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LORIN J. LAPIDUS*

INTRODUCTION

In *The Odyssey*, Homer wrote,

> I, she said, was to listen to them, but you must tie me
> hard in hurtful bonds, to hold me fast in position
> upright against the mast, with the ropes' ends fastened around it;
> but if I supplicate you and implore you to set me
> free, then you must tie me fast with even more lashings.
> . . . .
> So they sang, in sweet utterance, and the heart within me
> desired to listen, and I signaled my companions to set me
> free, nodding with my brows, but they leaned on and rowed hard
> . . . .[1]

In these famous lines, the self-constraint Odysseus imposes on himself with the collective agreement of his shipmates reflects a distinct sense of rationality and pre-commitment in the face of a future that is unpredictable and dangerous. This is the essence of American constitutional jurisprudence. Just as Odysseus had his hands bound to the mast, we are bound to the rule of law as embodied in the United States Constitution.

To many, the Republic's constitutional commitment to the text and manifest purpose of the Fourteenth Amendment's Equal Protection Clause, which is to eliminate intentional racial discrimination, was fundamentally challenged by the United States Supreme Court decision in *Grutter v. Bollinger*.[2] This long anticipated deci-

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1. HOMER, THE ODYSSEY OF HOMER 189-90 (Richmond Lattimore trans., Harper Row 1977).

2. Grutter v. Bollinger, 539 U.S. 306 (2003).

sion opened an ominous gateway to a postmodern legal order where de jure racial discrimination has become institutionalized in a new form and with a new name, at least within the peripatetic haven of university life. *Grutter* has established the concept of racial diversity as a compelling state interest in public education. Following the *Grutter* decision, it is possible that the diversity rationale could reach into other areas of law, such as public employment.

The likelihood of the diversity rationale extending into the public employment context, as well as a critique of the diversity justification itself, is the central focus of this article. Part I describes the socio-political history of affirmative action in the United States from the Republic's inception through the modern era. Part II traces the constitutional trajectory of racial preferences in the educational context, culminating with *Grutter v. Bollinger* in 2003. Part III discusses the important trends in the pre-*Grutter* line of remedial affirmative action cases in the public employment context. Part IV examines the case law from the federal district and appellate courts that have applied *Grutter* in the public employment context. Finally, Part V offers predictions regarding the expansion of *Grutter*'s diversity rationale into public employment and evaluates whether the diversity rationale is appropriate in the public employment context. This article concludes that a close reading of *Grutter v. Bollinger* and the initial approaches taken by the lower federal courts indicates that it is unlikely the diversity rationale will extend far into the public employment context. The article argues that this result is entirely appropriate and consistent with the nation's socio-economic and moral traditions.

I. THE POLITICAL AND SOCIAL BACKDROP OF INSTITUTIONALIZED RACIAL PREFERENCES

The U.S. Constitution as first ratified in 1787 was a color-conscious document. For example, African slaves were not recognized citizens for representation purposes. Rather, a slave was counted as "three fifths" of a person.[3] Stripped of personhood and citizenship, a slave was constitutionally protected property. The 1787 Constitution further provided,

> No person held to service or Labour in one state, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or La-

3. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV.

> bour, but shall be delivered upon Claim of the Party to whom such Service or Labor may be due."[4]

The importation of slaves was permitted until 1808.[5]

The Republic's endorsement of slavery served as a barrier to national unity and tarnished the enlightenment principles of the Declaration of Independence.[6] While tenets of dual federalism may have been the articulated rationale for the secession of South Carolina in 1861, the institution of slavery served as the catalyst for the Civil War.[7] The constitutional protection and displacement of civil liberties based on an individual's race nearly caused the physical destruction of the Union.[8]

With the legal institution of slavery prohibited by the Thirteenth Amendment in 1865, the Republic made a conscious decision to amend the Constitution to ensure that no state may "deny to any person within its jurisdiction the equal protection of the laws."[9] The primary goal of the Fourteenth Amendment was to create a framework for governance that no longer recognized race as a legitimate means of distributing constitutional burdens and benefits.[10] Despite the new Amendment, discrimination continued to emanate through southern life. Jim Crow laws intentionally discriminated against the newly freed slaves by disallowing material integration into general society.[11] Blacks were disenfranchised by the imposition of insurmountable barriers, such as the grandfather clause and the literacy test for suffrage.[12] Thus, violation of constitutional protections and displacement of civil liberties on the basis of an individual's race continued. However, while this color-consciousness did not cause the physical destruction of the Union, it did, perhaps more harmfully, result in the moral destruction of Fourteenth

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4. U.S. CONST. art IV, § 2, cl. 3, *repealed by* U.S. CONST.. amend. XIV.

5. U.S. CONST. art. I, § 9, cl. 1, *repealed* in 1808.

6. 1 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 241 (7th ed. 1991).

7. *Id.*

8. *Id.*

9. U.S. CONST. amend. XIV, § 1.

10. *See id.*

11. KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 146-47 (1989).

12. *Id.* Both the literacy test and grandfather clause operated to greatly reduce if not practically eliminate the ability of the newly freed slaves to vote. *Id.* While literacy tests required potential voters to read sections of fairly esoteric historical or literary material, the grandfather clause mandated that, to qualify as a voter, a potential voter's grandfather must have been a registered voter. *Id.*

Amendment Equal Protection Clause by failing to safeguard the very principle it was created to advance.

Unfortunately, the Supreme Court adopted the color-conscious ideology with its approval of the separate-but-equal doctrine in *Plessy v. Ferguson*.[13] Despite this constitutional setback, Justice John Marshall Harlan offered a glimmer of hope in his dissenting opinion when he articulated his disapproval of the protection of rights based on race.[14] Justice Harlan wrote, "But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens."[15] Ultimately, Justice Harlan's imagery of the colorblind Constitution stands for the premise that civil liberties may not be protected, advanced, or inhibited on the basis of a citizen's race.[16] This learned principle finally came to constitutional fruition in *Brown v. Board of Education*.[17] After nearly six decades, the hostility of the Jim Crow era finally faded into the dark annals of American constitutional history.[18] *Brown* represented the proposition that black students' educational rights, and civil liberties in general, could no longer be disadvantaged because of their race, nor could white students' rights continue to be advanced because of their race.[19] Chief Justice Warren wrote, "Today, education . . . perhaps [one of] the most important functions of state and local government . . . is a right which must be made available to all on equal terms."[20]

Nevertheless, some endings fail to represent new beginnings. The counter-culture resistance of the 1960s rejected many of the values of equality established during the previous decade.[21] The loss of trust in government, intensified by Vietnam and Watergate, caused Americans to be wary of official motives.[22] Moreover, groundbreaking events such as James Meredith's attempt to enter the University of Mississippi amid a flurry of racial hysteria forever

13. 163 U.S. 537, 544, 551-52 (1896).
14. *Id.* at 559.
15. *Id.*
16. *See id.*
17. 347 U.S. 483, 493 (1954).
18. *Id.*
19. *Id.*
20. *Id.*
21. 2 ALFRED H. KELLY ET AL., THE American Constitution: Its Origins and Development 598, 612 (7th ed. 1991).
22. *Id.*

changed both the moral and constitutional trajectory of American society.[23] It was during this era that the focus on liberty and equality of rights, foundational principles of the Republic, and the Fourteenth Amendment was replaced with the *equality plus paradigm*.[24] With *equality plus*, the Constitution's once paramount negative liberties, enshrined in the Bill of Rights and the Civil War Amendments, were to morph into affirmative entitlements and special privileges.[25] *Equality plus* then administered these entitlements and privileges to the descendants of historically disadvantaged citizens based on immutable characteristics such as race.

The term *affirmative action* appeared officially for the first time in 1935 in the National Labor Relations Act.[26] The term began to take on its more contemporary meaning in 1961, even before the 1964 Civil Rights Act was passed.[27] President Kennedy issued Executive Order 10925, which went far beyond prohibiting discrimination.[28] Executive Order 10925 required federal contractors to take *affirmative action* to ensure that applicants were employed and treated fairly during the term of their employment.[29] An Executive Order promulgated by President Johnson in 1965 broadened the Kennedy Order by creating the Office of Federal Contract Compliance, which monitored the participation levels of minorities and women and developed timetables for the prompt creation of equal employment opportunity.[30] Finally, under the Nixon Administration, Revised Order 4 required contractors to add minorities and women to their affirmative action plans and develop goals for correcting deficiencies.[31]

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23. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 391-92 (3d ed. 1998).

24. 2 KELLY ET AL., *supra* note 21, at 609 (stating that official evenhandedness is not enough and government must take an affirmative role in leveling the playing field for minorities by providing racial preferences in state-created educational and employment opportunities).

25. *See* Patricia A. Cain, *The Right to Privacy under the Montana Constitution: Sex and Intimacy*, 64 MONT. L. REV. 99, 127 (2003) (explaining that negative liberty is simply the right to be free from government intrusion and regulation).

26. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)); *see* Martha West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 611-12 (1998) (explaining that if an employer violates the NLRA by discriminating against an employee for concerted union activity, the NLRB remedies the violation by ordering the employer to take "affirmative action," including reinstatement and/or back pay).

27. West, *supra* note 26, at 613-14.

28. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

29. *Id.* at §§ 301-302.

30. West, *supra* note 26, at 613-14.

31. *Id.* at 614.

The scope of affirmative action, or taking race or gender into account when making employment decisions, was broadened in the 1970s in the field of student admissions.[32] The Department of Housing, Education, and Welfare amended its regulations implementing Title VI, which provides that there shall be no discrimination in federally funded educational institutions.[33] The regulations instructed institutions to consider race to overcome low minority enrollment.[34] The American Association of Law Schools recognized in the 1960s that "there was a long tradition of separateness between the [top] schools" in the nation, which attempted to preserve Anglo-Saxon Protestant domination of the legal profession, and the poorer schools, which accepted large numbers of socio-economically disadvantaged students.[35] Racial preferences were seen as a way to level the field of competition and create new educational opportunities for minorities.[36]

II. Navigating the Choppy Waters of Affirmative Action in Public Education: The Constitutional Trajectory

A. Bakke's *Legacy: The Great Battle of the Circuits*

The Supreme Court's first consideration of racial preferences in the context of public university admissions came in a 4-1-4 split opinion in *Regents of the University of California v. Bakke*.[37] In *Bakke*, the Court considered whether the University of California at Davis Medical School's dual admissions policy complied with the Equal Protection Clause of the Fourteenth Amendment.[38] The admissions policy set quotas to ensure a certain number of seats for minority applicants.[39] Although all applicants were judged pursuant to the same characteristics, minority applicants competed only against each other before a special minority admissions committee for a predetermined number of places in the incoming class.[40]

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32. *Id.* at 619.
33. 37 Fed. Reg. 24,686-24,696 (Nov. 18, 1972).
34. *Id.*
35. Anthony J. Scanlon, *The History and Culture of Affirmative Action*, 1988 B.Y.U. L. Rev. 343, 345 (1988).
36. Frank Rene Lopez, *Pedagogy on Teaching Race and Law: Beyond "Talk Show" Discussions*, 10 Tex. Hisp. J. L. & Pol'y 39, 44 (2004).
37. 438 U.S. 265 (1978).
38. *Id.* at 269-70.
39. *Id.* at 275-76.
40. *Id.* at 274-75.

Justice Powell, providing the swing vote for the use of strict scrutiny, announced the Court's puzzling judgment. The plurality found the affirmative action program unconstitutional as a violation of the Equal Protection Clause.[41] Surviving strict scrutiny review requires that the University's consideration of race serve a compelling state interest and be narrowly tailored to achieve that interest.[42] The plurality held that although racial diversity could be a compelling state interest because a diverse student body contributes to the robust exchange of ideas,[43] the strict quota policy was not a narrowly tailored means to achieve the objective of diversity.[44]

Justice Powell articulated that "race or ethnic background may be deemed '*a plus*'" in weighing the many factors in favor of an applicant.[45] Justice Powell pointed to a model program existing at Harvard University as the paradigm for the affirmation of his analysis.[46] While Justice Powell wrote that "'societal discrimination' does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered," he also envisioned a future in which the "robust exchange" of ideas of diverse groups will advance the cause of academia.[47] A fair reading of *Bakke* still seems to affirm the supremacy of the Fourteenth Amendment as a shield rather than a sword.[48] *Bakke* represents the crossroads between the remedial and diversity mod-

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41. *Id.* at 320.
42. *Id.* at 299.
43. *Id.* at 312.
44. *See id.* at 319-20.
45. *Id.* at 312.
46. *Id.* at 316; *see* Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where do Universities Go From* Gratz *and* Grutter*?*, 33 J. L. & EDUC. 21, 25 (2004) (explaining that the Harvard Plan is a holistic model that considers race as one "plus" factor among many different considerations that could include geography or personal experiences when evaluating potential candidates for students in educational institutions). *But see* Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379, 385-90 (1979) (noting that the Harvard Plan had its genesis as a Jewish quota designed to achieve a better reflection of the nation's population by limiting the number of Jewish students attending Harvard).
47. *Bakke*, 438 U.S. at 310-12 (quoting Keyishan v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
48. *See generally* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1533-34 (1972) (explaining that the constitution may be used as a shield by providing protection from the arbitrary exercise of state power, while the constitution as sword concept envisions constitutional provisions that appear to prohibit state action to go one step further and permit affirmative remedies for constitutional violations).

els, in which the Court tries to establish its own footing with respect to the priority of remedial interests, societal discrimination and diversity.[49]

Nonetheless, the only clear consequence of *Bakke* is confusion in the federal circuits since it was decided in 1978. In the several years following *Bakke*, a deep ideological rift developed between the Fifth Circuit in Texas and the Sixth Circuit in Michigan over the use of race in the admissions decisions of each state's law schools.

In *Hopwood v. State of Texas*, the Fifth Circuit concluded that *Bakke* was not binding because Justice Powell's decision did not represent a majority, and held that the University of Texas School of Law discriminated in favor of minority applicants by giving them a substantial racial preference in its admissions program.[50] In practice, the University of Texas treated a special group of minorities, particularly African and Mexican Americans, differently than all other candidates.[51] In fact, African and Mexican Americans were placed on entirely separate admission tracks where lower standards were acceptable for admission.[52] The minimum Texas Index (TI) admission score for resident whites and non-preferred minorities was 199, while "Mexican Americans and blacks needed a TI of only 189 to be presumptively admitted."[53] As a result, the Texas admission program would admit "a minority candidate with a TI of 189 . . . even though his score was considerably below the level at which a white candidate almost certainly would be rejected."[54] Therefore, the separate admission criteria created a substantial racial preference and a dual admission standard.[55] Although no positions were set aside or reserved, the purpose of lower standards was, as the University of Texas described it, "to meet 'an aspiration' of admitting a class consisting of 10% Mexican Americans and 5% Black."[56]

The court noted, "The central purpose of the Equal Protection Clause 'is to prevent states from purposefully discriminating between individuals on the basis of race.'"[57] Applying strict scrutiny,

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49. *Bakke*, 438 U.S. at 310-12 (quoting Keyishan v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

50. Hopwood v. State of Texas, 78 F.3d 932, 944, 965 (5th Cir. 1996), *abrogated by* Grutter v. Bollinger, 539 U.S. 306, 316 (2003).

51. *Id.* at 936.

52. *Id.*

53. *Id.*

54. *Id.* at 937.

55. *See id.*

56. *Id.*

57. *Id.* at 939-40 (quoting Shaw v. Reno, 509 U.S. 630, 642 (1993)).

the *Hopwood* court ruled that "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."[58] The court reasoned that such consideration "frustrates, rather than facilitates, the goals of equal protection" by perpetuating improper stereotypes.[59] The court viewed "modern equal protection doctrine as recognizing only one compelling state interest . . . : remedying the effects of de jure racial discrimination."[60] In essence, a compelling state interest may not be used to remedy general societal biases and private actions that have no nexus to state action.[61] Hence, to satisfy strict scrutiny, the *Hopwood* court would have had to find that the law school was a de jure discriminator *and* that there were present effects of past discrimination.[62] The *Hopwood* court found no such evidence.[63]

In addressing the diversity rationale, the court stated that the rationale fosters rather than minimizes racial inequality by "treating minorities as a group, rather than as individuals."[64] The Fifth Circuit panel reasoned that the diversity rationale promoted improper stereotypes through the belief that a person's race controls his point of view.[65] The court deemed the diversity model irrational because it was synonymous with choosing applicants "based upon the physical size or blood type."[66] In the end, the Fifth Circuit viewed the diversity rationale as a self-defeating mechanism that thwarts the goal of ending racially motivated state action.[67]

A few years after the Fifth Circuit decided *Hopwood*, the Supreme Court encountered another law school affirmative action plan, this one developed in Michigan.[68] *Grutter v. Bollinger* would finally allow the Supreme Court to revisit the issues considered in *Bakke* and announce a rule that either supported or weakened the controversial 4-1-4 split. *Grutter* began when a white female from Michigan with a 3.8 GPA and a 161 LSAT score was denied admis-

58. *Id.* at 944.
59. *Id.* at 945.
60. *Id.*
61. *See id.*
62. *Id.* at 952.
63. *Id.* at 955.
64. *Id.* at 944-45.
65. *Id.* at 946.
66. *Id.* at 945.
67. *Id.* at 947-48.
68. Grutter v. Bollinger, 539 U.S. 306 (2003).

sion to the Law School.[69] The University of Michigan claimed to evaluate the totality of the applicant.[70] The admissions policy measured "hard factors" such as GPA and LSAT scores as well as personal statements and letters of recommendation.[71] The policy also evaluated "soft factors," including the quality of the undergraduate institution, the difficulty of the major, the enthusiasm of the recommender and, most controversially, race.[72] The University of Michigan asserted its "longstanding commitment to 'one particular type of diversity,' racial and ethnic diversity, with special reference to the inclusion of students from groups which have been historically disadvantaged, specifically African Americans and Hispanics."[73] The University's rationale for taking racial preferences into consideration during the admissions process was "to 'achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.'"[74]

To achieve this objective, the University reserved a range or group of seats of an unspecified amount for racial minorities, which it called a "critical mass."[75] It believed that a critical mass of minority students was essential to the law school because it added a unique character to the student body.[76] The Director of Admissions frequently consulted daily reports on the racial makeup of the incoming class and informed admissions workers how close they were to assembling the critical mass of minority students.[77] Michigan defined "critical mass" as a "meaningful number," that is, "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."[78] The Director of Admissions testified that if she could not consider the race of the applicant, a critical mass of minority students would not be achieved by considering LSAT scores and undergraduate GPA alone.[79] The difference between a quota and a critical mass appears to be that a quota is an officially predetermined, announced number, such as 10%. In contrast, a critical mass is an unannounced

69. *Id.* at 316.
70. *Id.* at 314-15.
71. *Id.* at 315.
72. *Id.* at 315-16.
73. *Id.* at 316.
74. *Id.* at 315 (citation omitted).
75. *Id.* at 316.
76. *Id.* at 315-16.
77. *Id.* at 318.
78. *Id.* at 318-19.
79. *Id.* at 318.

target percentage or range that varies between two reasonably close outer limits, such as between 9% and 12%. A quota and a previously undetermined critical mass appear to be functional equivalents.[80]

On appeal, the Sixth Circuit applied strict scrutiny and held that the University of Michigan Law School's admissions policy was narrowly tailored to serve a compelling interest in achieving a diverse student body.[81] Unlike the Fifth Circuit in *Hopwood*, the Sixth Circuit in *Grutter* felt bound by stare decisis: it had to follow Justice Powell's decision in *Bakke* because his opinion provided the narrowest support for the Court's judgment.[82] The *Grutter* opinion focused on the notion that when race is used as a plus, it enhances diversity because "a 'black student can often bring something [to the university] that a white person cannot offer.'"[83] In addition, the Sixth Circuit opined that the Michigan plan was drafted to comply with *Bakke* because the critical mass application was not a quota in that the applicants were treated as individuals and all pertinent elements of diversity were taken into consideration.[84]

B. *The O'Connor Factor: The High Court Endorses the Diversity Rationale in Education*

Grutter v. Bollinger finally made it to the Supreme Court.[85] In the end, as many keen Court watchers had predicted, Justice O'Connor lived up to her recent reputation of siding with the socially progressive members of the Court on highly charged individual rights issues.[86] Justice O'Connor was the deciding vote on the question whether racial diversity is a compelling state interest.[87] She decided that it is a compelling state interest, and that, when achieved through the critical mass model, an affirmative action plan

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80. *See id.* at 378-79 (Rehnquist, J., dissenting).

81. Grutter v. Bollinger, 288 F.3d 732, 742, 748 (6th Cir. 2002).

82. *Id.* at 742. The court applied the rule providing that "'[w]hen a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.'" *Id.* at 739 (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

83. *Id.* at 746 (citation omitted).

84. *Id.* at 744-47.

85. 539 U.S. 306 (2003).

86. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 922 (2000) (holding that Nebraska's Partial Birth Abortion statute was unconstitutional because it imposed an undue burden on a woman's right to have an abortion).

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

survives constitutional review.[88]

The Supreme Court, by a 5-4 majority, endorsed the *Bakke* plurality's view that student body diversity is a compelling state interest that can justify the use of racial preferences in university admissions.[89] This decision was based on the Court's finding that diversity "helps to break down racial stereotypes" as well as to enlighten and liven classroom discussion.[90] By accepting this view, the majority applied an unprecedented version of strict scrutiny, watering the standard down to little more than rational basis review. Justice O'Connor set this tone by deciding that strict scrutiny must take context into consideration in a significant way.[91] Thus, in *Grutter*, strict scrutiny included a good-faith reliance on the "educational judgment" of the school "that diversity is essential to its educational mission."[92] Part of the law school's compelling interest was assuring that minority students have a place within the student body.[93] This was especially important because minority students were "less likely to be admitted in meaningful numbers on [the basis of their LSAT scores and undergraduate GPA alone]."[94]

Next, the *Grutter* majority analyzed the critical mass system under the second prong of the strict scrutiny test. The Court found that the University's system was narrowly tailored to achieve racial diversity in the higher education setting, the compelling state interest first announced in *Bakke*.[95] While the Court held that a fixed numerical quota is unconstitutional, it accepted the concept of a critical mass.[96] Justice O'Connor ruled that an impermissible quota exists where a fixed number of seats are reserved exclusively for minority students, but explained that "'[s]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota."[97] Consequently, the Court endorsed the state's right to reserve seats for minority students, to form a critical mass, so long as the institution does not announce beforehand exactly how many seats or precisely what percentage of the class the critical mass will make up in a particular year. The University of

88. *Id.*
89. *See id.* at 327-28.
90. *Id.* at 330.
91. *Id.* at 327.
92. *See id.* at 328.
93. *See id.* at 338.
94. *Id.*
95. *Id.* at 334; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).
96. *Grutter*, 539 U.S. at 335-36.
97. *Id.* at 336.

Michigan's critical mass concept appears to have survived strict scrutiny because the admissions committee stated that it evaluates all factors, including race, that contribute to student body diversity.[98] In practice, the institution can adhere to an unfixed range of minority applicants, for example, between X% and Y% of African Americans. In short, the means are permissible as long as the institution does not pre-announce a fixed number, and promises to look at all factors in the admissions equation to reach its goal of achieving a diverse student body.

The Supreme Court proceeded with its unusual deference to the university under the strict scrutiny analysis by articulating that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," including lowering standards for entrance, but merely requires a "serious, good faith consideration of workable race-neutral [methods] that will achieve the diversity the university seeks."[99] The Court also upheld the Law School's program despite its lack of a sunset provision.[100] It took "the Law School at its word that it . . . will terminate [the] race-conscious[ ] program as soon as practicable."[101] The Court stated in dicta that it expected that in twenty-five years, the use of racial preferences would no longer be necessary to further the interest of racial diversity.[102]

III. THE REMEDIAL FRAMEWORK OF AFFIRMATIVE ACTION IN PUBLIC EMPLOYMENT: FROM *WYGANT*[103] TO *ADARAND*[104]

A. *Case Law Analysis*

The development of racial preferences in public employment began in 1986 with the members of the High Court sparring over the meaning of equality.[105] For the next several years, opinions riddled with pluralities and, consequently, uncertainties, fostered confusion regarding the appropriate level of scrutiny to be applied to

98. *Id.* at 336-37.
99. *Id.* at 339.
100. *Id.* at 343, 341-42 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).
101. *Id.* at 343.
102. *See id.* (implying that racial diversity will still be a compelling state interest).
103. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
104. Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995).
105. *See Wygant*, 476 U.S. at 267.

affirmative action in public employment.[106] Led many times by the newly appointed Justice O'Connor, the Court tried to establish equilibrium within the American common law.[107] The fundamental ideological debate centered on the nature of the discrimination itself, and against whom the discrimination was directed.[108] While some Justices deemed benign discrimination a permissible method of fostering equality, other Justices felt that attempting to force equality through inequality was self-defeating.[109] Ultimately, in 1989, and again in 1995, the Court respectively adopted and reaffirmed the strict scrutiny test as the constitutionally correct level of review in so-called benign discrimination cases.[110] However, the path from *Wygant* to *Adarand* with its many concurrences and dissents leaves two fundamental issues still somewhat uncertain: (1) how rigorously will strict scrutiny actually be applied; and (2) are there any non-remedial purposes, such as racial diversity as recognized in the educational context in *Grutter*, that can serve as a compelling state interest in the context of public employment?

1. *Wygant v. Jackson Board of Education*

In *Wygant v. Jackson Board of Education*, Justice Powell led the plurality in announcing a framework that addressed what can, and more notably what cannot constitute a compelling state interest under strict scrutiny in the public employment context.[111] *Wygant* considered the issue of "whether a school board . . . may extend preferential protection against layoffs to [minority teachers]" in accordance with the Equal Protection Clause.[112] A provision in the Collective Bargaining Agreement between the Jackson School Board and its teachers "protect[ed] employees who were members of certain minority groups" from being laid off.[113] The provision created a statistical model that commanded the board not to lay off a greater percentage of minority teachers than were currently work-

106. *Compare Wygant*, 476 U.S. at 267, *and* Metro Broad. Inc. v. FCC, 497 U.S. 547, 566 (1990), *with Adarand Constructors, Inc.*, 515 U.S. at 200.

107. *See Adarand Constructors, Inc.*, 515 U.S. at 204; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476 (1989).

108. *J.A. Croson Co.*, 488 U.S. at 535 (Marshall, J., dissenting); *see id.* at 527 (Scalia, J., concurring).

109. *See id.* at 535 (Marshall, J., dissenting); *id.* at 527 (Scalia, J., concurring).

110. *Id.* at 493-94 (majority opinion); *Adarand Constructors Inc.*, 515 U.S. at 227.

111. *Wygant*, 476 U.S. at 274-76.

112. *Id.* at 269-70.

113. *Id.* at 270.

ing for the board at the time.[114] Thereafter, the non-minority teachers brought an Equal Protection action in federal district court, where the program was upheld.[115] Applying rational basis, the court reasoned that no finding of prior discrimination was required and that the goal of providing role models for young minority students was sufficient to uphold the layoff provision.[116]

On review, the Supreme Court reversed the Sixth Circuit's affirmation of the district court's ruling.[117] The plurality began by noting "that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."[118] Even though the discriminatory classification operates against whites, it is nevertheless a classification based on race.[119] The plurality announced strict scrutiny as the constitutionally correct analysis and found that the Board's plan fell short of this stringent test.[120] The plurality noted that it had never held that general notions of societal discrimination are, in themselves, sufficient to meet the compelling government interest requirement.[121] "Rather, . . . some showing of prior discrimination by the governmental unit involved" is the benchmark for having a proper remedial purpose.[122] "Societal discrimination, without more is too amorphous . . . ."[123] To make the proper evidentiary showing, the fact finder must believe "that the employer had a *strong basis in the evidence* for its conclusion that remedial action was necessary."[124] A proponent must demonstrate the existence of identified state discrimination reflected by a significant statistical disparity between the racial composition of the school teaching staff and qualified minorities in the local labor pool, as well as anecdotal evidence.[125] The Court stressed that in the absence of these findings, a court could uphold remedies that are "ageless in their reach into the past, and timeless in their ability to affect the future."[126] In that spirit, the Court re-

114. *Id.*
115. Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195, 1204 (D. Mich. 1982).
116. *Id.* at 1202-03.
117. *Wygant*, 476 U.S. at 284.
118. *Id.* at 273.
119. *Id.*
120. *Id.* at 283-84.
121. *Id.* at 274.
122. *Id.*
123. *Id.* at 276.
124. *Id.* at 277 (emphasis added).
125. *Id.* at 274-76.
126. *Id.* at 276.

jected the Board's role model theory because it lacked a valid *remedial* purpose.[127] The idea that black students are better off with black teachers was offensive to the Court because it represented a pre-*Brown* mentality.[128]

In discussing the narrow tailoring prong, the plurality focused primarily on the rights of non-minorities by considering the heavy burden imposed on them by the preferential layoff provision.[129] Although some impact on the rights of the majority is tolerable, the means chosen by the Jackson County School Board placed it out of the realm of constitutionality because of the encumbrance of losing of an existing job, and hence, losing seniority.[130] The plan was not narrowly tailored because race-neutral alternatives were not adequately considered, and the range of minorities included a non-specific and overly broad collection of the nation's diverse races.[131]

Perhaps more intriguing than the plurality opinion is Justice O'Connor's concurrence. This opinion, in many ways, foreshadowed her majority opinion in *Grutter*.[132] Although O'Connor announced that the Court was applying strict scrutiny, she began her analysis by stating that the distinction between a *compelling* and an *important* governmental purpose may be negligible.[133] In addition, O'Connor noted that the "remedial purpose need not be accompanied by contemporaneous findings," and that even a *non-remedial* purpose might qualify as a compelling government interest.[134] Justice O'Connor opined 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 considerations to further that interest."[135] Therefore, at least in *Wygant*, O'Connor left open the possibility that the racial diversity rationale announced in *Grutter* might emerge in the public employment context.[136] While *Wygant* centered upon the compelling government interest component of strict scrutiny in the employment context, the precise form of the narrow tailoring prong still required outlining.

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127. *Id.*
128. *Id.*; *see also supra* text accompanying notes 17-21.
129. *Wygant*, 476 U.S. at 282-83.
130. *Id.* at 283-84.
131. *Id.* at 284 n.13.
132. *Id.* at 284-94 (O'Connor, J., concurring).
133. *Id.* at 286.
134. *Id.*
135. *Id.*
136. *Id.* at 287.

2. *United States v. Paradise*

In *United States v. Paradise*, the Supreme Court specified a number of balancing considerations to guide lower courts in determining whether an affirmative action plan was narrowly tailored.[137] The question in *Paradise* was whether a district court-ordered requirement of a 50% promotion for black Alabama state troopers was a violation of the Equal Protection Clause of the Fourteenth Amendment.[138] The suit began in 1972 with a federal district court finding that the Alabama police department had systematically excluded blacks from employment.[139] The district court determined that in its thirty-seven year history, the patrol never had a black trooper.[140] The district judge formed a plan to combat Alabama's discrimination of African Americans.[141] The district court ordered injunctive relief and instructed the Department to "hire one black trooper for each white trooper hired until [qualified] blacks constituted approximately 25% of the state trooper force."[142] After more than a decade of court supervision, the department never made meaningful progress, and in 1983, a final court order provided that for a limited period, "at least 50% of the promotions to corporal must be awarded to black troopers, if qualified black candidates were available."[143] The Eleventh Circuit affirmed the district court's order.[144] It concluded that the relief at issue was a temporary remedy intended to correct the egregious effects of past racial discrimination.[145]

The trouble in *Paradise* began with the Supreme Court, once again, conjuring up a paltry plurality, led by Justice Brennan.[146] The Court therefore failed to reach a consensus on the appropriate level of judicial scrutiny. The plurality held that the affirmative action plan survived strict scrutiny, so it was not necessary to reach a majority consensus on the level of scrutiny.[147] The plurality further held that the Alabama plan was narrowly tailored to achieve a com-

137. 480 U.S. 149, 171 (1987).
138. *Id.* at 153.
139. *Id.* at 154.
140. *Id.* at 159.
141. *Id.* at 154-55.
142. *Id.*
143. *Id.* at 162, 163.
144. *Id.* at 165.
145. *Id.* at 165-66.
146. *See id.* at 153.
147. *Id.* at 166-67.

pelling government interest.[148] *Paradise* confirmed *Wygant*'s central principle that the government "has a compelling interest in remedying past and present discrimination by the state actor."[149] Four decades of state exclusion of blacks from upper rank positions unquestionably created a compelling state interest in remedying a hiring process that was riddled with discrimination.[150]

The Court announced a set of balancing considerations that are still used by lower courts to ascertain whether an affirmative action plan meets the narrow tailoring requirement.[151] Courts must look to the following factors: (1) "the necessity for the relief"; (2) "the efficacy of [race-neutral] alternative remedies"; (3) "the flexibility and duration of the relief, including the availability of waiver provisions"; (4) "the relationship of the numerical goals to the relevant labor market [statistics]"; and (5) "the impact of the relief on" third party rights.[152]

In applying the announced factors, the *Paradise* plurality found that the 50% promotion quota was narrowly tailored.[153] First, the plurality ascertained that the relief chosen was necessary to achieve the objective sought due to Alabama's tumultuous racial past and manifest disregard of the district court's order to correct past effects of discrimination.[154] Second, even race-neutral alternatives proposed by Alabama failed to correct expeditiously the effects of past discrimination.[155] Third, the practical operation of the 50% promotion requirement was adequately "flexible, waivable, and temporary."[156] Such flexibility included a waiver of the racial preference plan if no qualified black candidates were available.[157] Fourth, the court-ordered plan would only last until the department came up with a promotion procedure that discontinued official discrimination against African Americans.[158] Flexibility was also demonstrated because the 50% requirement was simply a means to achieve the goal of 25% representation.[159] Finally, the Court held

148. *Id.* at 167.
149. *Id.*
150. *Id.* at 170.
151. *Id.* at 171.
152. *Id.*
153. *Id.* at 185-86.
154. *Id.*
155. *Id.* at 172.
156. *Id.* at 178.
157. *Id.* at 177.
158. *Id.* at 178.
159. *Id.* at 163-64.

that the affirmative action plan "did not impose an unacceptable burden on innocent third parties."[160] After all, the plan did not "require the layoff and discharge of white employees."[161] Ultimately, the announcement of the balancing test created a situation in which no stringent rules would control the constitutionality of racial preferences in employment. Rather, the jurisprudence would develop on a case-by-case basis. Any or all of these factors could be applied fully, or in part, depending on the specific case on review. A meaningful amount of discretion was left with the judicial branch. However, with discretion comes uncertainty.

As in *Wygant*, Justice O'Connor's dissenting opinion in *Paradise* demonstrated how a swing vote could affect the expansion of *Grutter* into public employment. Justice O'Connor began by criticizing the majority's application of the strict scrutiny test, writing that although "[t]he plurality today purports to apply strict scrutiny, . . . the Court adopts a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny."[162] Although Justice O'Connor did not view the affirmative action plan as a rigid quota, she acknowledged that more flexible goals might also "trammel unnecessarily" the rights of non-minorities and must be done sparingly.[163] One of Justice O'Connor's central concerns was that the plan was not "truly designed to eradicate the past effects" of discrimination.[164] More dramatically, the one-for-one promotion quota "far exceeded the percentage of blacks in the trooper force."[165] Hence, the statistical comparison between the percentage of minority workers to be promoted and the percentage of minority group members in the relevant work force was improperly skewed.[166] Justice O'Connor felt that the promotion goal must have a "closer relationship to the percentage of [minority group members] eligible for promotions" in the local labor pool.[167]

Justice O'Connor next criticized the lack of good-faith consideration of race-neutral alternatives such as "appoint[ing] a trustee to develop a promotion procedure that would satisfy the terms of the consent decrees."[168] In O'Connor's view, at the very least, strict

160. *Id.* at 182.
161. *Id.*
162. *Id.* at 196-97.
163. *Id.* at 197.
164. *Id.* at 198.
165. *Id.*
166. *Id.*
167. *Id.* at 199.
168. *Id.* at 200.

scrutiny required "that the District Court expressly evaluate the available alternative remedies."[169]

Ultimately, Justice O'Connor wrote that the affirmative action plan failed the narrow tailoring prong because it imposed a racial quota and did not adequately consider the efficacy of race-neutral alternatives.[170] This dissenting opinion is particularly surprising when compared with O'Connor's majority opinion in *Grutter*, in which she stood on the opposite side of the fence.[171] In *Grutter*, Justice O'Connor applied the same form of watered down strict scrutiny she condemned in *Paradise*.[172] A few years after *Paradise*, in *City of Richmond v. J.A. Croson Co.*, the Supreme Court decided in a 6-3 opinion that strict scrutiny analysis is the appropriate test for courts to apply when examining state affirmative action programs.[173] This consensus was, however, short-lived.

3. *City of Richmond v. J.A. Croson Co.*

In *Croson*, the Justices split along ideological lines in a barrage of divergent opinions.[174] *Croson* subtly returned to the pre-1989 debate over whether non-remedial interests can be compelling and whether benign discrimination is constitutional.[175] This case went beyond technicalities and provided insight into the Court's division over the constitutional value of racial preferences, an issue that remains contentious.[176]

The *Croson* saga began in 1983 when the Richmond City Council adopted the Minority Business Utilization Plan.[177] This plan, declared "remedial in nature," required prime contractors receiving city contracts "to subcontract at least [30%] of the dollar

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169. *Id.* at 201.

170. *Id.*

171. *Compare* United States v. Paradise, 480 U.S. 149, 201 (1987) (O'Connor, J., dissenting) (arguing that although the plurality purports to apply "strict scrutiny," the Court, in actuality, adopted a standardless review of the narrowly tailored component of strict scrutiny, much less stringent than required by traditional form of review), *with* Grutter v. Bollinger, 539 U.S. 306, 327 (2003), in which Justice O'Connor led the majority and accepted a much more relaxed application of strict scrutiny's narrow tailoring prong by not requiring a sunset provision and minimizing the duty of the law school to try race neutral admission alternatives.

172. *Grutter*, 539 U.S. at 327.

173. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989).

174. *Id.* at 511 (Stevens, J., concurring); *id.* at 520 (Scalia, J., concurring); *id.* at 528 (Marshall, J., dissenting).

175. *Id.* at 476-77 (majority opinion).

176. *Id.* at 511 (Stevens, J., concurring); *id.* at 520 (Scalia, J., concurring); *id.* at 528 (Marshall, J., dissenting).

177. *Id.* at 477 (majority opinion).

amount of these contracts to Minority Business Enterprises"("MBEs").[178] An MBE is a business in which "at least [51%] . . . is owned and controlled . . . by minority group members."[179] Minorities who qualified under the plan included "citizens . . . who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts."[180] A waiver would be granted only under exceptional circumstances.[181] Proponents of the plan relied on statistics showing that while Richmond's general population was 50% black, only 0.67% of the city's construction contracts were awarded to minority businesses from 1978 to 1983.[182] The controversy arose when Richmond compelled Croson, a general contractor, to offer a subcontract to a minority firm, which ended up raising the cost of the project.[183] The city denied Croson's request for a waiver, or in the alternative, an overall increase in the contract price.[184] Croson then filed suit against the City under § 1983.[185] He contended that the Richmond ordinance was unconstitutional both facially and as applied to his case.[186]

The central issue addressed was whether Richmond's 30% requirement for minority subcontractors violated the Equal Protection Clause.[187] The Court, led by Justice O'Connor, began by announcing strict scrutiny as the touchstone for constitutional review.[188] The Court held that the city's plan failed the strict scrutiny test because it was unable to show a compelling governmental interest.[189] Justice O'Connor concluded that none of the city's findings provided Richmond with a strong basis for its conclusion that remedial action was necessary; the 30% financial quota could not be realistically tied to an injury suffered by an individual citizen of Richmond.[190] The generalized finding of societal discrimination reached by comparing the number of blacks in the local community to the number of black subcontractors awarded city contracts was

178. *Id.* at 477-88.
179. *Id.* at 478.
180. *Id.*
181. *Id.*
182. *Id.* at 479-80.
183. *Id.* at 482-83.
184. *Id.* at 483.
185. *Id.*
186. *Id.*
187. *Id.* at 477-78.
188. *Id.* at 493.
189. *Id.* at 498-99.
190. *Id.* at 499.

wholly improper.[191] The proper statistical comparison is the ratio of qualified black subcontractors in the local labor market to the number of minority owned business that are awarded city contracts.[192]

In conducting the narrow tailoring analysis, Justice O'Connor indicated that the program was flawed because the 30% quota was a rigid target that was completely unrelated to a proper remedial purpose and could only have served the unconstitutional goal of "outright racial balancing."[193] In addition, the plan was over-inclusive because it included obscure minority groups whose histories were relatively unscathed by this Republic's racist past.[194] Finally, Richmond failed to discuss adequately, or even consider, viable race-neutral alternatives to its race-based quota.[195] Such alternatives should have included "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races."[196] Justice O'Connor stressed the importance of the temporary nature of racial preferences to ensure that deviation from equal treatment has meaningful limits.[197]

Croson also provided insight into some of the Justices' core ideologies. For example, Justice O'Connor felt that the Richmond plan was unconstitutional because the determination was based solely on race.[198] Therefore, it is reasonable to expect, as *Grutter* illustrates, that O'Connor would uphold a plan where race is accompanied by other factors. Justice O'Connor also highlighted the importance of strict scrutiny as a means of discerning benign or remedial classifications from those motivated by racial politics.[199] Hence, in Justice O'Connor's view, it appears there is a difference between discrimination aimed at the minority and discrimination aimed at the majority to correct the discrimination directed at the minority. Yet, in contrast to her concurrence in *Wygant*,[200] Justice

191. *Id.* at 501-02.
192. *Id.*
193. *Id.* at 507.
194. *Id.* at 506.
195. *Id.* at 507.
196. *Id.* at 509-10.
197. *Id.* at 510.
198. *See id.* at 493.
199. *Id.*
200. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284-86 (1986) (O'Connor, J., concurring) (implying that even a non-remedial purpose such as racial diversity might qualify as a compelling government interest).

O'Connor articulated that "[u]nless [racial classifications] are strictly reserved for remedial settings, they may [exacerbate] notions of racial inferiority and lead to . . . racial hostility."[201] Therefore, Justice O'Connor's reasoning in *Croson* seems to reject her earlier argument that other non-remedial interests, such as racial diversity, should qualify as compelling governmental interests under the first prong of the strict scrutiny analysis.[202]

Justice Stevens took a view similar to that of Justice O'Connor in *Wygant*.[203] Although voting with the majority, Justice Stevens wrote a separate concurrence to voice his opinion that the remedial goal of correcting past or present discrimination should not be the only governmental interest considered compelling.[204] In particular, Justice Stevens implied that the government interest of racial diversity could very well withstand strict scrutiny.[205]

Justice Scalia's opinion provides an important description of the color-neutral paradigm of the Fourteenth Amendment. In Justice Scalia's view, discrimination, whether branded benign or invidious, is contrary to the text of the Fourteenth Amendment.[206] The official exercise of discriminatory racial classifications, whether directed at those whose skin is black or those whose skin is white, is equally offensive to the Constitution.[207] Justice Scalia believes that rights and benefits cannot be protected, advanced, or diminished on the basis of race.[208] Attempting to even the score is self-defeating in that it "reinforce[s] a manner of thinking . . . that was the source of the [racial] injustice" itself.[209]

Justice Marshall's opinion represents the progressive jurisprudential view of the contemporary critical race theorists.[210] According to Justice Marshall, strict scrutiny is inappropriate in some racial classification contexts.[211] Justice Marshall would require that racial

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201. *Id.*
202. *See id.*
203. *Id.* at 512-13 (Stevens, J., concurring in part and concurring in the judgment).
204. *Id.* at 511.
205. *Id.* at 511-12
206. *Id.* at 527 (Scalia, J., concurring).
207. *Id.* at 527-28.
208. *Id.*
209. *Id.* at 527.
210. *See* Rachel F. Moran, *People of Color, Women, and the Public Corporation: Whatever Happened to Racism?*, 79 ST. JOHN'S L. REV. 899, 906-12 (2005) (explaining that Critical Race Theory challenges traditional biological understandings of race and considers race a social construct that remains tainted by the legacy and institution of both intentional and subtle racism).
211. *See Wygant*, 476 U.S. at 535 (Marshall, J., dissenting).

preference plans be subject to intermediate scrutiny.[212] Under this more lenient standard, the affirmative action plan "must serve [only] important governmental objectives and must be substantially related to [the] achievement of those objectives."[213] On a broad scale, Justice Marshall considered racial discrimination designed to help minorities "by remedying the effects of discrimination" to be benign and deserving of constitutional protection.[214] Therefore, rights could more easily be protected on the basis of race if the racial classification operated against the political majority and in favor of the political minority.[215]

4. *Metro Broadcasting, Inc. v. Federal Communications Commission*

Justice Marshall's minority position became a constitutional reality just one year later in *Metro Broadcasting, Inc. v. Federal Communications Commission*.[216] One significant difference between *Croson* and *Metro Broadcasting*, however, is that *Metro Broadcasting* involved the Equal Protection component of the Fifth Amendment's Due Process Clause rather than that of the Fourteenth Amendment.[217] Leading the majority in *Metro Broadcasting*, Justice Brennan announced a new concept of equality.

Metro Broadcasting dealt with the "minority preference policies of the Federal Communications Commission."[218] The principal question was whether awarding a preference to minorities in the bidding process for the Federal Communication Commission ("FCC") licenses contravened the Equal Protection component of the Fifth Amendment.[219] The FCC defined minorities as "Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian, and Asiatic American."[220] The origin of these racial preferences began as an amendment to the Federal Communications Act of 1934.[221] In response to the scarcity of minority groups holding

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212. *See id.*

213. *Id.* (quoting Regents of Univ. of Cal. v. Bakke, 428 U.S. 265, 359 (1978)).

214. *See id.* at 552-53.

215. *See id.*

216. Metro Broad. Inc. v. FCC, 497 U.S. 547, 566 (1990) (applying intermediate scrutiny), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

217. *Id.* at 552.

218. *Id.*

219. *Id.*

220. *Id.* at 554 n.1 (citing Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979, 980 n.8 (1978)).

221. *See* 47 U.S.C. §§ 151, 301, 303, 307, 309 (1982). The amendment sought to

broadcast licenses, the FCC authorized minority preferences as a means of increasing broadcast viewpoints.[222] The FCC reasoned that diversity of opinion in broadcasting better educates the non-minority audience.[223] Race was considered a plus factor among other factors including "full-time participation in station operation by owners, . . . proposed program service, . . . [and] efficient use of frequency."[224] Metro Broadcasting challenged the constitutionality of this minority preference program when it lost a license to a minority-controlled firm.[225] The FCC Review Board overturned the administrative law judge's decision, finding that despite Metro Broadcasting's "local residence and civic participation advantage," the 90% Hispanic makeup of Rainbow Broadcasting, Metro Broadcasting's competitor for the license, warranted a substantial racial preference in Rainbow Broadcasting's favor.[226] A divided Court of Appeals for the D.C. Circuit affirmed the FCC's ruling.[227]

A majority of the Supreme Court agreed, applying a new level of scrutiny to affirm the Appeals Court decision.[228] First, the Court noted the significance of this case, which dealt with a benign minority preference program specifically mandated by Congress.[229] Due to explicit congressional direction, as opposed to state action, a greater level of deference was required.[230] According to Justice Brennan, the decision in *Croson* announced just one year earlier was not applicable because it dealt with state action.[231] Instead, the majority adopted the intermediate level of scrutiny to evaluate non-remedial racial classifications authorized by the federal government.[232] The FCC's racial preference plan would be upheld under this model, so long as the initiative served an "important governmental objective[ ] and . . . [was] substantially related to the achievement of that objective.[233] The Court held that the FCC plan

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follow in the footsteps of the original purpose of the statute, which was to actively enhance the cultural diversity of programming. *Id.*

222. *Metro Broad. Inc.*, 497 U.S. at 555-56.
223. *Id.* at 556 (citing 68 F.C.C. 2d at 980-81).
224. *Id.* at 556-57.
225. *Id.* at 558-59.
226. *Id.*
227. *Id.* at 560.
228. *Id.* at 566.
229. *Id.* at 563.
230. *Id.* at 564-65.
231. *Id.* at 565.
232. *Id.* at 564-65.
233. *Id.*

met the criteria and was constitutional.[234] In applying the first prong of intermediate scrutiny, the majority reasoned that broadcast diversity qualified as an important government objective because it "contribut[ed] to a 'robust exchange of ideas.'"[235] In turn, a higher representation of minority broadcasters would benefit the public at large by providing "access to a wider diversity of information services."[236]

In conducting the substantial relationship analysis, the Court accorded deference to the expertise of the FCC, as well as to congressional findings revealing that achieving the "nexus between minority ownership and [broadcast] diversity" could only be achieved through racial preferences.[237] The race-neutral alternatives executed by the commission in the decades before the affirmative action plan was implemented were found to be ineffective.[238] The majority also articulated that the plan was temporary because it would be subject to a series of congressional appropriations.[239] Finally, the FCC's plan did not place an undue burden on third parties. In order to correct injustice, "innocent persons may be called upon to bear some of the burden of the remedy."[240]

Justice O'Connor's dissent in *Metro Broadcasting* further illustrates her inconsistent Equal Protection jurisprudence.[241] While echoing points from her *Wygant* dissent, the opinion provided an ideology that stands at odds with her majority opinion in *Grutter*. Justice O'Connor stated that strict scrutiny was the appropriate level of review because the harm caused by the racial classification was no less onerous if the action were taken by the federal government rather than the state.[242] A lower standard of review was simply too dangerous in that "the Government [could] resort to racial distinctions more readily."[243] Justice O'Connor reasoned that the FCC's plan was unconstitutional under strict scrutiny because it impermissibly provided benefits to some and burdens to others "based on the assumption that race . . . determines [socio-economic and

234. *Id.* at 566.
235. *Id.* at 568 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-13 (1978)).
236. *Id.*
237. *Id.* at 569.
238. *Id.* at 585.
239. *Id.* at 594.
240. *Id.* at 596.
241. *Id.* at 602-31 (O'Connor, J., dissenting).
242. *Id.* at 604.
243. *Id.* at 610.

political perspective]."[244] Justice O'Connor also stated that "[m]odern Equal Protection [jurisprudence] has recognized only one [compelling] interest: remedying the effects of racial discrimination."[245] Broadcast diversity is "too amorphous . . . and . . . unrelated to any legitimate basis for employing racial classifications" to be characterized as a compelling state interest.[246] In fact, Justice O'Connor wrote that racial classifications must be left only for *remedial settings*, otherwise they would foster "notions of racial inferiority and . . . hostility."[247] The FCC scheme was, therefore, nothing more than an attempt at racial balancing, even though race was only one of many factors.[248] Furthermore, Justice O'Connor stated that attempting to create "viewpoint diversity by identifying . . . a 'black viewpoint' [or] an 'Asian viewpoint'" would not even pass a low-level rational basis test.[249]

5. *Adarand Constructors, Inc. v. Pena*

The final pillar of the remedial foundation of racial preferences in public employment was placed in *Adarand Constructors, Inc. v. Pena*.[250] The Supreme Court authorized the use of strict scrutiny for any racial preference program, whether the classification is committed by the state or federal government and regardless of the race of the program's beneficiaries.[251] Finally, a fundamental consensus was reached concluding that racial preference plans must be viewed with the utmost caution. Nevertheless, the freshly appointed Justices Souter, Breyer and Ginsburg, together with the wavering Justice O'Connor, left the practical application of strict scrutiny resembling a sheep dressed in wolf's clothing.

The primary issue in *Adarand* was whether financial incentives provided to general contractors to hire minority sub-contractors contravened the Equal Protection component of the Fifth Amendment.[252] The controversy began when Mountain Gravel & Construction Company, a general contractor, awarded a guardrail subcontract to Gonzales Construction Company instead of

244. *Id.* at 602.
245. *Id.* at 612.
246. *Id.*
247. *Id.* at 613.
248. *Id.* at 614 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989)).
249. *See id.* at 612-15.
250. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
251. *Id.* at 226.
252. *Id.* at 204.

Adarand Constructors, notwithstanding Adarand's lower bid.[253] The prime contract was governed by the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA").[254] The contract provided that if Mountain Gravel "hired subcontractors certified as small businesses controlled by 'socially and economically disadvantaged individuals,'" it would receive 10% of the final amount of the approved minority subcontract as additional compensation.[255] In addition, STURAA required that 10% of the appropriated funds be expended with small businesses "owned and controlled" by minority groups.[256] When it lost the guardrail subcontract to the minority subcontractor, Adarand filed suit in federal court, "claiming that race-based presumptions involved in the use of [preferential] subcontracting compensation . . . violate[d] [its] right to equal protection."[257] The Supreme Court vacated the Tenth Circuit's decision, which had affirmed the district court's granting of summary judgment to the government.[258]

Justice O'Connor, writing for the majority, began the Court's analysis by significantly reducing any precedential dissimilarities between Equal Protection obligations under the Fourteenth Amendment and those under the Fifth Amendment.[259] Both constitutional provisions are analyzed in "precisely the same" way because both aim to provide uniformity and fair order and to prohibit arbitrary governmental power.[260]

The Court overruled the use of intermediate scrutiny for benign racial preference plans under the Fifth Amendment, which had been upheld in *Metro Broadcasting*.[261] Therefore, "all racial classifications, imposed by [any] governmental actor, must be analyzed by a reviewing court under strict scrutiny."[262] Hence, "such classifications are constitutional only if they are narrowly tailored mea-

253. *Id.* at 205.

254. *Id.* at 208; *see* Pub. L. No. 100-17, 101 Stat, 132 (1987).

255. *Adarand Constructors, Inc.*, 515 U.S. at 205, 209. Under The Small Business Act, such individuals are defined as those who have been subject to racial or ethnic prejudice because of their identity within such a group without regard to their individual qualities. Blacks, Hispanics, Asians and Native Americans are presumed to be such individuals. *Id.* at 205 (citing 15 U.S.C. § 637(d)(2), (3) (1994)).

256. *Id.* at 208 (quoting the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 145).

257. *Id.* at 210.

258. *Id.* at 210-12, 239.

259. *Id.* at 213-18.

260. *See id.* at 213-17.

261. *Id.* at 226-27.

262. *Id.* at 227.

sures that further compelling governmental interests."[263] The majority dispelled the notion that benign discrimination is presumed to be more constitutionally tolerable than any other form of intentional racial discrimination.[264] All racial classifications were now to be confronted with skepticism and treated consistently.[265] According to Justice O'Connor, *Metro Broadcasting* was an anomaly in the organic tradition of Equal Protection jurisprudence "stretching back over fifty years," which frowned upon protecting rights on the basis of innate characteristics.[266] Nevertheless, Justice O'Connor "wish[ed] to dispel the notion that strict scrutiny [will always be] 'strict in theory, but fatal in fact.'"[267] Justice O'Connor believed that the government will be qualified, in particular instances, to respond to "the lingering effects of racial discrimination against minority groups."[268] The Court remanded the case to the Tenth Circuit to apply the newly announced standards.[269]

This decision remains significant because although it announced that the appropriate level of review is strict scrutiny, the application has been far from uniform, as demonstrated in *Grutter*. Justice O'Connor's majority opinion in *Metro Broadcasting* leaves open the possibility that strict scrutiny is malleable. Consequently, *Grutter*'s alternative application of strict scrutiny, which looked more like rational basis, could in theory allow the diversity rationale to seep into some areas of public employment.

B. *Summation*

Equal Protection jurisprudence in public employment now requires the application of strict scrutiny review. The Supreme Court's progress from *Wygant* to *Adarand* solidified a number of vital principles. Ultimately, "all racial classifications imposed by [any] governmental actor," whether deemed invidious or benign, receive the most exacting form of constitutional review, embodied in strict scrutiny.[270]

To satisfy strict scrutiny, the governmental action must be justi-

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263. *Id.*
264. *Id.* at 226-27.
265. *Id.*
266. *See id.* at 231-32.
267. *Id.* at 237 (citing Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).
268. *Id.*
269. *Id.*
270. *Id.* at 227.

fied by a compelling state interest and be narrowly tailored to achieve such interest.[271] Currently, the Supreme Court has only found remedying the effects of past or present de jure discrimination to qualify as a compelling state interest.[272] To satisfy the standard of proof required for state sponsored remediation, there must be a specific showing of prior or current intentional discrimination.[273] This showing can be made by pointing to significant statistical disparities between the number of qualified minorities in the local labor pool and the number of minorities actually hired or promoted.[274] Additionally, the showing may include anecdotal evidence.[275] There must be a strong basis in the evidence to reach the conclusion that remedial action is necessary.[276] If a court finds a compelling government interest, it then engages in a balancing test to ascertain whether the proposed plan is narrowly tailored.[277] The factors for consideration include:

> the necessity for relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.[278]

After *Grutter* was decided in June of 2003, the application of the strict scrutiny remedial framework announced in the *Croson/Adarand* line of cases grew uncertain. Would the remedial justification be accompanied or perhaps even replaced with the freshly minted diversity rationale?

IV. *GRUTTER* ON THE JOB: THE DIVERSITY LANDSCAPE IN PUBLIC EMPLOYMENT

A. *Initial Reaction by the Supreme Court*

Grutter v. Bollinger redefined Equal Protection jurisprudence. For the first time, a clear majority of the Supreme Court applied strict scrutiny and legitimized a new rationale that fractured the

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271. *Id.* at 229.
272. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).
273. *Id.* at 277.
274. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989).
275. Concrete Works of Colorado v. City and County of Denver, 321 F.3d 950, 958 (2003).
276. *Wygant*, 476 U.S. at 277.
277. United States v. Paradise, 480 U.S. 149, 171 (1987).
278. *Id.* at 206.

traditional remedial paradigm in the educational context.[279] The concept of racial diversity, at least in the educational context, now qualifies as a compelling state interest under the first prong of strict scrutiny analysis.[280] Justice O'Connor's rationale in *Grutter* was based on deference given to the University of Michigan's conclusion that diversity enriches learning outcomes and better prepares students for the professional challenges ahead in an increasingly diverse workforce.[281] In addition, the *Grutter* majority altered the narrow tailoring prong of the strict scrutiny analysis by imposing a less stringent application of the *Paradise* balancing factors.[282] The Court accepted the concept of a critical mass as a permissible alternative to quotas.[283]

The Court rejected the viable race-neutral alternative to lowering admissions standards, across the board, to allow a broader array of students to gain acceptance.[284] Notably, the Court did not appear overly concerned with the impact on non-minority students, who are adversely affected by the racial preference plan. The Court reasoned that because all pertinent elements of diversity are taken into account, all applicants can illustrate their uniqueness to the admissions committee.[285] Although the Court expected that the program would not be necessary within 25 years, it upheld the plan despite its lack of a waiver or sunset provision.[286] Therefore, the affirmative action plan may continue indefinitely.[287]

Grutter was an important case and its impact is not limited to diversity in education. *Grutter*'s expansion into the realm of public employment is contingent on three central inquiries. First, whether the Supreme Court will apply the watered down form of contextual strict scrutiny announced in *Grutter* to public employers, thereby

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

280. *Id.*

281. *Id.* at 330.

282. *See id.* at 334-35 (stating that the admission must be flexible when considering diversity).

283. *Id.* at 335-36. A "critical mass" is an unannounced close range of seats generally intended for minorities, as opposed to an unconstitutional quota, which is an announced fixed range of spots reserved explicitly for minorities. *Id.* According to Justice O'Connor, "'some attention to numbers' . . . does not transform a flexible admissions system into a rigid quota" that contravenes the Fourteenth Amendment. *Id.* at 336 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978)) (alteration in original).

284. *See id.* at 337-38.

285. *Id.* at 341.

286. *Id.* at 342.

287. *Id.* at 343.

giving public employers the unprecedented deference it gave the University of Michigan. Second, whether the Court will break with the traditional remedial paradigm and declare that racial diversity is a compelling state interest in public employment. Finally, whether the Court will apply the liberalized narrow tailoring analysis, which less rigidly and more arbitrarily applies the *Paradise* balancing factors.

An initial response to the first inquiry was provided by the Supreme Court in 2003 when the Court denied certiorari from a Tenth Circuit case.[288] *Concrete Works of Colorado, Inc. v. City and County of Denver* addressed whether the City of Denver had shown a strong basis in the evidence for remedying past discrimination in the construction industry.[289] In dissenting from the Court's denial of certiorari, Justice Scalia, joined by Chief Justice Rehnquist, argued that the Tenth Circuit improperly decided the case because it failed to apply the traditional strict scrutiny analysis of the *Croson/ Adarand* line of cases.[290] In particular, "[c]oming on the heels of . . . *Grutter v. Bollinger*," Scalia felt that the Court's decision to deny certiorari "invite[d] speculation that [*Croson*] has effectively been overruled."[291]

In finding that the City of Denver had a compelling interest in remedying past discrimination in the local construction industry, the Tenth Circuit upheld the city's annual goal that 10% of the total dollars spent on construction contracts be spent with minority-owned businesses.[292] The evidence that the City of Denver presented in support of its affirmative action ordinance included records, which did not indicate discrimination per se, but rather demonstrated findings of the city's noncompliance with affirmative action requirements, its failure to facilitate minority participation,

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288. Concrete Works of Colo., Inc. v. City & County of Denver, Colo., 540 U.S. 1027 (2003) (mem.) (Scalia, J., dissenting from denial of certiorari).

289. Concrete Works of Colo., Inc. v. City & County of Denver, 321 F.3d 950 (10th Cir. 2003).

290. *Concrete Works of Colo., Inc.*, 540 U.S. at 1027, 1029-30.

291. *Id.* at 1027.

292. *Concrete Works of Colo., Inc.*, 321 F.3d at 992, 994. A minority business was defined in the 1990 ordinance as at least 51% owned by 1 or more members of the following minority groups: Blacks, Hispanics, Asian Americans or American Indians. *Id.* at 956. In addition, in order to qualify under the affirmative action program, the daily operations of the business must have been controlled by at least one eligible minority group. *Id.* Once the city certified the business, it would then qualify to receive special consideration in being placed in the pool of minority companies that were guaranteed to receive 10% of the total money spent by Denver on construction contracts. *Id.*

and practices that appeared to have a negative effect on minority groups.[293] In addition, statistical disparity studies showed underutilization of minority contractors and that minority businesses were less than half as likely to own their own businesses as were whites of comparable age and experience.[294] Finally, the City of Denver introduced anecdotal evidence that included certain instances of racial and gender epithets, as well as the testimony of a senior vice president of a majority-owned construction firm who stated that, based on personal experiences, minority firms were judged incompetent by non-minority firms.[295]

Disagreeing with the Tenth Circuit's finding of a strong basis in the evidence, Justice Scalia criticized the court's manifest disregard of *Croson*'s requirement that the government actually prove it is remedying identified discrimination.[296] According to the Tenth Circuit, Denver must only show that "an inference of past or present discrimination could be drawn" from the evidence.[297] In addition, the Tenth Circuit heightened the showing that the plaintiff must make, shifting the burden of proof to the plaintiff "'to rebut [Denver's] initial showing of the existence of a compelling state interest.'"[298] Justice Scalia pointed out the material inconsistency with *Croson*, under which racial preferences cannot be a means to remedy unproven discrimination.[299] Scalia argued that it is always the government's burden to prove, by a strong basis in the evidence, that it is remedying identified discrimination and that there is a strong basis in the evidence to conclude that such action is necessary.[300]

In evaluating the evidence introduced by the City of Denver, Justice Scalia pointed out that Denver made the wrong statistical comparison by "*assum[ing]* that minority firms were on average as qualified, willing, and able" to perform the contract.[301] Denver did not utilize actual bidding data or adjust the raw data via a regres-

293. *Id.* at 960-61.

294. *Id.* at 962-63, 964-65.

295. *Id.* at 969.

296. *Concrete Works of Colo., Inc.*, 540 U.S. at 1027 (mem.) (Scalia, J., dissenting from denial of certiorari).

297. *Concrete Works of Colo., Inc.*, 321 F.3d at 970.

298. *Id.* at 959 (quoting Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1175 (10th Cir. 2000)).

299. *Concrete Works of Colo., Inc.*, 540 U.S. at 1030 (mem.) (Scalia, J., dissenting from denial of certiorari).

300. *Id.* at 1031.

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

sion analysis.[302] Justice Scalia also pointed to the unworkability of "studies [showing] racial disparities in business formation rates and access to capital."[303] Such realities can be dealt with by race-neutral measures, including the rigorous enforcement of non-discrimination laws.[304] The fact that Denver continued to use racial preferences "for a generation" greatly troubled Justice Scalia.[305]

Scalia's primary concern was that the strong-basis-in-the-evidence standard announced in *Wygant* was being replaced by the good-faith reliance paradigm announced in *Grutter*.[306] The Supreme Court's acceptance of the Tenth Circuit's inference test, the weak showing of evidence, and the lack of a sunset provision after *Grutter* supports this concern. As one judge has noted, "[s]trict scrutiny is not what it once was. . . . [I]t has mellowed in recent decades."[307] If recent precedent is any guide, a state's interest is compelling if the state says it is.

B. *Extension of the Diversity Rationale to the Workplace*

The Seventh Circuit Court of Appeals was the first of two courts to apply *Grutter*'s diversity rationale to a public employment case.[308] In *Petit v. City of Chicago*, the Seventh Circuit addressed whether racial preferences, in the form of artificially increased test scores of minorities applying for the rank of sergeant in the Chicago Police Department, violated the Equal Protection Clause of the Fourteenth Amendment.[309]

In the mid-1980s the Department issued an examination to promote 458 officers to the sergeant rank.[310] Of the 3,416 officers who took the examination, 2,274 were white, 931 were African American and 192 were Hispanic.[311] The examination consisted of a multiple-choice section, a written short answer component, an oral component, and a practical performance evaluation.[312] After

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302. *Id.* at 1031-32.
303. *Id.* at 1032.
304. *Id.* at 1033.
305. *Id.* at 1034.
306. *Id.*
307. Catholic Charities of Sacramento v. Superior Court, 85 P.3d 67, 105 (Cal. 2004) (Brown, J., dissenting), *cert. denied,* 543 U.S. 816 (2004).
308. *See* Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003), *cert. denied,* 541 U.S. 1074 (2004).
309. *Id.* at 1112.
310. *Id.* at 1116.
311. *Id.*
312. *Id.*

standardizing the results to eliminate differences in subjective grading in the oral and short answer portion of the test, the results showed that African Americans and Hispanics did not score well enough to allow a substantial number of promotions from these racial groups.[313] Of the 458 promotions, the test results would have yielded the promotion of only 60 African Americans and 15 Hispanics.[314] To balance this inequality, the city upwardly adjusted the results for African Americans and Hispanics to "reflect[ ] the score a candidate would have received if the test had not had an adverse racial impact."[315] Instead of 60 African Americans promoted to the sergeant rank, 119 promotions were made, constituting 59 additional promotions, an increase of 98.3%.[316] Similarly, Hispanics received 41 promotions instead of 15, resulting in a 273.3% increase.[317] White officers who were not promoted filed suit in federal court.[318] The district court "granted summary judgment for the city based on its claim that the police department had an operational need to engage in affirmative action and that the action it took was narrowly tailored."[319]

On appeal, the Seventh Circuit set the stage for its approach when it stated that it must conduct the analysis in accordance with the University of Michigan cases of 2003.[320] The court began by quoting sections of *Grutter*, which held that racial diversity is a compelling government interest.[321] Judge Evans, writing for the three-judge panel, noted that *Grutter*'s affirmation of the deference given to the University of Michigan could also be applied to the Chicago Police Department.[322]

Taking *Grutter*'s approach, the court ruled under the rubric of operational need that "there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially . . . divided . . . city."[323] The court adhered to *Grutter*'s unorthodox form of strict scrutiny by giving substantial deference to the Chicago Police Department's expert witnesses in concluding

313. *Id.*
314. *Id.*
315. *Id.* at 1117.
316. *Id.* at 1116-17.
317. *Id.*
318. *Id.* at 1112.
319. *Id.* at 1113.
320. *Id.* at 1112.
321. *Id.* at 1114.
322. *Id.*
323. *Id.*

"that affirmative action was warranted to enhance the operations of the [Chicago Police Department.]"[324] Criminal justice experts, based on studies conducted since the 1960s, revealed "that minorities are frequently mistrustful of police and are more willing than non-minorities to believe that the police engage in misconduct."[325] In turn, "this lack of confidence . . . reduce[s] the willingness of some [minority] community members to cooperate with the police."[326] A former chief of police in Oregon noted, and several high-ranking members of the Chicago Police Department agreed, that diversity at the sergeant rank helps "to influence officers on the street," to improve cooperation, and defuse dangerous situations.[327] The court also stated that the growth of minorities in the community must be paralleled at the sergeant rank to earn the community's trust and, ultimately, enhance the police department's ability to prevent and solve crimes.[328] Hence, the city concluded, and the Seventh Circuit accepted as a compelling interest, that a diverse police force would better earn the community's trust and better protect Chicago citizens.[329]

The Seventh Circuit also found that upwardly adjusting minority applicants' test scores was narrowly tailored to achieve the goal of diversifying the police force.[330] In beginning its analysis, the court echoed *Grutter*, which provided that mechanical, predetermined bonuses are unacceptable, yet race used as a plus factor in a flexible, non-mechanical manner is constitutionally acceptable.[331] A sunset provision and consideration of the impact of the racial preference on members of the majority were essential to the Seventh Circuit's formulation.[332] In applying the *Paradise* factors, the court reasoned that the score adjustment used by the Chicago Police Department met the second prong of strict scrutiny, because the city was merely altering the test results to reflect "the score a candidate would have received if the test had not had an adverse racial impact."[333] Additionally, because the test was not validated and because the margin of error revealed that the lowest scoring

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324. *Id.*
325. *Id.* at 1115.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.* at 1117-18.
331. *Id.* at 1116.
332. *Id.*
333. *Id.* at 1117.

white candidate and the top scoring black candidate were very close, the candidates were both qualified.[334] The Seventh Circuit further noted that the program ceased after 1991 and the city adequately minimized the harm to the 82 plaintiffs in the action, 50 of whom were denied promotion.[335] Finally, the Court distinguished the twenty-point advantage struck down in the University of Michigan undergraduate case[336] and reasoned that the score adjustment here could be seen "not as an arbitrary advantage given to the minority officers, but rather as eliminating an advantage the white officers had on the test."[337]

The Seventh Circuit again applied the diversity rationale in the context of public employment in a 2004 decision concerning promotional opportunities in a Fire Department.[338] *Biondo v. City of Chicago* explored a fact pattern nearly identical to that of *Petit*.[339] White applicants for promotion were delayed pursuant to an affirmative action program; the city defended the program as complying with federal regulations.[340] Judge Williams, in a concurring opinion, implied that the city should not only have pled a remedial basis for its action, but it should have also pled the operational-need corollary to the diversity rationale approved in *Petit* just one year earlier.[341] Judge Williams noted that a "non remedial reason may also constitute a compelling interest supporting the use of race and ethnicity in employment decisions."[342]

In *Lomack v. City of Newark*, a second court applied the diversity rationale in public employment.[343] Since 1980, Newark had been under a consent decree designed to combat the intentional racial discrimination that existed in its fire department.[344] The de-

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334. *Id.*

335. *Id.*

336. Gratz v. Bollinger, 539 U.S. 244 (2003).

337. *Petit*, 352 F.3d at 1117-18; *see Gratz*, 539 U.S. at 270 (holding that while racial diversity is a compelling government interest, a 20-point award to minority applicants in the selection process in the undergraduate division of the University of Michigan was not a narrowly tailored measure to achieve the sought after diversity).

338. Biondo v. City of Chicago, 382 F.3d 680 (7th Cir. 2004).

339. *Id.*

340. *Id.* at 683.

341. *Id.* at 692 (Williams, J., concurring). The *Petit* court stated that it was applying the *Grutter* diversity model to the public employment area to address the operational need of a large metropolitan police force. Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003), *cert. denied,* 541 U.S. 1074 (2004).

342. *Biondo*, 382 F.3d at 692.

343. Lomack v. City of Newark, No. Civ.A.04-6085 (JWB), 2005 WL 2077479, at *3 (D.N.J. Aug. 25, 2005).

344. *Id.* at *1.

cree enjoined New Jersey from unlawfully discriminating against black or Hispanic fire department employees or applicants with respect to hiring, assignment, training, discipline, promotion, or discharge.[345] In 1995, the city authorized two studies examining the operation of the consent decree.[346] Based on these studies, the city concluded that numerous firehouses were racially segregated.[347] For example, one study revealed that of the 108 teams of firefighters, 81 had a majority of white personnel, 15 were predominantly black, 1 had a Hispanic majority, while the remaining 11 were integrated.[348] In 2002, the mayor ordered city officials to create a departmental personnel transfer system to create 100% diversity.[349] In 2003, Newark announced its new plan of involuntary transfers of firefighters across the city, on the basis of race, to diversify the department and comply with the 1980 consent decree.[350] By 2004, the city announced that all Newark fire teams had been racially integrated.[351] Soon after, white plaintiffs filed suit, claiming that the involuntary transfers on the basis of race violated their constitutional rights under the Equal Protection Clause.[352]

Surprisingly, the district court chose not to view this matter as a reasonable remedial action by a city "operating under a Consent Decree to desegregate its fire companies."[353] Instead, the court ignored the remedial line of cases and analyzed the controversy as an extension of *Grutter v. Bollinger*.[354] The court applied *Grutter*'s watered down strict scrutiny to Newark's desegregation policy and found that the city had a compelling government interest in attaining a racially diverse fire company.[355] The court found that exposure of firefighters to different backgrounds, vocabularies and cultures better prepared them to work effectively with colleagues and improve performance on tests for promotion.[356] In addition, the court reasoned that although education is not the primary purpose of a fire company, firefighters spend substantial time in both

345. *Id.*
346. *Id.*
347. *Id.* at *2.
348. *Id.*
349. *See id.* at *3.
350. *See id.* at *2-3.
351. *Id.* at *4.
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.* at *6.
356. *Id.* at *7.

formal and informal training, and therefore, racial stereotypes can be broken down in the firehouse just as in the classroom.[357] The court applied *Grutter*'s good-faith deference standard by taking the testimony of both a former director and a chief at their word when they stated that the camaraderie and tolerance gained by diversifying the fire company would improve the performance of the firefighters.[358] Finally, after upholding Newark's plan as a constitutionally measured response, thereby passing the narrow tailoring prong, the court went on to say that Newark's policy of augmenting transfer requests was laudable as well as the "right and just" thing to do.[359]

Although the diversity model was extended by the *Petit* and *Lomack* courts in the context of police and fire operations, courts have taken the contrary approach in other fields of public employment.[360] Perhaps the clearest expression against expanding the diversity rationale to public employment was announced by a federal district court in Florida in the context of public contracting.[361] In *Hershill Gill Consulting Engineers v. Miami-Dade County*, engineering firms owned by white males challenged participation goals ordered under the county's Minority and Women Business Enterprise (MWBE) program.[362] Based on the Fourteenth Amendment's Equal Protection Clause, the plaintiffs argued that they were unlawfully deprived of a fair chance to compete for county contracts because the MWBE program established participation goals for granting architectural and engineering contracts to certain minority contractors.[363] "In order to qualify [as a minority business under] the MWBE program, a business must [have been] owned and controlled by one or more Black, Hispanic or female individual[ ], and [had to] have an actual place of business in Miami-Dade County."[364] African American-operated businesses would receive 12% and Hispanic operated businesses would receive 25% of all architectural and engineering contracts.[365] To achieve these participation goals, the county used several methods, including set-asides,

357. *Id.*
358. *Id.*
359. *Id.* at *9.
360. *See, e.g.*, Hershill Gill Consulting Eng'rs, Inc. v. Miami-Dade County, 333 F. Supp. 2d 1305 (S.D. Fla. 2004).
361. *Id.*
362. *Id.* at 1310.
363. *Id.*
364. *Id.* at 1312.
365. *Id.*

subcontractor goals, and bid preferences.[366] Bid preferences operate by "artificially reduc[ing] a MWBE bid by as much as [10%] for purposes of determining the lowest bid."[367] Although the county must revise and review the MWBE program annually, the participation goals have remained unchanged since 1994, even after a study revealed that racial parity was reached between 1996 and 1997.[368] In 2000, the county hired an econometrician to analyze significant statistical evidence in an effort to justify the MWBE program's continued remedial purpose.[369] The district court withheld its order until after *Grutter v. Bollinger* was decided and cases interpreting *Grutter* were concluded.[370] Significantly, Miami-Dade "argue[d] that its affirmative action program [was] in place to remedy past and current discrimination in the architectural and engineering industry."[371] What the traditional remedial purpose had to do with *Grutter*'s diversity rationale is as unclear.

Beginning its analysis in a conventional fashion, the district court announced that pursuant to *Adarand*, "the applicable standard for analyzing [the MWBE program was] strict scrutiny."[372] Therefore, "the proponent of [the] racial classification bears the burden of proving" a narrowly tailored compelling state interest proven by a strong basis in the evidence.[373] Next, the court stated that the *Grutter* diversity paradigm did not alter the remedial Equal Protection framework.[374] The district court concluded that "*Grutter* do[es] not modify *Croson* or *Adarand* in the area of public contracting."[375] Nevertheless, Judge Jordan felt that some of *Grutter*'s language was helpful in adjudicating the narrow tailoring prong of the strict scrutiny analysis.[376]

Consequently, after the court found that the county's remedial justification was not compelling because it was supported by only attenuated and weak evidence, the court engaged in the narrow tailoring evaluation.[377] Judge Jordan echoed *Grutter*'s caveat that

366. *Id.*
367. *Id.*
368. *Id.* at 1313-14.
369. *Id.* at 1315.
370. *Id.* at 1316.
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.* at 1317.
375. *Id.*
376. *Id.*; *see id.* at 1326.
377. *Id.* at 1324-26.

context matters when reviewing classifications for purposes of equal protection inquiry.[378] First, as applied to all the MWBE programs, many of the minorities who took advantage of the racial preferences were not actually minorities with respect to their numerical composition in the local population.[379] Ultimately, the court struck down the entire ambit of MWBE programs.[380]

The district court then considered the legality of the Hispanic Business Enterprise ("HBE") program.[381] The district court consequently ruled that the county failed to take into consideration any race-neutral alternatives to the HBE program.[382] In striking down the HBE program, the court found that the indefinite continuation of a fixed numerical quota was inconsistent with *Grutter*'s central message.[383] In operation, courts seem willing to extend *Grutter*'s modified narrow tailoring prong to the traditional remedial model in public employment cases.[384]

C. *The Application of Grutter's Reformed Narrow Tailoring Analysis*

This subsection details cases in which lower federal courts have relied on the traditional remedial justification set forth in the *Croson/Adarand* line of cases. In addition, it considers the manner in which these courts have applied *Grutter*'s deferential narrow tailoring analysis.

In *Bullen v. Chaffinich*, two master corporals who were denied promotions to the rank of sergeant argued that the Governor and the Secretary of the Department of Public Safety used racial quotas in hiring and promoting state troopers.[385] Both officers were eligible for promotion between October 1, 2001 and December 31, 2001.[386] The test for promotion consisted of two parts: (1) a written examination based on material in a textbook; and (2) an oral examination.[387] Only those candidates who passed the written test were

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378. *Id.* at 1326.
379. *Id.* at 1327.
380. *Id.* at 1344.
381. *Id.* at 1330-31.
382. *Id.*
383. *Id.* at 1332-33.
384. W. States Paving Co. v. Wash. State DOT, 407 F.3d 983 (9th Cir. 2005); Bullen v. Chaffinch, No. Civ.A. 02-1315-JJF, 2003 WL 22953222 (D. Del. Dec. 5, 2003).
385. *Bullen*, 2003 WL 22953222, at *1.
386. *Id.*
387. *Id.*

eligible to take the oral examination.[388] The written and oral scores, based on evaluations provided by neutral out-of-state police officials, were combined to determine the candidate's final score.[389] Next, scores were banded according to standard deviation statistical analysis.[390] In 1991, the Human Resources Department changed the banding method, facilitating higher scores.[391] For example, if the original model had created an A band with a range of 96-100 and a B band of 91-95, the new method would have resulted in bands beginning at 92.5 and 87.5, respectively.[392] The Superintendent instituted promotions based on the new band scores.[393] The candidates from the highest band were promoted before moving on to lower bands.[394]

The plaintiffs argued that, beginning in 1998, the Governor and the Secretary of the Department of Public Safety had used racial quotas in hiring and promoting troopers.[395] The former Human Resources Director testified that the Secretary had a standing order to recruit a particular percentage of minority candidates.[396] At trial, the plaintiffs presented an e-mail from the Governor to the Superintendent.[397] The e-mail revealed that the Secretary had ordered 30% of trooper recruits be African American.[398] Additional evidence demonstrated that the Captain of the state police force had advised the Superintendent, in writing, that "written references should not be made to [the Secretary's] 'direction to hire a class of 30% African American.'"[399] Also admitted into evidence were several promotion sheets and internal memos.[400] The promotion sheets and internal memos described efforts to increase minority representation and contained numerical calculations, broken down by race.[401] These figures tended to show that altering the standard deviation resulted in more African Americans being promoted.[402]

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388. *Id.*
389. *Id.* at *2.
390. *Id.*
391. *Id.*
392. *Id.* at *2 nn.2-3.
393. *Id.* at *2.
394. *Id.*
395. *Id.* at *3.
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.* at *4-5.
401. *Id.*
402. *Id.* at *5.

The jury also considered an Executive Order from the Governor, issued in response to a Justice Department inquiry, which announced a plan to increase the number of minorities in the state's "workforce to reflect the diversity of the state's population."[403] Evidence also showed that the Governor hired an outside consultant who recommended placing a freeze on all promotions in order to examine aspects of the hiring and promotional practices of the state police.[404] The plaintiffs argued that this freeze unlawfully prevented their promotions because approximately five vacancies existed.[405] A few months later, the state used a new list of promotions and promoted a woman and an African American man.[406] The defendant argued that it legitimately delayed filling many of these vacancies because of a pressing need to review the operational need of the force and its desire to conduct an assessment of the disruption from a new wave of promotions resulting from the September 11, 2001 terrorist attacks.[407] The jury found for the plaintiffs and concluded that the defendants unlawfully discriminated against them on the basis of race in violation of 42 U.S.C. § 1981. Specifically, the jury found that the defendants maintained an illegal quota in violation of the Equal Protection Clause of the Fourteenth Amendment.[408]

Delaware filed a post-trial motion, arguing that the verdict was unsupported by evidence.[409] The state claimed that no reasonable juror could have found that the defendants maintained an illegal quota in the late 1990s and the latter part of 2001.[410] Based on *Grutter*'s unorthodox narrow tailoring analysis, the district judge granted the defendant's motion and overturned the jury verdict.[411] The judge articulated that the state police did not maintain "a program in which a certain fixed number or proportion of opportunities [was] 'reserved exclusively for certain minority groups.'"[412] The judge further disregarded the evidence of the e-mail implementing the 30% goal and ruled that even though "race was a substantial and motivating factor," and "attempts were made by

403. *Id.* at *3.
404. *Id.* at *4.
405. *Id.* at *5.
406. *Id.* at *4.
407. *Id.* at *5-6.
408. *See* Bullen v. Chaffinch 336 F.Supp. 2d 342, 347 (D. Del. 2004).
409. *Id.*
410. *Id.*
411. *Id.* at 348.
412. *Id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 335 (2003)).

Defendants to manipulate the promotional process" to achieve minority representation, an illegal quota did not exist.[413] Finally, the judge stated, in dicta, that such generalized aggressive efforts to achieve equal opportunity were admirable.[414]

A 2005 decision from the Ninth Circuit addressed a similar issue. In *Western States Paving Co. v. Washington State Department of Transportation*, the court considered whether the Transportation Equity Act for the 21st Century's (TEA-21) authorization of racial preferences in federally funded contracts violated the Equal Protection Clause.[415] The plaintiff, a subcontractor, submitted bids for two local paving projects.[416] The prime contractor was bound by TEA-21's minority utilization requirement mandating 14% minority participation.[417] Therefore, despite Western Paving's substantially lower bids, the general contractor awarded the subcontracts to minority-owned firms.[418]

Congress passed TEA-21 based on evidence of past discrimination in the transportation contracting industry.[419] Enacted in 1998, TEA-21 provided race and sex-based contracting preferences.[420] The statute provided that, except as the Secretary of Transportation otherwise determined, "not less than 10 percent of the amounts made available . . . shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals."[421] The corresponding regulations identified blacks, Hispanics, Asian Americans, Native Americans and women as socially and economically disadvantaged.[422] However, a safety net provided that wealthy minorities could be disqualified while poor non-minority contractors could be included in the program.[423] The regulations explained that the 10% minority utilization requirement was "aspirational in nature"; it could be tweaked by each individual state and should only be used after attempting race-neutral alternatives.[424] The regulations also provided a two-step process for apply-

413. *Id.*
414. *Id.*
415. W. States Paving Co. v. Wash. State DOT, 407 F.3d 983, 987 (9th Cir. 2005).
416. *Id.*
417. *Id.*
418. *Id.*
419. *Id.* at 988.
420. *Id.*
421. *Id.* (quoting the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113 (1998)).
422. *Id.* at 988-89.
423. *Id.* at 989.
424. *Id.* at 989-90.

ing race-conscious measures.[425] After calculating the relative availability of minority firms in the local industry, the figure was adjusted to reflect their proven capacity to perform the requisite work.[426]

The court applied the traditional *Croson/Adarand* remedial framework, stating that racial "'classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.'"[427] Unlike the Tenth Circuit's good-faith burden-shifting paradigm of *Concrete Works of Colorado*,[428] the Ninth Circuit stated that it must determine whether the United States has shown by a "strong basis in the evidence" that TEA-21 satisfies strict scrutiny's exacting requirement that "remedial action was necessary."[429]

In analyzing the facial challenge, the court found that the federal government had shown it had a strong basis in the evidence that discrimination in the transportation industry warranted remedial action.[430] The Ninth Circuit applied *Grutter*'s modified narrow tailoring analysis after quoting the *Paradise* factors.[431] First, the court noted that TEA-21 did not establish an unconstitutional quota because it only required a good-faith compliance effort.[432] The Ninth Circuit ruled that unlike the 30% set-aside created in *Croson*, the aspirational contracting goal of 10% provides the state with a flexible system that adequately comports with narrow tailoring mandates.[433] Ultimately, the court reasoned that each state could set "minority utilization goal[s] that reflect[ed] the realities of [the state's] own labor market."[434] Next, the court cited *Grutter*'s requirement that while each conceivable race-neutral alternative need not be exhausted, a good-faith consideration of race-neutral alternatives must be implemented.[435] Due to TEA-21's preference that race-neutral measures be considered, the court found this factor was met despite the lack of actual implementation of race-neu-

425. *Id.* at 989.
426. *Id.*
427. *Id.* at 990 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).
428. Concrete Works v. City & County of Denver, 36 F.3d 1513 (10th Cir. 1994).
429. *See W. States Paving Co.*, 407 F.3d at 991-92.
430. *Id.* at 991.
431. *See id.* at 993.
432. *Id.* at 994.
433. *Id.*
434. *Id.* at 995.
435. *Id.* at 993.

tral measures.[436] Finally, the court decided that the burden placed on white contractors who lost projects to minority contractors who submitted higher bids did not itself invalidate TEA-21's racial preference program.[437] The court reasoned that otherwise, all affirmative action plans would be unconstitutional.[438] As the decisions from the Delaware district court and the Ninth Circuit illustrate, federal courts are willing to extend *Grutter*'s liberalized narrow tailoring analysis to racial-preference cases in the employment arena.

V. THE FUTURE OF THE DIVERSITY RATIONALE AND CONTEXTUAL STRICT SCRUTINY IN PUBLIC EMPLOYMENT

A. *Reading The Tea Leaves: Predictions and Analysis*

The remedial framework laid out in the *Croson/Adarand* line of cases is likely to stay in control of the public contracting sector, as none of *Grutter*'s foundational reasoning logically applies to government contracting, including public works and defense contracting. A three-tiered analysis facilitates the inquiry into *Grutter*'s potential outgrowth to public employment. The first tier looks at important emanations from the remedial line of affirmative action cases, ranging from *Wygant* in 1986 to *Adarand* in 1995. The second tier examines the textual indicators from the *Grutter* majority. The third tier evaluates the lower federal courts' interpretation of *Grutter*'s diversity rationale in public employment cases.

1. Remedial Line of Affirmative Action Cases

On balance, the *Croson/Adarand* line of cases does not strongly indicate that the *Grutter* diversity justification will expand to public employment. First, the remedial line of cases has established traditional strict scrutiny as the proper standard of review of governmental racial classifications in all contexts.[439] More important, the only compelling government interest that a majority of the High Court has agreed upon is remedying the effects of past or present de jure discrimination.[440] The Justice whose opinions provide the clearest insight into how the Supreme Court might address the

436. *See id.* at 993-94.
437. *Id.* at 995.
438. *Id.*
439. *See supra* text accompanying note 271.
440. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986); *see* Hiller v. County of Suffolk, 977 F. Supp. 202, 206 (E.D.N.Y. 1997).

diversity argument in employment cases has recently retired. In her *Wygant* concurrence, Justice O'Connor suggested that a non-remedial paradigm encouraging racial diversity could emerge in public employment.[441] Yet, in her *Metro Broadcasting* dissent, Justice O'Connor rejected the notion that creating racial diversity in public broadcasting was a compelling government interest, and articulated that modern Equal Protection jurisprudence has recognized only the remedial model as satisfying the initial prong of strict scrutiny.[442] Not only did Justice O'Connor waffle on the possibility of a non-remedial justification, she also fluctuated on the strictness with which strict scrutiny review would be applied.[443] Importantly, it was her swing vote that decided both *Adarand* in 1995 and *Grutter* in 2003. Without Justice O'Connor on the bench, it is hard to predict what value the remedial line of cases will have on future jurisprudence.

While the block of the four more liberal Justices on the Court seem likely to accept the concept of creating diversity at the workplace as compelling, only Justice Stevens has stated his beliefs on paper.[444] Concurring in *Croson*, Justice Stevens wrote that correcting the effects of past discrimination should not be the only compelling government interest and hinted that creating racial diversity could be an effective governmental purpose.[445] Despite the uncertainty left by Justice O'Connor's departure, the remedial line of cases is, at the very least, neutral; at most, it fails to indicate that *Grutter*'s diversity rationale will expand into public employment cases. *Grutter*'s textual emanations are, however, more indicative.

2. Textual Emanations

The *Grutter* opinion begins by articulating the good-faith compelling state interest analysis, providing the caveat that not every decision based on race is equally objectionable and that context matters when reviewing such classifications.[446] *Grutter* establishes a

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441. *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring); *see supra* text accompanying notes 133-37.

442. Metro Broad., Inc. v. FCC, 497 U.S. 547, 612 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); *see supra* text accompanying notes 242-50.

443. *See supra* text accompanying notes 242-50.

444. City of Richmond v. J.A. Croson Co., 488 US 469, 512-13 (1989) (Stevens, J., concurring in part and concurring in the judgment); *see supra* text accompanying notes 204-06.

445. *See supra* text accompanying notes 204-06.

446. Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003).

case-by-case approach in which the court might consider racial preferences in public employment. The Court further stated that remedying past discrimination is not the "only governmental use of race that can survive strict scrutiny."[447] This statement presents another rationale that would, at least in principle, allow consideration of diversity at the public workplace.

The Court provided two stronger signals that indicate the potential for expansion. First, the majority noted that the "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[448] Although this was dicta, the question that remains is whether the statement is merely an ethical aspiration or whether it propounds a future constitutional mandate. Second, Justice O'Connor noted that a diverse workforce benefits major American businesses, many of whom have indicated that the skills needed in today's global economy can only be developed through exposure to diverse peoples and viewpoints.[449] Justice O'Connor even pointed to the U.S. Armed Forces as an example of the necessity and effect of racial diversity.[450]

However, the textual indicators against expansion of the diversity rationale are more telling. The unprecedented good-faith application of strict scrutiny coupled with the non-remedial diversity model in *Grutter* was based on the uniqueness of the educational judgment of academic institutions.[451] Therefore, a crucial part of the Court's holding was "in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[452] It was through this educational courtesy that the Court departed from the traditional remedial justification and ruled that racial diversity is a compelling government interest.[453] Another important textual indicator against expansion is that the diversity rationale is primarily based upon "break[ing] down racial stereotypes" and making classroom discussions "more spirited."[454]

In contrast, the government as an employer, whose purpose is

447. *Id.* at 328.
448. *Id.* at 332.
449. *Id.* at 330-31.
450. *Id.* at 331.
451. *See id.* at 328.
452. *Id.*
453. *See id.*
454. *Id.* at 330.

to provide the efficient operation of essential services, functions in a manifestly different capacity than the government as an educator. It is attenuated to argue that breaking down stereotypes through the process of intentionally giving preferences to minorities so that they may bring a new perspective into the world debate improves the durability of the pavement in a road, the accuracy of a missile defense system, or the effectiveness of a fire department. Intentionally discriminating against individuals on the basis of race, in the name of diversity, is not justified when the tasks at hand are tangible and not pedagogical. Ultimately, *Grutter*'s reasoning does not logically extend to realizing the benefits of learning about different races and livening discussion in the employment context.

The Court noted that the admissions policy at the University of Michigan was implemented to prepare students for work and that the "path to leadership [must] be visibly open to talented and qualified individuals of [all races]."[455] A reasoned inference from these particular statements is that while the High Court was tolerant of racial preferences in the university context, it may be less enthusiastic in the employment field. While affirmative action serves an initial purpose of leveling the playing field at the formative level, the Court implies that once the basic path is laid, the Court will be less tolerant in the employment context where the goals and obligations are fundamentally different. Even though the text and purpose of *Grutter* point against expansion of the pure diversity justification, the lower federal courts have taken it upon themselves to chart a slightly different path.[456]

3. Interpretation by the Federal Courts

While a limited number of courts have actually applied the diversity justification, others have employed a less rigorous narrow tailoring analysis in the public employment context. Only two courts, so far, have expressly applied *Grutter*'s diversity model to an employment case. The first case was *Petit*, which involved the operational needs of the Chicago Police Force.[457] Some commentators point to *Petit* as an important indication of the lower courts' willingness to extend *Grutter*'s diversity justification.[458] Nevertheless,

455. *Id.* at 331-32.

456. *See, e.g.*, Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003), *cert. denied,* 541 U.S. 1074 (2004); Lomack v. City of Newark, No. Civ.A.04-6085, 2005 WL 2077479, at *3 (D.N.J. Aug. 25, 2005).

457. *See supra* text accompanying notes 310-39.

458. *See* Eric A. Tilles, *Lessons from* Bakke: *The Effect of* Grutter *on Affirmative*

once *Petit*'s surface is scratched, the reality beneath speaks not of diversity but of public safety. By pairing African American authorities with African American neighborhoods and Hispanic authorities with Hispanic neighborhoods, *Petit* did not address diversity, but homogeneity. *Petit*, therefore, is not a logical extension of *Grutter*'s diversity paradigm. Instead, *Petit* applied an operational-need corollary to the diversity rationale; such a justification should simply be called the public safety exception.

Grutter's holding, that diversity is a compelling government interest, was specifically based on the notion that diversity "helps to break down racial stereotypes," facilitates understanding of different races, enlightens, creates more spirited dialogue, and better prepares students as professionals.[459] In contrast, *Petit*'s holding and accompanying rationale were more about division than diversity. The Seventh Circuit, in essence, sees a compelling state interest in sending African American authorities into African American neighborhoods and Hispanic authorities into Hispanic neighborhoods because African Americans better relate to African Americans and Hispanics better relate to Hispanics.[460] This arrangement better diffuses criminal encounters between minorities and police and prevents future crimes.[461]

Ironically, the Chicago police force approach appears to follow Professor Derrick Bell's interest-convergence thesis.[462] Bell's thesis states that American law was founded on white, Eurocentric understanding and power,[463] and that minority progress occurs only when advancing the interests of minorities is in the best interest of the majority.[464] If the operational need to diversify the sergeant rank claimed by the Chicago police force affirms the notion that only officials and citizens of the same race can best relate to one another to control public safety, then the operational-need justification is wholly antithetical to *Grutter*'s diversity rationale. If Chicago wanted to employ the pure diversity rationale, as described in *Grut-*

Action in Employment, 6 U. PA. J. LAB. & EMP. L. 451, 460 (2004); Michael L. Foreman, Kristin M. Dadey & Audrey J. Wiggins, *The Continuing Relevance of Race-Conscious Remedies and Programs in Integrating the Nation's Workforce*, 22 HOFSTRA LAB. & EMP. L.J. 81, 103-04 (2004).

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

460. *See supra* text accompanying notes 325-29.

461. Petit v. City of Chicago, 352 F.3d 1111, 1115 (7th Cir. 2003), *cert. denied*, 541 U.S. 1074 (2004).

462. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 47 (5th ed. 2004).

463. *Id.*

464. *Id.*

ter, it would have implemented a plan to integrate the different races of police sergeants and officers so the officers from represented races would learn about the socio-economic heritage of other officers to promote better cooperation within the local community. White officers would learn from minority officers to enable white officers to stand alone in a minority neighborhood, and vice versa.

Incidentally, Newark, New Jersey did apply the integration approach in *Lomack v. City of Newark*.[465] Nevertheless, *Lomack's* application of the diversity rationale was seriously flawed. First, the court expressly refused to see *Lomack* for the desegregation case that it plainly was.[466] While the court noted that the involuntary transfer plan was designed to effectuate the *remedial* purpose of the consent decree, it applied Grutter's *non-remedial* diversity rationale.[467] The diversity justification is not remedial in any sense. Hence, the court in *Lomack* erred by confusing these two distinct constitutional frameworks. The city should have prevailed under the desegregation line of cases, modeled after the busing cases of the 1960s, or in the alternative, the court should have applied the *Croson/Adarand* jurisprudence, which is grounded in the employment context. Under the *Croson/Adarand* line of jurisprudence, transfers would be legitimate if they were undertaken to effectuate the remedial purpose of the consent decree.[468] Instead, the district court forced the education-based diversity rationale into an employment context where it did not apply.

Despite *Petit* and *Lomack*, the distinct functions served by education and employment indicate that an expansion of the diversity rationale is unlikely, especially on higher levels of review. Intentionally hiring sergeants of a certain race to facilitate minority cooperation with police, or laying pipe under an interstate highway, have nothing to do with improving learning through diversity. The district court in *Hershill Gill* agreed.[469] In that case, when participation goals were set for minority firms in the context of construction

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465. Lomack v. City of Newark, No. Civ.A.04-6085, 2005 WL 2077479, at *3 (D.N.J. Aug. 25, 2005) (holding that achieving racial diversity within the Newark, N.J. Fire Department is a compelling government interest because exposure of firefighters to different backgrounds and vocabularies better prepares firefighters to work effectively with colleagues and improve performance on promotional exams).

466. *Id.* at *4.

467. *Id.* at *6.

468. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 476 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204 (1995).

469. *See supra* text accompanying notes 362-86.

projects, the court stated that the *Grutter* diversity model did "not modify *Croson* or *Adarand* in the area of public contracting."[470] At least in the view of this particular court, the diversity rationale did not apply to public contracting cases and, therefore, remedial cases are unaffected by *Grutter*.[471]

However, the diversity rationale could conceivably be applicable in the context of university professorships.[472] A logical link between *Grutter*'s diversity reasoning and enhancing learning outcomes through exposure to people of different races applies to professors' interactions with students, and to the level of discourse among students.[473] Classroom discussion is livened by diversity of professors, thereby increasing the number of cultural views portrayed to students.[474] Public school systems may also argue that racial diversity is as important in elementary and secondary schools as it is in Universities because it better prepares students for higher education.

Overall, lower courts have readily extended *Grutter*'s liberalized narrow tailoring analysis to the traditional remedial line of cases. This approach includes acceptance of the critical mass or unannounced range model, as accepted in *Bullen* and *Western States Paving*. Other examples include a less exhaustive consideration of race-neutral alternatives, tolerating a larger threshold of an acceptable burden on the majority, and possibly the lack of a sunset provision. In addition, it is plausible that courts could continue in the footsteps of the Tenth and Seventh Circuits and water down the strict scrutiny analysis by giving substantial deference to the government's position that affirmative action serves a compelling government interest in certain circumstances. Perhaps some courts will extend the diversity rationale to employment cases in an effort to uphold suspect racial preference plans.

In *Petit*, the Seventh Circuit kept in line with *Grutter*'s good-faith standard when it gave deference to the views of Chicago police experts who concluded that racial preferencing used to enhance diversity of the force was essential to carrying out operations.[475]

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470. Hershill Gill Consulting Eng'rs v. Miami-Dade County, 333 F. Supp. 2d 1305, 1317 (S.D. Fla. 2004).

471. *Id.*

472. Suzanne E. Eckes, *Diversity in Higher Education: The Consideration of Race in Hiring University Faculty*, 2005 BYU EDUC. & L.J. 33, 48 (2005).

473. *Id.*

474. *Id.* at 49.

475. Petit v. City of Chicago, 352 F.3d 1111, 1114-15 (7th Cir. 2003), *cert. denied,* 541 U.S. 1074 (2004).

This action is directly analogous to the Supreme Court's approach in *Grutter*. There, the Court used strict scrutiny as the appropriate level of review, but took the University of Michigan at its word that creating racial diversity was a compelling interest put in place to improve learning outcomes and break down stereotypes.[476] In addition, the three Supreme Court Justices who dissented from denial of certiorari in *Concrete Works of Colorado v. Denver* questioned the Tenth Circuit's approach to the remedial diversity justification.[477] The Tenth Circuit merely required that Denver demonstrate that an inference of discrimination could be drawn from the evidence, as opposed to *Wygant*'s more stringent requirement that the government show a "strong basis in evidence."[478]

With a material change in the composition of the Supreme Court, however, the *Grutter* decision itself, and perhaps all affirmative action programs in the United States, are just one vote away from being stricken from American constitutional jurisprudence. If Chief Justice Roberts mirrors former Chief Justice Rehnquist's vote and Justice Alito becomes the swing vote, the Court would have the 5-4 majority required to overturn *Grutter*. A narrow interpretation of "compelling government interest" in education cases would make it extremely difficult to advance or protect constitutional liberties on account of race. Benign discrimination, and the concept that the moral appropriateness of intentional discrimination changes by altering the color of the beneficiary, would end.

Nevertheless, the probable short-term outcome is more restrained. The Court will likely employ a case-by-case approach, where stare decisis is well respected and fundamental changes in the law occur more incrementally. In the near future, *Grutter* will remain fundamentally intact or perhaps slightly modified. Yet even under *Grutter*, the non-remedial diversity rationale is only minimally susceptible to expansion into public employment. It is likely that the Supreme Court will be hesitant to apply the diversity rationale to most public employment contexts.

B. *The Supreme Court and Judicial Politics*

With Chief Justice Roberts and Justice Alito confirmed, affirmative action stands to be limited or perhaps functionally eradicated. Based on the new Justices' jurisprudential temperament, it is un-

476. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).
477. 540 U.S. 1027, 1029 (2003).
478. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986).

likely that they will support the non-remedial racial diversity paradigm announced in *Grutter*. It is therefore conceivable that Chief Justice Roberts, along with Justice Alito, could return the razor-sharp teeth back to strict scrutiny review. As a result, it is unlikely that *Grutter* will extend into public employment.

A snapshot of Roberts's approach to Equal Protection issues is revealed in an amicus brief he wrote in support of *The Associated General Contractors of America for Adarand Constructors v. Mineta*.[479] The 2001 Supreme Court case analyzed the constitutionality of the TEA-21 statute that provided for racial preferences in federal contracting projects.[480] In his brief, Roberts took a hard line approach to *Wygant*'s strong-basis-in-the-evidence requirement and argued that Congress lacked the specific findings to support the compelling interest behind the asserted remedial purpose of the statute.[481] Roberts also highlighted that simple legislative pronouncements of good faith that lack specific findings regarding the industry to which the preference is applied, cannot suffice.[482]

Roberts's testimony before the Senate Judiciary Committee, however, revealed a more measured view of affirmative action.[483] For example, Roberts stated that he understood the current Court to permit "[c]onsideration of race or ethnic background, so long as it's not . . . a make-or-break test."[484] Roberts also expressed his view that the Supreme Court adequately considered the impact of affirmative action when it upheld the race-conscious admissions program at the University of Michigan Law School.[485] In an exchange with Senator Diane Feinstein, Roberts articulated that "efforts to ensure the full participation in all aspects of our society by people, without regard to their race, ethnicity, gender, religious beliefs, all of those are efforts that I think are appropriate."[486] Fi-

479. Brief for The Associated General Contractors of America as Amicus Curiae Supporting Petitioners, Adarand Constructors v. Mineta, 534 U.S. 103 (2001) (No. 00-730).

480. Adarand Constructors v. Mineta, 534 U.S. 103, 105-06 (2001).

481. Brief for The Associated General Contractors of America, *supra* note 479, at 7-13.

482. *Id.* at 9.

483. Greg Stohr & Robert Schmidt, *Roberts Gives Hints on Property, Race, Death Penalty (Update 3)*, Sept. 14, 2005, http://www.bloomberg.com/apps/news?pid=10000103&sid=AGjJjznR_R6Y&refer=US.

484. TopNews.com, *Text of John Roberts Hearing 5*, Sept. 14, 2005, http://www.wtopnews.com/index.php?nid=343&sid=570126.

485. *Id.*

486. SFGate.com, *Text of John Roberts Hearing-19*, Sept. 14, 2005, http://sfgate.com/cgi-bin/article.cgi?f=/N/a/2005/09/13/national/w194051D18.DTL.

nally, Roberts noted that "a measured effort that can withstand scrutiny is . . . a very positive approach."[487]

Justice Alito's position on affirmative action is more evident. On his application to work under Attorney General Meese during the Reagan Administration, Alito wrote, "I am particularly proud of my contribution in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion."[488] Alito noted that he believes "'very strongly in limited government, federalism, free enterprise, the supremacy of the elected branches of government . . . and the legitimacy of a government role in protecting traditional values.'"[489]

Although Alito has not written an opinion on affirmative action in the Fourteenth Amendment context, he voted to strike down an affirmative action program under Title VII, while the Third Circuit was sitting en banc in 1996.[490] In *Taxman v. Board of Education of the Township of Piscataway*, the Board, faced with a budget crisis, fired Ms. Taxman, a white teacher with equal seniority to a black teacher, to achieve racial diversity on the faculty pursuant to an affirmative action program.[491] The en banc majority, joined by Judge Alito, held that under Title VII, affirmative action plans must have a remedial purpose to be upheld.[492] Thus, Judge Alito signed on to the notion that, given the clear language of Title VII, "a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster."[493] In light of the new Justices' conservative approach to affirmative action, it appears unlikely that they will support an extension of the non-remedial diversity rationale to public employment.

CONCLUSION

It is proper to ask "'[w]hether America's public policy effec-

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487. *Id.*

488. Bill Sammon, *Alito Rejected Abortion as a Right*, THE WASH. TIMES, Nov. 14, 2005, at A01.

489. *Id.* (quoting Samuel Alito's application for appointment as Deputy Assistant Attorney General).

490. Taxman v. Bd. of Educ. of Piscataway, 91 F.3d 1547, 1550 (3d Cir. 1996) (en banc).

491. *Id.* at 1550-52.

492. *Id.* at 1557.

493. *Id.* at 1550.

tively fights historical discrimination by practicing it.'"[494] The diversity regime has placed the nation in a "paradox which is that we are trying to eradicate the historically invidious effects of race [discrimination] with a process that institutionalizes race as the basis for college admissions [and] faculty hiring [decisions]."[495] Courts should find that diversity is not a compelling government interest under the Equal Protection Clause because it perpetuates affirmative entitlements. Above all, the negative liberties embodied within the individual protections of the Constitution should be shields to be used for defense rather than swords designed for attack.

The central issue is the relationship between negative liberty and affirmative rights. The Bill of Rights and the Fourteenth Amendment were added to our Constitution to ensure that the state would not engage in the arbitrary exercise of power, a cornerstone of the oppression experienced under the English Crown.[496] The negative liberties enshrined in the Fourteenth Amendment are in place to ensure the survival of the fundamental values of fair order learned from both Lockean enlightenment philosophy and the Republic's ongoing journey in order to prevent the abuse of power. The Fourteenth Amendment should protect citizens from official oppression, but the Amendment should not provide a categorical right to privileged entitlements based on race, when the citizen has suffered no de jure discrimination. Hence, the only justification that arguably fits within the text and purpose of the Fourteenth Amendment is the remedial model recognized in the *Croson/Adarand* line of cases. Under the remedial model, a remedial program is constitutional where there is proof that discrimination committed by the state caused the harm that will be remedied.[497] Above all, it is imperative to recognize that the morality of intentional racial discrimination does not change by reversing the colors of the perpetrator or beneficiary. The same wrong drives both discrimination and its remedy.

In the employment context, diversity proponents would try to supplement *Grutter*'s reasoning with the justification of a representative bureaucracy. In the literal sense, a representative bureaucracy is "a civil service in which every race, caste, or social class of persons in a nation are represented in exact or roughly proportional

494. Dinesh D'Souza, *Affirmative Action Debate: Should Race Based Affirmative Action be Abandoned as a National Policy?*, 60 ALB. L. REV. 425, 429 (1996).

495. *Id.*

496. EPSTEIN & WALKER, *supra* note 23, at 630-31.

497. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986).

numbers to its makeup in the overall population."[498] This approach values the social equity achieved through racial diversity above the standards of efficiency and individual rights. In short, the representative bureaucracy is designed to generate a workforce that is broadly characteristic of the society in which it functions, so people of authority can better relate and, hence, service the corresponding racial segments of the citizenry.[499] Yet, proponents fail to consider efficiency. The government should demand the best possible employees, for the best possible team in order to achieve efficient operations in its conceived purpose of servicing the citizenry. Several reviews have found that there is no clear economic case for diversity.[500]

Supporters of affirmative action and diversity reason that racism is omnipresent in American society.[501] A recent article argues that more than fifty years after *Brown* and more than thirty years of racial preferences have simply not been enough time for minorities to attain meaningful socio-economic achievement in the professional sphere.[502] This approach focuses on the disparate impact theory, which states that disparities between whites and minorities in employment rates, in themselves, warrant racial preference plans.[503]

The diversity proponents vilify the shameful role race has played in the past, yet wish to re-institutionalize the same disgraceful regime today. While the African American story indeed depicts a long and arduous struggle for liberty, the possibility of disciplining those responsible is impossible. Discriminating against innocent members of the majority further splits the racial chasm. Enlightenment philosophy teaches that individuals are free until they actually hurt another or interfere with another's liberty. The stringent enforcement of anti-discrimination laws preserves the proper balance

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498. David Nachmias & David H. Rosenbloom, *Measuring Bureaucratic Representation and Integration*, *in* DIVERSITY AND AFFIRMATIVE ACTION IN PUBLIC SERVICE 40 (Walter D. Broadnax ed., 2000).

499. *See* Lloyd G. Nigro, *A Mini-Symposium, Affirmative Action in Public Employment*, *in* DIVERSITY AND AFFIRMATIVE ACTION IN PUBLIC SERVICE 160-61 (Walter D. Broadnax ed., 2000).

500. See Stephan Overell, *An issue that is not black and white: Corporate Diversity: Is there really a business case for having a diverse workforce?*, FIN. TIMES (London), Feb. 21, 2005, at 11; Donna Howell, *Work Force of the 21st Century: Is there a pot of gold at the end of the diversity rainbow for large corporations?*, INVESTORS BUSINESS DAILY, June 20, 2005, at A10.

501. *See* Foreman, Dadey & Wiggins, *supra* note 458, at 112-13.

502. *Id.* at 104-05.

503. *Id.* at 83-84.

of liberty and equity. The equal protection of all must not be replaced with the unequal protection of some.

A social order that penalizes those who do well in their professional endeavors is a symptom of a dysfunctional culture. We should aspire to live up to one of the most fundamental principles of the civil rights movement, which was capsulized by the Reverend Dr. Martin Luther King Jr., when he espoused his hope that Americans wish to "[l]ive in a nation where they will not be judged by the color of their skin but by the content of their character."[504] Consequently, the next time the opportunity emerges to halt the progress of racial preferences into the public employment context, we, in the spirit of Odysseus, should remain faithful to the rule of law as enshrined in the federal constitution by leaning on and rowing hard.

504. Martin Luther King Jr., I Have a Dream Speech delivered at the Lincoln Memorial (August 28, 1963) (transcript available at http://www.americanrhetoric.com/speeches/Ihaveadream.htm).