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# Constitutional Law - Affirmative Action: The Supreme Court Strikes down the University of Michigan's Admission Policy but Finds Diversity to Be a Compelling Interest - Gratz v. Bollinger

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# CONSTITUTIONAL LAW—AFFIRMATIVE ACTION: THE SUPREME COURT STRIKES DOWN THE UNIVERSITY OF MICHIGAN'S ADMISSION POLICY BUT FINDS DIVERSITY TO BE A COMPELLING INTEREST

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

## I. FACTS

Plaintiffs and petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan's College of Literature, Science, and the Arts (University).[1] Both applicants were white and residents of Michigan.[2] Gratz applied in 1995 and was denied admission.[3] Subsequently, she applied and was accepted at the University of Michigan at Dearborn, where she graduated in 1999.[4]

Hamacher applied for admission to the University for the class of 1997.[5] Hamacher was also denied admission and was later admitted to Michigan State University.[6] Like Gratz, Hamacher also graduated, but intended to transfer to the University at the time the lawsuit was filed.[7]

The University of Michigan's College of Literature, Science, and the Arts is one of the leading public institutions in the country.[8] The University is a selective institution, meaning that it receives many more applicants than it can readily admit.[9] The University has long promoted diversity through various means, including recruitment and outreach efforts.[10] Because these methods did not enroll enough minority students, the University decided to include race as one of many factors in selecting its incoming class.[11]

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1. Gratz v. Bollinger, 539 U.S. 244, 251 (2003).

2. *Id.*

3. *Id.*

4. *Id.* The University of Michigan at Dearborn was founded in 1959. *About UM-Dearborn: Overview*, *at* http://www.umd.umich.edu/about/overview.html (last visited Mar. 16, 2004). The school has about 8,500 students. *Id.* The student body is made up of 94% Michigan residents and the "average" student had an American College Testing (ACT) score of 24 and a 3.4 high school GPA. *About UM-Dearborn: Profile of Enrolled Students*, *at* http://www.umd.umich.edu/about/profile.html (last visited Mar. 16, 2004).

5. *Gratz*, 539 U.S. at 251.

6. *Id.*

7. *Id.* at 251 n.1.

8. Brief for Respondents at 1, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516).

9. *Id.* In 1997, the College of Literature, Science, and the Arts received over 13,500 applicants for 3,958 spots. *Id.* at 1 n.1.

10. *Id.* at 3-4.

11. *Id.* at 4-11.

The University's Office of Undergraduate Admissions (OUA) oversees the admissions process.[12] To maintain consistency, the OUA issues a set of written admissions guidelines every year.[13] The admissions counselors relied upon these guidelines in making their admissions decisions.[14] These decisions are based on many factors including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race.[15] From 1995 to 2003, race included African-Americans, Hispanics, and Native Americans.[16] Furthermore, "'virtually'" every qualified applicant from these groups was admitted.[17]

During 1995 and 1996, counselors evaluated applicants according to SCUGA factors.[18] SCUGA awards points for the quality of the applicant's high school (S), the strength of an applicant's high school curriculum (C), the applicant's unusual circumstances (U), the applicant's geographical residence (G), and the applicant's alumni relationships (A).[19] These scores were added to the applicant's GPA to achieve what was called the "GPA 2" score.[20] The admissions counselor then took this score and consulted the guidelines chart that had a range of "GPA 2" scores down the vertical axis and standardized test scores on the horizontal axis.[21] The admissions counselor would then find where the applicant's "GPA 2" score and test score intersected.[22] Once the counselor found the appropriate cell, he or she was confronted with one of four actions.[23] The counselor could choose to admit, to reject, to delay for additional information, or to postpone for reconsideration.[24] These cells contained different suggestions based exclusively

12. *Id.* at 5.

13. *Id.* at 6.

14. *Id.*

15. *Id.* at 7-9. Admissions counselors determined high school quality by looking to factors such as college attendance rates of graduates, standardized test scores, and advanced placement courses offered. *Id.* at 8 n.12. Conversely, curriculum strength is determined by looking at the course selection of the individual applicant. *Id.* at 8. An applicant will lose points for selecting easy courses, but will be awarded points for selecting the most difficult courses. *Id.*

16. Gratz v. Bollinger, 539 U.S. 244, 253-54 (2003) (citing Appendix to Petition for Certiorari at 111a, Gratz v. Bollinger, 537 U.S. 1044 (2002) (No. 02-516)).

17. *Id.*

18. *Id.* at 254.

19. *Id.*

20. *Id.* The "GPA 2" score was designed to supplement the regular GPA to provide counselors with more information upon which to base admissions decisions. *Id.* By looking to SCUGA factors, the University hoped to eliminate the gap in GPA scores between whites and minorities. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

on race.[25] Consequently, a minority student with the exact same score as a white student could be admitted, while the white student could be waitlisted or denied.[26]

In 1997, the University modified the admissions procedure to include additional point values under the "U" category of the SCUGA factors.[27] Applicants could now receive points for being an underrepresented minority, coming from a socioeconomic disadvantage, attending a predominantly minority high school, or being under represented in the unit to which the student was applying.[28] Thus, in 1997, Hamacher's "GPA 2" and ACT scores placed him in the "delay for admission" category, while a minority applicant with the same or similar scores would have generally been admitted.[29]

In 1998, the University abandoned the Guidelines Tables and SCUGA factors, instead basing admissions on a "selection index."[30] This index consisted of a maximum score of 150 points.[31] The scale was broken down as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); and 74 and below (delay or reject).[32] Each applicant received points based on his or her high school GPA, standardized test scores, academic quality of the applicant's high school, strength or weakness of the high school's curriculum, in-state residency, alumni relationships, personal essay, and personal achievement or leadership.[33]

The predominant factor was high school GPA, which contributed up to eighty points.[34] There were a total of 110 points available for academic factors.[35] In addition, up to forty points could be awarded for non-academic

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25. *Id.* at 254 n.7.

26. *Id.* A student who was waitlisted would receive a letter stating that although the applicant was in the qualified range, he or she would not be immediately admitted. *Id.* at 256. The applicant would then be placed on a waiting list. *Id.* If students who had been admitted declined their admission, persons from the waiting list could then be admitted. *Id.* However, if enough spots did not open up to allow admission, the applicant would subsequently be denied. *Id.*

27. *Id.* at 255.

28. *Id.* For example, men applying for a place in nursing school would now be considered an underrepresented minority. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Brief for Respondents at 7, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516).

35. *Id.* The applicant's SAT or ACT score could total up to twelve points. *Id.* Applicants could receive up to ten points for the academic strength of their high school (for example, counselors evaluate the student's curriculum based on their knowledge of labels such as "honors"). *Id.* at 8. Counselors could also subtract up to four points from those who chose weaker class schedules when more difficult classes were available. *Id.*

factors.[36] The most controversial of these factors included the awarding of twenty points for one of the following: socioeconomic disadvantage, membership in an underrepresented minority group, attendance at a predominantly minority or predominantly socio-economically disadvantaged high school, recruitment for athletics, or at the Provost's discretion.[37] The University claimed that the new "selection index" did not change the way race was substantively considered in admissions; it only changed the mechanics.[38]

From 1995 to 1998, the University's policy also provided that qualified applicants from underrepresented minorities should be admitted as soon as possible.[39] To achieve this goal, the University maintained a rolling admissions policy to permit consideration of these applications submitted later in the academic year through the use of "'protected seats.'"[40] A committee projected the likely number of applications, and a corresponding number of seats were held until these groups had been accommodated.[41] Any remaining seats would then be released to the general applicant pool.[42]

In 1999 and 2000, the OUA decided to provide an additional level of review for some applicants, while still awarding twenty points to all minority applicants.[43] Under the new system, a counselor could "flag" an applicant for review by the Admissions Review Committee (ARC) if the applicant "(1) [was] academically prepared to succeed at the university, (2) [had] achieved a minimum selection index score, and (3) possess[ed] a quality or characteristic important to the University's composition of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and

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36. *Id.* Applicants were given up to ten points more if they were Michigan residents, six more points for being from an underrepresented county, two points for residency in underrepresented states, four points if one of the applicant's parents was an alumnus, one point if a sibling or grandparent was an alumnus, three points for an excellent personal essay, five points for personal achievement, and five points for leadership. *Id.* at 8-9.

37. *Id.* at 9. According to University Provost Paul Courant, "provost's discretion" was a way of giving further consideration to children of university donors. Victoria Edwards & Tomislav Ladika, *U. Michigan: U. Michigan Students Question Points for Legacies, Donors*, U-WIRE, Mar. 13, 2003, *available at* 2003 WL 16409660. Courant stated that the children of donors are not guaranteed points but they can be awarded twenty points at the provost's discretion. *Id.* The use of this discretion has diminished in the last three years, according to Courant. *Id.*

38. Gratz v. Bollinger, 539 U.S. 244, 255 (2003).

39. *Id.* at 256. This was because the University believed that minorities would be more likely to decline admission if forced to wait. *Id.*

40. *Id.* Other groups with protected seats included foreign students, ROTC candidates, and athletes. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

underrepresented race, ethnicity, or geography."[44] The ARC then determined whether to admit, defer, or deny each applicant.[45]

In October of 1997, petitioners filed a class action lawsuit against the University of Michigan, the College of Literature, Science, and the Arts, James Duderstadt and Lee Bollinger.[46] Petitioners asserted that the University had violated Title VI of the Civil Rights Act, 42 U.S.C. § 1981, and the Equal Protection Clause of the Fourteenth Amendment, by using race as a factor for admissions.[47] Petitioners sought injunctive, declaratory, and monetary relief in an amount to be proven at trial.[48]

The parties filed cross-motions for summary judgment with respect to liability.[49] The district court upheld the University's admissions policy after 1998, finding diversity to be a compelling state interest.[50] However, the district court found the admissions policy from 1995 to 1998 "to be more problematic."[51] The court held that the University's practice of "protecting seats" for underrepresented minorities kept others from competing for these spots.[52] This system was found to be "a functional equivalent of a quota."[53] Thus, the district court granted the petitioners' motion for summary judgment for the years of 1995 to 1998, but granted the respondents' summary judgment for the 1999 to 2000 policy.[54] Therefore,

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44. *Id.* at 256-57. Michigan residents needed a score of eighty while out-of-state applicants needed a seventy-five to be considered for the flagging procedure. *Id.* at 257 n.8.

45. *Id.* at 257.

46. *Id.* at 252. The Board of Regents was subsequently named the proper defendant replacing the University and the College of Literature, Science, and the Arts. *Id.* at 252 n.2. Duderstadt was the president of the University when Gratz applied. *Id.* at 252 n.3. He was sued in his individual capacity. *Id.* Bollinger was president when Hamacher applied and was sued both in his official capacity and as an individual. *Id.*

47. *Id.* at 252. Title VI explains that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal assistance." 42 U.S.C. § 2000d (2000). Section 1981(a) provides that: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a) (2000). The Equal Protection Clause requires that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

48. Complaint at para. 1, Gratz v. Bollinger, 122 F. Supp. 811 (E.D. Mich. 2000) (No. 97-75231), *available at* http://www.umich.edu/~urel/admissions/legal/gratz/gratzham.html. The district court also agreed to bifurcate determination of liability and damages. Gratz v. Bollinger, 122 F. Supp. 2d 811, 814 (E.D. Mich. 2000). The liability phase of the trial was to proceed first with damages being assessed separately. *Id.*

49. *Id.* at 815.

50. Gratz v. Bollinger, 539 U.S. 244, 258-59 (2003).

51. *Id.* at 259.

52. *Gratz*, 122 F. Supp. 2d at 832.

53. *Id.*

54. *Id.* at 833.

the court denied the petitioners' request for injunctive relief.[55] Both parties appealed to the Sixth Circuit Court of Appeals because neither side had achieved a total victory.[56] The Sixth Circuit heard the appeal on the same day as *Grutter v. Bollinger*,[57] a companion case challenging the University's Law School admissions policy.[58] The Sixth Circuit upheld the admissions policy for the University of Michigan's Law School in *Grutter*.[59]

Fearing a similar result in their own case, petitioners Gratz and Hamacher applied for and were granted certiorari from the Supreme Court before the Sixth Circuit could announce a decision.[60] On June 23, 2003, the United States Supreme Court *held* that (1) petitioners had standing to seek declaratory and injunctive relief; (2) the university's current undergraduate admissions policy violated the Equal Protection Clause because its use of race was not narrowly tailored to achieve the University's asserted compelling interest in diversity; and (3) Title VI and 42 U.S.C. § 1981 were also violated by the admissions policy.[61]

## II. LEGAL BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal

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55. *Id.* at 814.

56. Gratz v. Bollinger, 539 U.S. 244, 259 (2003). Gratz and Hamacher sought to overturn the lower court's decision that diversity was a compelling interest. *Id.* The University appealed because its policies after 1998 were found to be unconstitutional. *Id.*

57. 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003). Grutter involved a challenge to the University of Michigan's Law School admissions policy by rejected white applicants. *Id.* at 735. At the district court level, the policy was struck down because diversity was not found to be a compelling interest and the law schools use of race in admissions was not narrowly tailored. Grutter v. Bollinger, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001). The Sixth Circuit reversed, finding diversity to be a compelling interest and the program to be narrowly tailored. *Grutter*, 288 F.3d at 735.

58. *Gratz*, 539 U.S. at 259.

59. *Id.* In *Grutter*, the Sixth Circuit looked to *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), to determine whether the law school had a compelling interest in promoting diversity of the student body. *Grutter*, 288 F.3d at 738. The majority of the court found that Justice Powell's opinion in *Bakke* was binding on the Sixth Circuit. *Id.* at 739. This meant that the law school could use a policy to promote racial diversity if it was not overly broad. *Id.* The Sixth Circuit then examined whether the law school's admissions policy was narrowly tailored to achieve the compelling interest of diversity. *Id.* at 744. The Court noted that the law school's plan was virtually the same as a similar plan approved by Justice Powell in *Bakke*. *Id.* at 747. It was a single-track plan with no separate admissions process for minority applicants. *Id.* at 746. Additionally, the plan considered more than just race in its definition of diversity. *Id.* at 747. The plan also considered factors such as the applicant's leadership, work experience, unique talents or interests, and letters of recommendation. *Id.* Therefore, the Sixth Circuit reversed the district court, holding that the plan was constitutional under *Bakke*. *Id.* at 752.

60. *Gratz*, 539 U.S. at 259-60.

61. *Id.* at 245-47.

protection of the laws."[62] This amendment has never been held to deny the government the ability to treat people differently because of a certain characteristic.[63] Most classifications drawn by the government only need to pass a rational basis test.[64] However, racial classifications require the highest scrutiny.[65]

### A. RACIAL CLASSIFICATIONS REQUIRE STRICT SCRUTINY

In *Korematsu v. United States*,[66] the United States Supreme Court held "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[67] That is not to say that all such restrictions are unconstitutional, rather the courts must subject them to the most rigid scrutiny.[68] Since *Korematsu*, the Court has consistently applied strict scrutiny to all racial classifications.[69] This standard does not change whether the particular racial classification benefits or burdens the party.[70] This failure to distinguish between benevolent and invidious discrimination based on race has caused consistent dissent.[71]

When a governmental unit makes a race-based classification, that classification will be found constitutional only if it is a narrowly tailored measure that is designed to further one or more compelling governmental interests.[72] For a classification to be narrowly tailored it must be "necessary" to further the compelling interest.[73] The fit between the law and the compelling interest must be "the most exact connection."[74] Affirmative action has been strictly scrutinized, along with all racial classifications.[75]

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62. U.S. CONST. amend. XIV, § 1.

63. *E.g.* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000) (stating that states may discriminate on basis of age if there is a rational basis for doing so).

64. *Id.*

65. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995).

66. 323 U.S. 214 (1944).

67. *Korematsu*, 323 U.S. at 216.

68. *Id.*

69. *Adarand*, 515 U.S. at 224.

70. Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion).

71. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316-17 (1986) (Stevens, J., dissenting) (arguing that there is a clear difference between racial inclusion and exclusion); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 358-59 (1978) (Brennan, J., dissenting). Justice Brennan argued that where a policy is not designed to stigmatize minorities, but rather to help them, it should be constitutional. *Id.* at 379.

72. *Adarand*, 515 U.S. at 227.

73. *Id.* at 237.

74. Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting).

75. *Adarand*, 515 U.S. at 227.

## B. AFFIRMATIVE ACTION

Affirmative action has been defined as a voluntary undertaking to remedy discrimination by means of specific group-based preferences or numerical goals that are accompanied by a specified time period for achieving those goals.[76] State, local, and federal governments have implemented programs that are designed to remedy the past effects of discrimination.[77]

### 1. *The Struggle to Find Compelling Interests*

Governments have offered many interests to justify their actions.[78] Diversity of a student body and remedying the effects of past discrimination are the only interests to be marginally successful.[79] In *Smith v. University of Washington Law School*,[80] the Ninth Circuit held diversity of the student body was a compelling interest.[81] Similarly, the Supreme Court held in *City of Richmond v. J.A. Croson Company*[82] that a city's interest in correcting past discrimination can be compelling when backed by particular findings in that jurisdiction.[83]

#### a. Is Diversity Compelling?

In *Regents of the University of California v. Bakke*,[84] the Court addressed a race-based admissions policy for the first time.[85] In *Bakke*, the University of California at Davis Medical School maintained a dual track admissions policy.[86] This policy was designed to increase the number of "disadvantaged" students admitted to each class.[87] The admissions policy

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76. Cohen v. Brown Univ., 101 F.3d 155, 170 (1st Cir. 1996).

77. *Adarand*, 515 U.S. at 205; Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

78. *Bakke*, 438 U.S. at 305-06.

79. Smith v. Univ. of Wash. Law School, 233 F.3d 1188 (9th Cir. 2000); *Croson*, 488 U.S. at 469.

80. 233 F.3d 1188 (9th Cir. 2000).

81. *Smith*, 233 F.3d at 1200-01.

82. 488 U.S. 469 (1989).

83. *Croson*, 488 U.S. at 509.

84. 438 U.S. 265 (1978).

85. *Bakke*, 438 U.S. at 265.

86. *Id.* at 272-73.

87. *Id.* at 272. Applicants were asked whether they considered themselves to be "economically and/or educationally disadvantaged." *Id.* at 274. The applicants were also asked whether they wished to be considered as a member of a "minority group." *Id.* The students who responded affirmatively to these questions were evaluated by a special committee. *Id.* These applicants did not have to meet the minimum GPA standard of 2.5 or compete against the other mainstream applicants. *Id.* at 275. Although many whites considered themselves "disadvantaged," none received admission through the special committee. *Id.* at 276.

reserved sixteen out of one hundred spots for "disadvantaged" students.[88] Alan Bakke, a white male, filed suit after twice being denied admission, even though minority students with lower scores were granted admission.[89]

Justice Powell, writing for himself, applied strict scrutiny to the school's admissions policy.[90] The medical school responded with a list of potential compelling interests.[91] Justice Powell argued that diversity of the student body was compelling.[92] Justice Powell based this decision largely on the importance of academic freedom and its First Amendment protection.[93] He argued that since diversity was an essential part of academic freedom, it should be protected under the First Amendment.[94] However, this conclusion was once again unsupported by the other justices.[95]

Justice Brennan, writing for four justices, joined Justice Powell in finding that the "Government may take race into account when it acts not to demean or insult any racial group . . . ."[96] However, this was only appropriate to remedy the present effects of past discrimination.[97] Justice Brennan agreed that the Harvard Plan backed by Justice Powell was constitutional, so long as the use of race was limited to remedying the lingering effects of past discrimination.[98]

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88. *Id.* at 275.

89. *Id.* at 276-78.

90. *Id.* at 305. Justice Powell applied strict scrutiny to the racial classification in Part IV of his opinion. *Id.* No other justices joined in this part. *Id.* at 272.

91. *Id.* at 306. The medical school argued that (a) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession, (b) countering the effects of societal discrimination, (c) increasing the number of doctors in underserved communities, and (d) obtaining the educational benefits derived from a racially diverse student body were compelling interests. *Id.*

92. *Id.* at 311-15. However, Justice Powell found that the policy was not narrowly tailored, because the quota system was not "necessary" to achieve diversity. *Id.* at 315. Additionally, Justice Powell found that the medical school's sole focus on ethnic diversity undermined other important forms of diversity. *Id.* Justice Powell recommended a program similar to Harvard College's. *Id.* at 316. The Justice's plan would focus on all forms of diversity, because "[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer." *Id.* Under this system, race could be used as a "plus" in one applicant's file while not completely insulating him or her from competition with fellow applicants. *Id.* at 317. In effect, each applicant would be treated as an individual in the admissions process. *Id.* at 318. Justice Powell reasoned that if many forms of diversity were included, a rejected applicant could not blame his rejection solely on his race or ethnic background. *Id.* Therefore, Justice Powell found that "the denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program." *Id.* at 318 n.52.

93. *Id.* at 312.

94. *Id.*

95. *Id.* at 328 (Brennan, J., plurality) (joining in Parts I, II, V-C); *see id.* at 411 (Stevens, J., plurality) (arguing that the question of whether race should be considered in admissions was not an issue in the case and any discussion of it would be inappropriate).

96. *Id.* at 325 (Brennan, J., plurality).

97. *Id.*

98. *Id.* at 326 n.1.

Meanwhile, Justice Stevens, writing for four justices, agreed only with Justice Powell that the exclusion of Bakke because of his race violated Title VI of the Civil Rights Act.[99] He argued that when a court can make a ruling on statutory grounds, avoiding a constitutional issue, it must do so.[100]

Following the fractured opinion in *Bakke*, the circuits have disagreed as to whether diversity of a student body was a compelling interest.[101] The Sixth and Ninth Circuits have found diversity to be compelling.[102] Yet, the Fifth and Eleventh Circuits have rejected diversity as a compelling interest.[103] In addition to educational diversity, governments have tried to justify racial classifications as a way of remedying past discrimination.[104]

b. Remedying Past Discrimination

Courts have long been concerned with remedying the past effects of racial discrimination.[105] In *United States v. Jefferson County Board of Education*,[106] a school desegregation case, the Fifth Circuit stated that "an appropriate remedy should undo the results of past discrimination as well as prevent future inequality of treatment."[107]

The Supreme Court stated in *Richmond v. J.A. Croson Co.*[108] that this rationale could be used in the right situation.[109] In *Croson*, the City of Richmond developed a program for Minority Business Enterprises (MBE's).[110] The program reserved thirty percent of all city construction contracts for MBE's.[111] An MBE was defined as a business where at least fifty-one percent of the stock was owned by an African-American,

99. *Id.* at 421 (Stevens, J., plurality).

100. *Id.* at 411.

101. *See* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1200-01 (9th Cir. 2000) (holding diversity is a compelling interest); *see also* Grutter v. Bollinger, 288 F.3d 732, 739 (6th Cir. 2002) (holding diversity is a compelling interest), *aff'd*, 539 U.S. 306 (2003); *contra* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (holding diversity is not a compelling interest); Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1247 (11th Cir. 2001) (holding diversity is a not a compelling interest).

102. *Smith*, 233 F.3d at 1200-01; *Grutter*, 288 F.3d at 739.

103. *Hopwood*, 78 F.3d at 944; *Johnson*, 263 F.3d at 1247.

104. *E.g.* Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989).

105. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966).

106. 372 F.2d 836 (5th Cir. 1966).

107. *Jefferson*, 372 F.2d at 877 (quoting United States v. Duke, 332 F.2d 759, 768 (5th Cir. 1964)).

108. 488 U.S. 469 (1989).

109. *Croson*, 488 U.S. at 509.

110. *Id.* at 477.

111. *Id.*

Hispanic, Asian, Native American, Eskimo, or an Aleutian person.[112] The plan was adopted to remedy past discrimination in Richmond's construction industry.[113] This was done even though there was no direct evidence of past discrimination, either by Richmond's contractors or by the city when awarding the bids.[114] The Court applied strict scrutiny because it was a racial classification.[115] Due to the lack of evidence of past discrimination within the city or by the city, the program was struck down.[116] However, the Court stated, "[n]othing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction."[117]

Governments can remedy both the effects of systematic and individual discrimination.[118] The Court reasoned that a narrowly tailored racial preference could be used in extreme cases.[119] Thus, remedying past discrimination could have been a compelling interest, if it was backed by direct evidence and was used in an "extreme case" where other alternatives were not available.[120] In addition to presenting a compelling interest, a racial classification must be narrowly tailored to the advancement of that interest.[121]

### 2. *Racial Classifications Must be Narrowly Tailored*

Once the government has a compelling interest, it must demonstrate that the racial classification has been narrowly tailored to achieve that interest.[122] This requires that the racial classification is "necessary" to further the compelling interest.[123] Thus, a racial classification should only be used in "extreme cases" or where no race-neutral alternatives exist.[124]

In *United States v. Paradise*,[125] the Court listed several factors to be used to determine whether a racial classification was narrowly tailored.[126]

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112. *Id.* at 478. Please note that these terms have been changed to more acceptable modern race designations.

113. *Id.* at 480.

114. *Id.*

115. *Id.* at 493.

116. *Id.* at 510-11.

117. *Id.* at 509.

118. *Id.*

119. *Id.*

120. *Id.* at 509-11.

121. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

122. *Id.*

123. *Id.* at 237.

124. *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 509-11 (1989) (arguing that safeguards are needed to prevent those with political power from favoring their own racial groups).

125. 480 U.S. 149 (1987).

These factors include (1) the efficacy of race neutral alternatives; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on third parties.[127]

If viable race-neutral alternatives existed, the racial classification was not "necessary."[128] The planned duration of the program had to be limited and could "not last longer than the discriminatory effects it [was] designed to eliminate."[129] Next, a policy cannot look to a group's prevalence in the population and automatically reserve the same percentage of places in a given profession.[130] The policy must be flexible, treating all members of the favored group as individuals, rather than mechanically assigning benefits simply based on race or ethnicity.[131] Finally, a policy cannot give a benefit to the favored group that would "unduly disadvantage" the disfavored group.[132] Opponents and proponents of affirmative action have looked for race neutral alternatives.[133]

### C. PERCENTAGE PLANS: A RACE-NEUTRAL ALTERNATIVE TO AFFIRMATIVE ACTION?

In recent years, affirmative action has been under siege.[134] Opponents have successfully removed it through the ballot box, in the courtroom, and by executive order.[135] In California and Washington, voters have passed initiatives banning the use of affirmative action in public education.[136] The Fifth and Eleventh Circuits declared the affirmative action policies of the

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126. *Paradise*, 480 U.S. at 171 (citing Sheet Metal Workers v. EEOC, 478 U.S. 421, 481 (1986)).

127. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999) (quoting Hayes v. N. State Law Enforcement Officer Ass'n, 10 F.3d 207, 216 (4th Cir. 1993)).

128. *Croson*, 488 U.S. at 507-09. The Court found that the city failed to even consider any race-neutral alternatives, and thus the policy was not narrowly tailored. *Id.*

129. Fullilove v. Klutznick, 448 U.S. 448, 513 (1980).

130. *Croson*, 488 U.S. at 507 (citing *Sheet Metal Workers*, 478 U.S. at 494).

131. Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1253 (11th Cir. 2001). Racial quotas are forbidden. *Id.* Additionally, a race-conscious admissions policy must not be applied in such a "rigid or mechanical" way as to make race the defining characteristic instead of treating all applicants as individuals. *Id.* at 1253-54. As a result, the University of Georgia's admissions policy was found to be too mechanical and therefore not narrowly tailored. *Id.* at 1254.

132. *Id.*

133. Jennifer L. Shea, Note, *Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education*, 78 IND. L.J. 587, 588-89 (2003).

134. *Id.*

135. *Id.*

136. *Id.*

University of Texas Law School and University of Georgia unconstitutional.[137] In Florida, Governor Jeb Bush issued an executive order banning the use of affirmative action in admissions.[138] Following these defeats, universities searched for a viable alternative.[139]

Fearing a large decline in minority enrollment, officials in California, Texas, and Florida instituted percentage plans that guaranteed admission to students who met the state's class rank requirement.[140] For example, California's Board of Regents adopted a plan to admit all students who graduated within the top four percent of their high school class.[141] The new plan had mixed results.[142] In 2002, more minorities were admitted to the state's university system than under the old affirmative action plan.[143] However, opponents were quick to point out that the number of minority students actually declined at the most prestigious schools.[144]

Unlike state courts, federal courts are courts of limited jurisdiction.[145] They possess only the power that is authorized by the Constitution and by statute.[146] It is presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.[147] To fall within the jurisdiction of the federal courts, the party bringing the claim must have standing.[148]

### D. STANDING

To have standing, a party must allege a present case and controversy.[149] Past exposure to illegal conduct does not in itself show a present case or

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137. *Id.* at 589 (citing Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001)).

138. *Id.* at 604 (citing Fla. Exec. Order No. 99-281 (Nov. 9, 1999), *available at* http://www.state.fl.us/eog/executive_orders/1999/november/eo99-281.html (last visited Feb. 1, 2004)).

139. *Id.* at 588.

140. *Id.* at 606.

141. *Id.* This new plan was designed to combat the loss of minority students following the adoption of Proposition 209. *Id.*

142. *Id.* at 608.

143. *Id.*

144. *Id.* at 608-09. Similarly, at the University of Florida, that state's most elite public university, African-American student enrollment declined from twelve percent to six or seven percent the year following the elimination of the affirmative action policy. *Id.* at 610.

145. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

146. Willy v. Coastal Corp., 503 U.S. 131, 136-37 (1992).

147. Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 7, 8 (1799); McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 182-83 (1936).

148. Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (citing Flast v. Cohen, 392 U.S. 83, 94-101 (1968)).

149. O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974).

controversy regarding injunctive relief.[150] For a present case or controversy to exist, there must be present adverse effects resulting from the earlier exposure to illegal conduct.[151]

The Court has stated that "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[152] Standing focuses on the individual bringing the complaint rather than on the issues he or she wishes to have adjudicated.[153]

According to the modern Court, standing has three elements.[154] "First, the plaintiff must have suffered 'an injury in fact.'"[155] This injury must have been to a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical.[156] Second, there must be a causal connection between the injury suffered and the defendant's actions.[157] Third, it must be likely that relief will result from a favorable decision for the plaintiff.[158] The Court explained that "particularized" meant that injury must affect the person in a "personal and individual way."[159] The plaintiff has the burden to prove all three elements.[160]

To determine whether a plaintiff has standing, the Court may look beyond overt actions to the intent of the parties.[161] In *Clements v. Fashing*,[162] the Court considered a challenge to a provision of the Texas Constitution that required the immediate resignation of all state officials

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150. *Id.*

151. *Id.*

152. Warth v. Seldin, 422 U.S. 490, 498 (1975).

153. *Flast*, 392 U.S. at 99.

154. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

155. *Id.* at 560. The plaintiff himself must suffer the injury. Blum v. Yaretsky, 457 U.S. 991, 999 (1982). It is not enough that someone else might be injured by the conduct of which the plaintiff complains. *Id.* The plaintiff must show that he is among the class that is affected by the defendant's actions. *Id.* Additionally, a plaintiff who has suffered an injury of one kind cannot litigate a claim based on a similar injury by which he or she has not been personally been affected. *Id.* In *Blum*, the Court held that where class representatives had only been threatened with transfers to lower levels of care they did not have standing to represent those that had been threatened with higher levels of care. *Id.* at 1001. "If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring before the whole structure of state administration before the courts for review." Lewis v. Casey, 518 U.S. 343, 358 n.6 (1995).

156. *Lujan*, 504 U.S. at 560 (citing Allen v. Wright, 468 U.S. 737, 756 (1984)).

157. *Id.* at 561 (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

158. *Id.* (citing *Simon*, 426 U.S. at 38, 43); *see also Allen*, 468 U.S. at 757-58 (holding that parents lacked standing where tax suit against IRS was unlikely to force private schools to desegregate).

159. *Lujan*, 504 U.S. at 560 n.1.

160. *Id.* at 561.

161. Clements v. Fashing, 457 U.S. 957 (1982).

162. 457 U.S. 957, 962 (1982).

upon their announcement to run for another office.[163] The Court found that they had met Article III standing because they would have announced their candidacy for other offices but for the automatic resignation provision.[164]

In a class action lawsuit, a plaintiff must meet the requirements of Federal Rule of Civil Procedure 23(a) to have standing.[165] The main requirement, in terms of standing, is that claims and defenses of the representative party be typical of the claims and defenses of the absent class members.[166] Therefore, in *H.L. v. Matheson*,[167] an unemancipated minor had no standing to litigate claims on behalf of emancipated older women.[168] Similarly, in *Blum v. Yaretsky*,[169] Medicaid patients transferred to lower levels of care lacked standing to litigate on behalf of patients objecting to transfers to more intensive care facilities.[170]

Finally, the Court has found that actual performance is not required to confer Article III standing.[171] In affirmative action cases, a plaintiff only needs to be able to show the inability to compete on an equal footing to claim an actual injury.[172] To establish standing, a party must be able to show that they were ready and able to perform, but for the policy.[173]

## III. ANALYSIS

In *Gratz v. Bollinger*,[174] Chief Justice Rehnquist wrote the majority opinion of the Court, in which Justices O'Connor, Scalia, Kennedy and Thomas joined.[175] The majority held that (1) the petitioners had standing to

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163. *Clements*, 457 U.S. at 962.

164. *Id.*

165. FED. R. CIV. P. 23(a). Rule 23(a) Prerequisites to a Class Action provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

*Id.*

166. *Id.*

167. 450 U.S. 398 (1981).

168. *Matheson*, 450 U.S. at 406-07.

169. 457 U.S. 991 (1982).

170. *Blum*, 457 U.S. at 1001.

171. *See* Turner v. Fouche, 396 U.S. 346, 361-62 n.23 (1970) (holding that a plaintiff, who did not own property, had standing to challenge a law requiring property ownership for membership on the school board, even though he did not present any evidence showing that he applied and was rejected).

172. Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993).

173. *Id.*

174. 539 U.S. 244 (2003).

175. *Gratz*, 539 U.S. at 247.

seek declaratory, monetary, and injunctive relief; (2) the University's admissions program was not narrowly tailored to achieve the asserted compelling interest in diversity; and (3) the policy violated the Equal Protection Clause, so it also violated Title VI and 42 U.S.C. § 1981.[176] Justice O'Connor filed a concurring opinion, in which Justice Breyer joined in part.[177] Justice Thomas concurred in the judgment.[178] Justice Breyer also concurred in the judgment but not in the opinion.[179] Justice Stevens dissented in an opinion in which Justice Souter joined.[180] Justice Souter filed a separate dissent in which Justice Ginsburg joined in part.[181] Justice Ginsburg also filed a separate dissent in which Justice Breyer joined in part.[182]

### A. THE MAJORITY OPINION

The Court was presented with a challenge to the University of Michigan's College of Literature, Science, and the Arts admissions policy.[183] The Court found that the petitioners had standing because they had a personal stake in the outcome of the case.[184] Next, the Court held the admissions policy unconstitutional, because it was not narrowly tailored for achieving educational diversity.[185] Finally, the Court held that the policy violated the Equal Protection Clause, Title VI, and 42 U.S.C. § 1981.[186]

#### 1. *Standing*

Even though neither party raised the issue of standing, the Court examined whether petitioner Hamacher had standing to seek declaratory and injunctive relief.[187] Chief Justice Rehnquist argued that Hamacher's future injury was not hypothetical, even though Hamacher did not actually apply for admission as a transfer student.[188] The Chief Justice noted that if Hamacher was required to apply and be rejected, the cycle would continue

176. *Id.* at 245-47.
177. *Id.* at 276-80 (O'Connor, J., concurring).
178. *Id.* at 281 (Thomas, J., concurring).
179. *Id.* at 281-82 (Breyer, J., concurring).
180. *Id.* at 282 (Stevens, J., dissenting).
181. *Id.* at 291 (Souter, J., dissenting).
182. *Id.* at 298 (Ginsburg, J., dissenting).
183. *Id.* at 249-50.
184. *Id.* at 268.
185. *Id.* at 275.
186. *Id.* at 275-76.
187. *Id.* at 260.
188. *Id.* at 260-61.

indefinitely, because Hamacher would always be required to show that he intended to transfer again.[189]

The majority relied on a line of precedent showing that intent had been used to establish standing in numerous previous equal protection cases.[190] Justice Rehnquist noted that Hamacher did intend to transfer, even though he did not actually apply to transfer after his initial rejection.[191] Therefore, the Chief Justice determined that Hamacher had the necessary intent required to allege actual injury.[192]

Next, the Court reasoned that for injury to exist, Hamacher only needed to show an inability to compete on equal footing with other applicants.[193] Justice Rehnquist concluded that to establish standing, a party challenging a set-aside program only needs to demonstrate that it was ready and able to perform, but for the discriminatory policy.[194]

The Court noted that Hamacher's claim was that race prevented him from competing equally for admission with minority applicants.[195] The majority determined that a minority with the same qualifications as Hamacher would have been admitted.[196] The Court reasoned that after being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student if the University dropped its admissions policy.[197] Therefore, Hamacher was deemed to have standing to challenge the University's use of race in admissions.[198]

Next, the Court rejected the notion that Hamacher was not properly certified as a class representative to seek injunctive relief.[199] Chief Justice

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189. *Id.* at 261.

190. *Id.* at 261-62 (citing Clements v. Fashing, 457 U.S. 957, 962 (1982)).

191. *Id.* at 262.

192. *Id.*

193. *Id.* (citing Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993)).

194. *Id.* (citing *Northeastern Fla. Chapter*, 508 U.S. at 666).

195. *Id.*

196. *Id.* (citing Appendix to Petition for Certiorari at 115a, Gratz v. Bollinger, 537 U.S. 1044 (2002) (No. 02-516)).

197. *Id.*

198. *Id.*

199. *Id.* at 268. The petitioners filed a class action lawsuit and the district court certified both as class representatives. *Id.* at 252. The class contained those who applied and were rejected under both the freshman and transfer admissions policies. *Id.* at 252-53. Justice Stevens argued that differences between the freshman and transfer admissions policies prevented Hamacher from representing freshmen applicants. *Id.* at 286 (Stevens, J., dissenting). Most notably Stevens noted that the transfer policy did not use the 150-point system. *Id.* Instead the transfer policy provided that some applicants, including minority and socially disadvantaged applicants would generally be admitted if they possessed a 2.5 undergraduate GPA, sophomore standing, and a 3.0 high school GPA. *Id.* Justice Stevens argued that these differences denied Hamacher standing as a class representative, because his injury was not the same as the absent class members. *Id.* at 286-87.

Rehnquist determined that Hamacher had standing, because his claim concerned the same fundamental issue as the absent class members.[200] Justice Rehnquist noted that the University used the same criteria to evaluate transfer and freshmen applicants.[201] The Chief Justice found that the only difference between the criteria was that all underrepresented, minority, freshmen applicants received the twenty points and were admitted, while virtually all underrepresented, minority transfers were admitted.[202] The Court found that while this small difference may be relevant in a narrow tailoring argument, it was not relevant to Hamacher's standing.[203]

Furthermore, the majority relied on precedent to show that where a class member and his or her representative have been judged by the same test, the requirements of rule 23(a) would clearly be satisfied.[204] The Chief Justice noted that the same issues were implicated by the use of race in all undergraduate admissions under the policy.[205]

The Court found the district court's certification of the lawsuit valid as a class action because it was a perfect vehicle for ensuring that an individual's claim does not become moot.[206] The majority held that Hamacher had standing because his past injury and the risk of future injury at the time of certification demonstrated the need for a class action.[207] Having shown that petitioners had standing, Justice Rehnquist turned to the merits of the case.[208]

### 2. *Diversity Found to be Compelling*

Because the University used a racial classification, the Court applied strict scrutiny.[209] The Chief Justice noted that the standard does not change whether the minority is benefited or burdened.[210] The Court held that in order to survive strict scrutiny, a racial classification must be narrowly tailored to further a compelling governmental interest.[211]

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200. *Id.* at 267-68.
201. *Id.* at 265.
202. *Id.* at 266
203. *Id.*
204. *Id.* at 267 (citing Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. 147, 159 n.15 (1982)).
205. *Id.*
206. *Id.* at 267-68 (citing Joint Appendix at 67-69, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)).
207. *Id.* at 268.
208. *Id.*
209. *Id.* at 270.
210. *Id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995)).
211. *Id.* (quoting *Adarand*, 515 U.S. at 227).

The majority rejected the petitioner's argument that the Court had never found diversity to be a compelling interest, and that only the desire to remedy past discrimination was compelling.[212] The Court rejected the contention that "'diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting a narrowly-tailored means.'"[213]

The majority held that diversity of the student body was a compelling interest.[214] Since educational diversity in higher education was a compelling interest, the Chief Justice next examined whether the University's admissions policy was narrowly tailored to serve that interest.[215]

### 3. *The Policy Was Not Narrowly Tailored*

The majority found that the admissions policy was not narrowly tailored, because it automatically distributed twenty points, one fifth of the points needed for admission, to every minority student.[216] Justice Rehnquist relied on *Bakke* to conclude that a proper system would consider race or ethnicity to be a "'plus.'"[217] A "plus" meant that a particular black applicant could be compared with an Italian-American who exhibits qualities that promote diversity, without race being the decisive factor.[218] The Chief Justice summarized that such a system would be flexible enough to ensure that all applicants are treated as individuals.[219]

The majority noted that Justice Powell had underscored the importance of this individual treatment.[220] The Chief Justice explained that Justice Powell never contemplated that race would become the all-important single characteristic automatically guaranteeing the admittance of minority applicants.[221] Justice Rehnquist stressed that Justice Powell intended that all of an individual's traits should be considered during the admissions process.[222]

The Court found the University's policy strayed too far from this intent.[223] The majority held that the policy mechanically awarded every

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212. *Id.* at 268 (citing Brief for Petitioners at 15-16, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)).

213. *Id.* (quoting Petitioners' Brief at 17-18, 40-41, *Gratz* (No. 02-516)).

214. *Id.*

215. *Id.* at 270.

216. *Id.*

217. *Id.* at 270-71 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).

218. *Id.* at 271 (quoting *Bakke*, 438 U.S. at 317).

219. *Id.* (citing *Bakke*, 438 U.S. at 317).

220. *Id.*

221. *Id.* (citing *Bakke*, 438 U.S. at 315).

222. *Id.*

223. *Id.*

minority applicant twenty points toward admission with only a determination that the applicant was, indeed, a minority.[224] The University made race the decisive factor by automatically awarding twenty points to all minorities.[225]

Next, the Court considered Justice Powell's hypothetical example of how the Harvard Plan would treat applicants as individuals.[226] The example was as follows:

> "The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparent abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependant upon race but sometimes associated with it.*"[227]

Justice Rehnquist rejected the notion that the University followed the Harvard Plan.[228] The Chief Justice demonstrated how both students A and B were automatically given twenty points, even though their backgrounds were completely different.[229] However, the third, a white student who was an extremely talented artist, could only receive a maximum of five points.[230] Chief Justice Rehnquist argued that under the Harvard Plan, applicant C would likely receive equal consideration because of his extraordinary talent.[231]

The Chief Justice next attacked the University's claim that the new flagging procedure implemented in 1999 addressed the problem.[232] The

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224. *Id.* at 271-72.
225. *Id.* at 272.
226. *Id.* (citing *Bakke*, 438 U.S. at 324).
227. *Id.* at 272-73 (quoting *Bakke*, 438 U.S. at 324) (emphasis in original).
228. *Id.* at 273 n.20.
229. *Id.* at 273.
230. *Id.*
231. *Id.*
232. *Id.* The University claimed that the additional procedure of flagging allowed counselors to look at applications individually. *Id.* This procedure allowed additional consideration for applicants that were qualified but had not already been admitted. *Id.* at 256-57.

Court again used Justice Powell's A, B, and C example from *Bakke*.[233] Justice Rehnquist concluded that student A would never be flagged; instead, he would automatically receive twenty points for being an "under-represented minority," which would ensure that he would be admitted.[234] Therefore, the University would never consider A's individual experiences or his potential contribution to diversity.[235] Students B and C could be flagged, assuming that B was not already admitted by virtue of being awarded twenty points automatically and C could muster seventy points.[236] The Chief Justice noted that only a small number of applicants were ever flagged.[237] However, this was always after the twenty points had already been awarded.[238]

Next, the Court rejected the University's claim that an individualized application process would not be possible because of the large number of applications received.[239] Chief Justice Rehnquist noted that potential administrative challenges resulting from the implementation of a program capable of presenting an individualized assessment of each applicant would not excuse the use of an otherwise unconstitutional alternative.[240]

The Court determined that because the policy was not narrowly tailored, it violated the Equal Protection Clause of the Fourteenth Amendment.[241] The Court also found that the policy violated Title VI and 42 U.S.C. § 1981.[242]

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233. *Id.* at 273.

234. *Id.* at 273-74

235. *Id.* at 274.

236. *Id.*

237. *Id.* (quoting Appendix to Petition for Certiorari at 117a, Gratz v. Bollinger, 537 U.S. 1044 (2002) (No. 02-516)). The majority found the flagging procedure to be too little too late. *Id.* Too few applicants were flagged to provide any real individualized scrutiny for applicants. *Id.* Additionally, the Court noted that the University never even provided the actual number of applications flagged. *Id.*

238. *Id.* The majority opined that this feature only reinforced the flaws of the policy. *Id.* at 273. The Court noted that the automatic award of twenty points to all minorities virtually assured them of automatic admission. *Id.* Therefore, the Court reasoned that very few minorities were ever evaluated as individuals. *Id.* at 273-74.

239. *Id.* at 275 (quoting Brief for Respondents at 6 n.8, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)).

240. *Id.* at 275-76 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989)).

241. *Id.*

242. *Id.* (citing Alexander v. Sandoval, 532 U.S. 275, 281 (2001)). The Court ruled that a violation of the Equal Protection Clause by an institution that accepts federal funds also violates Title VI. Alexander v. Choate, 469 U.S. 287, 293 (1985). Section 1981 was meant to proscribe discrimination in the making and enforcement of contracts against, or in favor, of any race. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295-96 (1985). A contract for educational services is a "contract" under § 1981. Runyon v. McCrary, 427 U.S. 160, 172 (1976). Finally, a violation of the Equal Protection Clause by purposeful discrimination will also violate §1981. Gen. Bldg. Contractors Ass'n. Inc. v. Pennsylvania, 458 U.S. 375, 389-390 (1982).

### B. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor wrote a separate opinion to emphasize the differences between the University's law school admission policy, which was upheld in *Grutter*, and the admission policy in this case, which was unconstitutional.[243] Justice O'Connor concluded that the lack of individualized review was fatal to the program.[244]

After summarizing the lower court's decision and the admissions policy, Justice O'Connor explained that the University's policy actually prevented individualized evaluation of the applicants.[245] She argued that by granting twenty points to all minority applicants and only five points to even the most outstanding white leader, the University had ensured that each individual's contribution to diversity could not be individually assessed.[246] Justice O'Connor concluded that race had become the deciding and dominant factor, overwhelming most of the other nonracial factors.[247]

Finally, Justice O'Connor disagreed with the University's contention that the flagging process provided an individualized assessment of applicants.[248] She saw this process as little more than an "afterthought."[249] She argued that there was very little evidence presented at trial to show how many applicants were actually evaluated by this process or if the flagging process even worked.[250] In addition, Justice O'Connor concluded that the cutoff level for review was only enforced after all the minority applicants had already received their automatic twenty points.[251] Subsequently, Justice O'Connor concluded that there was not enough evidence to support a finding of individualized review required by strict scrutiny.[252] Thus, she joined the Court's opinion reversing the district court.[253]

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243. Gratz v. Bollinger, 539 U.S. 244, 276-77 (2003) (O'Connor, J., concurring). The University of Michigan Law School also had a race-conscious admissions policy. Grutter v. Bollinger, 539 U.S. 306, 316 (2003). However, students were given individualized reviews with racial or ethnic diversity being a factor. *Id.* at 337. The Law School considered many possible non-racial factors in achieving diversity. *Id.* at 338. The Law School also frequently accepted non-minority applicants with lower test scores based on these factors. *Id.*

244. *Gratz*, 539 U.S. at 277.

245. *Id.* at 279.

246. *Id.*

247. *Id.*

248. *Id.* at 279-80.

249. *Id.* at 280.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

### C. JUSTICE THOMAS'S CONCURRENCE

Justice Thomas concurred because he agreed that the Court properly applied precedent, including *Grutter v. Bollinger*.[254] In *Grutter*, Justice Thomas wrote a separate opinion dissenting from the overall result, but concurring with the majority for two reasons.[255] First, Justice Thomas agreed with the majority that the use of race in admissions remained unlawful.[256] Second, he approved of the majority's conclusion that the use of racial preferences in higher education will be illegal within twenty-five years.[257] For similar reasons to his opinion in that case, Justice Thomas would have held that the Equal Protection Clause categorically denied the state's use of racial preferences in admissions.[258]

Justice Thomas wrote separately to acknowledge that this policy avoided the added constitutional defect of discriminating among the preferred racial groups.[259] He argued that the policy avoided this problem because it awarded all minorities the same racial preference.[260]

Nevertheless, Justice Thomas found the policy was unconstitutional, "because it [did] not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants."[261] He elaborated that a valid policy would have to allow consideration of nonracial distinctions of all applicants.[262]

### D. JUSTICE BREYER'S CONCURRENCE

In his one paragraph opinion, Justice Breyer concurred in the judgment, but not in the Court's opinion.[263] Therefore, he joined in Justice O'Connor's concurrence except when she joined the Court's opinion.[264] Justice Breyer also joined in Part I of Justice Ginsburg's dissent, because he agreed with her that government policymakers should "distinguish between policies of inclusion and exclusion," as those of inclusion are more consistent with the Equal Protection Clause of the Fourteenth Amendment.[265]

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254. *Id.* at 281 (Thomas, J., concurring).
255. Grutter v. Bollinger, 539 U.S. 306, 349-51 (2003) (Thomas, J., concurring and part and dissenting in part).
256. *Id.* at 350-351.
257. *Id.* at 351.
258. Gratz v. Bollinger, 539 U.S. 244, 281 (2003).
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* (Breyer, J., concurring).
264. *Id.*
265. *Id.* at 281-82.

### E. JUSTICE STEVENS'S DISSENT

Justice Stevens, joined by Justice Souter, asserted that the petitioners lacked standing to seek forward-looking relief.[266] Unlike the plaintiff in *Grutter*, petitioners Hamacher and Gratz both enrolled and were accepted into other schools before they filed their complaint.[267] Additionally, neither petitioner had been in the process of reapplying, nor had tried since.[268] Justice Stevens concluded that "[t]here [was] a total absence of evidence that either petitioner would receive any benefit from the prospective relief sought by their lawyer."[269] Justice Stevens noted that even though some unidentified person may have standing to seek injunctive relief, neither petitioner did.[270]

Justice Stevens admitted that both Gratz and Hamacher had standing to seek damages, as compensation for an alleged wrongful denial of admission.[271] However, relying on *Los Angeles v. Lyons*,[272] Justice Stevens noted that past injuries do not allow a party to protect third parties from similar harm.[273] He argued that in order to seek injunctive relief, petitioners must show that they faced an imminent threat of future injury.[274] Justice Stevens reasoned that in this case, neither petitioner faced any threat of future injury based on the University's admissions policy, because they both had already enrolled in different schools at the time the case was filed.[275]

Justice Stevens argued that Hamacher did not have standing for three reasons.[276] First, Hamacher presented no evidence to show that he ever actually applied for admission as a transfer student.[277] Therefore, Justice Stevens argued that Hamacher's threat of future injury was "conjectural or hypothetical" rather than "real or immediate."[278]

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266. *Id.* at 282 (Stevens, J., dissenting).

267. *Id.* Justice Stevens noted that Barbara Grutter had not attended another law school and that she still desired to go to the University's law school. *Id.* at 282 n.1 (citing Joint Appendix at 30, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)).

268. *Id.* at 282.

269. *Id.*

270. *Id.*

271. *Id.* at 284.

272. 461 U.S. 95 (1983).

273. Gratz v. Bollinger, 539 U.S. 244, 284 (2003) (citing *Los Angeles*, 461 U.S. at 102).

274. *Id.* (citing Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 210-11 (1995)).

275. *Id.* at 284 n.4.

276. *Id.* at 285.

277. *Id.*

278. *Id.* at 285-86 (citing O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).

Second, the transfer policy was neither before the Court, nor was it even addressed by the district court.[279] Justice Stevens noted that significant differences between the two policies existed.[280] As a result, Hamacher should not be permitted to complain about the freshman application process.[281] Justice Stevens declared, "For '[i]f the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review.'"[282]

Third, Justice Stevens noted that relief must be likely to flow from a favorable decision.[283] He argued that the differences between the transfer and freshmen policies would make it unlikely that an injunction granted to modify the freshmen policy would have any effect on the transfer policy.[284] Justice Stevens concluded that Hamacher could not have standing to seek injunctive relief because he would never obtain relief.[285]

Next, Justice Stevens disagreed with the majority's contention that Hamacher had standing because he challenged every use of race in admissions by the University.[286] Justice Stevens relied on both the transcript of oral arguments[287] and the brief by petitioners[288] to show that the petitioners did not challenge all use of race, but only the use of diversity as a compelling interest in undergraduate admissions.[289]

Justice Stevens argued that because the transfer policy was not before the Court, it was impossible to know whether the University would defend it based on diversity grounds or under a remedial interest context.[290] He

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279. *Id.* at 286 (citing Transcript of Oral Argument at 4-5, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)).

280. *Id.* Mainly, the transfer admissions policy did not use a point system where twenty points were automatically given to minority applicants. *Id.* (citing 10 Record at 16 (Ex. C), Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)).

281. *Id.*

282. *Id.* at 286-87 (quoting Lewis v. Casey, 518 U.S. 343, 358-59 n.6 (1996)).

283. *Id.* at 287 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

284. *Id.* at 287 (citing *Allen*, 468 U.S. at 751).

285. *Id.*

286. *Id.*

287. *Id.* at 287-88 (citing Transcript of Oral Argument at 14, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)). Petitioners' attorney admitted that they were not suggesting an absolute ban on using race in admissions. *Id.*

288. *Id.* at 288 (citing Brief of Petitioners at 16-17, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)). Justice Stevens noted that "petitioners' briefs filed with this Court attack the University's asserted interest in 'diversity,' but acknowledge that race could be considered for remedial reasons." *Id.*

289. *Id.* at 287-88.

290. *Id.*

also noted that the transfer policy's absence of a point system might affect a narrow tailoring analysis of the policy.[291]

Justice Stevens likened Hamacher's claim to that of an unemancipated minor who lacked standing to litigate on behalf of older women, and to that of Medicaid patients transferred to intensive care that lacked standing to litigate on behalf of those who faced a transfer to more intensive care.[292] Like those plaintiffs, Justice Stevens argued, neither petitioner in this case had a personal stake in the current request for prospective relief, so neither had standing.[293]

In Part III of his opinion, Justice Stevens attacked the certification of Hamacher as a class representative.[294] Justice Stevens noted that a class representative "'must allege and show that they personally have been injured, not that [the] injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'"[295] Justice Stevens concluded that like the petitioners in *Blum*, Hamacher did not have standing because he could not prove personal injury.[296] Justice Stevens respectfully dissented because neither petitioner could prove a personal stake in the outcome and thus lacked Article III standing.[297]

### F. JUSTICE SOUTER'S DISSENT

Justice Souter agreed with Justice Stevens that Patrick Hamacher lacked standing to challenge the University's admissions policy.[298] He wrote separately to demonstrate that even with the Court's current interpretation of standing, Hamacher did not have standing.[299] In Part II, Justice Souter, joined by Justice Ginsburg, argued that even if the merits of the case were reachable, the Court's judgment was incorrect.[300]

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291. *Id.*

292. *Id.* at 289 (citing Blum v. Yaretsky, 457 U.S. 991, 1001 (1982); H.L. v. Matheson, 450 U.S. 398, 406-07 (1981)).

293. *Id.*

294. *Id.*

295. *Id.* (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976)).

296. *Id.* at 290.

297. *Id.* at 290-91

298. *Id.* at 291 (Souter, J., dissenting).

299. *Id.*

300. *Id.* at 293.

1. *Hamacher Lacked Standing*

Justice Souter argued that the Court's finding of standing was based on two propositions.[301] First, both the transfer and freshmen admissions policies used race to achieve diversity of the student body.[302] Second, Hamacher had standing to challenge this use of diversity in any admissions decision.[303] Justice Souter argued that the Court granted standing to Hamacher simply because his argument, if successful, would eliminate both policies.[304]

2. *The Admissions Policy was Constitutional*

Justice Souter recognized that the Court had developed two positions for admissions policies.[305] First, Justice Souter noted that "*Grutter* reaffirme[d] the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases."[306] Second, *Bakke* outlawed the use of racial quotas.[307] Justice Souter concluded that since the University's policy was not a quota, it was closer to what *Grutter* reaffirmed than what *Bakke* outlawed.[308]

To prove his point, Justice Souter contrasted the rigid quota system of *Bakke* with the University's plan where any applicant could compete for any spot.[309] Justice Souter compared the University's policy with gender-sensitive hiring policies that had been upheld because they allowed all applicants to compete for all spots.[310]

Justice Souter admitted that the only potential problem with the University's policy was that membership in a minority group entitled an applicant to 20 points out of a total of 150 points.[311] However, Justice

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301. *Id.* at 291.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at 293.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 293-94 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (Powell, J., plurality)).
310. *Id.* at 294. In *Johnson v. Transportation Agency of Santa Clara County*, the court upheld a gender sensitive hiring program. 480 U.S. 616, 638 (1987). Instead of requiring a quota, the Agency's plan provided for no set number of women to be hired. *Id.* Instead of a set aside plan, the plan required women to be weighed against all applicants. *Id.* The hiring plan only required that the sex be an additional factor in the hiring process. *Id.* Thus, the court upheld the plan under *Bakke*. *Id.*
311. Gratz v. Bollinger, 539 U.S. at 294 (2003).

Souter noted that non-minority students could "receive twenty points for athletic ability, socioeconomic disadvantage, [and] attendance at a socio-economically disadvantaged or predominantly minority high school."[312] In addition, they could also receive ten points for being residents of Michigan, six points for being a resident in an underrepresented Michigan county, or five points for leadership and service.[313] Justice Souter noted that the majority objected to this policy because minority applicants automatically were given a large award of twenty points.[314]

Justice Souter argued that Justice Powell's "plus" factors had to be assigned a numerical value out of necessity.[315] Justice Souter reasoned that "[s]ince college admission is not left entirely too inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic . . . ."[316] Justice Souter concluded that the University accomplished the same "holistic review" of applicants by use of a numbered scale that the law school achieved using different means, which was upheld by the Court in *Grutter*.[317]

Furthermore, Justice Souter argued that the twenty point award was not so large as to guarantee admission.[318] On the contrary, non-minority students could achieve higher selection scores than minorities based on non-racial factors.[319] The fact that "virtually every qualified underrepresented minority applicant" is admitted could indicate that very few qualified minority applicants apply, or that self-selection results in a strong minority pool.[320]

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312. *Id.* at 294-95.

313. *Id.* at 295.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* In *Grutter*, the University's Law School admissions policy was upheld because each student's application was given a "holistic review." Grutter v. Bollinger, 539 U.S. 306, 337 (2003). During the admissions process each application was reviewed individually. *Id.* The admissions counselors then decided whether to admit the applicant in the light of all the applicant's characteristics. *Id.* In this manner, the University considered all the ways the applicant might contribute to educational diversity. *Id.* Justice Souter reasoned that although the University did not look at each undergraduate application individually, the numbered scale achieved the same goal by awarding points for more than just race. Gratz v. Bollinger, 539 U.S. 244, 295 (2003).

318. *Id.*

319. *Id.* at 296. Justice Souter noted that twenty points were also awarded for nonracial factors such as athletic prowess. *Id.* at 294-95. Thus, a white athlete with a strong ACT score and GPA could outscore a minority with a lower ACT and GPA. *Id.*

320. *Id.* at 296 (citing Respondent Bollinger's Brief at 39, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516); Appendix to Petition for Certiorari at 111a, Gratz v. Bollinger, 537 U.S. 1044 (2002) (No. 02-516)).

Justice Souter concluded that it must be the size of the bonus that makes the majority suspicious, but mere suspicion is not enough to justify the majority's conclusion.[321] Justice Souter noted that the district court did not find the assigned point value troubling and made only limited findings on the work of the ARC.[322] Justice Souter argued that there was no record of the case-by-case work of the committee, so the Court should have vacated and remanded this case.[323] By ruling against the University without a full record of the activities of the committee, he argued that the Court penalized the University for being honest about its program.[324]

Furthermore, Justice Souter stated that the University's plan was preferable to some race-neutral alternatives like percentage plans.[325] He rejected these plans because they were meant to achieve the same result in an underhanded way.[326] Justice Souter stated that the winner should not be the party who hides the ball.[327] Justice Souter concluded that even if the petitioners had Article III standing, he would have affirmed the granting of summary judgment to the University by the district court.[328]

### G. JUSTICE GINSBURG'S DISSENT, JOINED BY JUSTICE SOUTER AND JUSTICE BREYER IN PART I

Justice Ginsburg, joined by Justices Souter and Breyer, disagreed with the majority's use of one standard to judge all racial classifications.[329] Justice Ginsburg argued that one standard would only be appropriate if the country had fully recovered from its history of discrimination.[330] Justice Ginsburg relied on voluminous government census data showing large disparities between whites and African Americans in nearly every important

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321. *Id.* (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 287-88 (1986) (Powell, J., plurality)).

322. *Id.* (citing Gratz v. Bollinger, 122 F. Supp. 2d 811, 829-30 (E.D. Mich. 2000)).

323. *Id.* at 297.

324. *Id.*

325. *Id.* at 297-98. The United States in its amicus brief contended that the University could achieve many of the same outcomes with a race-neutral percentage plan. Brief for the United States as Amicus Curiae Supporting Petitioner at 18, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516). These plans guaranteed admission for a certain percentage of graduates from each of the state's high schools. *Id.* The United States argued that similar plans had been adopted with success in California, Florida, and Texas. *Id.*

326. Gratz v. Bollinger, 539 U.S. 244, 298 (2003). Justice Souter argued that these policies were designed to encourage admission of minorities from inner city high schools. *Id.* at 297.

327. *Id.* at 298.

328. *Id.*

329. *Id.* (Ginsburg, J., dissenting).

330. *Id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995)).

category measured.[331] Justice Ginsburg argued that these disparities were present in unemployment, poverty, and access to health care.[332]

Additionally, she cited large amounts of data showing the superior quality of white schools when compared to primarily minority institutions.[333] These disparities also indicated that African-American adults earned less money than whites, even with equivalent levels of education.[334]

Therefore, Justice Ginsburg argued that in implementing the Equal Protection Clause, lawmakers may properly differentiate between policies of exclusion and inclusion.[335] She argued that actions designed to burden minorities were not in the same category as those actions designed to remedy past discrimination.[336]

Justice Ginsburg argued that racial classifications were inherently "suspect," not because they can never be used, but because racial classifications have been used as a tool of oppression.[337] Thus, if a classification was designed to achieve equality rather than to oppress, it was not suspect.[338]

Justice Ginsburg admitted that the mere claim that equality was the goal was not enough to immunize the University's policy from judicial scrutiny.[339] Justice Ginsburg argued that close scrutiny was needed to weed out malicious classifications from the benign and to ensure that any racial preference was not so large as to harm the previously favored groups.[340]

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331. *Id.* at 299 (citing U.S. CENSUS BUREAU, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002 368 tbl.562 (2002) [hereinafter STATISTICAL ABSTRACT]).

332. *Id.* (citing U.S. CENSUS BUREAU, U.S. DEP'T. OF COMMERCE, POVERTY IN THE UNITED STATES: 2002 291 tbl.A (2001); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HEALTH INSURANCE COVERAGE: 2000 391 (Table A) (2001)).

333. *Id.* at 299-300 (citing James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 273-74 (1999)). The data showed that minority students at under funded schools were more likely to score poorly on standardized tests, and more likely to drop out. *Id.* at 300 n.5.

334. *Id.* at 300 (citing STATISTICAL ABSTRACT 140, *supra* note 331, at tbl.211).

335. *Id.* at 301 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316 (1986) (Stevens, J., dissenting)).

336. *Id.* (citing Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 433-34 (1988)).

337. *Id.* (citing Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (2d Cir. 1968)).

338. *Id.* (citing *Norwalk*, 395 F.2d at 932).

339. *Id.* at 302. Justice Ginsburg disagreed with the majority that strict scrutiny should be applied to all racial classifications. *Id.* Instead, she argued that racial classifications designed to remedy the lingering effects of past discrimination should be allowed so long as they serve a legitimate governmental purpose. *Id.* (citing United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (1966)).

340. *Id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting)).

Accordingly, Justice Ginsburg found no fault with the University's admissions policy.[341] She noted that the University was one of the top schools in the country, and admitted only qualified applicants.[342] The minority applicants admitted generally fit into the historically oppressed group.[343] Justice Ginsburg noted that the program was not designed to decrease the number of whites attending and that no seats were reserved on the basis of race.[344] Furthermore, she concluded that white students were not harmed because their chances of being admitted were not greatly diminished because of the program.[345]

Justice Ginsburg agreed with the other dissenters and refuted the United States' claim that the University should implement a percentage plan as an effective race-neutral alternative.[346] She found these plans to be "disingenuous" because they were not race-neutral, but instead were designed to accomplish the same goals as the current admissions plan.[347]

Justice Ginsburg acknowledged that as long as "racial oppression [was] still visible in our society," universities will continue to maintain affirmative action plans either openly or in secret.[348] She argued that by striking down the University's policy, the Court would force universities to achieve similar results in secret. [349]

## IV. IMPACT

Like any landmark case, the decision in *Gratz* elicited a wide range of reactions.[350] Even though the admissions policy in *Gratz* was found to be unconstitutional, the University claimed victory because diversity was recognized as a compelling interest.[351] President Bush, who filed an amicus brief opposing the University, also claimed victory.[352] In fact, the only

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341. *Id.* at 302-03.

342. *Id.* at 303 (citing Appendix to Petition for Certiorari at 108a, 111a, Gratz v. Bollinger, 537 U.S. 1044 (2002) (No. 02-516)).

343. *Id.*

344. *Id.* (citing Brief for Respondents at 10, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)).

345. *Id.* (citing Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Science Admissions*, 100 MICH. L. REV. 1045, 1049 (2002)).

346. *Id.* at 303 n.10.

347. *Id.* (citing Respondents' Brief at 44, *Gratz* (No. 02-516)).

348. *Id.* at 304.

349. *Id.*

350. *What Do U-M Court Rulings Mean?*, DETROIT NEWS, June 24, 2003, *available at* 2003 WL 57064239.

351. Terrence J. Pell, *Court Gives New Life to Quota Camouflage*, NEWSDAY, July 1, 2003, *available at* 2003 WL 57985827.

352. James Gerstenzang, *Affirmative Action Survives; The Supreme Court Upheld Race as a Factor in University Admissions but Struck Down Quota-Type Systems in Another Ruling*,

party not claiming outright victory was the Center for Individual Rights (CIR), which won the lawsuit.[353] The most immediate impact of *Gratz v. Bollinger* has been in the field of higher education.[354]

### A. CHANGES IN HIGHER EDUCATION

In response to the rulings in *Gratz* and *Grutter*, the University of Michigan unveiled a new admissions policy expressly relying on the Court's decisions.[355] The new policy now states:

> The new application form is designed to facilitate *individualized, holistic* consideration, with special attention to providing opportunities for all applicants to demonstrate the ways in which they would contribute to the life and diversity of the University. The changes to the application form do not alter the factors considered in the process (e.g., socioeconomic status, race or national origin, special skills and talents, unusual life experiences, etc.); they simply make it possible for each applicant to provide more detailed and individualized information about these criteria, so as to facilitate the particularized application review approved by the U.S. Supreme Court in *Grutter v. Bollinger*.[356]

Although the most immediate impact was on the University of Michigan, *Gratz* will have a broader impact, because poorly drawn admissions policies will always run afoul of Title VI.[357] Title VI prohibits institutions which receive federal money from discriminating based on race.[358] Almost all public and private universities receive federal money, so all will be affected.[359]

Finally, to the chagrin of anti-affirmative action proponents, some schools that did not have race-sensitive policies before the rulings are now

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ORLANDO SENTINEL, June 24, 2003, at 2, *available at* 2003 WL 57954447. President Bush stated, "The [C]ourt has made clear that colleges and universities must engage in a serious, good faith consideration of workable race-neutral alternatives." *Id.*

353. Pell, *supra* note 351, at 1 (recognizing that the decision, and the University's reaction to it, will lead to more litigation).

354. *The Admissions Review Process: Mission Statement and Overview*, at http://www.admissions.umich.edu/process/review/intro (last visited Oct. 14, 2003).

355. *Id.*

356. *Id.* (emphasis added).

357. Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003).

358. Charles Lane, *O'Connor Questions Foes of U-Michigan Policy; Justice Seen as Holding Likely Swing Vote as Court Weighs Affirmative Action Cases*, WASHINGTON POST, Apr. 2, 2003, *available at* 2003 WL 17425097.

359. *Id.*

implementing them.[360] These schools now believe that it is possible to draft a policy that is constitutionally tested and court approved.[361] In addition to the impact in higher education, the Court's ruling will also be felt in the business world.[362]

### B. CHANGES IN BUSINESS RECRUITMENT

In the two University of Michigan cases, over eighty business organizations and corporations filed amicus briefs in support of the University's diversity-based rational.[363] Although the Court's decisions did not deal directly with business, many employers are thinking about implementing diversity-based recruitment policies.[364] Some believe that this rationale can be easily translated into the business environment.[365] However, others believe that it will be difficult.[366]

Either way, under the diversity rationale, companies would have to be careful in crafting race-sensitive recruitment policies.[367] Failure to do so will assuredly lead to more expensive litigation.[368] The decision in *Gratz* will probably not have much of an impact in states where there is a racially homogenous demographic.

### C. IMPACT ON NORTH DAKOTA

Most if not all the universities in North Dakota must comply with the Court's new stance on affirmative action.[369] However, North Dakota does not have any selective universities, so the effects will likely be limited only

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360. John Turner, *U. South Carolina: Admissions Policy Might Include Race at U. of South Carolina*, THE GAMECOCK VIA U-WIRE, Aug. 27, 2003, at 1, *available at* 2003 WL 59919615; *see* Pell, *supra* note 351 at 1.

361. Turner, *supra* note 360, at 1.

362. Michael T. Burr, *High Court Opens Door to Race-Conscious Recruitment: U. of Mich. Ruling Provides Insights for Corporate Employers*, CORPORATE LEGAL TIMES, Sept. 2003, at 1-5.

363. *Id.* at 3.

364. *Id.* at 1.

365. *Id.*

366. *Id.* at 3. Robert Hale, a partner with Goodwin Proctor in Boston explains, "First . . . the primary dispute in the University of Michigan cases involved the state and its institutions—not private companies. And second, the court continued *Bakke's* tradition of deference to the academic freedom of colleges and universities." *Id.* Hale continued, "In the private employment area, you have a basic standard in the Civil Rights Act." *Id.* This Act prohibits discrimination in employment unless it is designed to remedy the effects of past discrimination. *Id.*

367. *Id.* at 4. A company looking to establish such a program should show (1) that they exhausted all race-neutral alternatives; and (2) that the program is necessary to advance a compelling business need such as fundamental improvements in operations or management. *Id.*

368. *Id.*

369. LANE, *supra* note 358, at 60.

to professional schools with limited enrollments.[370] This would include the University of North Dakota School of Law.[371] However, all applicants already receive a complete evaluation of his or her file by each admissions counselor no matter what his or her race may be.[372] This process is based on Powell's opinion in *Bakke,* so no applicant is either exclusively admitted or denied based on numbers alone.[373]

## V. CONCLUSION

In *Gratz*, the majority held that petitioners had standing to challenge the University's admissions policy.[374] Next, the Court found that even though diversity was a compelling interest, the University's admissions program was too mechanical to be narrowly tailored.[375] Finally, because the policy violated the Equal Protection Clause, it also violated Title VI and 42 U.S.C. § 1981.[376]

*Daniel P. Bakken*[*]

370. Interview with Kathryn Rand, Associate Professor of Law, University of North Dakota, in Grand Forks, N.D. (Oct. 3, 2003) (on file with author).

371. *Id.*

372. Interview with Randy Lee, Professor of Law and Chair of Admissions Committee, University of North Dakota, in Grand Forks, N.D. (Oct. 3, 2003) (on file with author).

373. *Id.*

374. Gratz v. Bollinger, 539 U.S. 244, 268 (2003).

375. *Id.* at 275.

376. *Id.* at 275-76.

[*] Thank you to my wife and parents for their love and support throughout the last year.