup>37</sup>

Though Justice Powell concluded that a quota plan does not permissibly further “genuine diversity,” he also concluded that plans that consider an applicant’s race among a host of other factors<sup>38</sup> are constitutionally permissible.<sup>39</sup> Under such plans, race is considered a “plus,” rather than as determinative, and, therefore, they satisfy the Fourteenth Amendment’s mandate that government treat individuals equally.<sup>40</sup>

### B. *Hopwood v. Texas*: “Remedying Past Wrongs” Is the Only Compelling Interest Justifying Racial Preferences

Relying on the Supreme Court’s affirmative action case law since *Bakke*, the Fifth Circuit, in *Hopwood v. Texas*, found the University of Texas Law School’s admissions program, which favored blacks and Mexican Americans, unconstitutional.<sup>41</sup> Because the admissions program classified applicants on the basis of race, the Fifth Circuit subjected it to strict scrutiny.<sup>42</sup> Thus, the

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34. *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

35. *Id.* at 314-15.

36. *Id.* at 315 (emphasis in original).

37. *Id.* at 320.

38. The factors include the following: “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.” *Id.* at 317.

39. *Id.* at 317.

40. *Id.*

41. 78 F.3d 932, 934-36 (5th Cir. 1996).

42. *Id.* at 940.

law school bore the burden of proving that (1) the racial classification furthered a compelling state interest, and (2) the admissions program was narrowly tailored to achieve that interest.<sup>43</sup> The court concluded, however, that the law school presented no compelling justification for preferring blacks and Mexican Americans over all others.<sup>44</sup>

The law school put forth two justifications for its admissions program: (1) obtaining the educational benefits that result from assembling a diverse student body and (2) remedying the effects of past discrimination.<sup>45</sup> In a two-part opinion, the Fifth Circuit rejected both arguments, finding neither sufficiently compelling to warrant the use of racial preferences in the school's admissions policy.<sup>46</sup>

The court began its analysis by acknowledging that Justice Powell's opinion in *Bakke* found that "diversity is a sufficient justification for limited racial classification."<sup>47</sup> For three reasons, however, the court refused to accept diversity as a compelling state interest.<sup>48</sup>

First, the court noted that the portion of the *Bakke* opinion that embraced the diversity rationale received only Justice Powell's endorsement.<sup>49</sup> Moreover, the court continued, diversity had never been found to constitute a compelling interest by a majority of the Supreme Court under strict scrutiny analysis.<sup>50</sup> Consequently, the Fifth Circuit concluded that Justice Powell's

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43. *Id.*

44. *Id.* at 934. Because the Fifth Circuit did not find student body diversity to be a compelling interest, it declined to consider, in accordance with the second prong of the strict scrutiny standard, whether the University of Texas plan was narrowly tailored to further the school's interest in achieving such diversity. *Id.*

45. *Id.* at 938.

46. *See id.* at 941-55.

47. *Id.* at 942-43.

48. *See id.* at 944-48.

49. *Id.* at 944.

50. *Id.* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), embraced the justification of "broadcast diversity" within the context of a federal statute creating preferences for minority controlled radio and television stations when issuing broadcast licenses. *Id.* at 566. However, *Metro Broadcasting* held that racial classifications created by Congress should be accorded more deference than those originating in statehouses and city council chambers and should, therefore, be subject to only intermediate, rather than strict, scrutiny: "We hold that benign race conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Id.* at 565.

In *Bakke* and in *Wygant v. Jackson Board of Education*, 467 U.S. 267 (1986), the Court embraced the diversity rationale and, unlike *Metro Broadcasting*, deployed the weapon of strict scrutiny while reaching its conclusion; however, both of those opinions were plurality opinions in which the sections discussing the standard of review did not muster a majority vote. *See Regents of the Univ. of Cal. v. Bakke*, 408 U.S. 265, 299 (1978); *Wygant*, 476 U.S. at 273-74.

Finally, *Crososn* marked the first time a majority of the Court subjected a race-based affirmative



view in *Bakke* did not represent binding precedent.<sup>51</sup>

Next, the court underscored how subsequent case law since *Bakke* had effectively eroded the notion that diversity could serve as a compelling state interest.<sup>52</sup> The only case since *Bakke* in which the Supreme Court accepted the diversity rationale was *Metro Broadcasting, Inc. v. FCC*,<sup>53</sup> however, in that case, the Court subjected the racial classification at issue to merely intermediate scrutiny, rather than to strict scrutiny.<sup>54</sup> Regardless, *Metro Broadcasting* was later overruled by the *Adarand Constructors, Inc. v. Peña*<sup>55</sup> decision, which “squarely rejected intermediate scrutiny as the standard of review for racial classifications.”<sup>56</sup> In addition, the Fifth Circuit emphasized that *City of Richmond v. J.A. Croson Co.*<sup>57</sup> held that “remedying past wrongs” is the “only . . . compelling state interest to justify racial classifications.”<sup>58</sup> Thus, it remained that no majority had ever adopted the diversity rationale as compelling, and indeed the seemingly only compelling justification for governmentally created racial classifications was to remedy the effects of past discrimination.<sup>59</sup>

Finally, the Fifth Circuit rejected the diversity rationale because the court found it to be inimical to the Fourteenth Amendment’s purpose of ending racially motivated state action.<sup>60</sup> Diversity, as a catalyst for classification by race, “contradicts, rather than furthers, the aims of equal protection,” the court stated.<sup>61</sup> “It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.”<sup>62</sup>

The second part of the Fifth Circuit’s analysis concentrated on whether the remedial purpose of the school’s admission program constituted a compelling state interest.<sup>63</sup> The court initially determined that the alleged harm must be

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action program to strict scrutiny. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989). However, the Court retreated from maintaining “diversity” as a compelling justification. It stated, “[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” *Id.* at 493.

51. *Hopwood*, 78 F.3d at 944.

52. *Id.* at 944-45.

53. 497 U.S. 547 (1990).

54. *Hopwood*, 78 F.3d at 944.

55. 515 U.S. 200 (1995).

56. *Hopwood*, 78 F.3d at 944.

57. 488 U.S. 469 (1989).

58. *Hopwood*, 78 F.3d at 944.

59. *See id.* at 944-45.

60. *Id.* at 948-49.

61. *Id.* at 945.

62. *Id.*

63. *See id.* at 949.

caused by the specific state actor—in this case the University of Texas Law School.<sup>64</sup> Thus, the court rejected any notion that the law school's admissions program was permissible as a remedy for past racial discrimination perpetrated by either the State of Texas or the University of Texas System.<sup>65</sup> The court next determined that it was incumbent upon the law school to prove that the effects of past discrimination by the law school itself justified its admission program and that the school had constructed its program "specifically to remedy the identified present effects of the past discrimination."<sup>66</sup>

The law school attempted to defend its racial preferences as a means for remedying three deleterious effects of past racial discrimination: (1) the law school's ongoing reputation among minority populaces as being a "white" school; (2) the lingering perception that the school's environment is hostile toward minorities; and (3) the under-representation of minorities within the law school student body.<sup>67</sup>

The Fifth Circuit rejected all three claims.<sup>68</sup>

The court first concluded that the school's poor reputation among minorities was linked solely to the mere knowledge that it had refused to admit African Americans at some point in its history.<sup>69</sup> Such knowledge of historical fact, the court asserted, did not constitute the type of effect that justifies race-based admissions policies.<sup>70</sup>

Second, the court dismissed the hostile environment argument, contending that there existed no evidence of any action by the school that contributed to hostility toward minorities.<sup>71</sup> Accordingly, if any such hostility pervaded at the school, the court noted, it resulted from societal discrimination, which, if anything, was compounded by "the overt and prevalent consideration of race in admissions."<sup>72</sup>

Finally, the court tackled the law school's argument that its admissions program passed constitutional muster because it attempted to remedy past discrimination by admitting a percentage of minorities commensurate with Texas's minority population.<sup>73</sup> The court dismissed the argument because the

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64. *Id.* at 952.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.* at 952-54.

69. *Id.* at 952.

70. *Id.*

71. *Id.* at 953.

72. *Id.*

73. *Id.* at 954.

State of Texas and its universities, not the law school, had discriminated against racial minorities.<sup>74</sup> *Croson*, it noted, “unequivocally restricted the proper scope of the remedial interest to the state actor that had previously discriminated.”<sup>75</sup>

In sum, *Hopwood* rejected each of the University of Texas Law School’s policy justifications for its affirmative action admissions policy. *Hopwood* embodies the proposition that strict scrutiny recognizes no non-remedial interest, including diversity, as sufficiently compelling to justify government-imposed racial classifications.<sup>76</sup> Neither the educational benefits flowing from a diverse student populace, nor the corrective purpose of shedding a poor reputation among minorities, nor the inclination to eradicate a hostile environment sufficed as a compelling interest.<sup>77</sup> Moreover, the court found the school’s defense that it was attempting to compile a class of law students reflective of Texas’s general population likewise unconvincing.<sup>78</sup> The court declared that remedying the present effects of prior discrimination by the specific state actor is the only governmental interest worthy of satisfying the strict scrutiny standard where racial classifications are invoked.<sup>79</sup>

C. *Grutter v. Bollinger in the Federal District Court: Educational Diversity Is a “Laudable,” but not a “Compelling,” Interest*

The federal district court decision in *Grutter v. Bollinger* echoed the *Hopwood* decision. It found the University of Michigan Law School’s admissions program, which is designed to admit a “critical mass” of selected racial minorities—namely blacks, Hispanics, and Native Americans—constitutionally flawed.<sup>80</sup>

Michigan explained that the purpose of its program is to obtain the educational benefits that flow from diversity.<sup>81</sup> Moreover, the school displays a commitment to one type of diversity—racial and ethnic diversity.<sup>82</sup> To achieve educational diversity, the program is designed to enroll a “critical

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74. *Id.*

75. *Id.*

76. Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 395 (1998).

77. *See Hopwood*, 78 F.3d at 962.

78. *See id.*

79. *See id.* at 942-62.

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

81. *Id.* at 840.

82. *Id.* at 827.

mass"—or "meaningful numbers"—of minority students.<sup>83</sup> The goal, in short, is to enroll a number of minority students sufficient to allow them to contribute to classroom dialogue without feeling isolated.<sup>84</sup>

The school insisted that it is imperative to consider race to achieve such critical mass.<sup>85</sup> In fact, members of targeted minority groups would not be admitted in significant numbers, Michigan contended, unless race is explicitly considered because, on average, those minority groups have relatively lower GPAs and LSAT scores compared to whites and Asians.<sup>86</sup> The school emphasized that racial diversity is an important part of education because exposure to others of various races helps students understand and be sympathetic to heterogeneous viewpoints.<sup>87</sup>

In short, Michigan asserted that its interest in obtaining a diverse student body is compelling and that the only way it can achieve that interest is by granting preferences to certain minority groups.<sup>88</sup>

The court, however, rejected the school's argument. Its first task was to determine the weight Michigan accords a prospective student's race.<sup>89</sup>

The court found race not merely one factor considered among many, as Michigan had argued; rather, it concluded that Michigan places "heavy emphasis" on a student's race.<sup>90</sup> Despite the fact that the court accepted that Michigan reviews each file individually and considers a multitude of factors in evaluating whether to accept or reject an applicant,<sup>91</sup> it nonetheless concluded that the law school "explicitly considers the race of applicants in order to enroll a critical mass of underrepresented minority students."<sup>92</sup> Accordingly, the court next endeavored to determine whether racial diversity is a compelling state interest.<sup>93</sup>

Michigan proffered two policy rationales as support for its goal of admitting a critical mass of diverse students.<sup>94</sup> The school first pointed to the educational benefit of the "livelier, more spirited, and . . . more enlightening" classroom environment that results from the presence of students representing

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83. *Id.* at 828.

84. *Id.* at 832-33.

85. *Id.* at 833.

86. *Id.* at 840.

87. *Id.* at 833-34.

88. *See id.* at 827-34.

89. *See id.* at 840.

90. *Id.*

91. *Id.* at 842.

92. *Id.* at 843.

93. *Id.*

94. *Id.* at 849-50.

a variety of backgrounds and viewpoints.<sup>95</sup> The second benefit resulting from racial diversity is the dismantling of racial stereotypes, which helps students in a multi-racial setting become better prepared to engage in a democratic and pluralistic society.<sup>96</sup>

The district court found the identified benefits "laudable" but not compelling.<sup>97</sup> Taking a cue from the Fifth Circuit in *Hopwood*, the court first concluded that the single vote cast for the diversity rationale in *Bakke* did not warrant its recognition as a compelling state interest.<sup>98</sup> In addition, the court concluded, the Supreme Court's subsequent decisions in *Croson* and *Adarand* made it clear that remedying the effects of past discrimination is the only compelling reason for government to create racial classifications.<sup>99</sup>

Separately, the court went on to consider the policy rationales Michigan advanced to justify its race-based admissions program as a remedy to the discrimination minorities face in society.<sup>100</sup> Michigan's evidence was plentiful but ultimately not persuasive.<sup>101</sup>

Michigan first defended its affirmative action admissions program as a bulwark against the phenomenon of "cascading"—relegating minority students to less selective institutions because of the difficulty in gaining admittance to the more prestigious schools.<sup>102</sup> The foreseeable consequence of cascading is to render the most able minority students overwhelmingly isolated in top schools.<sup>103</sup>

Michigan next underscored the necessity of an affirmative action admissions program to "counterbalance the negative effects of racism on the academic performance" of minority students.<sup>104</sup> Systematic deprivations in housing and educational opportunities lead to a performance gap between minorities and non-minorities.<sup>105</sup> In addition, minorities encounter a racially hostile environment at predominately white schools, which leaves them feeling isolated, alienated, and discouraged, and thus reduces their desire to succeed academically.<sup>106</sup>

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95. *Id.* at 849.

96. *Id.* at 850.

97. *Id.*

98. *See id.* at 847-48.

99. *Id.* at 849.

100. *See id.* at 855-72.

101. *See id.*

102. *Id.* at 859.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 859-60.

The school finally defended its admissions program in four additional ways: as a remedy to the bias in standardized testing;<sup>107</sup> as a mechanism for preventing resegregation;<sup>108</sup> as a means of enhancing the quality of education for all students;<sup>109</sup> and as a vehicle for aiding the integration of the legal profession.<sup>110</sup>

While the court recognized the United States's deplorable history of racial discrimination and that its vestiges still linger, it found Michigan's arguments neither compelling nor germane to the constitutional question.<sup>111</sup> In addition to the fact that the court found much of Michigan's evidence to support its assertions tenuous,<sup>112</sup> it also found the school's arguments legally flawed: The court stated that the Constitution does not permit "the effects of general, societal discrimination" to be "remedied by race-conscious decision-making."<sup>113</sup> Moreover, the court concluded, whatever solution Michigan intended to implement to forestall resegregation and eradicate the harmful consequences of societal discrimination, the solution had to be race neutral.<sup>114</sup> "The focus," the court declared, "must be upon the merit of *individual applicants*, not upon assumed characteristics of racial groups. An admissions policy that treats any applicants differently from others on account of their race is unfair and unconstitutional."<sup>115</sup>

In sum, the district court found the University of Michigan Law School's affirmative action admissions program unconstitutional because the program's purpose—to admit a racially diverse class—is not a compelling state interest, and because Michigan's law school had not engaged in discrimination; rather, the discrimination the school attempted to remedy was that imposed upon minorities by society.<sup>116</sup>

#### *D. Grutter v. Bollinger in the United States Supreme Court: Educational Diversity Endures as a Compelling State Interest*

The anomalous nature of the *Bakke* opinion, in which a bulk of the decisive constitutional analysis was delivered by a single Justice, has rendered

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107. *Id.* at 860-61.

108. *Id.* at 860.

109. *Id.* at 862.

110. *Id.* at 863.

111. *See id.* at 863-72.

112. *See id.* at 864-68.

113. *Id.* at 869.

114. *See id.* at 871.

115. *Id.* (emphasis in original).

116. *Id.* at 872.

it difficult for lower courts to divine its legal principles.<sup>117</sup> Indeed, despite Justice Powell's finding in *Bakke* that the educational benefits flowing from a racially diverse student populace constitute a compelling state interest, the *Hopwood* court and the district court in *Grutter* refused to recognize *Bakke's* plurality opinion as binding precedent.<sup>118</sup> The Court's post-*Bakke* case law, *Hopwood*, and *Grutter*, had eclipsed the portion of *Bakke* that endorsed diversity as a constitutionally permissible justification for government-created racial classifications.<sup>119</sup>

The Supreme Court's decision in *Grutter*, however, mutes any further speculation of whether diversity persists as a compelling interest: a majority of the Court, speaking through Justice O'Connor, vindicated the diversity rationale, and thus cemented its status as a compelling state interest when invoked within the context of higher education.<sup>120</sup>

In announcing that student body diversity survives as a compelling state interest, the Court conceded that its decisions since *Bakke* had created justifiable confusion on the point.<sup>121</sup> The Court acknowledged that *Croson* stated that unless racial classifications are created for remedial purposes, they may not be compelling; however, the Court also quickly noted that it had "never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination."<sup>122</sup> Moreover, the Court had not considered the constitutionality of the diversity rationale in the context of higher education since *Bakke*.<sup>123</sup> As the Court put it, "[c]ontext matters." Accordingly, "[n]ot every decision influenced by race is equally objectionable," and it is thus critical to "carefully examin[e] the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."<sup>124</sup>

Beyond defending its holding by virtue of the unique context of higher education, the Court further supported its conclusion that diversity is compelling on a range of other grounds.<sup>125</sup>

First, the Court invoked the notion seized upon by Justice Powell in *Bakke*

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117. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000); *Grutter*, 137 F. Supp. 2d 821 (E.D. Mich. 2003).

118. *Hopwood*, 78 F.3d at 944; *Grutter*, 137 F. Supp. 2d at 847-48.

119. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond, Inc. v. J.A. Croson*, 488 U.S. 469 (1989); *Hopwood*, 78 F.3d at 944-45; *Grutter*, 137 F. Supp. 2d at 849.

120. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

121. See *id.*

122. *Id.*

123. *Id.*

124. *Id.* at 327.

125. See *id.* at 328-33.

that rooted in the Constitution is the precept of "educational autonomy." Thus, universities retain the "freedom . . . to make [their] own judgments as to education,"<sup>126</sup> including the method for selecting their student bodies. Consequently, the Court deferred to Michigan's judgment that "diversity is essential to its educational mission."<sup>127</sup> In doing so, the Court explained that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"<sup>128</sup>

Second, the Court characterized Michigan's efforts to ensure that it enrolled a "critical mass" of selected minority students not as constitutionally impermissible racial balancing, but rather as a method of realizing the "substantial" educational benefits that diversity produces.<sup>129</sup> Notably, Michigan's admissions program promotes understanding among races and helps to dissolve racial stereotypes, thereby leading to livelier classroom discussion from which all students may benefit.<sup>130</sup> Additionally, the Court continued, diversity among students prepares them to engage in an increasingly diverse workforce and society.<sup>131</sup> Such preparedness is indispensable for producing students fit for work and citizenship.<sup>132</sup> Accordingly, "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."<sup>133</sup>

Moreover, institutions of higher education serve as training grounds for America's future leaders.<sup>134</sup> "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry," the Court concluded, "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."<sup>135</sup>

In sum, the Court embraced the diversity rationale as constituting a compelling state interest for three reasons. First, the Court recognized the unique context of higher education.<sup>136</sup> Second, the Court yielded to Michigan's educational autonomy, concluding that the school—not the

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126. *Id.* at 329 (quoting *Regents of the Univ. of Cal. v. Bakke*, 408 U.S. 265, 312 (1978) (opinion of Powell, J.)).

127. *Id.* at 328.

128. *Id.* at 329 (quoting *Bakke*, 408 U.S. at 318-19 (opinion of Powell, J.)).

129. *Id.* at 329-30.

130. *Id.* at 330.

131. *Id.*

132. *See id.* at 330-31.

133. *Id.* at 331.

134. *Id.* at 332.

135. *Id.*

136. *Id.* at 327.



Court—knows how to best select its student body.<sup>137</sup> Finally, the Court concluded that the diversity rationale is supported by the educational benefits that result from the presence of a diverse student populace.<sup>138</sup>

### III. BEYOND POLICY: DIVERSITY AS A CONSTITUTIONALLY GROUNDED JUSTIFICATION FOR RACIAL PREFERENCES IN HIGHER EDUCATION ADMISSION PRACTICES

The Court correctly concluded that educational diversity qualifies as a compelling state interest. As was the case with the *Bakke* Court, the *Grutter* Court grounded its conclusion in the policy goals served by diversity. Indeed, courts reviewing the constitutionality of the diversity rationale in the context of higher education have assiduously considered and explained the policy justifications for accepting or rejecting student body diversity as a compelling state interest.<sup>139</sup> The courts, though, have conspicuously neglected to address the notion that a university's interest in diversity<sup>140</sup> is rooted in constitutional principles expressed by the Fourteenth Amendment.<sup>141</sup> It is from this expression that diversity constitutes a compelling state interest.

The Fourteenth Amendment's Equal Protection Clause provides the foundation for the diversity rationale. The Constitution espouses one of our government's preeminent values in that clause—the political equality of all members of our society.<sup>142</sup> The concept of majority rule inherent in a democratic system, however, presents potential dangers that political equality may not overcome.<sup>143</sup> Where majority rules, there lies the specter of it

137. See *id.* at 328-29.

138. *Id.* at 330-32.

139. See, e.g., *Bakke*, 408 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (accepting student body diversity as a compelling state interest); but see, e.g., *Hopwood*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 538 U.S. 1033 (1996); *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (rejecting student body diversity as a compelling state interest).

140. The compelling interest identified here is "diversity." The courts, however, vacillate between identifying diversity itself and identifying the educational benefits that flow from diversity as the interest at issue. Compare *Grutter*, 539 U.S. at 328 ("the Law School has a compelling interest in attaining a diverse student body") with *id.* at 333 (the "compelling interest in securing the educational benefits of a diverse student body"). The Court is equivocal; however, critiquing the distinction is beyond the scope of this Comment. It suffices, here, to target the interest as "diversity," because if educational benefits indeed flow from diversity, it is axiomatic that the presence of diversity remains a precondition of realizing those benefits.

141. The Fourteenth Amendment reads in pertinent part: "No State shall . . . deny to any person within its jurisdiction equal protection of the laws." U.S. CONST. amend. XIV, § 2.

142. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

143. Liu, *supra* note 76, at 417.

stamping out the rights of the minority.<sup>144</sup> In such event, not only are the minority's rights threatened, but our constitutional order may be upended.<sup>145</sup> As De Tocqueville observed:

If ever the free institutions of America are destroyed, that event may be attributed to the omnipotence of the majority, which may at some future time urge the minorities to desperation and oblige them to have recourse by physical force. Anarchy will then be the result, but it will have been brought about by despotism.<sup>146</sup>

James Madison, credited as the chief architect of the U.S. Constitution,<sup>147</sup> expressed the same sentiment while championing the Constitution's ratification.<sup>148</sup> He believed it imperative "not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."<sup>149</sup>

While Madison's trepidation over the potential insurgency of majority tyranny may be tempered by the size and pluralistic nature of our nation,<sup>150</sup> the majority will not inevitably consider every competing interest.<sup>151</sup> The shackles of slavery and of the segregation laws, which persisted into the 1960's, to point out only two examples, illustrate the majority's "propensity . . . to ignore or subordinate minority" interests.<sup>152</sup> Consequently, forestalling or remedying majoritarian abuse and the injustice it wroughts is an everlasting

144. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 269 (Philips Bradley ed., Kopf 1945) (1835).

145. See *id.*

146. *Id.*

147. See *THE FEDERALIST* (William R. Brock ed., 1992).

148. See *THE FEDERALIST* NO. 51 (James Madison) (William R. Brock ed., 1992).

149. *THE FEDERALIST* NO. 51, at 267 (James Madison) (William R. Brock ed., 1992).

150. In fact, Madison expressly argued that the threat of majoritarian tyranny is most present in small societies and least present in large, pluralistic ones:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the most easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens. . . .

*Id.* at 47.

151. Liu, *supra* note 76, at 418.

152. *Id.*

constitutional concern.<sup>153</sup>

Indeed, out of such concern arose the inception of how the Court identifies suspect classes meriting strict scrutiny review, as the Court announced in *United States v. Carolene Products Co.* “that heightened judicial scrutiny of majoritarian legislation may be justified where ‘prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.’”<sup>154</sup> The Court recognized that prejudice prevents minorities from having their interests served.<sup>155</sup> Thus, the Fourteenth Amendment extends protection to “discrete and insular minorities” not merely to ensure their political interests are served while they face the perpetual threat of being outvoted, but also to alleviate the effects of the prejudice that “perpetuates, and is perpetuated by, their isolation and marginalization.”<sup>156</sup>

A vital representative government is predicated on the active participation of its citizens as well as on the protection of minority rights.<sup>157</sup> Prejudice marginalizes minority groups; therefore, its eradication is essential to preserving a robust democracy.<sup>158</sup> Because education “is required in the performance of our most basic public responsibilities,”<sup>159</sup> public universities must shoulder the burden of providing an education “that anticipates the demands of democratic politics.”<sup>160</sup> In particular, institutions of higher education must provide to students an environment that promotes “cross racial understanding”<sup>161</sup> and consequently reverses the polarizing effects of racial prejudice.<sup>162</sup>

The Fourteenth Amendment’s Equal Protection Clause proscribes invidious race discrimination by government entities.<sup>163</sup> If, as the Court has held, the Constitution permits the creation of affirmative action programs to remedy the present effects of past racial discrimination,<sup>164</sup> then the Constitution must also permit the creation of affirmative action programs aimed at facilitating cross racial understanding.<sup>165</sup> Thus, it is from the values

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153. *Id.*

154. *Id.* (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

155. *See id.*

156. *Id.* at 419.

157. *Id.* at 422.

158. *See id.*

159. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

160. Liu, *supra* note 76, at 422.

161. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

162. *See Liu, supra* note 76, at 422.

163. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

164. *Id.* at 505.

165. *See Liu, supra* note 76, at 422.

expressed by the words in the Fourteenth Amendment that merit student body diversity being vindicated as a compelling state interest.<sup>166</sup>

Having concluded that the Court correctly accepted educational diversity as a compelling state interest, this Comment turns now to the federal district court's and the Supreme Court's analysis resolving whether Michigan's plan is narrowly tailored to achieve that interest.

#### IV. JUDICIAL DISPUTE OVER WHETHER THE MICHIGAN PLAN AT ISSUE IN *GRUTTER* IS NARROWLY TAILORED

Just as the district court and the Supreme Court arrived at different conclusions over whether student body diversity constitutes a compelling state interest, the two courts also reached disparate outcomes over whether Michigan's admissions plan is narrowly tailored to achieve student body diversity. The following traces the analysis each court undertook to answer the question.

##### A. *Federal District Court Conclusion: Michigan's Plan Is a "Far Cry" from the "Close Fit" the Constitution Demands*

Notwithstanding its conclusion that Michigan's admissions program suffers the constitutional infirmity of not being supported by a compelling interest, the federal district court went on to evaluate whether the program is narrowly tailored.<sup>167</sup> The district court targeted five reasons why Michigan's admissions program is not narrowly tailored to achieve its interest of admitting a diverse group of students.<sup>168</sup>

First, the court pointed out that Michigan failed to precisely define what constitutes a "critical mass" of minority students.<sup>169</sup> It is virtually impossible, the court commented, to achieve narrow tailoring where "the contours of the interest being served are so ill-defined."<sup>170</sup>

Second, the university failed to place a time limit on its use of racial classifications in its admissions process.<sup>171</sup> While the school maintained that it would discontinue using race as a factor in admissions when it was no longer necessary to do so to obtain a critical mass of minority students, the

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166. *Id.*

167. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E.D. Mich. 2001).

168. *See id.* at 850-52.

169. *Id.* at 850.

170. *Id.* at 851.

171. *Id.*

court found that the open-ended nature of the program further illustrated the program's insufficient tailoring.<sup>172</sup>

Third, the court found that Michigan's admissions program is virtually indistinguishable from an unconstitutional quota system. It noted that the university had created a de facto minimum threshold of ten percent minority enrollment as constituting a "critical mass."<sup>173</sup> Such a program is not narrowly tailored, the court found, because there exists no principled difference between a fixed number of slots and a fixed minimum percentage.<sup>174</sup>

Fourth, the court inveighed against the plan's arbitrary selection of protected groups.<sup>175</sup> Limiting preferred status to African Americans, Hispanics, and Native Americans necessarily excludes other racial and ethnic groups that have suffered discrimination.<sup>176</sup> Consequently, the "haphazard selection of certain races," the court concluded, "is a far cry from the 'close fit' between the means and the ends that the Constitution demands in order for a racial classification to pass muster under strict scrutiny analysis."<sup>177</sup>

Finally, Michigan impermissibly failed to sufficiently investigate race-neutral alternatives for achieving a critical mass of minority students.<sup>178</sup> Regardless of whether such race-neutral methods would effectively yield a critical mass of minorities, "the law school's failure to consider them . . . prior to implementing an explicitly race-conscious system militates against a finding of narrow tailoring."<sup>179</sup>

### *B. The Supreme Court Analysis: Michigan's Plan Is Narrowly Tailored*

In contrast to the conclusion reached by the district court, the Supreme Court concluded that Michigan's admissions plan comports with the requirements of narrow tailoring.<sup>180</sup> The Court highlighted three reasons why Michigan's program embodies a narrowly tailored plan.<sup>181</sup>

First, the Court determined that the law school's program does not operate as a quota system; rather, the program is sufficiently tailored to allow

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172. *See id.* at 851.

173. *See id.*

174. *Id.*

175. *See id.* at 851-52.

176. *Id.* at 852.

177. *Id.*

178. *See id.*

179. *Id.* at 853.

180. *See Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

181. *See id.* at 334.

race to be considered as a “plus” factor in the admissions process.<sup>182</sup>

Second, the program provides for “individualized consideration” of each applicant—a “paramount” consideration in the context of a race-conscious admissions program.<sup>183</sup> Michigan sufficiently demonstrated that all factors included in an applicant’s file are considered along with his or her race and that the school accords those factors “substantial weight.”<sup>184</sup>

Moreover, related to the consideration of individualized review of each file, the Court sought to ensure that Michigan’s program does not “unduly burden” students who are not members of the program’s preferred minority groups.<sup>185</sup> The Court concluded that Michigan’s program imposes no such burden because, by allowing the school to consider “‘all pertinent elements of diversity,’” it ensures that the school may admit non-minority applicants over its targeted minority applicants.<sup>186</sup>

Finally, to conclude that Michigan had considered race-neutral alternatives to its race-based program<sup>187</sup> and that Michigan’s program would “be limited in time,”<sup>188</sup> the Court deferentially yielded to the school’s good faith.<sup>189</sup>

Without exploring the race-neutral alternatives the school had in fact considered before implementing its race-conscious program, the Court dismissed the alternatives suggested by the district court—such as employing a lottery or de-emphasizing an applicant’s GPA or LSAT score—because they would have forced Michigan to sacrifice its racial diversity, academic prestige, or both.<sup>190</sup> Instead, the Court chose to “take the Law School at its word that it would ‘like nothing better than to find a race neutral admissions formula.’”<sup>191</sup>

The Court likewise granted Michigan deference on the issue of limiting the time span of programs providing for racial preferences.<sup>192</sup> Michigan has not provided for a precise end-date for its race-based program.<sup>193</sup> But the

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182. *Id.* at 334-36.

183. *Id.* at 337.

184. *Id.* at 337-38.

185. *Id.* at 341.

186. *Id.* (quoting *Regents of the Univ. of Cal. v. Bakke*, 408 U.S. 265, 317 (1978) (opinion of Powell, J.)).

187. *Id.* at 339-40.

188. *Id.* at 343.

189. *Id.* at 339-43.

190. *Id.* at 339-40.

191. *Id.* at 343 (quoting Brief for Respondent at 34, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

192. *See id.*

193. *See id.*

school is able to comply with the Court's time limitation because the Court again took the school "at its word that it . . . will terminate its race-conscious admissions program as soon as practicable."<sup>194</sup>

V. THE SUPREME COURT SHOULD HAVE DECIDED THE ADMISSIONS PLAN AT ISSUE IN *GRUTTER* IS UNCONSTITUTIONAL BECAUSE THE PLAN IS NOT NARROWLY TAILORED TO ACHIEVE THE COMPELLING INTEREST OF EDUCATIONAL DIVERSITY

The Court erred in concluding that Michigan's admissions program is narrowly tailored to achieve the compelling state interest of educational diversity. First, the program is deficiently underinclusive, and thus does not comport with strict scrutiny's mandate that there exist a "close fit" between the government interest and the means chosen to further that interest.<sup>195</sup> Second, the Court's deference to Michigan's "academic freedom" was misplaced.

A. *Michigan's Admissions Program Is Deficiently Underinclusive*

The "close fit" requirement has generally become known to mean that, for a court to deem a classification narrowly tailored, the classification may not be either too overinclusive or too underinclusive.<sup>196</sup> In the context of affirmative action, a classification is overinclusive if it benefits individuals who fall outside the scope of the plan's stated interest.<sup>197</sup> In contrast, a classification is underinclusive if it fails to benefit individuals who are similarly situated to those who are benefited by the program.<sup>198</sup> In other words, "[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."<sup>199</sup> Michigan's admissions plan suffers the constitutional

194. *Id.*

195. *See id.* at 333.

196. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 644-47 (15th ed. 2004).

197. *See* *Richmond v. J.A. Croson*, 488 U.S. 469, 506 (1989). The City of Richmond's affirmative action program included Eskimos and Aleuts among the program's potential beneficiaries. *Id.* The Court observed, however, that "[i]t may well be that Richmond has never had an Aleut or Eskimo citizen." Consequently, the Court deemed Richmond's program "gross[ly] overinclusive[.]" *Id.*

198. *See* SULLIVAN & GUNTHER, *supra* note 196, at 644-47.

199. *See id.* at 644 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920)).

infirmities of creating such "arbitrary" classifications and of disregarding individuals who belong to minority groups warranting preference along with the school's targeted groups.

To arrive at its conclusion that Michigan's plan is narrowly tailored, the Court ignored the district court's conclusion that there is no principled method upon which Michigan selects the minorities it prefers.<sup>200</sup> While the plan itself identifies African Americans, Hispanics, and Native Americans as groups targeted for preference, the law school bulletin indicates that particular attention is given to African Americans, Mexican Americans, Native Americans, and Puerto Ricans raised on the U.S. mainland.<sup>201</sup>

The discrepancies attending Michigan's choice of groups targeted for special preference reveals the program's underinclusive nature. For instance, as the district court pointed out, Michigan gives a "special commitment" to African Americans, but ostensibly excludes blacks hailing from other parts of the globe.<sup>202</sup> The court also emphasized that giving preference to Mexican Americans leaves out other individuals of Hispanic descent who do not originate from Mexico.<sup>203</sup> In addition, the district court underscored how illogical it is for the university to distinguish between Puerto Ricans who are raised on U.S. soil and those who are raised elsewhere.<sup>204</sup> Furthermore, other ethnic and racial groups besides the ones Michigan favors have also suffered discrimination.<sup>205</sup> The district court specifically identified "Arabs and southern and eastern Europeans" as such victims.<sup>206</sup>

In short, Michigan's "haphazard"<sup>207</sup> selection of the races it chooses to favor with its admissions program typifies the underinclusive classifying prohibited by narrow tailoring.<sup>208</sup> "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'"<sup>209</sup> The Court has repeatedly referred to the "close fit" as measured by the degree that a classification is overinclusive or underinclusive.<sup>210</sup> Yet, the *Grutter* Court glossed over the

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200. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

201. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 851-52 (E.D. Mich. 2001).

202. *Id.* at 852.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. See SULLIVAN & GUNTHER, *supra* note 196, at 644-47.

209. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (quoting *Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989)).

210. See SULLIVAN & GUNTHER, *supra* note 196, at 644-47.



underinclusive nature of Michigan's admission program.<sup>211</sup>

*B. The Court's Deference to Michigan's "Academic Freedom" Was Misplaced*

Beyond disregarding the underinclusive character of Michigan's admissions program, the Court, citing the university's "constitutional dimension"<sup>212</sup> of academic freedom, accorded the school substantial deference in concluding it had adequately considered race-neutral alternatives and would end its race-based program when "practicable."<sup>213</sup> The Court's deference to the school is misplaced. Michigan, in fact, failed to adequately consider race-neutral alternatives to its plan,<sup>214</sup> and it has not complied with the constitutional mandate of placing a time limit on its racial preferences.<sup>215</sup> Both failures further undermine the Court's conclusion that Michigan's admissions program is narrowly tailored.

The district court found that Michigan did not adequately consider race-neutral alternatives before implementing its admissions plan;<sup>216</sup> yet, the Court accepted that the university had considered such alternatives without requiring it to explain precisely which alternatives it had considered.<sup>217</sup> The Court thus ignored one of its own admonitions of affirmative action jurisprudence: The Court previously stated that whether the government entity first considers race-neutral means for achieving its objectives before creating its racial classifications is a factor for deciding whether a program is narrowly tailored.<sup>218</sup> As a justification for its lax inquiry of the race-neutral alternatives Michigan considered, the Court relied upon the university's "educational autonomy"<sup>219</sup> in deciding how to best accomplish its mission of obtaining a racially diverse student body.<sup>220</sup>

The Court stated that "[w]e are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that

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211. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

212. *Id.* at 329.

213. *Id.* at 343.

214. See *id.* at 339-40.

215. See *id.* at 341-43.

216. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 852-53 (E.D. Mich. 2001).

217. *Grutter*, 539 U.S. at 339-41.

218. *Richmond v. J.A. Croson*, 488 U.S. 469, 507 (1989).

219. *Grutter*, 539 U.S. at 329.

220. *Id.* at 328.

is the cornerstone of its educational mission.”<sup>221</sup> Thus, the Court allowed Michigan to substitute its interest in retaining an elite law school for the constitutional mandate of considering race-neutral alternatives.<sup>222</sup>

The Court granted Michigan similar deference when considering the Constitution’s requirement that race preferences be “limited in time.”<sup>223</sup> Because a “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race[.]” a narrowly tailored race-based affirmative action program must have a “logical end point” to ensure that the program is “employed no more broadly than the interest demands.”<sup>224</sup> The Court readily asserted that racial classifications are “dangerous” and, if not tempered by a time limit, threaten the Constitution’s tenet of assuring equality.<sup>225</sup> Yet, evidently, the danger is not of such imminence or eminence to require an academic institution to produce evidence to support its claim that its affirmative action program will cease at some future date.<sup>226</sup> The Court, instead, merely “take[s] the Law School at its word that it . . . will terminate its race-conscious admissions program as soon as practicable.”<sup>227</sup>

The Court’s deference with regard to whether Michigan considered race-neutral alternatives and whether it will adopt a self-imposed time limit on its admissions plan is misplaced. First, as Justice Thomas points out, the First Amendment does not “countenance the unprecedented deference the Court gives to the Law School. . . .”<sup>228</sup> Second, the Court ignores its own pronouncement from *Croson* cautioning against judicial deference.<sup>229</sup>

Under strict scrutiny, the First Amendment does not entitle academic institutions to any judicial deference.<sup>230</sup> Justice Thomas recounts the precedential history shaping the Court’s conclusion that the First Amendment grants institutions “educational autonomy” to the degree that they should be accorded judicial grace when constructing racial classifications.<sup>231</sup> He is incredulous that the case law leads to the conclusion to which the majority says it leads.<sup>232</sup>

221. *Id.* at 340.

222. *See id.* at 355-56 (Thomas, J., concurring in part and dissenting in part).

223. *Id.* at 342 (majority opinion).

224. *Id.* at 341-42.

225. *Id.* at 342.

226. *See id.* at 343.

227. *Id.*

228. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part).

229. *See Richmond v. J.A. Croson*, 488 U.S. 469, 500-01 (1989).

230. *Grutter*, 539 U.S. at 361 (Thomas, J., concurring in part and dissenting in part).

231. *Id.* at 362-64.

232. *See id.*

The notion of academic freedom, he points out, originated from *Sweezy v. New Hampshire*—a case in which the Court held that the investigation of a suspected subversive who had given a university lecture violated due process.<sup>233</sup> The majority opinion in that case reasoned that the right of academic freedom created by the First Amendment prohibited the investigation.<sup>234</sup> Thomas next notes that in *Bakke* Justice Powell extrapolated from *Sweezy* “that the First Amendment somehow protected a public university’s use of race in admission.”<sup>235</sup> The majority in *Grutter*, accordingly, relied upon *Bakke* to support its claim that universities are entitled to deference.<sup>236</sup> However, as Thomas observes, the case precedents “provide[] no answer to the question whether the Fourteenth Amendment’s restrictions are relaxed when applied to public universities.”<sup>237</sup> Hence, the First Amendment does not authorize public universities to do what is otherwise proscribed by the Fourteenth Amendment.<sup>238</sup>

In addition, the Court itself, in its decision in *Croson*, cautioned against granting government bodies the very type of deference it granted the University of Michigan.<sup>239</sup> The Court in *Croson* acknowledged that, generally, government is “entitled . . . [to] deferential review by the judiciary.”<sup>240</sup> The standard changes, however, when governmental classifications invoke a suspect class.<sup>241</sup> In such circumstances, a court should withhold granting any deference to the government. “The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.”<sup>242</sup>

The Court’s deference to the university is wholly antithetical to the rigid review that strict scrutiny requires.<sup>243</sup> In fact, “[t]he Court confuses deference to a university’s definition of its educational objective with deference to the implementation of [its] goal.”<sup>244</sup> As a consequence, Michigan is permitted to

233. *See id.* at 362 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 254 (1957)).

234. *Id.* at 363 (citing *Sweezy*, 354 U.S. at 256-57).

235. *Id.* (citing *Regents of the Univ. of Cal. v. Bakke*, 408 U.S. 265, 312 (1978) (opinion of Powell, J.)).

236. *Id.*

237. *Id.*

238. *Id.*

239. *See Richmond v. J.A. Croson*, 488 U.S. 469, 500-01 (1989).

240. *Id.* at 501.

241. *Id.*

242. *Id.*

243. *See Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

244. *Id.*

subvert the strict scrutiny standard.<sup>245</sup>

The Constitution does not countenance the deference the Court eagerly accorded the university.<sup>246</sup> Nor does the pervasive “danger”<sup>247</sup> of racial classifications militate in favor of granting such deference to government actors who create racial preferences.<sup>248</sup> Accordingly, Michigan’s failure to articulate the race-neutral alternatives it considered before enacting its affirmative action admissions program<sup>249</sup> as well as its failure to include a sunset provision in its program<sup>250</sup> further demonstrates that its program is not narrowly tailored to achieve its interest.

In sum, the Court erred in upholding Michigan’s admissions program. While Michigan devised the program to achieve the constitutionally permissible goal of educational diversity, the program fails to further that goal through narrowly tailored means. First, the program’s “haphazard” selection of those meriting admissions preference demonstrates its underinclusiveness.<sup>251</sup> Second, the Court’s deference to Michigan allowed the school to invoke its First Amendment entitlement to “educational autonomy”<sup>252</sup> to escape from showing how its plan comports with the Court’s Fourteenth Amendment jurisprudence: the school was not forced to demonstrate that it had considered race-neutral alternatives before adopting its race-based plan;<sup>253</sup> nor was the school required to incorporate a time limit for considering racial preferences into the plan.<sup>254</sup> Accordingly, Michigan’s plan fails to capture the “close fit” between the compelling state interest and the means chosen to further that interest and is therefore unconstitutional.

The next section of this Comment attempts to show that an economic affirmative action plan may remedy the constitutional problems afflicting Michigan’s plan. Economic affirmative action plans provide greater inclusiveness than race-based plans. In addition, the plans themselves are race neutral. Finally, economic affirmative action plans offer universities that adopt such plans both the educational benefits of equality of opportunity and potentially achieving a diverse student body as well as the legal benefit of having challenges to such economic affirmative action plans subjected to a

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245. *See id.* at 387 (Rehnquist, C.J., dissenting); *id.* at 388 (Kennedy, J., dissenting).

246. *See id.* at 362-64 (Thomas, J., concurring in part and dissenting in part).

247. *Id.* at 342 (majority opinion).

248. *See Richmond v. J.A. Croson*, 488 U.S. 469, 501 (1989).

249. *See Grutter*, 539 U.S. at 339-40.

250. *See id.* at 341-43.

251. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 852 (E.D. Mich. 2001).

252. *Grutter*, 539 U.S. at 329.

253. *See id.* at 339-41.

254. *See id.* at 343.

lower standard of review than strict scrutiny.<sup>255</sup>

#### VI. A NARROWLY TAILORED, RACE-NEUTRAL ALTERNATIVE TO RACIAL PREFERENCES: ECONOMIC AFFIRMATIVE ACTION

The narrow tailoring prong of strict scrutiny demands both that government ensure there exists a "close fit" between the compelling interest and the means chosen to advance that interest,<sup>256</sup> and that government consider race-neutral alternatives before developing racial classifications.<sup>257</sup> The "close fit" requirement is generally measured by a classification's relative overinclusiveness or underinclusiveness.<sup>258</sup>

As argued above, Michigan's admissions plan, by extending preference to only select minority groups to the exclusion of other minority groups who have also suffered discrimination, is patently underinclusive. In addition, in deferring to the notion of Michigan's academic freedom, the Court accepted in good faith that the school had explored race-neutral alternatives to its program without fully investigating what those alternatives were.<sup>259</sup> But the district court, meanwhile, had extended the school no such deference and, in the course of its investigation, concluded that Michigan had failed to sufficiently consider race-neutral alternatives to its plan.<sup>260</sup> Hence, Michigan's admissions plan suffers from the twin constitutional infirmities of underinclusiveness and of being implemented before other race-neutral alternatives were considered.

Class-based affirmative action represents a remedy to both shortcomings. A class-based plan would target the poor for preference in college admissions rather than racial minorities. Class-based affirmative action, therefore, provides for greater inclusiveness than sheer race-based plans because all individuals from depressed socioeconomic backgrounds qualify for preference regardless of their race. Accordingly, by discounting race, class-based affirmative action inherently embodies a race-neutral alternative to a race-based plan.

Other benefits, as well, accrue from class-based affirmative action.

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255. See *Korematsu v. United States*, 323 U.S. 214 (1944).

256. *Id.* at 333.

257. *Richmond v. J.A. Croson*, 488 U.S. 469, 507 (1989).

258. See SULLIVAN & GUNTHER, *supra* note 196, at 644-47.

259. See *Grutter*, 539 U.S. at 339-40.

260. See *Grutter*, 137 F. Supp. 2d at 852.

### A. *Equality of Opportunity*

The poor have long lacked opportunities available to those from more wealthy segments of society.<sup>261</sup> Discrimination has stunted the advancement of the poor just as it has stunted the advancement of racial minorities.<sup>262</sup> Class preferences offer the promise of equal educational opportunity—a goal the Court champions:

This Court has long recognized that “education . . . is the very foundation of good citizenship.” For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals. . . .” [E]nsuring that public institutions are open and available to all segments of American society . . . represents a paramount government objective.” And, “[n]owhere is the importance of such openness more acute than in the context of higher education.”<sup>263</sup>

Moreover, Dr. Martin Luther King Jr.—a strong advocate for class-based affirmative action—observed, “[i]t is a simple matter of justice . . . that America, in dealing creatively with the task of raising the Negro from backwardness, should also be rescuing a large stratum of the forgotten white poor.”<sup>264</sup> Class-based affirmative action expounds the equality and justice to which the Court and Dr. King refer by providing the white poor as well as the minority poor access to education.

### B. *Obtaining Educational Diversity Through Race-Blind Economic Affirmative Action Is a Viable Prospect*

What is more, while supplying opportunities for low-income whites, public universities may still be able to achieve the compelling interest of racial diversity via race-neutral, class-based admissions practices. Even though the scholarship is divided on this point,<sup>265</sup> as Figure One helps

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261. See generally Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037 (1996).

262. See *id.* at 1061.

263. *Grutter*, 539 U.S. at 331-32 (internal citations omitted).

264. Kahlenberg, *supra* note 261, at 1062 (quoting MARTIN LUTHER KING JR., *WHY WE CAN'T WAIT* 147 (1963)).

265. See, e.g., *id.*; R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029 (2001) (defending class-based affirmative

illustrate, U.S. Census statistics reveal minorities perhaps constitute a “critical mass” of low wage earners and of those in poverty.<sup>266</sup>

Figure One is divided into three primary income segments. The first segment shows the total white and total minority households earning \$29,999 or less in income for 2003. Minorities constituted thirty percent of all such households. In addition, minority households represented twenty-four percent of households receiving between \$30,000 and \$59,999 in income. Finally, among households earning \$60,000 or more, eighteen percent were minority households.

The data reveal that, if an admissions program were to adopt a class-based preference plan that discounted an individual’s race, a significant number of racial minorities would benefit from receiving class preference. Michigan consistently admitted a class comprised of at least ten percent of its targeted minority groups.<sup>267</sup> Minority households represented thirty percent of households earning the lowest income in 2003. Thus, by targeting the poorest segment of society for admission preference, public universities may still be able to admit a “critical mass” of minority students.

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action as a viable method for obtaining racially diverse classrooms); *but see, e.g.*, Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452 (1997) (arguing class-based affirmative action is an inferior substitute for race-based affirmative action); Tung Yin, *A Carbohc Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213 (1996) (deriding the notion that racial diversity in public universities can be obtained through race-neutral class preferences).

266. While the Census statistics reveal that racial minorities constitute a significant percentage of the lowest wage earners in 2003, test scores are not uniform across racial categories. *See* Yin, *supra* note 265, at 233-35. According to Yin, black students, for example, comprise roughly only fifteen percent “of the applicant pool scoring above 977 points” on the SAT among households earning less than \$10,000 per year. *Id.* at 235. Consequently, Yin contends that because universities use standardized test scores as one primary admission criterion, the beneficiaries of class-based affirmative action “are likely to be overwhelmingly white.” *Id.* However, Yin’s data set is incomplete, as it compares whites with only blacks rather than all other racial minorities. *See id.* at 233-35. A rigorous examination of the empirical test-score data across all races is beyond the scope of this Comment. This Comment’s purpose is not to irrefutably demonstrate that class-based affirmative action will necessarily yield diverse university classes; rather, it attempts to show that the socio-economic data reveal that minorities comprise a substantial proportion of individuals falling on the lower end of the socio-economic ladder, and thus universities instituting race-neutral, class-based admissions plans will have a significant number of racial minorities comprising their targeted populace. Hence, achieving educational diversity through race-neutral means remains a possibility.

267. *Gruiter v. Bollinger*, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001).

FIGURE 1

<b>Household Income—2003</b>					
11,117 represents 11,117,000					
<b>Income Interval</b>	<b>Grand Total</b>	<b>Total White</b>	<b>% White</b>	<b>Total Minority</b>	<b>% Minority</b>
Under \$10,000	11,117	7,012	63%	4,105	37%
\$10,000–14,999	8,487	6,035	71%	2,452	29%
\$15,000–\$19,999	8,306	5,926	71%	2,380	29%
\$20,000–\$24,999	8,065	5,827	72%	2,238	28%
\$25,000–\$29,999	7,502	5,479	73%	2,023	27%
<b>Total</b>	<b>43,477</b>	<b>30,279</b>	<b>70%</b>	<b>13,198</b>	<b>30%</b>
<b>Income Interval</b>	<b>Grand Total</b>	<b>Total White</b>	<b>% White</b>	<b>Total Minority</b>	<b>% Minority</b>
\$30,000–\$34,999	7,338	5,412	74%	1,926	26%
\$35,000–\$39,999	6,661	4,954	74%	1,707	26%
\$40,000–\$44,999	6,376	4,765	75%	1,611	25%
\$45,000–\$49,999	5,330	4,096	77%	1,234	23%
\$50,000–\$59,999	9,826	7,676	78%	2,150	22%
<b>Total</b>	<b>35,531</b>	<b>26,903</b>	<b>76%</b>	<b>8,628</b>	<b>24%</b>
<b>Income Interval</b>	<b>Grand Total</b>	<b>Total White</b>	<b>% White</b>	<b>Total Minority</b>	<b>% Minority</b>
\$60,000–\$74,999	11,786	9,346	79%	2,440	21%
\$75,000–\$99,999	12,972	10,612	82%	2,360	18%
\$100,000–\$149,999	11,115	9,309	84%	1,806	16%
\$150,000–\$199,999	3,491	2,933	84%	558	16%
\$200,000 and over	2,947	2,578	87%	369	13%
<b>Total</b>	<b>42,311</b>	<b>34,778</b>	<b>82%</b>	<b>7,533</b>	<b>18%</b>

Source: U.S. Census Bureau, Statistical Abstract of the United States: 2006, p. 462, Figure No. 676.



The prospect is even more stark when one examines the data in Figure Two showing the number of children living below the poverty level.

FIGURE 2

<b>Persons Below Poverty Level—2003</b>					
16,283 represents 16,283,000					
<b>Income Interval</b>	<b>Grand Total</b>	<b>Total Whites</b>	<b>% White</b>	<b>Total Minorities</b>	<b>% Minority</b>
Under 18 years old	16,283	7,985	49%	8,298	51%
18 to 24 years old	5,463	3,202	59%	261	41%
<b>Total</b>	<b>21,746</b>	<b>11,187</b>	<b>51%</b>	<b>10,559</b>	<b>49%</b>
<b>Income Interval</b>	<b>Grand Total</b>	<b>Total Whites</b>	<b>% White</b>	<b>Total Minorities</b>	<b>% Minority</b>
25 to 64 years old	17,767	10,419	59%	7,348	41%
65 years old and older	3,903	2,666	68%	1,237	32%
<b>Total</b>	<b>21,670</b>	<b>13,085</b>	<b>60%</b>	<b>8,585</b>	<b>40%</b>
<b>Grand Total</b>	<b>43,416</b>	<b>24,272</b>	<b>56%</b>	<b>19,144</b>	<b>44%</b>
Source: U.S. Census Bureau, Statistical Abstract of the United States: 2006, p. 473, Figure No. 696.					

Figure Two reveals that minorities constitute fifty-one percent of persons under eighteen living below the poverty line. Accordingly, race-blind admissions programs granting preference to those living below the poverty level are likely to admit a number of minorities as a result.

### *C. Legal Advantages to Class-Based Preferences*

An additional advantage of a class-based affirmative action program is that, though it grants preferences to some individuals over others, such a program likely satisfies the Constitution's strictures. A reviewing court would subject a class-based program to one of two constitutional tests: "rational basis review" or "strict scrutiny." A class-based program could survive either.

#### 1. Rational Basis Review

Economic disadvantage does not constitute a suspect class.<sup>268</sup>

268. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

Consequently, it is unlikely that programs creating preferences for the poor would be subjected to strict scrutiny.<sup>269</sup> In lieu of strict scrutiny review, such programs would instead be subjected to the rational basis review standard. Under rational basis review, the classification must rationally further a legitimate state interest.<sup>270</sup> Thus, because ensuring educational opportunities remain open to all segments of society no doubt constitutes a legitimate state interest,<sup>271</sup> economic affirmative action admissions plans would be adjudicated constitutional under the rational basis review standard.

## 2. Strict Scrutiny

A court would still subject a class-based admissions plan to strict scrutiny, however, if a defendant demonstrates that the facially neutral plan was designed to have a racially discriminatory impact.<sup>272</sup> Thus, if a university creates an economic affirmative action program as a means for obtaining a "critical mass" of minority students, a reviewing court will subject the program to strict scrutiny.<sup>273</sup> Nevertheless, such a program would assuredly pass constitutional muster.

First, the *Grutter* Court found the diversity rationale compelling.<sup>274</sup> Second, a class-based admissions program would be narrowly tailored to achieve the compelling interest of racial diversity as long as it complied with certain constitutional mandates. For instance, a university must ensure that the program creates preferences rather than "quotas" for racial minorities.<sup>275</sup> Additionally, if racial diversity is the university's ultimate objective, the school must maintain a system of "individualized review" of its application files.<sup>276</sup> In other words, a student's poor socio-economic background may not be the determinative factor in her admission; rather, her economically depressed circumstance must be considered merely as a "plus" in her file and thus be considered along with her other credentials.<sup>277</sup> Finally, as a class-based plan stands as a facially race-neutral one, the need for a university to consider race-neutral alternatives as well as time limits for its program is obviated.

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269. *See Korematsu v. United States*, 323 U.S. 214 (1944).

270. *See Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

271. *See Grutter v. Bollinger*, 539 U.S. 306, 301-02 (2003).

272. *See Washington v. Davis*, 426 U.S. 229, 242 (1976).

273. *See id.*

274. *Grutter*, 539 U.S. at 328.

275. *Id.* at 335.

276. *Id.* at 336-37.

277. *Id.* at 336-39.

Thus, a class-based affirmative action plan that is facially neutral, but implemented to achieve racial diversity, would nonetheless satisfy the strict scrutiny standard by comporting with each of these requirements.

In sum, myriad benefits accompany a university's use of an economic affirmative action plan. If two of the aims of race-based affirmative action plans are to atone for past discrimination and to ensure equality of educational opportunities, then class-based plans achieve the same result, but across all races. In addition, because racial minorities constitute a large portion of society's poorer segments, universities may still be able to obtain the advantages of racially diverse student bodies, but through race-neutral means. Finally, class preferences hold the advantage of not automatically invoking the legally daunting strict scrutiny review. Regardless of the constitutional standard to which a court subjects a class-based plan, however, almost invariably the plan will be upheld.

## VII. CONCLUSION

The Supreme Court's decision in *Grutter* solidified educational diversity as a compelling state interest.<sup>278</sup> While the Court specifically reasoned that the policy interests of dismantling racial stereotypes, preparing students to engage in a diversified workforce, and ensuring pathways to leadership remain unobstructed for individuals of all races justified its conclusion,<sup>279</sup> educational diversity also remains a compelling state interest because it is rooted in constitutional precepts.<sup>280</sup>

Despite educational diversity's standing as a compelling state interest, however, the admissions program at issue in *Grutter* should have been invalidated as unconstitutional because it is not narrowly tailored to achieve that interest. First, it fails to account for individuals who are similarly situated to those benefited under its terms. A number of other minority groups merit preference along with those groups targeted by Michigan's plan. As such, the plan is impermissibly underinclusive.<sup>281</sup> Second, Michigan failed to consider race-neutral alternatives before enacting its plan as well as failed to impose a time limit on its racial preferences.<sup>282</sup> Thus, Michigan's plan does not satisfy the strictures of narrow tailoring.

In contrast, admissions plans targeting prospective students based on their

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278. *Id.* at 328.

279. *Id.* at 330-32.

280. *See supra* Part III.

281. *See SULLIVAN & GUNTHER, supra* note 196, at 644-47.

282. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 851-52 (E.D. Mich. 2001).

socio-economic class, rather than their race, do comport with constitutional mandates. A class-based program does not invoke a suspect classification.<sup>283</sup> Accordingly, a reviewing court would likely subject such a program to rational basis review instead of strict scrutiny. If the plan were constructed, however, for the purpose of conferring benefits on the basis of one's race, strict scrutiny would be the standard to which the court would subject it.<sup>284</sup> Nevertheless, the plan would still likely withstand strict scrutiny review because class-based plans embody the type of race-neutral alternative that the Constitution requires.<sup>285</sup> Moreover, because racial minorities comprise a disproportionate number of individuals falling into the lowest socio-economic class segment,<sup>286</sup> schools may still be able to achieve the compelling interest of attaining a racially diverse student body through a race-blind economic affirmative action program. Economic affirmative action plans thus confer the dual benefits of granting preferences to the white poor as well as disadvantaged minorities, rendering such plans more fully inclusive than plans that target strictly based upon one's race.

In sum, while the *Grutter* Court correctly concluded that educational diversity is a compelling state interest, it incorrectly concluded that Michigan's plan is narrowly tailored to achieve that interest. An economic affirmative action plan is superior to a race-based affirmative action plan because it grants benefits to a more inclusive populace of disadvantaged individuals and thus more fully embodies the constitutional precept of the inherent equality of all members of our society.

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283. See *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

284. See *Washington v. Davis*, 426 U.S. 229 (1976).

285. *Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003).

286. See *supra* Part VI.B.

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