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DIVERSITY IN HIGHER EDUCATION: THE CONSIDERATION OF RACE IN HIRING UNIVERSITY FACULTY

Suzanne E. Eckes[*]

I. INTRODUCTION

The U.S. Supreme Court firmly established that a diverse student body is a compelling state interest in *Regents of the University of California v. Bakke*,[1] *Grutter v. Bollinger*,[2] and *Gratz v. Bollinger*.[3] The answer, however, to whether a diverse faculty constitutes a compelling interest remains unclear. This paper explores whether the arguments used in student body diversity cases may extend to university faculty diversity as a compelling state interest. Race-conscious faculty affirmative action programs require different legal considerations depending on whether the programs aim to achieve university faculty diversity or to remedy past discrimination.

Race-conscious affirmative action cases reviewed by the Supreme Court can be divided into the following three categories: the consideration of race for diversity purposes, including viewpoint diversity; the consideration of race to correct racial imbalance; and the consideration of race to remedy past discrimination. In the context of higher education, the cases focused on student body diversity. In the context of employment, the cases generally focused on remedying past discrimination.[4]

In order to examine diversity, remedial interest, and racial balance arguments in race-conscious affirmative action programs for hiring faculty, an analysis of several key race-conscious student admissions and employment cases is necessary. Specifically, before *Bakke*, *Grutter*, and *Gratz*, there were a series of public employment affirmative action cases that addressed past discrimination and racial imbalance. These cases provide guidance to institutions seeking to use race as a factor in hiring faculty members. After comparing the diversity rationale cases with the

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1. *Regents of the U. of Cal. v. Bakke*, 438 U.S. 265 (1978).
2. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
3. *Gratz v. Bollinger*, 539 U.S. 244 (2003).
4. Some employment cases have addressed racial balancing as well as past discrimination.

remedial interest rationale cases, this paper discusses other decisions that focus specifically on race and faculty hiring. Based upon these analyses, this paper concludes with an exploration of policy arguments concerning whether race should be considered in hiring faculty.

II. SUPREME COURT RACE-BASED CASES: WHAT STANDARD OF REVIEW IS APPLIED?

The Court applies one of three standards when considering the constitutionality of a government action, with strict scrutiny being the most difficult standard to satisfy.[5] When considering race in the context of employment or education, race-conscious policies are subject to strict scrutiny in Equal Protection Clause cases.[6] The government must show that the action is narrowly tailored to achieve a compelling state interest.[7] For example, when hiring university faculty for remedial reasons, the university must demonstrate a compelling state interest in remedying the impact of past discrimination and show the hiring plan is narrowly tailored to remedy the impact of the past discrimination.[8] Likewise, in using race as a criterion to achieve faculty diversity, a university must demonstrate that a diverse faculty is a compelling state interest and then establish that the race-conscious plan is narrowly tailored to achieve the goal of diversity.[9]

III. STUDENT BODY DIVERSITY CASES: DO THESE DECISIONS EXTEND TO FACULTY DIVERSITY?

Since 1978, institutions of higher education have relied upon Justice Powell's opinion in *Bakke* to justify faculty and student diversity programs. This reliance on *Bakke* has increased due to the recent *Grutter* and *Gratz* decisions. Although the Supreme Court solely addressed the issue of student diversity in these cases, some scholars contend the holdings extend to faculty diversity because the decisions contain no language restricting this issue to the student body.[10]

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5. *See generally* Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law*, 605–55 (14th ed., Found. Press 2001).

6. *Id.*

7. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

8. *See* Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where Do Universities Go from* Gratz *and* Grutter*?* 33 J.L. & Educ. 21, 23 (2004).

9. *Id.*

10. *See* Joint Statement of Constitutional Law Scholars, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Actions Cases* 22–25 (Civ. Rights Project at Harv. U. 2003) [hereinafter Joint Statement].

The Supreme Court recognized that a diverse student body is a compelling state interest in *Bakke*.[11] Here, the University of California at Davis Medical School reserved a specific number of admissions slots for minority students.[12] The Supreme Court struck down the affirmative action plan, holding that the use of a quota, or reserving a certain number of seats for minorities, was unconstitutional.[13] Although the Court found the University's race-conscious admissions plan was unconstitutional, Justice Powell's plurality opinion held that California's interest in maintaining a diverse student body was sufficiently compelling.[14] Justice Powell stated that a diverse student body "is a constitutionally permissible goal for an institution of higher education."[15]

Despite the *Bakke* opinion, universities had insufficient guidance as to what extent race could be used in admissions or in faculty hiring. Several courts relied on Justice Powell's concept of the use of race as one of many factors, or as a plus factor, in university admissions.[16] Some courts even extended Justice Powell's approach to employment—including faculty hiring.[17] The difficulty interpreting *Bakke*'s approved consideration of race as a plus factor was subsequently resolved in *Grutter* and *Gratz*.

In *Grutter v. Bollinger*, the Supreme Court confirmed Justice Powell's holding that student body diversity is a compelling state interest, and therefore, race could be used in university admissions.[18] In *Grutter*, the majority reasoned *Bakke* emphasized 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."[19] The majority noted that "numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares

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11. 438 U.S. at 310–12.

12. *Id.* at 289.

13. *Id.* at 289–99.

14. *Id.* at 310–12.

15. *Id.* at 311–12.

16. *See DeRonde v. Regents of the U. of Cal.*, 625 P.2d 220, 224–25 (Cal. 1981); *McDonald v. Hogness*, 598 P.2d 707, 712 (Wash. 1979).

17. *See Higgins v. Vallejo*, 823 F.2d 352, 357–59 (9th Cir. 1987) (relying on Justice Powell's *Bakke* rationale); *U. & Community College Sys. of Nev. v. Farmer*, 930 P.2d 730, 734–35 (Nev. 1997) (treating Justice Powell's opinion in *Bakke* as the decision of the Court).

18. 539 U.S. at 322–23. The Court also recognized Justice Powell's opinion had served as the "touchstone for constitutional analysis" of affirmative action programs in universities across the country. *Id.* at 323.

19. *Id.* at 322–323 (citing *Bakke*, 438 U.S. at 320).

them as professionals.'"[20] The Court also concluded that the benefits of diversity "are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[21]

After the Court reasoned that diversity was compelling and that race could be used as a factor, it next addressed whether the University of Michigan Law School's program was narrowly tailored.[22] The Court noted that "[w]hen race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."[23] Because of the holistic—or many factored—approach to selecting the student body, the University of Michigan's affirmative action plan was deemed narrowly tailored.[24] This holistic approach was quite different from the quota system used in *Bakke*.[25]

In contrast to the Law School's program in *Grutter*, in *Gratz* the admissions program automatically distributed 20 points to every applicant from an "underrepresented minority" group.[26] In the written statement, the Court stressed Justice Powell's reasoning in *Bakke* would not permit "any single characteristic" to automatically ensure an "identifiable contribution to a university's diversity,"[27] but rather called for individual consideration.[28] Unlike the admissions program in *Grutter*, the undergraduate program in *Gratz* did not individually consider the students.[29] Accordingly, the Court held that the undergraduate affirmative action policy was not narrowly tailored and therefore violated the Equal Protection Clause of the Fourteenth Amendment, Title VI, and 42 U.S.C. § 1981.[30]

A well-reasoned argument can be made to extend the Court's student body diversity holdings to faculty diversity contexts.[31] It is important to

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20. *Id.* at 330 (quoting Br. for Am. Educ. Research Assoc. as Amici Curiae at 3 (Feb. 18, 2003) (available at 2003 WL 398292)).

21. *Id.* at 330–331.

22. *Id.* at 333–43.

23. *Id.* at 327.

24. *Id.* at 338–343.

25. *See id.* at 337–38.

26. 539 U.S. at 270.

27. *Id.* at 271.

28. *Id.* at 270–75.

29. *Id.*

30. *Id.* at 275.

31. *See* Jonathan Alger, *When Color-Blind Is Color-Bland: Ensuring Faculty Diversity in*

note that *Grutter* and *Gratz* focused on diversity and not the remedial interest argument. *Bakke, Grutter,* and *Gratz* offer strong language supporting governmental interest in both student body and faculty diversity.[32] In *Bakke,* the Court noted that student body diversity would lead to "the robust exchange of ideas."[33] Arguably, this concept could be applied to the robust exchange of ideas between both faculty and students and faculty and faculty. The *Grutter* Court held that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[34] This concept could also be applied to university faculty.

The Joint Statement of Constitutional Law Scholars[35] argues that "[o]ne of the benefits of student body diversity identified by the *Grutter* Court is the development of a diverse and integrated leadership that can serve the needs of government, business, and the military."[36] In other words, a diverse faculty can help create a network of future leaders in all academic disciplines. Additionally, the Joint Statement noted that

> The *Grutter* Court stressed that context is critical in strict scrutiny analysis, and the Court may be more inclined to uphold race-conscious policies in employment contexts that closely parallel the higher education context, where the benefits of diversity in the workplace are welldocumented [sic] and race is used as a "plus" factor in a non-mechanical hiring or promotion process that also considers non-racial factors and allows applicants to compete for jobs on an equal footing.[37]

By considering race as one of many factors and by using research to document the benefits of faculty diversity, a plan may be considered narrowly tailored.

The University's educational judgment regarding diversity and its educational mission were honored by the Court in *Grutter.*[38] The Court stated: "Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[39] This deference arguably relates to the academic freedoms under the First Amendment, including who may

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Higher Education, 10 Stan. L. & Policy Rev. 191 (1999); *see also,* Joint Statement, *supra* n. 10 at 22–25 (arguing that the Michigan affirmative action decisions could extend to faculty diversity).

32. *See* Joint Statement, *supra* n. 10 at 22–25.
33. 438 U.S. at 311–13.
34. 539 U.S. at 332.
35. Joint Statement, *supra* n.10.
36. *Id.* at 24.
37. *Id.* at 25.
38. 539 U.S. at 328.
39. *Id.*

teach, what may be taught, and who may be admitted to study.[40] In permitting this flexibility, the Court noted that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"[41]

Moreover, under Executive Order, universities receiving federal money are required "to take affirmative action" regarding race as an employment factor.[42] The Supreme Court has not interpreted either the Constitution or Title VII of the Civil Rights Act of 1964 to prohibit race-conscious hiring to promote faculty diversity.[43] Indeed, until the Supreme Court specifically decides whether a diverse faculty is a compelling interest, one could infer that *Bakke*, *Grutter*, and *Gratz* permit universities to consider race in hiring faculty.

IV. PUBLIC EMPLOYMENT CASES: DO THESE DECISIONS INCLUDE FACULTY SELECTION REMEDIAL PROGRAMS?

Remedying past discrimination has been recognized under existing case law to support race-conscious hiring if such programs are narrowly tailored. Before *Grutter* and *Gratz*, the Court decided a series of cases in which a divided Court addressed the constitutionality of various race-conscious employment programs. Although the majority of these cases were not specifically focused on faculty diversity, it is necessary to explore the reasoning used by the Court in some of these public employment cases to understand the Court's reasoning regarding the use of race-conscious programs for remedial purposes. In addition to the Equal Protection argument present in *Grutter* and *Gratz*, within the employment context, Title VII is often at issue. Title VII does not consider affirmative action as discrimination if the affirmative action plan is considered valid.[44] It is important to note that an employer affirmative action plan that focuses on a remedial purpose has only been considered valid under Title VII.[45] Diversity, on the other hand, has just been developed as a valid reason under Title VII for adopting an affirmative action plan.[46]

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40. Patrick Linehan, *Guarding the Dumping Ground: Equal Protection, Title VII and Justifying the Use of Race in the Hiring of Special Educators*, 2001 BYU Educ. & L.J. 179, 199 (2001).

41. *Grutter*, 539 U.S. at 330.

42. Exec. Or. No. 11246, 3 C.F.R. 339 (1965) (*reprinted as amended in* 1 Affirmative Action Compl. Man. for F. Contractors (BNA) 101, 101).

43. *See* Alger, *supra* n. 31 at 193.

44. Monique C. Lillard, Deborah C. Malamud, Miranda Oshige McGowan, Charles A. Shanor, *The Effect of the University of Michigan Cases on Affirmative Action in Employment*, 8 Employee Rights & Empl. Policy J. 127, 136 (2004).

45. *Id.* at 136–37.

46. Lillard et al., *supra* n. 44.

One of the earlier cases to address under-representation of minority employees was *United Steelworkers of America v. Weber*.[47] In this case, the Supreme Court held that race-conscious plans may be used in job categories in which minorities are traditionally underrepresented.[48] In *Weber*, a collective bargaining agreement established a race-conscious training program for unskilled minority workers.[49] The training program reserved 50 percent of the spots for minority workers.[50] The Supreme Court held that such a plan was permissible to eradicate racial discrimination,[51] but a plan establishing rigid racial placement would be impermissible.[52] It is important to note that *Weber* was a Title VII case. As such, the court used a different test from the strict scrutiny test applied in Equal Protection cases. Some of the other employment cases discussed employed this different test for the same reasons.

Fullilove v. Klutznick[53] is another employment case that demonstrates the Supreme Court's analysis of a race-conscious decision to remedy past discrimination. In this case, the Supreme Court examined the Public Works Employment Act enacted by Congress for minority business enterprises.[54] The Court upheld, under a lesser degree of scrutiny, the congressionally created affirmative action program that set aside 10 percent of government business for minority-owned businesses.[55]

Similar reasoning was applied six years later in *Local 28 of Sheet Metal Workers International Association v. EEOC*, when the Supreme Court suggested that the Constitution permits court-ordered affirmative action to eliminate "the lingering effects of pervasive discrimination."[56] In this case, it was alleged that membership preferences were granted to non-white workers who had not been identified as victims of unlawful discrimination.[57] The Supreme Court noted that the district court properly used statistical evidence to establish petitioner's non-white membership statistical goal under the affirmative action plan and

47. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

48. *Id.* at 208–09.

49. *Id.* at 197.

50. *Id.*

51. *Id.* at 209.

52. *Id.*

53. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

54. *Id.*

55. *Id.* at 453. In a plurality opinion, Justice Burger noted Congress's remedial powers in this area. *Id.* at 483–84.

56. *Local 28 of Sheet Metal Workers Intl. Assn. v. EEOC*, 478 U.S. 421, 476 (1986).

57. *Id.* at 455.

order.[58]

In a similar case, *Johnson v. Transportation Agency*,[59] the Supreme Court more narrowly defined its approach when it held that gender-conscious plans applied to job categories in which minorities are traditionally underrepresented are acceptable. In *Johnson,* the transportation agency adopted a plan where sex was considered in promotions because women were underrepresented in such positions.[60] The Court upheld the plan because there was not only an imbalance of women but because the plan, like the plan in *Weber,* did not excessively harm men.[61] Further, the Court reasoned that the plan seemed to have an end in sight.[62]

Around this time, *Wygant v. Jackson Board of Education*[63] was decided. *Wygant* was the only Supreme Court case dealing directly with faculty and diversity under the remedial interest argument. The Board of Education in Jackson, Michigan, developed a race-conscious layoff agreement with the local teachers' union.[64] Under this plan, teacher seniority would govern if layoffs were necessary except that "at no time [would] there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."[65] When layoffs became necessary, the school district disregarded the race-conscious layoff agreement and laid off two minority teachers.[66] The two teachers and the union brought suit under the Equal Protection Clause and the Civil Rights Act of 1964.[67] In state court, the teachers prevailed on breach of contract and the school district's arguments were rejected.[68] As a result of the state court decision, the school district began enforcing the race-conscious layoff plan. The laid-off non-minority teachers brought suit in federal court challenging the plan on both Title VII and Equal Protection grounds.[69]

The district court upheld the race-conscious layoff plan under an Equal Protection analysis as an attempt to remedy societal discrimination

58. *Id.* at 440–42.
59. *Johnson v. Transp. Agency*, 480 U.S. 616 (1987).
60. *Id.* at 620–21.
61. *Id.* at 630.
62. *Id.* at 639–40.
63. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).
64. *Id.* at 270–71.
65. *Id.* at 270.
66. *Id.* at 271.
67. *Id.*
68. *Id.* at 272.
69. *Id.*

by providing minority role models in the classroom.[70] The Sixth Circuit Court of Appeals affirmed; the Supreme Court granted certiorari on the Equal Protection Clause claim.[71] In a five–four decision, with five separate opinions, the Supreme Court reasoned that the school board's interest of providing black role models and remedying the societal discrimination that created historically white teaching staffs were not compelling.[72]

When the Court examined the remedial argument, focus was placed on the prior discriminating practices of the school district.[73] Justice Powell stated in the plurality opinion that the "Court had insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[74] He reasoned that the plan operated "against whites and in favor of certain minorities, and therefore constituted a classification based on race."[75] Further, according to Justice Powell, a policy embracing racial preferences to create minority role models could not be upheld as legitimate.[76]

Although the Supreme Court struck down the role model theory, it is arguable that a Court majority endorsed the constitutionality of faculty diversity as a goal. Justice O'Connor, in her concurrence, stated that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial consideration in furthering that interest."[77] Justice Marshall, in his dissent joined by Justices Brennan and Blackmun, stated that he would have upheld the school board's policy under the lower standard of intermediate scrutiny.[78] The dissent by Justice Stevens recognized the need for an integrated faculty, stating: "In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty."[79]

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70. *Id.*

71. *Id.* at 273.

72. *Id.* at 274–84 (plurality).

73. *Id.* at 274.

74. *Id.*

75. *Id.* at 273.

76. *Id.* at 274–76.

77. *Id.* at 286 (O'Connor, J., concurring) (citing Justice Powell's opinion in *Bakke*, 438 U.S. at 311–15).

78. *Id.* at 301–03 (Marshall, Brennan, & Blackmun, JJ., dissenting).

79. *Id.* at 315 (Stevens, J., dissenting).

Although the affirmative action plan was struck down in *Wygant*, another plan was upheld during this same time period. In *United States v. Paradise*,[80] the Supreme Court upheld a court-ordered promotion policy implemented because of a four-decade documented history of racial discrimination against blacks in the Alabama Department of Public Safety.[81] Justice Brennan's plurality opinion stated that "[t]he Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor."[82] The Court did note, however, that the remedial plan should be "temporary in application."[83]

When analyzing affirmative action policies, the *Paradise* Court considered the following five factors: the necessity for relief and the efficacy of alternative remedies; the use of a rigid racial quota or a flexible racial goal; the duration of the relief; the numerical goals; and the impact of the relief on third parties.[84] These factors may be weighed against each other and some may be more heavily relied upon than others.[85] Justices Brennan, Marshall, Blackmun, and Powell concluded that racial preferences could be used when the five factors were met.[86] Justice Stevens concurred on the grounds that the district court had equitable power to fashion a broad remedy in a particular case where a constitutional violation had been found.[87] The Supreme Court also noted that the race-conscious promotion requirements were flexible because they could be waived if no qualified candidate was available.[88]

After *Paradise*, there seemed to be a shift in the Court's affirmative action employment cases beginning with *City of Richmond v. J.A. Croson Company*[89] when the Court struck down a race-conscious program. In this case, Richmond had a contract set-aside program for minority-owned businesses.[90] This program required prime contractors to subcontract at least 30 percent of the dollar amount of each construction contract to minority-owned businesses.[91] The Court held that because the city could not identify a broad need for remedial action in the area of

80. *U.S. v. Paradise*, 480 U.S. 149 (1987).

81. *See Paradise v. Prescott*, 585 F. Supp. 72, 74 (N.D. Ala. 1983), *aff'd*, 767 F.2d 1514 (11th Cir. 1985), *aff'd sub nom. U.S. v. Paradise*, 480 U.S. 149 (1987).

82. *Paradise*, 480 U.S. at 167 (plurality).

83. *Id.* at 178.

84. *Id.* at 171–86.

85. *Id.*

86. *Id.*

87. *Id.* at 189–95 (Stevens, J., concurring).

88. *Id.* at 177 (plurality).

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

90. *Id.* at 477–78.

91. *Id.* at 477.

government contracts, the plan violated the Equal Protection Clause of the Fourteenth Amendment.[92] According to the Court, the city's set-aside program was not narrowly tailored and [93] unlike previous cases, there was not enough evidence of prior discrimination.[94]

Given the lack of evidence demonstrating a need for a remedial plan, Justice O'Connor, writing for the majority, stated that the consideration of race in such programs "may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[95] Accordingly, the Court noted that the consideration of race could be justified if the program operated to remedy past wrongs against a group.[96] However, the evidence of discrimination must be strong enough to demonstrate the government's need to remedy the discrimination: "[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[97]

The Court upheld a race-conscious plan based on a lower level of scrutiny in *Metro Broadcasting v. Federal Communications Commission*.[98] In *Metro Broadcasting*, a Federal Communications Commission (FCC) program sought to ensure viewpoint diversity by permitting television stations and radio stations to be controlled by minority-run companies.[99] Specifically, in creating such a program, the FCC reasoned that a racially diverse group would lead to more diverse perspectives.[100] The FCC implemented this policy to "[enrich] and [educate] the non-minority audience."[101] In its lawsuit, Metro Broadcasting alleged that the policy violated the Equal Protection Clause of the Fourteenth Amendment.[102]

Under intermediate review, the Court upheld the FCC's policies. The Court reasoned that "[t]he Commission's minority ownership policies bear the *imprimatur* of longstanding [sic] congressional support and

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92. *Id.* at 511.

93. *Id.* at 505–08.

94. *Id.* at 485.

95. *Id.* at 493 (citing *Bakke*, 438 U.S. at 298).

96. *See Croson*, 488 U.S. at 493.

97. *Id.* at 498. The *Croson* Court also noted that race-neutral plans could have been explored and established. *See id.* at 509–10.

98. *Metro Broad. v. FCC.*, 497 U.S. 547 (1990), *overruled, Adarand*, 515 U.S. 200 (1995); *Metro Broad* was overruled to the extent that the Court incorrectly used mid-level scrutiny, instead of strict scrutiny. *See Adarand*, 515 U.S. at 227.

99. 497 U.S. at 555.

100. *Id.* at 566.

101. *Id.* 556.

102. *Id.* at 558–60.

direction and are substantially related to the achievement of the important governmental objective of broadcast diversity."[103] For the majority, Justice Brennan stressed the importance of diversity in broadcasting and noted that it was a constitutionally permissible goal.[104] The Court reasoned that racial classification would withstand intermediate scrutiny if it did not impose undue burdens on non-minorities.[105] Justice O'Connor's dissent reiterated her stance in *Croson* regarding the justification of race-based programs, stating that such programs are only acceptable if they operate to remedy past wrongs against a group.[106]

Again applying strict scrutiny, in *Adarand Construction v. Pena*, the Court rejected a plan whereby a company under a U.S. government contract would receive additional compensation if the company hired minority-owned subcontractors.[107] The contracts were obtained as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987.[108] The Act stated that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals."[109] The Court rejected the proposition that affirmative action was necessary in this particular situation, but did note that affirmative action could be permissible to remedy past discrimination.[110] In striking down this affirmative action program, the majority opinion stated: "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[111] Thus, *Adarand* shows that the Court did not strike down affirmative action policies in all cases.

Before the *Gratz* and *Grutter* Supreme Court decisions, legal scholars argued over what type of influence the public employment affirmative action cases would have on education cases. After *Grutter* and *Gratz*, some scholars argue that the Supreme Court may choose to "uphold race-conscious policies in employment contexts that closely parallel the higher education context," or use race as a plus factor.[112] This line of

103. *Id.* at 600.
104. *Id.* at 568 (quoting *Bakke*, 438 U.S. at 311–13).
105. *Id.* at 596–97
106. *Id.* at 603 (O'Connor, J., dissenting).
107. 505 U.S. at 204–06 (majority).
108. Pub. L. No. 100–17, 101 Stat. 132 (1987).
109. 101 Stat. at 145.
110. *Adarand*, 515 U.S. at 218–21.
111. *Id.* at 237.
112. *See* Joint Statement, *supra* n. 10 at 25.

reasoning would be consistent with Justice O'Connor's reasoning in *Wygant* and *Grutter* when she reiterated that higher education is different than employment.

Evidence of past discrimination must be provided in order to meet the compelling state interest standard in public employment cases.[113] To satisfy this requirement, the government should have evidence of discrimination against each racial group included in the race-conscious policy.[114] For example, when the *Croson* Court struck down the race-conscious policy, it did so because the city did not have enough evidence of discrimination to support the constitutional scrutiny required under the Equal Protection Clause.[115] Therefore, when a university uses a race-conscious hiring plan to remedy past discrimination, the institution needs to have concrete evidence.[116] Some scholars argue that if a university cannot rely upon past societal discrimination as a basis for race-conscious policies, the university can "focus solely on present effects of past discrimination at that particular institution."[117] Concrete evidence would also be necessary in this situation.

V. OTHER NOTABLE RACE AND FACULTY CASES: WHAT DO THESE OUTCOMES ADVANCE?

Although this paper focuses on Supreme Court holdings, there are other cases that address race-conscious hiring of faculty and teachers, including one federal circuit court of appeals case,[118] one federal district court case,[119] and one state supreme court case.[120] The circuit court case addressed affirmative action at the K–12 level, while the federal district court case and the state supreme court case addressed affirmative action at the university level.[121]

The federal circuit court case examined the issue of race-conscious employment practices to achieve teacher diversity. In *Taxman v. Board of Education of the Township of Piscataway*, a white high school teacher was laid off by the school board in favor of retaining a black teacher, who

113. *See* Jeffrey M. Hanson, *Hanging By Yarns? Deficiencies in Anecdotal Evidence Threaten the Survival of Race-Based Preference Programs for Public Contracting*, 88 Cornell L. Rev. 1433, 1435–38 (2003).

114. 488 U.S. at 506.

115. *Id.* at 485

116. *Id.*

117. Alger, *supra* n. 31, at 192.

118. *Taxman v. Bd. of Educ. of the Township of Piscataway*, 91 F.3d 1547(3d Cir. 1996).

119. *Honadle v. U. of Vt. & St. Agric. College*, 56 F. Supp. 2d 419 (D. Vt. 1999).

120. *U. & Community College*, 930 P.2d at 733.

121. *Taxman*, 91 F.3d 1547; *Honadle*, 56 F. Supp. 2d 419.

happened to be the only black teacher within that particular department.[122] The district court granted partial summary judgment for the plaintiff's Title VII claim holding that the school board's action was overly intrusive on the rights of non-minorities.[123] The Third Circuit Court of Appeals affirmed the decision but focused on and rejected the school board's non-remedial objective to maintain a diverse faculty as inconsistent with the intent of Title VII's prohibition of racial discrimination. The court reasoned that non-remedial objectives are not permissible grounds for a race-conscious employment plan under Title VII. The court, relying on *United Steelworkers v. Weber*[124] and *Johnson v. Transportation Agency,*[125] reasoned that a plan must seek to rectify under-representation, not to promote diversity.[126]

The U.S. Supreme Court granted *certiorari*; but due to a last-minute settlement, the case never reached the high court.[127] This would have been the first Supreme Court case to focus on faculty diversity as a compelling state interest.[128]

In *Honadle v. University of Vermont and State Agricultural College,*[129] a professor applicant alleged reverse discrimination when the University used race as a hiring factor. The applicant moved for instatement to a position that the University filled with a minority candidate.[130] The court found that the University's affirmative action plan did not violate the Equal Protection Clause or Title VII of the Civil Rights Act.[131] Specifically, the court reasoned that a fund used to give departments incentive to hire minorities was not problematic.[132] Although the court refused to instate the denied applicant, the court did note that if the plaintiff could successfully prove that race influenced the decision to hire the minority employee, then the University's affirmative

122. *Taxman*, 91 F.3d at 1551.

123. *U.S. v. Bd. of Educ. of the Township of Piscataway*, 832 F. Supp. 836, 851 (D.N.J. 1993).

124. 443 U.S. 139 (1979).

125. 480 U.S. 616 (1987)

126. *Taxman*, 91 F.3d at 1558.

127. *Cert. granted* in *Piscataway Township Bd. of Educ. V. Taxman*, 521 U.S. 1117 (1997), *cert. dismissed*, 552 U.S. 1010 (1997).

128. Some scholars argue that this case was forced to settlement by pro-affirmative action groups who feared that this was a weak test case and as such the Supreme Court would have struck down the school's affirmative action program. *See* Matthew S. Lerner, *When Diversity Leads to Adversity: The Principles of Promoting Diversity in Educational Institutions, Premonitions of the* Taxman v. Board of Education *Settlement*, 47 Buff. L. Rev. 1035, 1046–47 (1999).

129. 56 F. Supp. 2d 419.

130. *Id.* at 424–30.

131. *Id.* at 425.

132. *Id.*

action plan may have been unconstitutional.[133]

The Nevada Supreme Court addressed a case involving the issue of race-conscious hiring practices to achieve faculty diversity. In *University and Community College System of Nevada v. Farmer*, a white female professor alleged that the University discriminated against her when it hired a black professor.[134] The black immigrant professor from Uganda was hired under a special minority program that allowed a department to hire an additional faculty member if it hired a minority candidate.[135] When hiring faculty, the University argued that it based its decision on the candidate's publications, teaching, subject specialization, educational background, and race.[136]

The Nevada Supreme Court upheld the University's race-conscious faculty hiring policy in order to achieve diversity and remedy the effect of an apparent racial imbalance in a traditionally segregated job category.[137] The Court noted that at the time of this decision, almost 90 percent of the faculty was white.[138] The Court relied on *Bakke* and reasoned "[t]he University demonstrated that it has a compelling interest in fostering a culturally and ethnically diverse faculty. A failure to attract minority faculty perpetuates the University's white enclave and further limits student exposure to multicultural diversity."[139] Additionally, the Court stated that "[w]e also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court."[140] Because the two candidates were fairly equal in merit, the University should have some discretion in making personnel decisions.[141] Although this case is only binding in Nevada, it demonstrates how universities rely on *Bakke*, and arguably on *Grutter* and *Gratz*, in finding faculty diversity a compelling interest.

These cases are of particular importance because they demonstrate how the lower courts interpret diversity in employment regarding teachers and professors. It is unfortunate that these cases never reached the U.S. Supreme Court. Guidance is still needed in considering race when hiring university faculty.

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133. *Id.* at 425–30.
134. 930 P.2d at 733.
135. *Id.* at 732.
136. *Id.*
137. *Id.* at 733.
138. *Id.* at 732.
139. *Id.*
140. *Id.*
141. *Id.*

Formerly, many institutions established affirmative action plans to remedy present effects of past discrimination in faculty hiring. Some universities may now, as a result of *Grutter* and *Gratz*, seek to sustain these programs to achieve educational benefits of diversity. Therefore, even if one argues that narrowly defined vestiges of past discrimination have been eliminated at some institutions, the diversity rationale seen in these cases remains an important justification for race-conscious faculty hiring as a matter of educational quality for the institution.

VI. POLICY ARGUMENTS: SHOULD RACE BE CONSIDERED IN FACULTY HIRING?

Although the arguments above focus on what is permissible under the law, there are several policy-based arguments that merit discussion. Two of these arguments are that a diverse faculty is related to important educational objectives and that diverse faculty members could serve as role models for both students and faculty.

Universities are premised upon the creation of a holistic learning environment as part of the institution's educational mission, promoting a sense of community among faculty and students who engage in a "robust exchange of ideas" both inside and outside the classroom.[142] One could argue that universities are institutions where people from diverse backgrounds come together to learn from one another. Some scholars believe that "racial and ethnic diversity among [university] faculty . . . serves important educational objectives."[143] For example, faculty members not only influence through teaching, but also through research, writing, and service activities. Through these actions, a diverse faculty and teaching staff play a pivotal role in breaking down stereotypes and improving race relations on campus and ultimately nationally.[144]

Faculty members serve as important role models for students and faculty. Although the role model theory was dismissed in *Wygant*, there are other issues to consider at a university. Under the faculty role model theory, when minority students witness minority faculty succeed, it may demonstrate to them that such achievement is possible in higher education. White students who have not regularly encountered members of minority groups in positions of authority may also benefit.[145] Diversity

142. *See* Alger, *supra* n. 31, at 199.

143. *See id.* at 194.

144. *Id.*

145. *See generally* Paul Brest & Miranda Oshige, *Race and Remedy in a Multicultural Society: Affirmative Action for Whom?*, 47 Stan. L. Rev. 855, 862–65 (1995); *see* Jon C. Dubin, *Essay: Faculty Diversity as a Clinical Legal Education Imperative*, 51 Hastings L.J. 445, 466 (2000).

at a university can raise cultural awareness for all involved.[146] Furthermore, the presence of minority faculty tends to make students of color feel that they are welcome in the institution. A "critical mass" of people of color can be quite beneficial.[147]

The significance of faculty diversity does not depend on the "false notion that there is an essential voice of persons of color" or that a faculty member's race dictates his or her particular way of thinking about one subject.[148] Instead, the idea is that people of different races and ethnicities often have different life experiences that affect their relations with members of other groups and influence their views on the subjects they teach.[149] A professor's background impacts the way he or she perceives the world. Paul Brest and Miranda Oshige use the example that African Americans regularly encounter discrimination not experienced by whites. Expanding the Brest and Oshige arguments, imagine the difference between a class discussion on racial profiling in an all-white lecture and a similar class discussion in a racially diverse lecture. The discussions would be very different in each setting and arguably more fruitful in the latter setting. Brest and Oshige write: "Policies that seem 'neutral' to a dominant group may have quite different meanings for members of other racial or ethnic groups. This has important implications both for the interpersonal and intellectual lives of students and faculty."[150]

Critics argue that consideration of race in faculty hiring equals reverse discrimination.[151] Other concerns, as mentioned in the *Farmer* dissent, involve how affirmative action plans consider faculty of mixed-ancestry or minority immigrant faculty members. In *Farmer*, it could be argued that the black professor, as an immigrant, was never disadvantaged by past discrimination. Under this reasoning, the remedial argument present in the public employment cases would not apply. After *Adarand*, one could argue that a university's motive in considering race in faculty hiring does not meet the requisite standard that remedies be narrowly tailored to address specific instances of past discrimination. However, it is equally arguable that professors who have lived abroad would certainly contribute to the learning environment on campuses.

Currently, most data is in regard to student body diversity. But, some

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146. *See generally* Alexander W. Astin, *What Matters in College? Four Critical Years Revisited*, (Jossey-Bass 1992) (reviewing the college satisfaction experiences of 20,000 students).

147. *See* Brest, *supra* n. 145, at 856 n. 4.

148. Dubin, *supra* n. 145, at 456 (citing Brest, *supra* n. 142, at 862).

149. *Id.*

150. Brest, *supra* n. 145, at 862.

151. *See Farmer*, 930 P.2d at 738 (Springer, J., dissenting).

of the arguments for student body diversity could extend to maintaining a diverse faculty.[152] Jonathan Alger, counsel to the American Association of University Professors, notes that the presence of a diverse faculty can enhance the learning opportunities for white students, but recognizes there is little data to prove such a claim.[153] Alger does, however, note that researchers are currently studying diversity at the campus and national levels.[154] In a survey of current research on diversity, the Association of American Colleges and Universities reported that diversity initiatives positively affect both minority and white students on campus.[155] These studies indicate that "diversity initiatives have an impact not only on student attitudes and feelings toward inter-group relations on campus, but also on institutional satisfaction, involvement, and academic growth."[156] Alger suggests that in future research, "the link between educational quality and legal standards must be explored and articulated in a manner that courts will understand and accept if race-conscious affirmative action programs are to survive."[157]

VII. CONCLUSION

Most progressive educational systems seek to support a diverse faculty and to provide an educational setting that encourages diversity. Oftentimes, universities adopt affirmative action programs in faculty hiring. Some universities implement such programs to remedy past discrimination, while other universities implement these plans to increase diversity. Whatever the underlying purpose for the affirmative action plan, there are different legal issues to consider. If a university seeks a diverse faculty under the principles articulated in *Grutter* and *Gratz*, questions remain as to whether this line of reasoning extends to faculty hiring. Alternately, if the university seeks to remedy past discrimination, the public employment cases dictate the need to

152. For instance, the Harvard Civil Rights Project demonstrated that students graduating from higher-tier law schools "experienced powerful education experiences from interaction with students of other races." *See* Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *Diversity Challenged: Evidence of the Impact of Affirmative Action* 143, 172 (Gary Orfield & Michal Kurlaender eds., Harvard Educ. Publg. Group 2001). Their research also found that exposure to diverse student bodies permitted the white law students to have an improved understanding of the critical dimensions of their profession. *Id.*

153. Alger, *supra* n. 31, at 194.

154. Jonathan R. Alger, *Affirmative Action in Higher Education: Unfinished Homework for Universities: Making the Case for Affirmative Action*, 54 Wash. U. J. Urb. & Contemp. L. 73, 80–81 (1998).

155. *Id.* at 76.

156. *Id.*

157. *Id.* at 77.

assiduously document past forms of discrimination to each particular group. Until the Supreme Court gives further guidance on faculty diversity, some universities will continue to use race as a factor in faculty hiring to increase faculty diversity or to remedy past discrimination.