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Constitutional Law: Forecasting the Sunset of Radical Preferences in Higher Education While Broadening their Horizons

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CONSTITUTIONAL LAW: FORECASTING THE SUNSET OF RACIAL PREFERENCES IN HIGHER EDUCATION WHILE BROADENING THEIR HORIZONS

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

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Respondents[1] implemented admissions policies designed to select an academically qualified and diverse student body with substantial promise for success within the legal profession.[2] Petitioner sought admission to the Law School, was rejected,[3] and filed a lawsuit alleging[4] that Respondents' admissions policies[5] discriminated against her on the basis of race in violation of the Fourteenth Amendment.[6] The district court[7] held that Respondents' acceptance of a "critical mass" of minority students in order

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* I would like to thank my mother Luceil for her unconditional love and support. I dedicate this comment to my grandfather Harry and to the memory of my beloved grandmother Eleanor.

1. Respondents included the University of Michigan Law School (the Law School), a previous President of the University of Michigan, a previous Dean of the Law School, a previous Director of Admissions for the Law School, and the current Dean of the Law School. Grutter v. Bollinger, 539 U.S. 306, 316 (2003). The Law School enjoys a reputation as one of the best in the country. *Id.* at 312.

2. *Id.* at 313. Respondents' admissions policies further emphasized the Law School's particular commitment to "'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.'" *Id.* at 316 (quoting Grutter v. Bollinger, 539 U.S. 306 app. 120 (2003)). Meaningful numbers were defined as a "'critical mass' of [underrepresented] minority students." *Id.* Admissions officers considered an applicant's application consisting of undergraduate grade point average, Law School Admissions Test scores, a personal statement, letters of recommendation, and an essay describing how the applicant will contribute to the diversity of the Law School. *Id.* at 315.

3. Petitioner, a white Michigan resident, was initially placed on a waiting list and was subsequently denied admission. *Id.* at 316.

4. Petitioner's complaint alleged that Respondents utilized race as a "'predominant'" factor affording selected minority applicants a greater likelihood of admission over students from disfavored racial groups with similar credentials. *Id.* at 317 (quoting Grutter v. Bollinger, 539 U.S. 306 app. 33-34 (2003)).

5. *See supra* note 2 and accompanying text.

6. *Grutter*, 539 U.S. at 316. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

7. The district court certified a class comprised of all applicants who were rejected by the Law School beginning in 1995 and who "were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School." Grutter v. Bollinger, 137 F. Supp. 2d 821, 824 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

to create a racially diverse student body violated the Equal Protection Clause of the Fourteenth Amendment and enjoined Respondents from using race as a factor in their admissions policies.[8] Respondents appealed, and the appellate court reversed, holding that diversity constituted a compelling state interest and that Respondents' use of race in admissions was lawful.[9] The Supreme Court granted certiorari[10] and, affirming the appellate court, HELD, that narrowly tailored uses of race in a public university's admissions policies in order to obtain the educational benefits that flow from a diverse student body are constitutionally permissible.[11]

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[12] Courts analyze equal protection claims that allege racial discrimination by assessing whether racial classifications are narrowly tailored to further a compelling government interest.[13] While Courts apply strict scrutiny review in order to expose potentially illegitimate uses of race, not every racial classification is invalidated by the Fourteenth Amendment.[14] Although race was not at issue in *Sweezy v. New Hampshire*,[15] the Court explored the role of rights safeguarded by both the Fourteenth and First Amendments within the realm of post-secondary education.[16]

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8. *Id.* at 872. The district court based its ruling on statistics suggesting that membership in particular minority groups increased the odds of acceptance hundreds of times over that of non-minority applicants. *See id.* at 837. The district court emphasized that "a distinction should be drawn between viewpoint diversity and racial diversity. While the educational benefits of the former are clear, those of the latter are less so." *Id.* at 849.

9. Grutter v. Bollinger, 288 F.3d 732, 735-39 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

10. Grutter v. Bollinger, 537 U.S. 1043 (2002). The Court stated it sought to resolve the disagreement among the federal appellate courts regarding whether diversity is a compelling government interest that justifies narrowly tailored uses of race for admissions purposes in public universities. *Grutter*, 539 U.S. at 322.

11. *Id.* at 343.

12. U.S. CONST. amend. XIV, § 1.

13. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold . . . that all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."). *Korematsu* represents the first case in which the Court articulated the strict scrutiny standard. *See Grutter*, 539 U.S. at 351 (Thomas, J., concurring in part and dissenting in part).

14. *See Grutter*, 539 U.S. at 326-27.

15. 354 U.S. 234 (1957).

16. *See id.* at 250. Although *Sweezy* did not concern an equal protection challenge, the Court reached the Fourteenth Amendment through the Due Process Clause. *See id.* at 235.

In *Sweezy*, the Court considered whether government action to restrict academic freedom within American universities violated the First Amendment.[17] Petitioner, a guest lecturer suspected of espousing anti-American ideology in a university humanities course, was held in contempt of court for failure to disclose the content of his classroom lectures during an investigation into subversive activities.[18] Accordingly, the Court discussed the extent to which the alleged encroachment upon individual liberties affected academic discovery and exchange.[19]

The Court characterized the importance of freedom to pursue academic inquiry within American universities as "self-evident" and critical for the advancement of the nation.[20] In this context, the Court held that the government could not inhibit the exchange of intellectual ideas and knowledge among students and instructors within the university system.[21] Moreover, the Court emphasized that First Amendment guarantees could not be abridged merely because a member of academia disseminated or

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17. *See id.* at 249-50.

18. *Id.* at 243-46. The New Hampshire legislature enacted a statute authorizing the state attorney general to conduct investigations related to violations of the Subversive Activities Act of 1951 and to proceed with criminal prosecutions. *Id.* at 236-37. The statute required that the attorney general invoke the assistance of the judiciary in order to hold witnesses in contempt. *Id.* at 238.

19. *See id.* at 250.

20. *Id.* The Court noted that the environment in which scholars and students learn must "always remain free to inquire, to study and to evaluate, to gain new . . . understanding; otherwise our civilization will stagnate and die." *Id.* Justice Frankfurter stressed that "grave harm" would result from government intrusion into the intellectual life of a university. *Id.* at 261-62 (Frankfurter, J., concurring in the result).

21. *See id.* at 250. Justice Frankfurter emphasized that

> "[a] university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry [and] the right to examine, question, modify or reject traditional ideas and beliefs. . . . The [spirit and] concern of [university] scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.
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> Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of . . . knowledge.
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> . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

Id. at 262-63 (Frankfurter, J., concurring in the result) (citing THE OPEN UNIVERSITIES IN SOUTH AFRICA 10—12 A. v. d. S. Centlivres & Richard Feetham eds., 1957).

harbored viewpoints that diverged from mainstream beliefs.[22] Thus, in *Sweezy*, the Court exhibited an unwillingness to permit government interference into specific facets of the intellectual life fostered by American colleges and universities.[23]

In *Keyishian v. Board of Regents*,[24] the Court applied the principles of academic freedom as articulated in *Sweezy*.[25] In the context of the First Amendment, the Court examined the validity of state legislation allowing for the disqualification and removal of public university instructors who failed to sign loyalty oaths disavowing subversive ideology.[26] Although the Court recognized the state's interest in protecting its educational system from subversive elements,[27] it struck down the legislation.[28]

Justifying its decision, the Court characterized the American classroom as a "'marketplace of ideas'" and rejected the notion that states could enact laws restricting student exposure to various points of view.[29] Safeguarding academic freedom, the Court emphasized, provided both transcendent value and practical application in training future leaders of the nation.[30] The Court criticized any restrictions placed upon an instructor's ability to communicate wide arrays of ideas to students as antithetical to the Constitution.[31]

Utilizing the *Sweezy* and *Keyishian* definitions of academic freedom, a sharply divided Court, in *Regents of the University of California v. Bakke*,[32] evaluated whether a university's racial set-aside admissions policy was constitutionally permissible.[33] Petitioner attempted to justify,

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22. *See id.* at 251. The Court characterized the absence of diverse viewpoints as "a symptom of grave illness in our society." *Id.* Scholarship, the Court remarked, could not "flourish in an atmosphere of suspicion and distrust." *Id.* at 250.

23. *See id.* The concurrence defined interference, whether overt or implicit, as that which "tends to check the ardor and fearlessness of scholars." *Id.* at 262 (Frankfurter, J., concurring in the result).

24. 385 U.S. 589 (1967).

25. *Id.* at 603.

26. *Id.* at 591-92, 603-04. Appellants were university instructors who refused to sign a certificate that they were not Communists or, if they had been Communists, that they disclosed that information to the university. *Id.* at 592. Failure to sign the certificate resulted in dismissal. *Id.*

27. *Id.* at 602.

28. *Id.* at 604. The Court stated that any regulation designed to limit First Amendment guarantees must be narrow in specificity and unambiguous. *See id.* at 604.

29. *Id.* at 603 (citation omitted).

30. *Id.*

31. *See id.* The Court added that restricting academic content would stifle "'that free play of the spirit which all teachers ought especially to cultivate and practice . . . .'" *Id.* at 601 (alteration in original) (quoting Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)). Justice Clark also acknowledged the pivotal role teachers played in shaping students' minds. *Id.* at 624 (Clark, J., dissenting) (citing Alder v. Bd. of Educ., 342 U.S. 485, 493 (1952)).

32. 438 U.S. 265 (1978).

33. *Id.* at 269-70, 211-13 (plurality opinion).

inter alia, its use of racial quotas on the basis of educational benefits that flowed from a diverse student body.[34] Respondent challenged the policy as an impermissible use of race prohibited by the Fourteenth Amendment.[35]

In his opinion announcing the judgment of the Court, Justice Powell noted that the *Sweezy* concurrence recognized that a university's academic freedom extended to its selection of a student body.[36] A diverse student body, Justice Powell reasoned, promoted an atmosphere of academic inquiry and freedom protected by the First Amendment.[37] Justice Powell acknowledged, however, that other elements aside from ethnicity and race produced a heterogeneous student body.[38] Recognizing judicial reluctance to interfere with universities, Justice Powell attributed a presumption of good faith to universities.[39] The Court held that, while a university may not

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34. *Id.* at 306 (plurality opinion).

35. *Id.* at 277-78 (plurality opinion). The medical school's admissions policy adopted a separate admissions system and committee for minority applicants operating in coordination with the regular admissions process. *Id.* at 272-74 (plurality opinion).

36. *Id.* at 312-13 (plurality opinion); *see supra* note 21 and accompanying text.

37. *See id.* at 312 (plurality opinion). Justice Powell acknowledged that the First Amendment did not explicitly enumerate academic freedom as a protected right. *Id.* (plurality opinion). Justice Powell recognized that university admissions policies aimed at creating a diverse student body would contribute to the "robust exchange of ideas." *Id.* at 313 (plurality opinion). Justice Powell noted observations by the President of Princeton University that a significant amount of academic understanding was achieved informally and outside the classroom through the interaction among students but that "it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs." *Id.* at 313 n.48 (plurality opinion) (quoting William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Wkly., Sept. 26, 1977 at 7, 9).

38. *See id.* at 314, 324 (plurality opinion). Justice Powell emphasized that diversity "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single . . . element." *Id.* at 315 (plurality opinion). In the Appendix to Justice Powell's opinion, he includes a discussion of the Harvard College admissions policies, noting that

> the Committee seeks—"variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience . . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories, and housing arrangements.*"

Id. app. at 322 (plurality opinion) (quoting Fred L. Glimp, *Final Report to the Faculty of Arts and Sciences*, 65 OFFICIAL REG. OF HARV. UNIV. NO. 25 at 93, 104-05 (1968)). Furthermore, Harvard College asserted that individual qualities or experience not dependent upon race are often the critical criteria in admissions decisions. *Id.* app. at 324 (plurality opinion).

39. *See id.* at 318-19 (plurality opinion). So long as university admissions policies that accorded weight to racial or ethnic background also evaluated student applications on an individualized, case-by-case basis, judicial interference into the academic process was unwarranted. *Id.* at 319 n.53 (plurality opinion). If, however, an applicant demonstrated that universities deviated

use racial quotas, it may, under properly devised standards, consider race and ethnicity in its admissions programs for the purpose of promoting student body diversity.[40]

Like the Court in *Bakke*, the instant Court analyzed Respondents' race-based admissions policies to determine whether admitting a "critical mass" of certain minorities to create a heterogeneous student body survived constitutional challenge.[41] The instant Court acknowledged *Bakke*'s effect upon university admissions policies by referring to amici curiae that noted how several universities modeled admissions policies on Justice Powell's opinion.[42] The instant Court maintained that universities represent the training ground for the nation's leaders.[43] The instant Court stressed that the goals of leadership and good citizenship could only be achieved by providing members of all racial and ethnic groups with access to higher education.[44] Thus, the instant Court held that Respondents' use of race in their admission policies in order to achieve a diverse student body did not violate the Fourteenth Amendment.[45]

Justifying its ruling, the instant Court noted that the First Amendment accords universities a broad range of academic freedoms as hallmarks of

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from individual comparisons or proved that admissions policies resulted in the systematic exclusion of particular groups of individuals, the presumption of legality might be refuted. *Id.* (plurality opinion).

40. *Id.* at 320 (plurality opinion). Courts would not presume that a university's admissions policy that does not facially discriminate on the basis of race would be implemented in such a manner as to conceal the true operation of a quota system. *Id.* at 318 (plurality opinion). Justice Powell cited with approval Harvard College's admissions policy that deemed ethnic and racial background as a "plus" when considered along with the applicant's entire application. *See id.* at 316-17, 321-24 (plurality opinion). However, Justice Powell acknowledged that other qualities, such as personal talents, leadership potential, community service, and other factors were "all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.* at 317 (plurality opinion).

41. *See* Grutter v. Bollinger, 539 U.S. 306, 318, 322 (2003).

42. *See id.* at 323. Because many universities formatted their admissions programs based upon Justice Powell's opinion, the Court characterized it as a "touchtone for constitutional analysis of race-conscious admissions policies." *Id. But see infra* note 51 and accompanying text.

43. *See Grutter*, 539 U.S. at 332.

44. *See id.* The Court noted that numerous studies demonstrated that diversity "promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Id.* at 330 (quoting Brief of Amici Curiae Educ. Research Ass'n at 3, *Grutter* (No. 02-241)). The Court explained that, in a "global marketplace" and economy, universities should enable all qualified members of a heterogeneous population access to education and training, both of which are prerequisites for success. *Id.* at 330-31. The Court stated that it has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Id.* at 331 (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).

45. *Id.* at 343.

a post-secondary education.[46] The instant Court considered a university's selection of its student body to be one component of academic freedom.[47] Additionally, the instant Court emphasized that the judiciary should defer to the expertise of educators concerning academic judgments made within their purview.[48] Therefore, the instant Court accepted Respondents' assurance that they would phase out race-conscious admissions policies when Respondents no longer deem them necessary.[49]

Justice Thomas, in a separate opinion, emphasized that the majority mischaracterized the compelling government interest offered by the Respondents in defense of their race-conscious admissions policies.[50] Justice Thomas questioned the majority's reliance upon social science evidence contained in numerous amicus curiae briefs as justification for deferring to Respondents' policy judgment.[51] Furthermore, Justice Thomas characterized the majority's expanded interpretation of academic freedom grounded in the First Amendment as unprecedented.[52] Justice Thomas criticized the majority's unexplained adoption of Justice Powell's opinion in *Bakke* as binding.[53] Furthermore, Justice Thomas objected to the

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46. *See id.* at 330.

47. *See id.* at 329. *But see infra* notes 53-54 and accompanying text.

48. *See Grutter*, 539 U.S. at 328.

49. *Id.* at 342-43. Respondents stated that they would "'like nothing better than to find a race-neutral admissions formula' and [would] terminate [their] race-conscious admissions program as soon as practicable." *Id.* at 343 (quoting Brief for Respondents at 34, *Grutter* (No. 02-241)). The Court estimated that, within twenty-five years, the use of racial preferences would no longer be necessary in order to achieve a diverse student body. *Id.*

50. *Id.* at 355 (Thomas, J., concurring in part and dissenting in part). Justice Thomas pointed to contradictory language in the majority opinion that first claimed Respondents had a "compelling interest in attaining a diverse student body" and later re-characterized that interest as "securing the *educational benefits* of a diverse student body." *Id.* (Thomas, J., concurring in part and dissenting in part). Justice Thomas concluded that diversity, in fact, was not the primary motivation Respondents sought through their admissions policy. *See id.* at 356 (Thomas, J., concurring in part and dissenting in part).

51. *See id.* at 364 (Thomas, J., concurring in part and dissenting in part). Despite the "impressive display of *amicus* support for the Law School in this case from all corners of society," *id.* at 371 (Thomas, J., concurring in part and dissenting in part), a plethora of contrary evidence suggested that no tangible academic benefits resulted from bolstering diversity through the consideration of race and ethnicity in admissions decisions. *See id.* at 364 (Thomas, J., concurring in part and dissenting in part); *see also* Sweezy v. N.H., 354 U.S. 234, 250 (1957) (emphasizing that, within the social science discipline, "few, if any, principles are accepted as absolutes").

52. *See Grutter*, 539 U.S. at 362 (Thomas, J., concurring in part and dissenting in part). "In my view, 'it is the business' of this Court to explain itself when it cites provisions of the Constitution to invent new doctrines—including the idea that the *First Amendment* authorizes a public university to do what would otherwise violate the *Equal Protection Clause*." *Id.* at 363 (Thomas, J., concurring in part and dissenting in part).

53. *Id.* at 356-57 (Thomas, J., concurring in part and dissenting in part). "[O]ne might expect the Court to fall back on the judicial policy of *stare decisis*. But the Court eschews even this weak defense . . . in favor of an unfounded wholesale adoption of [Justice Powell's opinion in *Bakke*]."

majority's characterization of Respondents' use of race and ethnicity in its admissions policies as educational autonomy.[54]

Justice Scalia's dissent criticized the majority for its conclusion that leadership and good citizenship resulting from racial and ethnic diversity justified admissions preferences.[55] Justice Scalia questioned the majority's acceptance of Respondents' policies and noted that universities utilized race to serve divergent purposes.[56] Justice Scalia concluded that the majority's deference and presumption of good faith to university academic decisions failed to address whether any educational benefits actually flowed from racial diversity.[57]

In a separate dissent, Chief Justice Rehnquist further criticized the majority for accepting Respondents' "critical mass" policies when they actually facilitated racial balancing.[58] Upon close analysis of admissions statistics over a six-year period, Chief Justice Rehnquist questioned the majority's conclusion that Respondents did not focus upon numerical

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Id. (Thomas, J., concurring in part and dissenting in part).

54. *See id.* at 362 (Thomas, J., concurring in part and dissenting in part). "The majority's broad deference to . . . the Law School's judgment that racial aesthetics leads to educational benefits . . . finds no basis in the Constitution or decisions of this Court. . . . [D]eference to the Law School's conclusion that its racial experimentation leads to educational benefits will, if adhered to, have serious collateral consequences." *Id.* at 364 (Thomas, J., concurring in part and dissenting in part).

55. *Id.* at 347-48 (Scalia, J., concurring in part and dissenting in part). Justice Scalia argued that the majority's reliance upon the theory that an educational institution fosters good citizenship through diversity was tenuous at best:

> This is not, of course, an "educational benefit" on which students will be graded on their Law School transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding). For it is a lesson of life rather than law—essentially the same lesson taught to (or rather learned by, for it cannot be "taught" in the usual sense) people . . . in institutions ranging from Boy Scout troops to public-school kindergartens.

Id. at 347 (Scalia, J., concurring in part and dissenting in part).

56. *Id.* at 348-49 (Scalia, J., concurring in part and dissenting in part). Justice Scalia posited an inherent hypocrisy in the fact that, while universities proclaim the importance of multiculturalism to justify admitting a diverse student body, administrators endorse "tribalism" and racial segregation on campuses through the proliferation of separate student organizations, specialty housing, and academic programming. *See id.* at 349 (Scalia, J., concurring in part and dissenting in part).

57. *Id.* at 348-49 (Scalia, J., concurring in part and dissenting in part). Justice Scalia forecasted that the majority's ambiguous findings would result in future litigation challenging the existence of any educational benefits that flow from racial diversity. *Id.* (Scalia, J., concurring in part and dissenting in part).

58. *See id.* at 379 (Rehnquist, C.J., dissenting).

equations to determine "critical mass."[59] Furthermore, Chief Justice Rehnquist questioned Respondents' failure to explain why the "critical mass" of students required to adequately represent each minority group varied among groups.[60] Chief Justice Rehnquist concluded that the majority's endorsement of Respondents' admissions policies was an unprecedented departure from constitutional jurisprudence on the issue of race.[61]

While adopting Justice Powell's premise in *Bakke* that student body diversity is a compelling interest, the instant Court reinterprets the importance of race and ethnicity in admissions beyond what Justice Powell contemplated.[62] The instant Court does not distinguish between the presence of minority students on campus[63] and whether those students actually contribute to the educational process.[64] By not addressing this distinction, the instant Court implies that the educational benefits flowing from race-conscious admissions are purely aesthetic rather than substantive.[65]

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59. *Id.* at 383 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist revealed that the percentage of minority students admitted by Respondents roughly equaled the overall percentage of those minority group applicants within the entire applicant pool. *Id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist therefore concluded that such a result was "far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers.'" *Id.* (Rehnquist, C.J., dissenting).

60. *Id.* at 381 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist concluded that Respondents' failure to explain the varying number of students comprising a "critical mass" among each targeted minority group suggested that "critical mass" was, in fact, a sham. *Id.* at 382-83 (Rehnquist, C.J., dissenting); *see supra* notes 53, 59 and accompanying text.

61. *Grutter*, 539 U.S. at 386 (Rehnquist, C.J., dissenting). "[W]hen it comes to the use of race, the connection between the ends and the means used to attain them must be precise. . . . Here the means actually used are forbidden by the *Equal Protection Clause of the Constitution.*" *Id.* at 387 (Rehnquist, C.J., dissenting).

62. *See id.* at 330. The majority stressed how Respondents' admissions policies provided real benefits by promoting cross-racial understanding and the dissolution of racial stereotypes. *Id. But cf. id.* at 355 (Thomas, J., concurring in part and dissenting in part) (stressing that the majority's failure to distinguish between educational benefits based on "racial aesthetics" and race for its own sake confused the issue). Although Justice Powell maintained that race or ethnic background may influence admissions offers if a candidate exhibits qualities more likely to promote beneficial educational pluralism, *see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (plurality opinion), he cautioned that diversity "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single . . . element." *Id.* at 315 (plurality opinion).

63. *See Grutter*, 539 U.S. at 333. Respondents maintained they could not diminish or eliminate stereotyping with "only token numbers" of minority students. *Id.*

64. *See id.* The majority accepts without explanation "the notion that Respondents do 'not premise [their] need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'" *Id.* (quoting Brief for Respondents at 30, *Grutter* (No. 02-241)).

65. *See id.* at 355 & n.3 (Thomas, J., concurring in part and dissenting in part). Justice

The instant Court expands the importance of race and ethnicity to processes occurring specifically outside the academic classroom: admissions and employment.[66] The instant Court focuses upon real-world applications cited in amicus curiae briefs.[67] Justice Powell found that the petitioner in *Bakke* failed to demonstrate how racial admissions quotas in its medical school enhanced the well-being of individual communities.[68] The instant Court, however, hinges national security on Respondents' "critical mass" admissions policies.[69]

In the classroom context, the instant Court tenuously defines the need for viewpoint diversity[70] in terms of racial diversity.[71] The instant Court maintains that racial diversity facilitates greater classroom discussion[72] but does not articulate how race achieves that result.[73] The instant Court forecasts the obsolescence of racial preferences in twenty-five years.[74] In doing so, the instant Court confuses minority access to education with minority viewpoint.[75]

Thomas suggested that Respondents sought an appearance "from the shape of the desks and tables in its classrooms to the color of the students sitting in them" that they concealed through use of the term "diversity." *Id.* at 355 n.3 (Thomas, J., concurring in part and dissenting in part). The Court approved of Respondents' "critical mass" although it suggested no correlation between a student's race and his or her viewpoint. *Id.* at 333; *see also* Grutter v. Bollinger, 137 F. Supp. 2d 821, 849-50 & n.38 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003) ("[W]itnesses testified that . . . viewpoints expressed in class by underrepresented minority students . . . might equally have been expressed by non-minority students. . . . [R]acial diversity is not responsible for generating ideas unfamiliar to some members of the class."); *see supra* text accompanying note 60.

66. *See Grutter*, 539 U.S. at 330-31.

67. *See id.* at 330. *But see* Sweezy v. N.H., 354 U.S. 234, 250 (1957) (emphasizing that few social science principles, if any, are accepted as absolute). *See supra* notes 44, 51 and accompanying text.

68. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310-11 (1978) (plurality opinion). Justice Powell found no relationship between admitting a fixed number of minority medical students and petitioner's asserted goal that those admitted students would promote better health-care services to communities. *See id.* at 311 (plurality opinion).

69. *See Grutter*, 539 U.S. at 331.

70. *See id.* at 330; Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (stating that, because diverse points of view are disseminated within the classroom, the classroom is the "'marketplace of ideas'" upon which the nation's future depends).

71. *See Grutter*, 539 U.S. at 330. *But see* Grutter v. Bollinger, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003) ("[Respondents] walk a fine line in simultaneously arguing that one's viewpoints are not determined by one's race but that certain viewpoints might not be voiced if students of particular races are not admitted in significant numbers.").

72. *See Grutter*, 539 U.S. at 330.

73. *See supra* note 64 and accompanying text.

74. *See Grutter*, 539 U.S. at 343.

75. *See id.* at 355 (Thomas, J., concurring in part and dissenting in part); *see supra* notes 65, 71 and accompanying text.

By granting constitutional validity to Respondents' race-conscious admissions policies, the instant Court expands the activities permitted under the guise of a university's academic freedom.[76] The majority opinions in both *Sweezy* and *Keyishian* did not extend academic freedom to university admissions.[77] Justice Powell's opinion in *Bakke* recognized academic freedom to include admissions.[78] The instant Court adopts Justice Powell's opinion as binding.[79] Closer examination of *Sweezy*'s and *Keyishian*'s reasoning might encourage the instant Court to reassess its broad interpretation of what constitutes an academic freedom.[80]

The instant Court attributes significance to Justice Powell's contention in *Bakke* that First Amendment academic freedoms extend to a university's selection of its student body.[81] The instant Court disregards the relatively low weight of authority upon which Justice Powell based his finding.[82] In *Sweezy*, the majority narrowly characterized the constitutional freedoms granted to universities in terms of substantive academic discovery of ideas and exchange of knowledge among current students and faculty.[83] The majority in *Sweezy* explicitly endorsed the legitimacy of academic freedom to express diverse viewpoints without constraint but did not implicitly extend that freedom beyond the classroom.[84] Additionally, the Court in *Keyishian* explicitly defined academic freedom solely within classroom contexts.[85]

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76. *See id.* at 362-64 (Thomas, J., concurring in part and dissenting in part). "[T]here is no basis for a right of public universities to do what would otherwise violate [the Constitution]." *Id.* at 362 (Thomas, J., concurring in part and dissenting in part); *see also* Stephen Henderson, *Diversity Ruling Ripples Beyond Education*, ST. PAUL PIONEER PRESS, Dec. 28, 2003, at 20A (suggesting that the Court's ruling will have vast implications outside the realm of education).

77. *See generally* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Sweezy v. N.H., 354 U.S. 234 (1957).

78. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (plurality opinion).

79. *See Grutter*, 539 U.S. at 325; *supra* note 53 and accompanying text.

80. *See supra* note 54 and accompanying text.

81. *See id.* at 330 (citing *Bakke*, 438 U.S. at 312, to support the idea that a university must have wide discretion in making sensitive judgments concerning which students should be admitted). According to Justice Thomas, Justice Powell's opinion in *Bakke* serves as the only source supporting the Court's conclusion that public universities are entitled to a broad application of deference with respect to admissions policies. *See id.* at 363 (Thomas, J., concurring in part and dissenting in part).

82. *See id.* at 330. The Court did not address the fact that Justice Frankfurter's concurrence contained support for admissions as an academic freedom. *See Sweezy*, 354 U.S. at 263; *supra* note 21 and accompanying text.

83. *See supra* note 20 and accompanying text.

84. *See supra* note 22 and accompanying text.

85. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967). The majority in *Keyishian* stated that the academic freedom embraced by the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.*

The instant Court departs from the premises in *Sweezy* and *Keyishian* and, in its place, adopts Justice Powell's characterization of university academic freedom to include the selection of students who may eventually contribute to the exchange of intellectual ideas.[86] In doing so, the instant Court categorizes the workings of university bureaucracies as a component of academic freedom, a categorization that has the potential to minimize professional accountability.[87] Because the majority presumes that university officials act in good faith, the instant Court enables university administrators to conduct themselves with near-total impunity.[88]

Ultimately, the instant Court lowers the requirements necessary to satisfy strict scrutiny analysis under the Fourteenth Amendment.[89] The instant Court has enabled those who utilize race-based classifications to claim protection under the First Amendment in order to justify that their interest in diversity is compelling under strict scrutiny.[90] As a result, the instant Court's holding will encourage a proliferation of diversity-based applications.[91] Therefore, while forecasting the ultimate demise of racial preferences, the instant Court actually broadens their application so as to

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86. *See Grutter*, 539 U.S. at 324-25. The Court cited Justice Powell for the proposition that "academic freedom . . . [extends to] 'select[ing] those students who will contribute the most to the "robust exchange of ideas" a university seeks . . . in the fulfillment of its mission [to create diversity].'" *Id.* at 324. Further, the Court expressly "endorse[d] Justice Powell's view that diversity is a compelling state interest that can justify the use of race in university admissions."

87. *See id.* at 369-70 (Thomas, J., concurring in part and dissenting in part). Justice Thomas recounted that "selective admissions has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators." *Id.* at 369 (Thomas, J., concurring in part and dissenting in part). Additionally, Justice Thomas likened the probable effects of the majority's decision to those admissions practices previously employed by Columbia University, where "Columbia could claim (falsely) that '"[w]e have not eliminated boys because they were Jews . . . . [through the use of intelligence testing] . . .[;] it [just] turns out that a good many of the low grade men are New York City Jews."'" *Id.* (Thomas, J., concurring in part and dissenting in part) (quoting letter from Herbert E. Hawkes, dean of Columbia College, to E.B. Wilson (June 26, 1922), *in* HAROLD S. WESCHLER, QUALIFIED STUDENT 160-61 (1977)).

88. *See id.* at 343. Justice Scalia foreshadowed that future lawsuits will question whether a university has exceeded the bounds of good faith and reminded the Court that "deference does not imply abandonment or abdication of judicial review." *Id.* at 348-49 (Scalia, J., concurring in part and dissenting in part) (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)); *see supra* notes 81, 87 and accompanying text.

89. *See id.* at 380 (Rehnquist, C.J., dissenting). "Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference." *Id.* (Rehnquist, C.J., dissenting); *see supra* note 54 and accompanying text.

90. *See supra* notes 52, 76 and accompanying text.

91. *See* Stephen Henderson, *Diversity Ruling Ripples Beyond Education*, ST. PAUL PIONEER PRESS, Dec. 28, 2003, at 20A (recounting how at least one court has applied the instant Court's holding to a non-education context).

reinvigorate their implementation and potentially undermine equal protection analysis.[92]

92. *See id.* ("Even though the justices probably didn't intend for the [instant Court's] ruling to have a broad application beyond education, that doesn't mean it will have no application beyond education.").