THE DIVERSITY RATIONALE: A PROBLEMATIC SOLUTION

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INTRODUCTION

Since at least the 1970s, U.S. colleges and universities have used the diversity argument to justify policies permitting the explicit consideration of race in admissions decisions. Increasingly in the 1990s, unsuccessful White applicants attacked these policies, asserting violations of their constitutional and statutory rights. The nation and the courts were deeply divided over both the legality and the morality of the challenged practices and the issue was widely discussed among the American public. In June of 2003, the United States Supreme Court entered the fray when it decided two of the most important affirmative action cases in recent decades. In *Grutter v. Bollinger*¹ and *Gratz v. Bollinger*,² two cases involving admissions policies at the University of Michigan, a divided Court held that the educational benefits flowing from a diverse student body constitute a compelling state interest and that colleges and universities may consider race in admissions in order to secure these benefits.³ The Court, however, struck down one of the challenged

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2. 539 U.S. 244 (2003).
3. *Grutter*, 539 U.S. at 325, 342; see also *Gratz*, 539 U.S. at 268 (rejecting plaintiffs' argument that diversity was not a compelling state interest "for reasons set forth in *Grutter*").
policies on the ground that it was insufficiently narrowly tailored.\footnote{4}

By determining that diversity is a compelling state interest in the context of higher education, the Supreme Court resolved at least one of the legal questions that had perplexed commentators and divided the lower federal courts. The Michigan decisions, however, left many questions unanswered. This Article examines some of those unresolved issues while simultaneously tackling a larger, more critical question for antidiscrimination advocates. Can the diversity argument achieve what traditional affirmative action sought to secure, that is, broad-based inclusion of historically underrepresented groups? The analysis proceeds as follows. Part I examines some of the reasons for diversity’s popularity. Part II explains why contemporary discussions of diversity may lead to confusion, distortion, and obfuscation and argues for a more “substantive” theory of diversity. Part III shifts the analysis to the legal context and explains why, as a general matter, resort to the law may be of limited assistance in ensuring the inclusion of certain groups. Part III also explores the use of the diversity argument in higher education and investigates the efficacy of this argument in other arenas, like the workplace.

I. DIVERSITY’S POPULAR APPEAL

Diversity, the notion that we should embrace and celebrate people’s differences, became fashionable in the 1980s. Since that time, the idea has been used frequently and quite favorably in public discourse.\footnote{5} Of course, how the issue is framed and the context in which it arises shapes public opinion. People tend to favor diversity when asked whether diversity, in a general sense or in the abstract, should be promoted. It is only when attention turns to developing actual mechanisms for securing particular types of diversity (e.g., racial diversity) that public resistance surfaces.\footnote{6} However, even when the goal

\footnote{4} Gratz, 539 U.S. at 269, 275.


\footnote{6} See New Poll, supra note 5; National Survey of Voters, supra note 5; see also Howard Fineman & Tamara Lipper, Affirmative Action: Race in the Spin Cycle, Newsweek, Jan. 27, 2003, at 26, 28 (citing a Newsweek poll finding that a majority of Blacks and
of diversity is offered to justify specific programs that consider race, there seems to be less resistance to these types of measures than to measures whose stated goals are to remedy past discrimination. The question, of course, is why? Given that initiatives undertaken to secure diversity are strikingly similar to initiatives undertaken to remedy past discrimination—in that both seek to ensure the inclusion of persons with different life experiences—why have diversity initiatives received greater public acceptance than more traditional affirmative action programs, which continue to be maligned and viewed as unwanted relics of the past?  

Two factors may explain this outcome. First, as has already been suggested, arguments used in support of diversity measures differ from those that are commonly employed for more traditional affirmative action programs. Generally speaking, supporters of diversity initiatives seek to justify their programs by arguing that diversity is good in itself and that contributions from persons of diverse backgrounds will advance the mission of the entity in question. While this rationale has been offered to explain traditional affirmative action efforts, proponents of traditional affirmative action have also

Whites oppose using preferences for Blacks): Linda Wertheimer, Few Definitive Answers in Race Poll: Despite Call for Diversity, 83% Oppose Use in College Admissions, DALLAS MORNING NEWS, Mar. 23, 2003, at 35A ("In a recent nationwide poll by the Associated Press, four of five Americans said it’s important that colleges have racially diverse student bodies. But just a slim majority, 51 percent to 43 percent, supported affirmative action as a way to increase diversity.").  

7. Like diversity initiatives, traditional affirmative action plans attempt to ensure the inclusion of members of certain groups by using criteria that take group membership into account. See James E. Jones, Jr., The Rise and Fall of Affirmative Action, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 345, 346 (Herbert Hill & James E. Jones, Jr., eds., 1993) (defining affirmative action as “public or private actions or programs which provide or seek to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups”). The only real difference in these programs appears to be their targeted audience and their underlying justifications.

8. See Fineman and Lipper, supra note 6 (noting the Bush administration’s opposition to affirmative action); see also Steven Holmes, Re-Rethinking Affirmative Action, N.Y. TIMES, Apr. 5, 1998, § 4, at 5 (pointing to events indicating that opponents of affirmative action were winning in the courts of law and the court of public opinion). For an insightful study of causes underlying White opposition to race-based affirmative action measures, see Laura Stoker, Understanding Whites’ Resistance to Affirmative Action: The Role of Principled Commitments and Racial Prejudice, in PERCEPTION AND PREJUDICE: RACE AND POLITICS IN THE UNITED STATES 135-70 (Jon Hurwitz and Mark Peffley eds., 1998).

9. This argument is often made in support of college admissions programs that consider a variety of group-based characteristics. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J., plurality opinion) (noting that “the atmosphere of speculation, experiment and creation”—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body”); see also Gary Orfield & Dean Whittington, Education and Legal Education: Student Experiences in Leading Law Schools, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 160 (Gary Orfield & Michal Kurlaender eds., 2001) (reporting survey results in which 89% and 91% of Harvard Law and Michigan Law students, respectively, indicated a “positive” impact of diversity on their total educational experience).
employed arguments based on principles of corrective and distributive justice. Under the former, affirmative action programs are necessary to remedy current discrimination and the present effects of past discrimination. Under the latter, affirmative action ensures that societal opportunities do not fall below a minimum threshold for all persons.

The controversial nature of the corrective and distributive justice rationales, and their absence from discussions of diversity, explain why diversity initiatives may be more palatable to persons outside of the civil rights community than more traditional affirmative action programs. With their focus on corrective justice, traditional affirmative action programs appear more exclusive, evoking images of slavery and demanding that people acknowledge and assume responsibility for this country’s history of racial oppression (a responsibility that many people are loath to accept because they feel that they and their immediate ancestors have done nothing wrong). With this emphasis on the past, traditional affirmative action programs may arouse feelings of fatigue, guilt, defensiveness, and anger, and bring to mind concerns about racial preferences, quotas, merit, stigma, and reverse discrimination, among other things. Consequently, these programs are more difficult for some people to accept.


11. Id. ("[C]orrective justice seeks to compensate individuals for wrongful injuries. It aims to make victims whole, to place them in the position they would have occupied absent the injustice.").

12. In describing the distributive justice rationale, Professors Brest and Oshige note: A just society should not allow people to be very poor or powerless. A purely distributive rationale is indifferent to how an individual’s subordinate status came about—whether it is the result of happenstance, discrimination, or cultural maladaptation to postindustrial American society. Welfare programs such as Aid to Families with Dependent Children and Medicare are paradigmatic (non-group-based) distributive policies. A hiring or admissions program favoring the disabled is an example of an essentially distributive affirmative action policy. . . . Distributive policies that seek to improve the present condition of individuals seldom aspire to be thoroughly egalitarian. They only prevent individuals from falling below some threshold, leaving a society with considerable variation in individual welfare.

Id. at 867.

13. See generally Stoker, supra note 8.

14. To some, programs driven by distributive justice principles may seem antithetical to notions of merit and individualism that are so central to the American Dream. This may explain why class-based affirmative action programs generally have not materialized in the United States. See, e.g., Lee Anne Fennell, Interdependence and Choice in Distributive Justice: The Welfare Compendium, 1994 WIS. L. REV. 235, 244 (1994) (noting the "conflicting themes" in society’s assessment of what is “just”—on the one hand, there exists the notion that “it is unacceptable . . . for some individuals to have insufficient means to obtain adequate food and shelter”; on the other hand, “is the idea that money belongs to those who ‘make’ it, and that individual effort expended in productive and important pursuits must be rewarded.”); Deidre A. Grossman, Voluntary Affirmative Action Plans in Italy and the United States: Differing Notions of Gender Equality, 14 COMP. LAB. L. 185, 224 (1993) (“[T]he United States Constitution abhors distributive justice. Its primary and exclusive
In contrast, because diversity initiatives generally lack any remedial component, the imagery evoked by the term “diversity” is quite different. While corrective affirmative action looks at the past, diversity suggests a more forward-looking orientation. The word diversity may also appear to be more inclusive. For some people, diversity calls to mind a host of factors connoting difference, including class, race, gender, age, disability, geographical origin, sexual orientation, artistic talent, and athletic ability, among other things. Consequently, a wide range of persons can envision themselves as potential beneficiaries of such programs. Everyone can be a member of the choir, so to speak.\(^\text{15}\)

While the above differences in underlying rationales are important, perhaps nothing explains the shift to talk of diversity more than a series of Supreme Court decisions in the 1980s and 1990s that successfully undermined traditional affirmative action programs.\(^\text{16}\) In those opinions, the Court made clear that race-based affirmative action measures are subject to strict scrutiny, the most rigorous form of constitutional review.\(^\text{17}\) Although the Court held that efforts to remedy the continuing effects of specifically identifiable past discrimination satisfy strict scrutiny, the Court rejected other rationales for affirmative action programs.\(^\text{18}\) It was unclear until the Michigan decisions whether the diversity justification would be sufficient.\(^\text{19}\) Because civil rights advocates were left with few legal grounds upon which to rest their efforts to eliminate discrimination, they strategically and quite pragmatically climbed onto the diversity bandwagon.\(^\text{20}\)

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15. See Fulwood & Weiss, supra note 5, at A14 (“Affirmative action is the code word for a set of practices that are seen as zero-sum, where somebody wins and somebody loses.... Diversity isn’t seen that way. Diversity is seen as everyone wins, as advancing the goals that everyone embraces.”) (quoting Daniel Yankelovich, chairman of a polling firm).


17. Croson, 488 U.S. at 493-98 (holding that strict scrutiny applies to all race-based classifications made by state and local governments); Adarand, 515 U.S. at 227 (extending strict scrutiny to federal race-based classifications).

18. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding that goal of alleviating the effects of societal discrimination by providing minority students with minority role models was insufficient justification for using race in determining teacher layoffs).


20. See Charles R. Lawrence, III, Each Other’s Harvest: Diversity’s Deeper Meaning,
II. The Limits of Diversity Discourse

As Part I demonstrates, diversity has been popular and prominent in our national discourse for several reasons. Some people have pursued diversity for its own sake. These individuals think that it is better to have different experiences, ideas, and viewpoints represented in just about any context. Thus, diversity is a good in itself. Others, however, have used diversity to further a civil rights agenda. That is, they have employed diversity as a political and legal tool to ensure that historically disempowered and underrepresented groups secure and maintain access to previously closed organizations and institutions. It is this latter use of diversity that provides the focus of this Part. More specifically, this Part looks at ways in which the current discourse may limit the usefulness of diversity as a vehicle of change. Section A examines diversity’s lack of a substantive, clearly defined meaning in contemporary parlance. In short, because diversity has the potential to encompass everything, it often refers to nothing in particular. Section A shows how this may not only lead to confusion, but also to deception.

Section B discusses the tendency in diversity discourse to conflate different diversity factors. In the same breath, people often speak of race, gender, national or geographic origin, disability, age, class, alumni and family connections, athletic ability, and artistic talent, among other things. Collapsing these very different factors under the umbrella of diversity may suggest that these items are fungible and should be accorded the same treatment. Yet, as Section B demonstrates, things are rarely this simple. There is a meaningful difference between diversity factors that historically have been used as a basis for inclusion and those that have been used as a basis for exclusion. The situation is further complicated by the fact that among those factors that have been used historically to exclude, there are particularized challenges to overcoming exclusionary barriers experienced by persons within different group-based classifications. As Section B reveals, the problem with “diversity talk” is that it obscures the need for specificity in a way that could ultimately undermine any meaningful quest for broad-based inclusion.

A. The Dangers of Confusion and Deception

Diversity lacks a substantive, clearly defined meaning in contemporary parlance. The concept means different things to different people depending upon when, where, and by whom it is invoked. Thus, one can never be quite certain of why or for what purpose diversity is being utilized or who is being

312 U.S.F. L. Rev. 757, 765 (1997) (noting the above behavior and criticizing pragmatic attempts by the public interest bar to save affirmative action in higher education by “separat[ing] the fight for integration in the university from the doctrinally undermined fight for integration in the workplace and distinguish[ing] the diversity rationale from the remedial rationale”).
benefited or harmed. A simple example demonstrates the potential problem. Assume that in an address to an audience of faculty, administrators, students, and alumni, a university president states that her institution is committed to and actively pursuing diversity (e.g., through admissions and hiring policies). Although some skeptics may question the underlying substance of the president’s statement, many audience members are likely to react positively to this general pronouncement. This response may occur because people tend to filter what is being said through the lens of their own personal experiences and to focus on what they believe to be important (in other words, people hear what they want to hear). Thus, a White female faculty member may think, “Good. We are going to hire more women.” A Latino male may think, “Finally, we are going to do something about the underrepresentation of people of color here.” An older person may assume that the president is speaking of age diversity. A poor person may assume that the institution is committing to redress socioeconomic barriers to inclusion. Disabled individuals may assume the speaker is committing to better access for the disabled. Persons from the northwest may think the president is referencing geographical diversity. Those with children may assume the institution is going to be more family-friendly. Those who are gay or lesbian may assume the president is discussing discrimination on the basis of sexuality. And so on.

Without anything more being said, everyone in the audience can embrace the president’s comments. Everyone can feel good. No one need feel threatened or excluded. Indeed, as noted in Part I, this is diversity’s appeal. Why employ terminology and controversial analyses (like that needed to explain distributive and corrective justice measures) that will only alienate some people and create unnecessary tension? Is it not better to use language that has the potential to embrace everyone and with which more people are comfortable?

The problem, of course, is that while broad, seemingly inclusive language may appear to be a good idea in the short term, over the long haul it is likely to lead to confusion at best. People who initially assume their issues will be addressed are likely to be concerned, angered, distrustful, bitter, or disillusioned when their expectations are subsequently disappointed. While some people may silently accept this state of affairs, others may request an explanation. Thus, the very issues the university president may have consciously or subconsciously attempted to avoid by initially using the all-inclusive word “diversity” will ultimately have to be addressed. At some point, a justification for focusing on or ignoring particular groups will have to be given and the consequences (e.g., possible backlash) faced.

The problem with contemporary talk of diversity is that it does not equip the president with a response that will be acceptable to those who are not the focus of the institution’s efforts. Simply saying, without more, that different viewpoints are being sought does not explain why some groups are being targeted while others are not. Even saying that certain groups are
underrepresented and that their input is being sought for the benefit of everyone associated with the institution will be inadequate without more. The president (and diversity advocates) must explain why the underrepresentation is problematic, why the targeted viewpoints are needed, and why the targeted group will most likely represent them. That is, the president must develop a more substantive theory of diversity.

The above example posits a relatively benign situation in which an institution is committed to securing diversity for at least some, but perhaps not all, groups. The vagueness of diversity, however, can be used to further less benign causes. For example, overly general terminology may lead to deception, as when an institution is merely paying lip-service to diversity without any real intent to change the status quo by including historically excluded groups. In this situation, it may be hard to hold the institution’s leaders accountable when they have spoken only in generalities from the outset. Without a commitment to a specific goal, it is often impossible to force or to monitor action. In addition, because of diversity’s broad sweep, it may be fairly easy to reconceptualize various forms of diversity, or to shift the focus from being about historically excluded groups to being about something else entirely. A recent conversation with a practicing lawyer confirmed this observation. The lawyer explained how an employer, in response to a serious claim of race discrimination, retained consultants to explore ways in which the employer might diversify its workplace. The analysis began with a focus on the institution’s lack of racial diversity. It ended, however, by examining ways in which the employer might effectively blend various corporate cultures during a merger of its branches. The fluidity of diversity allowed the employer to shift its focus from race to more generalized concerns about corporate culture all while touting its commitment to diversity.21

Diversity’s vagueness, combined with its forward-looking orientation, creates another difficulty: it leads people to approach diversity in an a-historical and an a-contextual manner. As noted in Part I, one of the perceived benefits of diversity discourse is that it creates a sense of inclusiveness; everyone is potentially a member of the choir. The wrinkle that often gets overlooked is that some groups have always been in the choir and will continue to be presumptive members. The latter insight is critical because in order for diversity to be a meaningful mechanism for inclusion (i.e., something more than a mere continuation of the status quo), diversity advocates must identify and focus on those groups that historically have been excluded and eliminate barriers to their inclusion. Again, explaining why it is necessary to include certain groups requires that diversity advocates articulate a more substantive theory of diversity’s importance. It requires that people examine contemporary discrimination and the continuing effects of past discrimination in the United

States.

The latter point is particularly pertinent to discussions of diversity in higher education. As discussed more fully in Part III, presently colleges and universities employ the diversity argument to support policies that consider race in the admissions process. Although one can understand why some antidiscrimination advocates support use of the diversity argument, approaching the problem of inclusion in this fashion cloaks what is really at stake in these cases. While a racially diverse student body benefits everyone, what is really being sought through these admissions policies is access for racial minorities to institutions from which they have been and still are systematically and disproportionately excluded because of racism. Thus, the real problem is historical and contemporary racism. Lack of diversity is its consequence.

Unfortunately, shallow talk of diversity does not produce the sort of rigorous analysis required to address the above concerns. Rather, the current focus allows people to promote a sense of inclusiveness (to “feel good”) without materially changing the underlying conditions of those who have been historically excluded. Current poll data demonstrates the soundness of this observation. That data indicates that while the public generally tends to regard diversity favorably, there is large-scale resistance to diversity measures focused on race (even in areas where diversity is more likely to be favored, like

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22. To be sure, there are undoubtedly other factors (e.g., class differences) that contribute to this exclusion. But, the main point of the text remains: that is, racism (or discrimination) is a central problem. Lack of diversity is merely a consequence. Indeed, many of the policies that have been subject to legal challenge originated from concerns about the underrepresentation of minorities as a result of historic racism. For example, in Bakke, the university argued that its special admissions program was developed, among other things, to counter the effects of societal discrimination. 438 U.S. at 306. Similarly, in Hopwood v. Texas, the university maintained that the purpose of its special admissions program was to remedy the continuing effects of past discrimination in the Texas school system. 78 F.3d 932, 948-49 (5th Cir. 1996). Only after a series of Supreme Court decisions made it more difficult to invoke the remedial rationale for affirmative action programs did institutions begin to use diversity as the sole justification for these programs. See Grutter v. Bollinger, 288 F.3d 732, 735 (6th Cir. 2002), cert. granted, 539 U.S. 306 (Dec. 2, 2002), and Gratz v. Bollinger, 122 F. Supp. 2d 811, 816 n.5 (E.D. Mich. 2000), cert. granted, 539 U.S. 244 (Dec. 2, 2002), in which the University of Michigan argued that the problematic aspects of its admissions policies were designed to achieve racial diversity and did not attempt to justify its policies on remedial grounds. The remedial argument, however, was offered by interveners in those cases. Grutter, 288 F.3d at 735; Gratz, 122 F. Supp. 2d at 816.

23. To be sure, avoiding discussion of racism proved successful in the Michigan cases, at least in the short term. By focusing on the consequence (lack of diversity), or recharacterizing the problem (race) as a lack of diversity, the University of Michigan was able to circumvent prior Supreme Court rulings that limited the use of race-based affirmative action measures for remedial purposes. While one may applaud the strategic maneuvering of the University, this tactic is limited for the reasons set forth in Part III.B. See discussion infra.
education and employment). This suggests that beneath the surface of diversity discourse, many of the historical barriers to inclusion are still present for some groups. Instead of challenging these barriers directly, diversity does not even require that people talk about them. By shifting from a conversation about securing access to previously disempowered groups to a dialogue about diversity writ in the abstract, people are not forced to "soil their tongues" with words like "discrimination" and their minds with thoughts about how to deal with America's history of oppression. In short, people are required to do no thinking at all.

B. The Risks from Commingling

The preceding Section examined the consequences of the tendency to overgeneralize in contemporary discussions of diversity. This Section addresses a related phenomenon, the tendency to oversimplify. When people talk about diversity, they often set forth diversity factors in a serial fashion. That is, they spout off these factors as if they are reciting the alphabet, without according any attention to variations among them. This commingling creates the illusion that class, race, gender, age, disability, athletic ability, sexual orientation, national and geographical origin, family connections, and artistic talent, among other things, are equally valued characteristics and that everyone will be invited onto the playing field. This Section demonstrates that these factors are not the same. They are neither equally valued nor equally welcomed by all people and, therefore, it is important not to conflate them. The analysis begins by distinguishing among factors of inclusion and factors of exclusion before proceeding to make a few general observations about differences among subordinated categories.

24. See supra notes 5 and 6; see also Michael A. Fletcher & Lee Hockstader, U-Mich Rulings Spur Strategic Scramble; Affirmative Action's Backers and Foes Ponder Response to High Court's Decision, WASH. POST, June 25, 2003, at A9 ("Although many Americans dislike racial preferences, they also embrace the idea of racial diversity."). Indeed, this was the position taken by the Bush administration in the Michigan cases. The President stated that while he supported the goal of diversity in higher education, he opposed the use of race and race-conscious measures by the University of Michigan to attain it. See Brief of the United States as Amicus Curiae Supporting Petitioners, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516); Brief of the United States as Amicus Curiae Supporting Petitioners, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241); Fineman & Lipper, supra note 6, at 29 (examining the position of the Bush administration).

25. Constantly presenting diversity factors in a serial fashion creates a tendency to engage in comparative analogies. Yet, when comparisons are made in the context of diversity, the focus tends to be on similarities rather than differences. Thus, all diversity factors become reduced to a common denominator and race becomes like gender, gender becomes like age, age becomes like disability, etc. The problem is that by aligning these factors in this fashion, the unique experiences of individuals falling within particular groups are minimized and the special obstacles they face in obtaining access to certain institutions are obscured.
1. Factors of inclusion versus factors of exclusion

There is a tendency in the current discourse to commingle, and consequently to equate, factors that have been used historically as a basis of inclusion (e.g., athletic ability, alumni connections, artistic talent, etc.) and those that have been used historically as a basis of exclusion (e.g., race, gender, age, disability, and class).\textsuperscript{26} It is, however, important that diversity advocates distinguish between factors of inclusion and factors of exclusion because they raise different issues. Factors of inclusion have been and will likely continue to be viewed as positive criteria. Individuals with these qualities will generally be welcomed and pursued by decision makers. Therefore, in many cases, there will be no real need for formal programs to ensure that these measures of diversity are present. By contrast, individuals falling within classifications that historically have been used as a basis of exclusion will face certain obstacles to inclusion. This is, in part, because some decision makers may still operate based upon consciously or subconsciously held biases against such groups. Thus, a deliberate effort at inclusion is likely required to overcome these prejudices.

It is also important to understand that the purposes served by factors of inclusion and factors of exclusion are quite different. The presence of individuals from historically disadvantaged groups is critical to equality efforts because the experiences and viewpoints of these groups can assist in overcoming structures of domination in the U.S. and to accomplish many of the other goals of substantive diversity.\textsuperscript{27} In contrast, while the inclusion of persons with special athletic abilities, artistic talents, and alumni connections may improve the social climate, cultural sophistication, and financial condition of some institutions (which are all important), their inclusion does not further the goals associated with substantive diversity.\textsuperscript{28}

2. Differences among subordinated categories

Not only must diversity advocates differentiate between factors of inclusion and factors of exclusion, they must also be attentive to important differences among those group-based classifications that have been used historically to exclude (e.g., race, gender, age, disability, sexuality, and class, among other things). Although individuals within these classifications share a history of pervasive discrimination, each of these factors is distinguishable from the others in ways that may render the achievement of certain forms of

\textsuperscript{26} For example, in Bakke, Justice Powell suggested that it would be appropriate for academic institutions to consider race, ethnicity, geographical origin, musical talent, and athletic ability, among other things, as measures of diversity. 438 U.S. at 321-25 (citing with approval Harvard’s admissions program which considered such factors).

\textsuperscript{27} For a brief statement of the goals of substantive diversity, see infra Part II.C.

\textsuperscript{28} Id.
Consider, for example, race and gender. These factors are often linked in conversation. (Indeed, how many times has the reader heard someone say in a discussion about gender that “it’s just like race”?) This linkage may stem from the fact that racism and sexism operate through similar mechanisms. People generally use physical characteristics to assign race (e.g., skin tone, hair texture, nose width, lip size, eye color) and gender (e.g., body shape, facial...

29. Importantly, the claim asserted here is not that all historically subordinated groups must be embraced in all situations. Rather, the point is that achievement of diversity requires both attention to context and to the unique barriers faced by various groups.

30. Before proceeding, a few caveats are in order. First, by making broad reference to general categories (e.g., race, gender, etc.), I do not mean to suggest that the experiences of individuals within a particular classification are monolithic. There are differences between various racial groups in the United States. Moreover, even within racial categories, people’s experiences vary depending upon a host of factors, including, among other things, gender, socioeconomic class, skin color, and sexuality. For additional discussion of the ways in which people of color are “racialized” and experience racism differently, see Richard Delgado, Derrick Bell Lecture: Derrick Bell’s Toolkit—Fit To Dismantle that Famous House?, 75 N.Y.U. L. Rev. 283, 297-99 (2000) (noting, among other things, that “Blacks are racialized by reason of their color; Latinos, Indians, and Asians on that basis but also by reason of their accent, national origin, and sometimes, religion as well”). See generally Brest & Oshige, supra note 10 (discussing differences among racial groups for purposes of determining criteria for inclusion in law school affirmative action programs); Juan Perea, The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought, 85 Cal. L. Rev. 1213 (1997) (analyzing ways in which use of the Black/White binary paradigm ignores the unique struggles of Mexican Americans and other Latinos/as in the United States against racism).

Second, I do not mean to suggest that “race” and “gender” are mutually exclusive. Women are of different races, and some people of color are women. See GLORIA T. HULL, ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (1982) (criticizing the civil rights and feminist movements for operating as if all women are White and all Blacks are men); see also Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990) (criticizing the idea of a unique women’s experience that is separate from race, class, and sexual orientation or a universal racial experience that can be separated from gender, class, etc.).

Finally, I do not intend to intimate that the differences identified herein are normatively correct or to imply that anyone should engage in the dubious business of ranking oppressions. Recognizing these limitations, it is nonetheless important to understand the different challenges to fighting various forms of discrimination.

31. See THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 69-83 (1997) (noting people’s use of gross morphological differences to delineate racial categories and to assign persons to racial classifications); Ariela J. Gross, Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South, 108 Yale L.J. 109, 137-41 (1998) (examining the use of physical characteristics to measure race in trials in the nineteenth-century south); Ian F. Haney Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 Harv. C.R.-C.L. L. Rev. 1, 3 (1994) (asserting that “[t]he characteristics of our hair, complexion, and facial features still influence whether we are figuratively free or enslaved”); see also Hudgins v. Wright, 1 Hen. & M. 134, 139 (Va. 1806) (“Nature has stamped upon the African and his descendants two characteristic marks, besides the difference of complexion... a flat nose and woolly head of hair.”).

To be sure, physical features are not the only means used to assign persons to racial
features, tone of voice, and the presence or absence of breasts or certain genitalia. Because these physical indicators are highly visible, racial and gender assignment is relatively easy and reliable (which may explain, in part, the pervasive history of racism and sexism). The fact that these indicators are also immutable and generally unrelated to individual capacity makes classifications. Throughout U.S. history, other factors also have been employed, including, among other things, ethnicity and ancestry. For example, even if a person looked White, if his immediate ancestors were known to be Black, then he would be considered Black. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896) (although Plessy appeared to be White, he was considered Black under Louisiana law because of his mixed-race ancestry), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954); Jane Doe v. Louisiana, 479 So. 2d 369 (La. Ct. App. 1985) (action by children, who appeared phenotypically White, to have their birth records changed to reflect their parent's racial designation as "white" instead of "colored").

32. These physical characteristics are often buttressed by reference to cultural cues (e.g., hair style, make-up, dress, jewelry, and mannerisms). Of course, these cultural cues themselves reflect gendered norms. For example, the appropriateness of a man wearing a dress or a woman shaving her head is assessed according to prevailing notions of masculinity and femininity.

33. No classification device is completely reliable. For example, very light-skinned Black persons are sometimes mistaken for White. And women are sometimes mistaken for men. See Marina Cantacuzino, Gender Blender: Androgyny May Be Trendy but a Girl Still Hates Being Mistaken for a Man, THE GUARDIAN (London), Oct. 27, 1994, at T13 (discussing the experiences of several women, including the author, who had been mistaken for men). In addition, a person's race and a person's biological sex can be hidden in some cases. See PAUL R. SPICKARD, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 333 (1989) (noting that in the United States, some African Americans, who appeared White, concealed their Black ancestry and lived (or "passed") in the White community as White); Dinitia Smith, One False Note in a Musician's Life: Billy Tipton Is Remembered with Love, Even by Those Who Were Deceived, N.Y. TIMES, June 2, 1998, at E1 (recounting story of a female jazz musician who successfully passed as male until her death and referencing other instances in history where women have passed as men for various reasons). Notwithstanding the above, people are very adept at discerning and weighing cues and using them to assign gender. See DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT 45-47 (1985) (observing that "[w]here there are ambiguities of group membership, ways are found to make accurate identifications as fast as necessary" through reliance upon a variety of different types of visible and invisible cues).

34. Although some persons may attempt to change their race or to minimize their physical connection to a particular racial group through use of, bleaching creams, hair straighteners, colored contact lenses, and cosmetic surgery, among other things, such efforts are rarely completely successful. See KATHY RUSSELL ET AL., THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS 51 (1992) (noting that in 1990, $44 million worth of skin-bleaching products were sold); Tananaive Due, A Whitewash: The Jacksons' Revamped Looks Revive Debate on Blacks Who Lighten Their Skin, CHI. TRIB., Oct. 23, 1991, available at 1991 WL 9423292 (commenting upon the lightening of Michael Jackson's skin over the years and his sister's argument that the cause was lupus); Gary Mays, No Cure for Jackson's Disease, THE PANTAGRAPH, March 1, 1993, available at 1993 WL 4327253 (reporting Michael Jackson's revelation to Oprah Winfrey that he suffers from a skin disorder that has caused his skin to lose pigmentation); Michel McQueen & Ted Koppel, America in Black and White: Shades of Prejudice, NIGHTLINE TRANSCRIPT BROADCAST (ABC television broadcast, Feb. 28, 1997), 1997 WL 12826288 (noting that skin bleach, sold almost exclusively to Black women, is still a $44 million a year industry).

Similarly, an individual, whose genital anatomy is inconsistent with the person's view
decisions based on race and decisions based on gender particularly objectionable and unfair.\textsuperscript{35}

Notwithstanding these similarities, it is important not to conflate these categories. Depending upon the circumstances, gender will be more or less of an obstacle to inclusion than race. For example, among many laypersons\textsuperscript{36} and judges,\textsuperscript{37} the perception remains that men and women are inherently different of himself or herself as male or female, may elect to have sex reassignment surgery to alter his or her biological sex. Even after such drastic procedures, the public may reject the reassignment. See Elvia R. Arriola, Law and the Gendered Politics of Identity: Who Owns the Label “Lesbian”? 8 Hastings Women’s L.J. 1 (1997) (recounting difficulties faced by some members of lesbian support group in accepting transsexual female).

35. See Frontiero v. Richardson, 411 U.S. 677, 686 (1973); see also Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1 (1976) (“Generalizations based on immutable personal traits such as race [are] especially frustrating because we can do nothing to escape their operation. These generalizations are still more pernicious, for they are often premised on the supposed correlations between the inherited characteristic and the undesirable voluntary behavior of those who possess the characteristic. [Because] the behavior is voluntary, and hence the proper object of moral condemnation, individuals as to whom the generalization is inaccurate may justifiably feel that the decision maker has passed moral judgment on them.”); Cass Sunstein, The Anticaste Principle, 92 Mich. L. Rev. 2410, 2429 (1994) (“The motivating idea behind an anticaste principle is that without good reason, social and legal structures should not turn differences that are both highly visible and irrelevant from the moral point of view into systematic social disadvantages.”).


37. For example, in his dissent in J.E.B. v. Alabama, a case involving the uses of peremptory challenges to exclude men from a jury, Chief Justice Rehnquist stated:

The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely “stereotyping” to say that these differences may produce a difference in outlook which is brought to the jury room. Accordingly, use of peremptory challenges on the basis of sex is generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors may be.

511 U.S. 127, 156 (1994) (internal citations omitted).

Chief Justice Rehnquist’s remarks reflect the fact that many people view race and gender differently. Although both classifications are based on immutable characteristics, some people tend to regard biological differences between men and women as inherently significant whereas the morphological differences between racial groups are considered meaningless in and of themselves. See also Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 11-13 (1995) (noting that the Court has used sexual difference to justify “less-than-heightened scrutiny” for sex-based classifications); Peter Lurie, Comment, The Law as They Found It: Disentangling Gender-Based Affirmative Action Programs from Croson, 59 U. Chi. L. Rev. 1563, 1580-81 (1992) (“Members of different races share biological features that give them inherently equal capabilities, so a classification that grants preference to one group over another must be arbitrary. . . . Gender classifications are less suspect because legitimate biological differences exist between men and women that may warrant different treatment under law. It is not anomalous to allow a government entity to legislate concerning gender
in ways that matter. That is, some people believe that there are certain sex-specific, biologically driven "realities" that make women less desirable in certain circumstances. Because of the pervasiveness of this belief, discrimination against women is sometimes seen as more socially acceptable than discrimination on the basis of race. Consequently, some employers may conclude that women are physically weak or "fragile" and are therefore incapable of serving effectively as prison guards and fire fighters, or that women lack interest in sales positions that require competitive and aggressive conduct. In addition, some employers may be reluctant to hire and invest in female workers because they fear that women will prioritize their family lives over their professional careers and will require time off for maternity leaves and other childcare purposes. Few employers, however, would reach the above conclusions on the basis of race, where they are likely to employ different stereotypes and rationales to exclude.

Again, the central point here is that racism and sexism each present unique barriers to inclusion that may require different strategic approaches in order to secure racial and gender diversity. In certain situations, the perception that

because undeniable differences between men and women may more frequently justify disparate treatment. The three-tiered system balances the nature of the distinction and the treatment accorded those on either side of the classification.

38. For an overview of this debate among legal scholars, see Kate Bartlett & Angela Harris, Gender and the Law 705-39 (2000).

39. See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (where the defendant argued that short women who weighed less than 120 pounds were not strong enough to serve as prison guards).

40. See, e.g., EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), aff'd, 839 F.2d 302 (7th Cir. 1988) (accepting defense based on argument that, unlike men, women lacked interest in commission sales jobs). Vicki Schultz & Stephen Patterson, Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. Chi. L. Rev. 1073 (1992), found that the result in Sears was not atypical and that courts were more likely to accept the lack-of-interest defense in gender cases than in race cases. This again suggests that people are more likely to believe that there are differences between the sexes that render different outcomes legitimate.

41. See, e.g., Marshall v. Am. Hosp. Ass'n, 157 F.3d 520 (7th Cir. 1998) (holding that it is lawful to discharge employee who required pregnancy leave during the busiest time of the year); Marafino v. St. Louis County Circuit Court, 707 F.2d 1005 (8th Cir. 1983) (holding that it is lawful not to employ pregnant women who would require leave of absence soon after beginning work).

42. Of course, there are certainly occasions when exclusion on the basis of gender and race are driven by the same stereotypes. For example, both women and people of color are often viewed as being intellectually inferior. Thus, some people would conclude that both women and people of color are insufficiently intelligent to handle certain demanding
women are different, indeed "weaker" and more prone to being distracted by family commitments, will be a formidable barrier to entry—perhaps an even a greater barrier to entry than race. At other times, race may present more of an obstacle. Diversity advocates must be particularly attentive to these differences and the contexts in which they arise in order to overcome them.

positions, like the presidency. With women, they might buttress their conclusions by tagging on an additional disqualifier (e.g., that women are too emotionally weak and unpredictable). With people of color, they may add on "untrustworthy" or "corrupt."

43. Although an exhaustive examination of the differences between race and gender is beyond the scope of this Article, one can quite readily posit a number of factors that may make racial diversity more difficult to obtain than gender diversity. For example, one could compare the nature of racial and gender stereotypes and the scope of the exclusion that has resulted therefrom. With gender, sexism operates to exclude women most often when women are perceived to be physically or mentally weak, in need of protection from "the harsher realities of life," or potentially desirous of special accommodation because of their ability to produce children. Invidious racial stereotypes, on the other hand, tend to be more extensive. Although stereotypes must be adjusted depending upon the racial group at issue, in general, people of color are perceived as lazy, lacking intelligence, morally corrupt, criminal, sexually promiscuous, overly aggressive, untrustworthy, and dirty, among other things. Because of the breadth of these stereotypes, racist beliefs may be invoked on more occasions and in more settings than gender stereotypes. Recognizing this fact, diversity advocates must understand that securing racial diversity is a bit like boxing with multiple shadows. The enemy can appear at any time, in a myriad number of places, and in various forms. Accordingly, the strategies one might utilize and the arguments one might employ will necessarily vary significantly from situation to situation. Thus, with academic or high-ranking corporate positions, decision makers may assume that people of color lack the necessary qualifications or intelligence. If a law enforcement position is sought, the problem may be a perceived lack of integrity or honor. If the position is one of a salesperson, then the problem may be a perceived lack of trust and concerns about laziness. And so on.

The fact that the U.S. population is more or less evenly divided between men and women may also affect the relative ability to secure racial and gender diversity. Although women are still foreclosed from operating in certain spheres, because women constitute roughly fifty percent of the population, it is impossible to segregate or to exclude women to the same extent as people of color. The demographic figures also mean that men and women are forced to interact with each other more frequently and on a more intimate level than people of different races. Most men have some intimate relationship with a woman, whether it be parental (father/daughter), spousal (husband/wife), or sibling (brother/sister). This is simply not true of cross-racial interactions. If the theory behind integration is correct, then this constant interaction (combined with feminist teachings and efforts) should make people more receptive on some level to arguments that men and women are equally capable, and consequently more inclined to accord opportunities to women. See Mark A. Chesler, Contemporary Sociological Theories of Racism, in TOWARDS THE ELIMINATION OF RACISM 36-37 (Phyllis A. Katz ed., 1976) (discussing contact theories of racism which propose that "white Americans tend to become less prejudiced when they have an experience of equal status interracial contact"); see also Andrew Tatslitz, Patriarchal Stones I: Cultural Rape Narratives in the Courtroom, S. CAL. REV. L. & WOMEN'S STUD. 387, 466-68 (1996) (summarizing empirical data showing a continuing willingness among White students to express negative stereotypes about Blacks while most university students show much less of a willingness to express degrading attitudes concerning female sexuality). Of course, intimate relations (or proximity), combined with notions of difference and inferiority have also made women more vulnerable to certain forms of subordination (e.g., domestic violence, rape, and other forms of physical or mental abuse).
Importantly, the idea is not simply to get people in the door, but also to create an atmosphere in which they will prosper. Unless diversity advocates address the root causes of the initial exclusion, attempts to achieve these goals will fail.

The extent of the challenge facing diversity advocates and the need for a more particularized and sophisticated analysis of differences among diversity factors become even more apparent when one considers factors like age, disability, sexuality, and class, among others. Understanding the variability in reception of persons within these categories requires analysis of the ways in which people perceive these factors differently—an analysis that diversity talk generally avoids. Yet, this analysis is essential if broad-based inclusion is to be achieved.

C. Developing a More Substantive Theory of Diversity

This Part has demonstrated that while diversity has certain ideological and symbolic advantages, persons interested in using the diversity argument to ensure equality of opportunity and access for historically subordinated groups must anticipate and devise ways to avoid some of the pitfalls inherent in the current discourse. One rather straightforward approach to the situation is to cease referencing diversity in abstract terms. To ensure the inclusion of historically subordinated groups in diversity programs and to test progress across classifications, people must move beyond general terminology. In short, to measure progress against racism, people must focus on race and speak of racial diversity. To measure progress against sexism, people must focus on gender and speak of gender diversity. To measure progress against disability discrimination, people must focus on disability and speak of diversity based on disability. Such specificity will reduce some of the confusion alluded to in Section II.A while also requiring that people be attentive to some of the unique barriers faced by different subordinated groups discussed in Section II.B.

The problems raised in this Part, however, require a deeper response, for what is really needed is a more substantive theory of diversity. Such a theory would be much more specific in explaining why diversity is being pursued. For example, a substantive theory of diversity would explain that diversity is important because, among other things: (1) it improves decision making by testing ideas against more perspectives; (2) it promotes creativity by incorporating more experiences; (3) it adds to “voice” in our everyday social institutions, thus promoting social harmony and perceived procedural justice; and (4) it aids in remedying past discrimination and preventing future subordination. A substantive theory would also explain why the inclusion of historically subordinated groups is necessary to achieving these goals. This analysis is important because until diversity advocates explain why diversity requires the inclusion of traditionally subordinated groups, they will be ill-equipped (1) to challenge decision makers who elect not to include these groups in their diversity programs or (2) to defend entities (like employers)
who would like to extend the concept of diversity beyond the educational arena.

At least one scholar, Professor Charles Lawrence, has begun to tackle these difficult problems. Professor Lawrence argues that current efforts are misguided because “diversity cannot be an end in itself... and cannot be a compelling interest unless we ask the prior question: diversity to what purpose?” Professor Lawrence notes that a “substance less definition” of diversity, or a generalized quest for diversity of ideas, leaves institutions vulnerable to an anti-essentialism critique from persons doubting whether race can serve as a proxy for diversity of ideas. In responding to these problems, Professor Lawrence asserts that the institutional interest in diversity cannot be divorced from efforts to eliminate racism. He notes that while race may not significantly affect discussions of quantum physics, the inclusion of people of color in academic institutions may contribute to our understanding of race and racism in the United States. This is the case not because all people of a particular race share the same point of view, but rather because they “share a lifetime of experience as a person of color in a racist society”—a qualification that no White person possesses. Professor Lawrence thus answers the question of “diversity for what purpose” by stating that “we seek racial diversity in our student bodies and faculties because a central mission of the university must be the eradication of America’s racism. We cannot pursue that mission without the collaboration of significant numbers of those who have experienced and continue to experience racial subordination.”

This sort of analysis and dialogue is needed in both popular and legal discourse in order to move from the current “symbolic” or “token” approach to diversity to a more constructive dialogue about inclusion. If diversity advocates continue to ignore the issues discussed in this Part, the quest for a more “diverse” society will ultimately be less successful than one might desire. In short, diversity advocates need to stop “tilting at windmills” and start recognizing the practical, psychological, political, and legal obstacles to real change.

44. Lawrence, supra note 20; see also Devon W. Carbado & Mitu Gulati, What Exactly Is Racial Diversity?, 91 Cal. L. Rev. 1149 (2003) (reviewing Andrea Guerrero, Silence at Boalt Hall: The Dismantling of Affirmative Action (2002)). Carbado and Gulati argue that proponents must define what is meant by “diversity” and explain clearly its social benefits. Id. at 1150 (noting “[n]or do the benefits of diversity go without saying. They must be theorized and demonstrated.”). Carbado and Gulati offer seven functions of diversity: (1) inclusion; (2) social meaning; (3) citizenship; (4) belonging; (5) colorblindness; (6) speech; and (7) institutional culture. Id. at 1151, 1154-65.

45. Lawrence, supra note 20, at 765.

46. Id. at 773-74 (using the Fifth Circuit’s rejection of the diversity rationale in Hopwood as an illustrative example).

47. Id. at 775.

48. Id. at 765.
III. THE DIVERSITY RATIONALE IN THE COURTS

Parts I and II examined diversity through a larger frame. This broader view is important because it helps situate the legal treatment of diversity, which is the focus of Part III. More specifically, this Part examines: (1) the nature of the discussion surrounding the Grutter and Gratz cases; (2) how the Court reached its conclusions in those cases after years of retreating from affirmative action measures; and (3) some of the complications and ongoing concerns arising from the Michigan opinions.

A. The Cases

In Grutter and Gratz, a divided Court held that the educational benefits flowing from a diverse student body constitute a compelling state interest and that colleges and universities may consider race in admissions to secure these ends. This outcome was not a foregone conclusion. Before Grutter and Gratz, existing precedent was unclear,49 the lower courts were split,50 and the Supreme Court had been extremely divided over affirmative action.51 Consequently, the Left feared the worst; that is, that the Court would conclude that diversity was not a compelling state interest and thereby close the door completely on the use of race in college admissions. The Right was also worried, fearing that the Court not only would find that diversity was a compelling state interest but that it would fail to place any real limits on the use of race-conscious measures to achieve it. As I explain below, the Michigan opinions contained something for everyone, and in so doing, raised more questions than they answered. To fully understand their flavor, one must go back to the beginning and trace the legal landscape leading to and culminating in Grutter and Gratz.

49. See infra Part III.A.1.


51. In both Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), and Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), decisions in which the Supreme Court clarified the governing standard to be applied to race-conscious affirmative action programs, the Court was closely divided. In Croson, the vote was 6 to 3 against the program at issue, 488 U.S. at 475. In Adarand, the vote was 5 to 4 concerning the standard to be applied in assessing federal affirmative action programs. 515 U.S. at 203.
1. The road to Grutter and Gratz

In the latter part of the 1990s, courts were increasingly asked to decide whether, consistent with constitutional and statutory principles, colleges and universities could consider race in their efforts to obtain diverse student bodies. The lack of clarity on this issue resulted, in part, from two Supreme Court decisions in 1989 and 1995 that limited the use of affirmative action. In those decisions, the Supreme Court held that all race-based classifications are subject to strict scrutiny, the most demanding form of constitutional review. Under this standard, race-conscious measures must further a compelling state interest and be narrowly tailored to that end. Although the Supreme Court held that efforts to remedy the continuing effects of specifically identifiable past discrimination satisfied strict scrutiny, the Court consistently rejected other rationales for affirmative action programs. Before the Michigan cases, however, the Court had never examined the diversity rationale under strict scrutiny. Thus, until the decisions in Grutter and Gratz, it was

52. For a list of the key cases, see supra note 50.

53. See Adarand, 515 U.S. at 227, 235-40 (holding that strict scrutiny must apply to race-based presumptions in government contract providing financial incentives for general contractors to hire socially and economically disadvantaged subcontractors); Croson, 488 U.S. 469 (holding that city ordinance violated Equal Protection Clause by requiring that nonminority-owned prime contractors award at least thirty percent of business on city construction contracts to minority subcontractors).

54. Croson, 488 U.S. at 493-98 (holding that strict scrutiny applies to all race-based classifications made by state and local governments); Adarand, 515 U.S. at 227 (extending strict scrutiny to federal race-based classifications). For a thoughtful critique of strict scrutiny, see generally Jed Rubenfeld, Affirmative Action, 107 Yale L.J. 427 (1997) (criticizing the transformation of strict scrutiny from a legal doctrine whose purpose was to "smoke out" invidious purpose to a "cost-benefit" analysis designed to test whether a practice prohibited by the Equal Protection Clause is nonetheless justified because it serves a compelling state interest).

55. Adarand, 515 U.S. at 227.

56. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding that goal of alleviating the effects of societal discrimination by providing minority students with minority role models was insufficient justification for the use of race in determining teacher layoffs).

57. In 1990, in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), the Supreme Court came close to directly deciding whether diversity can justify decision making that takes race into account. In that case, applicants for television broadcast licenses argued that two FCC policies, which awarded preferences to minority broadcasters, violated the Fifth Amendment's equal protection guarantee. Id. at 552, 565-66. In a 5 to 4 opinion, the Court rejected the challenges and upheld the constitutionality of the policies. Id. at 567-68 (concluding that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies"). The Supreme Court, however, applied intermediate scrutiny, a less rigorous form of constitutional review, to the challenged programs. Id. at 564. Thus, Metro Broadcasting did not resolve the question of whether the pursuit of viewpoint diversity could justify race-conscious decision making under strict scrutiny. Indeed, at least four Justices in Metro Broadcasting believed that the diversity rationale would not survive
unclear whether diversity was a compelling state interest. At the heart of the legal controversy was the Supreme Court’s 1978 decision in *Regents of the University of California v. Bakke*.

Because of the Court’s substantial reliance upon *Bakke* in *Grutter* and *Gratz*, that case merits attention.

Briefly, *Bakke* involved a challenge to a special admissions program at the Medical School of the University of California at Davis. That program was designed to increase the number of students from disadvantaged backgrounds and from designated minority groups. Notably, under the special admissions program, minority candidates were evaluated separately from regular candidates for admission, and 16 out of 100 seats in the entering class were set aside for individuals within the designated groups.

In 1973 and 1974, Alan Bakke, a White male, applied to the Medical School through the regular admissions process and was rejected. Bakke brought suit against the University arguing that the special admissions program excluded him on the basis of his race because, during the relevant years, the Medical School had admitted minority students through the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke’s. Bakke claimed that the Medical School’s admissions policy therefore violated his constitutional and statutory rights. In response, the Medical School argued that the program was necessary to “obtain the

strict scrutiny. See, e.g., *id.* at 612, (O’Connor, J., dissenting) (concluding that “the interest in increasing the diversity of broadcast viewpoints [was] clearly not a compelling interest [because] it [was] simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications”). The lack of clarity on this issue was compounded by subsequent changes in the Court’s composition. After *Metro Broadcasting*, four of the five Justices in the majority retired from the Court (i.e., Justices Brennan, Marshall, Blackmun, and White). They were replaced with Justices Ginsburg, Souter, Breyer, and Thomas. Because Justice Thomas has consistently joined Justice Scalia and Justice Rehnquist in refusing to uphold race-conscious measures, many commentators quite reasonably concluded that the necessary votes were not present to uphold diversity plans under strict scrutiny.

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58. 438 U.S. 265.
59. *Id.* at 272.
60. Pursuant to this program, a special subcommittee of the Admissions Committee, consisting primarily of faculty and medical students from minority groups, evaluated applicants falling within the specified categories. Applicants were initially screened to determine whether they had experienced economic or educational deprivation. Applicants who passed this initial hurdle were then rated by the special committee in a manner similar to that employed in the regular admissions process, except that candidates applying through the special program were not required to meet a 2.5 grade cutoff applicable to regular applicants. Persons applying through the special admissions process also were not rated or compared to the general admissions candidates. After conducting its review, the special committee recommended candidates to the regular admissions committee. *Id.* at 272-76.
61. *Id.* at 279.
62. *Id.* at 276.
63. *Id.* at 277.
64. *Id.* at 278-79.
educational benefits that flow from an ethnically diverse student body.”

Attesting to the complexity of this issue, the Supreme Court was severely divided. Indeed, the case resulted in several opinions, none of which spoke for the entire Court. Importantly, only Justice Powell discussed the Medical School’s argument that a university may consider race in admissions in order to achieve a diverse student body.

Applying strict scrutiny, Justice Powell concluded that obtaining a diverse student body is “a constitutionally permissible goal for an institution of higher education.”66 He noted: “[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. . . .”67 Justice Powell went on to observe:

The atmosphere of “speculation, experiment and creation”—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. . . . [I]t is not too much to say that the “nation’s future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples.68

Although Justice Powell concluded that the University’s interest in diversity was compelling, he nonetheless found that the Medical School’s program was not a necessary means to that end.69 Justice Powell was particularly concerned with the reservation of a set number of seats in each class for students from the designated groups.70 He also found problematic the program’s exclusive focus on ethnic diversity, noting that “the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element.”71

In contrast to the Davis plan, Justice Powell viewed favorably the admissions programs at Harvard and Princeton.72 Those programs considered race as a plus without that factor being decisive and without it shielding minority applicants from comparison with other candidates who possessed

65. The Medical School also maintained that the program was needed: (1) to reduce “the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession”; (2) to “counter[] the effects of societal discrimination”; and (3) to “increase the number of physicians who will practice in communities currently underserved.” Id. at 306.
66. Id. at 311-12.
67. Id. at 312.
68. Id. at 312-13.
69. Id. at 315-20.
70. Id. at 316.
71. Id. at 315.
72. Id. at 316-18.
other qualities promoting educational pluralism. Justice Powell noted that, in addition to race, these qualities might include “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”

As noted earlier, the Supreme Court was extremely divided in Bakke. Justices Brennan, Marshall, White, and Blackmun joined Justice Powell’s opinion but only in regards to the statement of facts and for the general proposition that states may, in appropriate circumstances, consider race and ethnic origin in admissions programs. Rejecting both strict scrutiny (or what is currently known as strict scrutiny) and rational basis review, these Justices adopted what has become known as intermediate scrutiny, meaning that the classification “must serve important governmental objectives and must be substantially related to achievement of those objectives.” The Brennan camp found that Davis’ policy met this standard because:

[its] articulated purpose of remedying the effects of past societal discrimination [was] sufficiently important to justify the use of a race-conscious admissions program where there [was] a sound basis for concluding that minority under representation [was] substantial and chronic and caused by past discrimination—and the handicap of past discrimination [was] impeding access of minorities to the Medical School.

These Justices therefore would have found the Davis program constitutional and rejected Bakke’s claims.

Justice Stevens filed an opinion concurring in the judgment in part and dissenting in part, in which Justices Burger, Stewart, and Rehnquist joined. Interestingly, these Justices found it unnecessary to reach the constitutional question of whether race can ever be a factor in admissions. Rather, they determined that Title VI controlled the outcome and that Bakke’s exclusion

73. Id.
74. Id. at 317. Justice Powell concluded:
This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a “plus” on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. at 318.
75. Id. at 272. Justices Brennan, White, Marshall and Blackmun filed a separate opinion concurring in the judgment in part and dissenting in part. Id. at 325-79.
76. Id. at 357-59.
77. Id. at 362.
78. Id. at 408-21.
79. Id.
violated that statute.\textsuperscript{80}

The upshot of the above is that five Justices (Powell, Stevens, Burger, Stewart, and Rehnquist) concluded, for different reasons, that the Davis policy was unconstitutional and that Alan Bakke should be admitted to the Medical School. Five Justices (Powell, Brennan, Marshall, White, and Blackmun) concluded (again for different reasons) that a state may consider race in the admissions process. Only Powell, however, offered diversity as a justification for the latter.

The split in Bakke led to confusion among courts and commentators when the diversity argument resurfaced in the federal courts. In 1996, the Fifth Circuit concluded that Bakke was not controlling precedent because no other Justice joined the part of the opinion in which Justice Powell discussed the diversity rationale.\textsuperscript{81} The Fifth Circuit went on to hold that diversity is not a compelling state interest and that the race-conscious admissions policy used by the University of Texas Law School was therefore unconstitutional.\textsuperscript{82} As explained below, the Sixth Circuit reached the opposite conclusion in Grutter,\textsuperscript{83} as did the Ninth Circuit.\textsuperscript{84} The Eleventh Circuit circumvented the central question altogether by determining that, regardless of whether diversity is a compelling state interest, the program before it failed strict scrutiny because it was not narrowly tailored.\textsuperscript{85} Given the split among the circuits, the

\textsuperscript{80} Id. Title VI states "[n]o 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 subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. After conducting a textual analysis, the Stevens camp concluded that the statute means what it says, whether Black or White, "[r]ace cannot be the basis for excluding anyone from participation in a federally funded program" regardless of the reason for the exclusion. 438 U.S. at 417.

\textsuperscript{81} See Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996). In addition, the court pointed out that since Bakke no court had found diversity to be a compelling state interest. \textit{Id.} Rather, the Fifth Circuit determined that under recent Supreme Court precedent only the interest in remediying past wrongs would be sufficient to justify the use of a racial classification. \textit{Id.} After examining the extent to which it was constrained by prior precedent, the Fifth Circuit went on to question the wisdom of using race to promote viewpoint diversity, observing that "[d]iversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility." \textit{Id.} at 945. As a result of the above reasoning, the court rejected both the use of "ethnic diversity simply to achieve racial heterogeneity" and the use of race as a proxy for other characteristics that universities value. \textit{Id.} at 945-46. Rather than use race as a proxy for viewpoint or other measures of diversity, the court asserted that universities ought to consider the backgrounds and life experiences of applicants on an individual basis. \textit{Id.} at 947.

\textsuperscript{82} \textit{Id.} at 934-35, 948, 962.

\textsuperscript{83} Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), aff'd, 539 U.S. 306 (2003); see discussion infra Part III.A.2.

\textsuperscript{84} See Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000) (upholding constitutionality of race-conscious admissions).

\textsuperscript{85} Johnson v. Bd. of Regents, 263 F.3d 1234 (11th Cir. 2001) (finding admissions
issue was ripe for Supreme Court review and the Court took up the mantle in December of 2002 by granting certiorari in the Grutter and Gratz cases.86

2. Grutter and Gratz

Grutter and Gratz involved two lawsuits brought in 1997 by unsuccessful White applicants against the University of Michigan. The first lawsuit, Gratz v. Bollinger,87 challenged the admissions policy of the University’s largest college, the College of Literature, Science & the Arts (“LSA” or “the College”). Briefly, in 1995 and 1996, LSA scored applicants based upon a combination of their grade point averages and so-called “SCUGA factors.” The latter included assessment of an applicant’s high school quality, high school curriculum, unusual background circumstances, geographical residence, and alumni connections.88 The resulting score, known as the “GPA 2” score, was then plotted on a chart with the applicant’s ACT and SAT scores; admissions decisions were based on where the applicant fell on the chart.89

In 1998, LSA replaced the above system with one in which admissions decisions were determined by an applicant’s ranking on a 150-point scale.90 In short, applicants received points based on their high school GPA, standardized test scores, the academic quality of their high school, the strength of their high school curriculum, in-state residence, alumni relationships, personal essay, and personal achievement or leadership potential.91 Importantly, certain applicants automatically received twenty points based on their membership in an underrepresented minority category, which included African Americans, Hispanics, and Native Americans.92

88. Gratz, 539 U.S. at 254.
89. Id. In 1997, LSA modified its admissions policy so that the formula used to calculate an applicant’s GPA 2 score was restructured to include additional point values under the “U” category in the SCUGA factors. Under this new system, applicants could receive points for underrepresented minority status, socioeconomic disadvantage, attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying. Id.
90. Id.
91. Id.
92. Id. In 1999, in addition to the selection index approach, LSA began providing an additional level of review for some applications. Id. at 256-57. Applications were flagged if an admissions counselor determined that the applicant was: (1) academically prepared to succeed at the University; (2) had achieved a minimum selection index score; and (3) possessed a quality or characteristic important to the University’s composition of its freshman class. Id. Upon review, flagged applicants were either admitted, deferred, or denied admission. Id.
The *Gratz* plaintiffs challenged the constitutionality of these policies because, under the old policy, applicants with the same GPA 2 score and ACT/SAT scores were subject to different admissions outcomes based upon their racial or ethnic status. In addition, the plaintiffs argued that the new policy violated their equal protection rights because the allocation of twenty points for minority status operated as the functional equivalent of a quota.

The second lawsuit, *Grutter v. Bollinger*, challenged the constitutionality of the Law School’s admissions policy. That policy, adopted by the Law School faculty in 1992, employed a more holistic approach than the one utilized by LSA. While the Law School paid close attention to LSAT scores and undergraduate grade point averages in making admissions decisions, the School also considered a number of “soft variables” which were designed to tell the Law School something about an “applicant’s likely contributions to the intellectual and social life of the institution.” Rather than allocating a number of points for race, the Law School reviewed the entire file of each applicant and weighed race, among other things, in determining whether to offer the applicant admission.

The cases were assigned to two different federal judges in the Eastern District of Michigan. In *Gratz* (the undergraduate case), Judge Patrick Duggan granted the University’s motion for summary judgment, finding that LSA’s admissions programs for 1999 and 2000 were constitutional. In *Grutter* (the

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93. *Id.*
94. *Id.* at 258.
96. See *Grutter*, 539 U.S. at 310-16, for an overview of the Law School’s admissions policy.
97. *Id.* at 315.
98. *Id.* at 314-15.
99. 122 F. Supp. 2d 811, 814 (E.D. Mich. 2001). More specifically, Judge Duggan concluded that diversity constitutes a compelling state interest in the context of higher education and justifies the use of race as one factor in the admissions process. *Id.* at 820, 824. In reaching this conclusion, Judge Duggan was not convinced that recent Supreme Court precedent had established, as a matter of law, that consideration of race to attain the educational benefits that flow from a racially and ethnically diverse student body in the context of higher education could never constitute a compelling interest. *Id.* at 821-22 (noting that “Supreme Court precedent has never held squarely and unequivocally either that remedying the effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest.”). Having been presented with strong evidence of the educational benefits that flow from a diverse student body, Judge Duggan concluded that the court was not barred from determining that such benefits are compelling. *Id.* at 822-24. Judge Duggan was also persuaded that the College’s use of race was narrowly tailored, finding that the program did not “utilize quotas or seek to admit a predetermined number of minority students.” *Id.* at 827. Rather, race operated as nothing more than a plus and did not insulate minority applicants from comparison with other applicants. *Id.* at 827-28. In addition, Judge Duggan
Law School case), Judge Bernard Friedman determined that the goal of achieving a diverse student body was not a compelling state interest and held against the Law School. Judge Friedman reasoned that: (1) Bakke was not binding precedent; and (2) the Supreme Court had suggested that the only state interest sufficiently compelling to justify consideration of race was that of remedying specific instances of discrimination. Id. at 843-50. Judge Friedman also concluded that the Law School’s admissions policy was not narrowly tailored because: (1) the Law School’s goal of enrolling a critical mass of minority students was ill-defined; (2) there was no time limit on the Law School’s consideration of race; (3) the Law School’s use of critical mass operated as a quota, which was specifically rejected in Bakke; (4) there was no reason for the Law School’s limit of special admissions to the specific racial groups that it designated; and (5) the Law School had failed to consider race-neutral alternatives to its admissions policy. Id. at 850-51.

100. 137 F. Supp. 2d 821, 850 (E.D. Mich. 2000). Judge Friedman reasoned that: (1) Bakke was not binding precedent; and (2) the Supreme Court had suggested that the only state interest sufficiently compelling to justify consideration of race was that of remedying specific instances of discrimination. Id. at 843-50. Judge Friedman also concluded that the Law School’s admissions policy was not narrowly tailored because: (1) the Law School’s goal of enrolling a critical mass of minority students was ill-defined; (2) there was no time limit on the Law School’s consideration of race; (3) the Law School’s use of critical mass operated as a quota, which was specifically rejected in Bakke; (4) there was no reason for the Law School’s limit of special admissions to the specific racial groups that it designated; and (5) the Law School had failed to consider race-neutral alternatives to its admissions policy. Id. at 850-51.

101. Id. at 738-39. In upholding the constitutionality of the Law School’s admissions policy, the Sixth Circuit relied upon the rule set forth in Marks v. United States, 430 U.S. 188 (1977). In Marks, the Supreme Court held that “[w]hen a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.” Id. at 193. Applying this rule to Bakke, the Sixth Circuit determined that Justice Powell’s opinion in Bakke was the narrowest rationale for the decision. Grutter, 288 F.3d at 741-42.

102. Id. at 738-39. In upholding the constitutionality of the Law School’s admissions policy, the Sixth Circuit relied upon the rule set forth in Marks v. United States, 430 U.S. 188 (1977). In Marks, the Supreme Court held that “[w]hen a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.” Id. at 193. Applying this rule to Bakke, the Sixth Circuit determined that Justice Powell’s opinion in Bakke was the narrowest rationale for the decision. Grutter, 288 F.3d at 741-42.

103. 539 U.S. 259-60.


105. Id.

106. Grutter, 539 U.S. at 321-22; see also Gratz, 539 U.S. at 267-70 (rejecting plaintiffs’ argument that diversity was not a compelling state interest “for reasons set forth in Grutter”).

107. 539 U.S. at 328-29 (noting that “our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions”).
Justice O'Connor pointed to four "substantial" benefits of a diverse student body. First, she noted that diversity increases "cross racial understanding" by "help[ing] to break down racial stereotypes" and "enabl[ing] students to better understand persons of different races."\textsuperscript{108} Second, diversity improves the learning process by "better prepar[ing] students for an increasingly diverse workforce and society, and better prepar[ing] them as professionals."\textsuperscript{109} Third, diversity promotes good citizenship by making public education available to a wide array of persons.\textsuperscript{110} And fourth, diversity in higher education creates and legitimates future leaders. Per Justice O'Connor, because universities train many of our nation's leaders, "in order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."\textsuperscript{111}

Having concluded that diversity, within the context of higher education, is a compelling state interest, the Court was next tasked with determining whether the two admissions policies at issue were narrowly tailored.\textsuperscript{112} Again, the Court was divided. By a 5 to 4 vote, the Court upheld the Law School's policy in \textit{Grutter},\textsuperscript{113} and by a 6 to 3 vote invalidated the undergraduate program in \textit{Gratz}.\textsuperscript{114} The Court determined that, unlike the program in \textit{Bakke}, the Law School's policy did not operate as a quota.\textsuperscript{115} Although the Law School paid attention to the number of minority students it admitted, it did not set aside a fixed number of slots for applicants from particular groups.\textsuperscript{116} The Court was also persuaded by the fact that the Law School engaged in individualized, holistic review of each candidate's file.\textsuperscript{117} This review was not limited to one

\textsuperscript{108} \textit{Id.} at 328-32.

\textsuperscript{109} \textit{Id.} at 330-32.

\textsuperscript{110} \textit{Id.} (Because "education is the very foundation of good citizenship... [t]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.").

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} Borrowing from Justice Powell's analysis in \textit{Bakke}, Justice O'Connor set forth the framework for this analysis, noting:

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot insulate each category of applicants with certain desired qualifications from competing with all other applicants. Instead, a university may consider race or ethnicity only as a plus in a particular applicant's file, without insulating the individual from comparison with all other candidates for the available seats. In other words, an admissions program must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.

\textit{Id.} at 334-35.

\textsuperscript{113} \textit{Id.} at 309-10.

\textsuperscript{114} 539 U.S. at 246-48.

\textsuperscript{115} \textit{Grutter}, 539 U.S. at 334-35.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.} at 335-39.
or two races, but applied to applicants of all races. In addition, the Law School did not consider only race, but weighed a variety of different factors that might contribute to student body diversity. Finally, the Court concluded that the Law School had devised a system that appropriately balanced its commitment to racial diversity with its goal of academic selectivity, and that it had not unreasonably rejected race-neutral alternatives such as selecting students through a lottery system or increasing access by deemphasizing standardized test scores.

The undergraduate program did not fare quite as well under the narrowly tailored analysis. By a 6 to 3 vote in *Gratz*, the Court invalidated the LSA’s admissions policy. Writing for the majority, Chief Justice Rehnquist concluded that the policy failed to provide individualized consideration to each applicant and placed too much weight on an applicant’s race. He noted:

The LSA’s policy automatically distributes 20 points to every single applicant from an “under represented minority” group. . . . The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell’s example, where the race of a “particular black applicant” could be considered without being decisive, the LSA’s automatic distribution of 20 points has the effect of making “the factor of race. . . . decisive” for virtually every minimally qualified under represented minority applicant.

The Court went on to reject LSA’s argument that its large volume of applications prevented it from using the type of holistic approach utilized by the Law School and approved by the Court in *Grutter*. Justice Rehnquist noted “the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.”

118. *Id.*
119. *Id.*
120. *Id.* at 337-41. On these points, the Court noted: Narrow tailoring does not require a university to choose between maintaining a reputation for excellence and fulfilling a commitment to provide educational opportunities to members of all racial groups. The Law School’s current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the law school simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission.

121. 539 U.S. at 246-48.
122. *Id.* at 270-72.
123. *Id.* at 274-76.
124. *Id.*
B. *Life After Grutter and Gratz: Future Challenges*

In *Grutter* and *Gratz*, as is common with Supreme Court opinions, the Court clarified a few matters, kept some things the same, and left other issues for another day. This Section examines the legal landscape in the aftermath of the Michigan cases.

1. *The battle over narrowly tailored*

The response to the Michigan opinions demonstrates that the controversy concerning the use of race-conscious measures to secure diversity is far from over. Indeed, one need look no further than the dissenting opinions in the cases to see that there remains considerable disagreement on the matter.125 On the central question of whether diversity is a compelling state interest, four Justices dissented.126 This sharp division on the Court may cause some people to hope (or fear as the case may be) that a change in the Court’s composition (i.e., the retirement of one of the Justices in the majority) will lead the Court to a different outcome in the near future. Yet, while an outright reversal is always a possibility, it seems unlikely.127 The conclusion that diversity constitutes a compelling state interest rests on much firmer ground following *Grutter* and *Gratz* than it did in the aftermath of *Bakke*. Unlike *Bakke*, where there was legitimate reason to question whether Justice Powell’s opinion represented the view of the Court, in *Grutter* and *Gratz*, five Justices clearly joined in holding that diversity is a compelling state interest. A reconfigured Court would have to ignore, quite blatantly, principles of stare decisis to change this result.

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126. Chief Justice Rehnquist argued that the Law School’s policy was not narrowly tailored and expressed concerns about the School’s attempt to enroll a critical mass of minority students. *Grutter*, 539 U.S. at 377-90. Although he approved of “considering race as one modest factor among many others” to achieve diversity in the context of higher education, Justice Kennedy argued that the majority did not appropriately apply strict scrutiny to the Law School’s program and therefore he dissented. *Id.* at 386-94. Justice Scalia’s dissent was based on his conclusion that the Law School’s admissions policy was “a sham to cover a scheme of racially proportionate admissions” and his belief that “[t]he Constitution proscribes government discrimination on the basis of race and state-provided education is no exception.” *Id.* at 345-51. Justice Thomas argued that the problem was the Law School’s desire to maintain its high standards and that “race discrimination [could not be] a permissible solution to the self-inflicted wounds of [its] elitist admissions policy.” *Id.* at 349-79.

127. See Marcia Coyle, *Foes of Race Preferences Hold Out Little Hope, The Recorder* (San Francisco), July 10, 2003, at 3 (“Even the prospect of a Supreme Court vacancy, which might change the voting calculus on this divisive issue, leaves affirmative action opponents with little hope of a reversal of the Michigan law school admissions decision for another decade or more.”).
anytime soon. This does not mean, however, that there is no reason to be concerned about the long-term viability of the Court’s ruling. Close scrutiny of the opinions reveals some unease, even among Justices in the majority, about using race-conscious measures to secure diversity and about how long these measures ought to be in place.\textsuperscript{128} Thus, while the central holding in \textit{Grutter} and \textit{Gratz} may not be threatened in the short term, over the long term, some Justices may question the continued need to use race to secure racial diversity.

There are, however, other ways short of outright reversal to undermine the force of a decision. As is apparent by now, finding that diversity is a compelling state interest is only half of the analysis. Race-conscious programs must also be narrowly tailored. Therein lies the rub. What does “narrowly tailored” mean? Certainly, in \textit{Grutter}, the Court purported to give universities some general guidance in crafting acceptable admissions policies. Policies must provide for individualized consideration of all applicants. No applicants may be shielded from comparison with other applicants. And programs must consider a range of diversity factors, among which race is only one. In addition, in the aftermath of \textit{Grutter} and \textit{Gratz}, we now know that an automatic allocation of points on the basis of race is impermissible.

Notably, since the \textit{Gratz} decision, LSA has changed its admissions policy.\textsuperscript{129} Under the new policy, the University continues to place primary emphasis on academic factors like standardized test scores, high school grades, the quality of an applicant’s high school curriculum, and the competitiveness of his or her high school, among other things.\textsuperscript{130} The new policy also considers nonacademic factors like personal interests and achievements, geographical location, alumni connections, race and ethnicity, family income, etc.\textsuperscript{131} The new policy, however, does not use a point system. Thus, none of the above factors receives a fixed weight in the admissions process. Instead, the new policy guarantees a more individualized and holistic review of each application.\textsuperscript{132}

\textsuperscript{128} See, e.g., 539 U.S. at 343 (“We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”). \textit{But cf.} \textit{id.} at 343-45 (Ginsberg, J., concurring) (taking issue with the Court’s temporal analysis).

\textsuperscript{129} Information concerning the new policy is available at http://www.admissions.umich.edu/proces/review (last visited Sept. 4, 2003).

\textsuperscript{130} \textit{id.}

\textsuperscript{131} \textit{id.}

\textsuperscript{132} \textit{id.} When applications are received, they are reviewed first by a reader, who makes a recommendation concerning the applicant’s admissions status. The application then goes to a professional admissions counselor, who conducts a blind review of the file and also makes a recommendation regarding admissions status. The two recommendations then go to a senior level manager in the Office of University Admissions, who reviews the recommendations and makes a final decision about whether the student should be admitted, deferred, or denied. \textit{id.}
The question of course is does this new policy, and others like it, meet the standards set forth in *Grutter* and *Gratz*? Because the new policy seems to mimic the admissions policy utilized by the Law School in *Grutter*, it ought to pass muster. However, given the fact-specific and individualized nature of the “narrowly tailored” inquiry and given that no two policies are identical, it is possible that some judges predisposed against race-based initiatives may scrutinize newly developed policies more carefully. These judges may isolate minor differences and give these differences dispositive weight in invalidating particular programs. Thus, until a variety of different policies have been tested in the courts, it will remain unclear to what extent universities may deviate from the Michigan Law School model and devise other means for securing diverse student bodies.\^133 In sum, while the Supreme Court offered general guidance in *Grutter* and *Gratz*, lower court interpretations of “narrowly tailored” will ultimately undermine (or expand) the power of the Michigan cases.\^134

2. The comparative treatment of diversity factors

The above are some of the more obvious questions to emerge in the aftermath of *Grutter* and *Gratz*. There are, however, other less obvious and less frequently discussed challenges ahead for persons interested in using the diversity rationale to secure the inclusion of underrepresented minorities. One such challenge results from the varying levels of scrutiny courts accord different diversity factors. These varying review levels make race-based diversity measures more difficult to defend than measures based on gender, class, age, and geographical origin, among other things. Consequently, risk-averse institutions may be less inclined to include race as part of their diversity initiatives. The following discussion explains how *Grutter* and *Gratz* do nothing to change this outcome.

Briefly, the Supreme Court has developed three levels of constitutional review for group-based classifications (e.g. race, religion, sex, national origin, age, disability, and class). Under strict scrutiny, an entity employing a group-based distinction must establish that its program is justified by a compelling state interest and that the means used to secure that interest are narrowly tailored. This means that the goal being pursued must be of the utmost importance and the method employed must infringe as little as possible upon the interests of other individuals. Strict scrutiny is so difficult to meet that few

\^133 See Coyle, supra note 127 (noting that both opponents and proponents of race-based initiatives predict there will be lots of litigation on the narrow-tailoring prong); Richard B. Schmitt & Justin Gesti, Decisions May Lead to More Lawsuits, L.A. TIMES, June 24, 2003, at A16 (same).

\^134 See Coyle, supra note 127 ("Grutter and Gratz together make it virtually inevitable there will be a lot of litigation on the narrow tailoring grounds.") (quoting Curt Levey, legal affairs director of the Center for Individual Rights).
programs (until *Grutter*) had satisfied it, which caused commentators to conclude that it was "strict in form, but fatal in fact." In contrast to strict scrutiny, intermediate scrutiny requires only that a plan be justified by an important governmental interest and that the means employed be substantially related to achievement of that interest.\(^{135}\) Although the line of demarcation between a "compelling interest" and an "important interest," and between "narrowly tailored" and "substantially related" is sometimes difficult to determine, overall intermediate scrutiny is more lenient than strict scrutiny. Finally, under rational basis review, as long as the asserted justification for a group-based distinction makes sense and is not patently illogical, courts will uphold it.\(^{136}\)

In applying this hierarchy, the Supreme Court has stated that invidious distinctions on the basis of race are the least justifiable form of discrimination while distinctions based on age,\(^{137}\) disability,\(^{138}\) and class,\(^{139}\) among other things, fall at the other end of the acceptability spectrum. Gender falls


\(^{136}\) Under this standard, a classification need only be rationally related to a legitimate state interest. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83-84 (2000). Unlike the extremely tight nexus between means and ends required under strict scrutiny, rational basis review does not mandate a "razor like precision" between group-based distinctions and the ends they serve. *Id.* at 83-84. For example, in the context of age distinctions, the Supreme Court has noted, "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. . . . That age proves to be an inaccurate proxy in any individual case is irrelevant. Where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" *Id.*

\(^{137}\) *See*, e.g., *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976); see also *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (finding that state constitutional provision mandating retirement of most state judges at the age of seventy did not violate the Equal Protection Clause because it was rationally related to goal of securing a competent judiciary). The Court recently reaffirmed that age is not a suspect classification for equal protection purposes in *Kimel*, 528 U.S. 62.

\(^{138}\) In *Alabama v. Garrett*, 531 U.S. 356 (2001), the Court made clear that rational basis review applies to disability cases; see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (applying rational basis review in case alleging discrimination against the mentally disabled).

\(^{139}\) The Supreme Court has been reluctant to find that the poor are a discrete and insular minority and for the most part has subjected wealth-based distinctions to only rational basis review. Notably, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court refused to apply strict scrutiny to a challenge to the Texas public school financing system. In the 1950s and 1960s, there were some indications that the Supreme Court might apply heightened scrutiny to certain wealth-based classifications. *See*, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). Since *Rodriguez*, however, the Court has retreated from the notion that wealth-based classifications are suspect except in criminal cases and certain cases involving parental rights. *See*, e.g., *M.L.B v. S.L.J.*, 519 U.S. 102 (1996) (holding that a state cannot condition appellate review of parental termination decision on litigant's ability to pre-pay certain court fees).
somewhere in the middle. Consequently, race-based classifications receive the most probing form of judicial review, whereas age and class receive the least-searching inquiry. If one accepts the Court’s conclusions about the nature of discrimination, then the resulting levels of scrutiny might make sense in cases where the Court is attempting to eradicate invidious discrimination. If a group has been subject to pervasive discrimination in the past, then one would certainly want to guard carefully against any distinctions that may cause future harm to individuals within the group.

The Court, however, has held that the method of constitutional analysis (i.e., the level of scrutiny to be applied) is the same regardless of whether a group-based classification is being used to help or to harm previously excluded groups. This holding, which has been extensively debated among commentators and judges, creates a problem for diversity advocates because it means that groups which the Court deems to have been subject to the most

140. See United States v. Virginia, 518 U.S. 515, 531-34 (1996) (finding that Virginia’s male-only admissions policy at the Virginia Military Institute violated the 14th Amendment’s Equal Protection Clause); J.E.B., 511 U.S. at 130-31, 135-40 (1994) (holding that state’s use of peremptory challenges to strike potential jurors on the basis of gender violates the Equal Protection Clause); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 722-24, 731 (1982) (invalidating university nursing program that excluded men); Craig v. Boren, 429 U.S. 190, 197, 200, 204 (1976) (invalidating Oklahoma statute that prohibited the sale of 3.2% beer to men under the age of 21 but allowed sale of this beverage to women at the age of 18). Although the Supreme Court has yet to address the level of scrutiny to be accorded gender-based affirmative action programs, the Court has suggested that the same level of scrutiny should apply for all sex-based classifications regardless of motive. See Hogan, 458 U.S. at 723 n.9 (“[W]hen a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.”). For discussion of levels of scrutiny for gender-based affirmative action programs, see generally Peter Lurie, Comment, The Law as They Found It: Disentangling Gender-Based Affirmative Action Programs from Croson, 59 U. Chi. L. Rev. 1563 (1992) (arguing that intermediate scrutiny should apply to all gender-based classifications regardless of who is advantaged by the classification).

141. See Adarand, 515 U.S. 200, 222 (1995) (“The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification . . . .”) (quoting Croson, 488 U.S. at 493-94 (opinion of O’Connor, J.)). In the Court’s view, strict scrutiny is necessary precisely to determine whether a classification is invidious or benign. Id. Professor Jed Rubenfeld, however, points out that this approach is not mandated by an “originalist understanding of the Equal Protection Clause because the Congress that constructed the Fourteenth Amendment passed statutes in racially specific terms for the benefit of Blacks.” See Rubenfeld, supra note 54, at 429-32. Thus, he notes, “[t]he colorblind contingent must begin by recognizing that they are calling on courts to render the kind of judgment about justice (beyond the letter of the law, beyond original intent) that elsewhere they deplore.” Id. at 432.

THE DIVERSITY RATIONALE

pervasive and least justifiable forms of discrimination may have the most difficulty defending a diversity program. Because race is subject to strict scrutiny, the racial component of diversity programs will be the most vulnerable element to attack. To be sure, Grutter helps diversity advocates because the Court held that the educational benefit flowing from a diverse student body is a compelling state interest. However, it bears remembering that Grutter and Gratz dealt with diversity in the context of higher education. In other contexts, like the workplace, public institutions will still need to meet the burden of establishing a compelling state interest for practices that use race to secure diversity. In addition, whether dealing with higher education or some other context, all entities must meet the burden of demonstrating that the means employed are narrowly tailored.

Because gender is a semi-suspect classification tested under intermediate scrutiny, the gender components of diversity programs are more likely to survive constitutional attack. Indeed, while there was uncertainty about whether diversity was a compelling state interest before Grutter and Gratz, it was fairly clear that diversity was an important state interest sufficient to satisfy intermediate scrutiny. In addition, showing that a program is substantially related to achievement of the desired end is easier to establish than showing that the means employed are narrowly tailored.

If the diversity rationale is sufficient for intermediate scrutiny, then it certainly will satisfy the even less demanding rational basis standard of review. Thus, age, disability, and class components of diversity programs are most likely to survive a challenge to their constitutionality. Because athletic ability, alumni connections, etc. are not subject to equal protection analysis, these components of diversity programs will always be upheld unless they are proven to be a cover for intentional discrimination against a protected group.

The conclusions set forth above are somewhat counterintuitive. According to the Supreme Court's hierarchy of discrimination, racism is the most persistent and intractable form of discrimination. Yet, a diversity program seeking to include people of color is least likely to survive constitutional

143. See Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (discussed supra at note 57) (supporting the conclusion that diversity programs involving semi-suspect classifications will survive intermediate scrutiny if the means employed are not overly broad).

144. For example, in J.E.B. v. Alabama, a case involving the uses of peremptory challenges to exclude men from a jury, Chief Justice Rehnquist stated:

That race and sex discrimination are different is acknowledged by our equal protection jurisprudence, which accords different levels of protection to the two groups. Classifications based on race are inherently suspect, triggering "strict scrutiny," while gender-based classifications are judged under a heightened, but less searching, standard of review. Racial groups comprise numerical minorities in our society, warranting in some situations a greater need for protection, whereas the population is divided almost equally between men and women. Furthermore, while substantial discrimination against both groups still lingers in our society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality...
attack. In contrast, a diversity program that uses factors like class, alumni connections, or athletic ability is most likely to survive challenge.

Admittedly, these obstacles to racial inclusion have always been present, as the Court’s three-tiered review structure existed before Grutter and Gratz. Indeed, one could assert that in Grutter, the Supreme Court improved matters by making it easier for institutions to defend the racial components of their diversity programs, at least in the context of higher education, because the Court held that the educational benefits from diversity are compelling. While correct, these observations do not undermine the point being made about the relative treatment of different diversity factors. While it may be easier after June 23, 2003, for colleges and universities to defend race-conscious diversity measures than it was to defend those very same measures before June 23, 2003, it is still more difficult to defend such measures when compared to other nonrace-based diversity initiatives. Importantly, Grutter did nothing to change this reality. In addition, it bears remembering that Grutter and Gratz dealt with diversity in higher education and there is reason to believe that the general principle set forth in those cases is limited to that context. Because it historically has been, and continues to be, harder to defend race-based diversity initiatives relative to initiatives focusing on other diversity factors, litigation-leery institutions may be reluctant to pursue racial diversity. Until scholars and practitioners successfully tackle the underlying constitutional review structure in the courts, institutions will have less of an incentive, indeed a disincentive, to include race as a factor in their diversity programs. It is this outcome which, even in the wake of Grutter and Gratz, should give pause to persons seeking to secure the inclusion of all historically underrepresented groups through the diversity argument.

Not only is the law of limited assistance to defenders of programs seeking to achieve racial diversity, it provides little recourse in those situations where an institution decides not to include race in its program. For example, assume that an institution’s diversity program includes women, disabled persons, and elderly individuals, but does not include race as a diversity factor. The plan is race-neutral because, on its face, it does not benefit or harm individuals of any race. In this situation, advocates interested in securing the inclusion of racial minorities will be hard-pressed to launch a constitutional challenge absent some direct or circumstantial evidence of intentional discrimination on the basis of

145. See Adarand, 515 U.S. at 247 (Stevens, J., dissenting) (observing that the holding would “produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves.”). To be sure, there are those (including a majority of the Justices on the Supreme Court) who believe this is the correct result because affirmative action is race discrimination (against Whites). This argument, however, begs the critical question of when discrimination is unacceptable and what standards should be employed in making that determination.
race. Even if the plan had a disparate effect on people of color, this alone would be insufficient to establish a constitutional violation.\textsuperscript{146} Because a failure to act does not give rise to a constitutional violation, diversity advocates will be stymied in their efforts to secure the inclusion of those most likely to be excluded. In short, diversity depends on the voluntary acts and goodwill of institutions. Because there is no legal mandate behind diversity programs, they are a potentially unreliable and unstable basis upon which to pin long-term hopes for inclusion.

3. Proposition 209 and other state-based initiatives

The \textit{Grutter} and \textit{Gratz} opinions raise another important concern. In short, the Court says that colleges and universities do not violate the equal protection provisions of the federal Constitution merely by utilizing admissions policies that consider race in order to achieve a racially diverse student body. This does not mean, however, that there may not be other restrictions on a public university’s ability to act. For example, it is widely known that in 1996, California voters banned the use of affirmative action by public entities of that state.\textsuperscript{147} Consequently, although the federal Constitution would not bar a public university in California from implementing a program like that used by the Law School in \textit{Grutter}, California law would prohibit it.\textsuperscript{148} Because a race-based (or any) diversity initiative must satisfy both the federal Constitution as well as state law, there is an incentive for groups hostile to the \textit{Grutter} and \textit{Gratz} holdings to undertake local efforts to undermine the force of those opinions in particular states.\textsuperscript{149} Indeed, such a campaign occurred in the State of Michigan after the \textit{Grutter} and \textit{Gratz} decisions came down. In an effort to limit the reach of the decisions and to prevent the University of Michigan from using race as a factor in admissions, several organizations implemented the Michigan Civil Rights Initiative seeking to amend Michigan’s constitution to


\textsuperscript{148} See Silverstein et al., supra note 147, at A1 (noting that \textit{Grutter} and \textit{Gratz} do not apply in California because of Prop. 209).

\textsuperscript{149} See Coyle, supra note 127, at 3 (noting that “the anti-preference movement now believe[s that] ballot initiatives, such as California’s Proposition 209 . . . offer the best way to attack affirmative action”).
eliminate racial preferences. Although this initiative ultimately failed, other such initiatives will surely follow both in Michigan and in other states.

4. From the classroom to the workplace: The legality of race-conscious hiring policies

In Grutter and Gratz, the Supreme Court concluded that diversity is a compelling state interest in the realm of higher education. It is not at all clear, however, that the Court will extend this holding to other contexts, like the workplace. Thus, while the University of Michigan may use race to secure a diverse student body, it is less certain that employers like Microsoft or the State of Texas may use race-conscious measures to obtain a racially diverse workforce. Understanding this point requires a comparison of diversity’s role in the classroom and in the workplace.

a. Diversity in the classroom

In Grutter, Justice O’Connor states:

[Given] the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. . . . [In Bakke], in announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: “The freedom of a university to make its own judgments as to education includes the selection of its student body.” From this premise, Justice Powell reasoned that by claiming the right to select those students who will contribute the most to the “robust exchange of ideas,” a university “seeks to achieve a goal that is


151. See Trounson & Silverstein, supra note 150 (noting that opponents of affirmative action were contemplating several such ballot initiatives in 2004, perhaps in Colorado, Arizona, Missouri, Texas, and Florida).

152. It is not unreasonable to surmise that the next line of diversity cases will involve employers. Indeed, employers frequently tout the importance of racially diverse workforces given the increasingly global nature of their business enterprises and the changing demographics of the United States. See Taylor H. Cox, Jr., Cultural Diversity in Organizations: Theory, Research, and Practice 30-31 (1993) (referencing, among other things, a corporation’s successful development of a product line for women of color and “another company’s success in turning around poor performance in inner cities by assigning management of those market areas to Black and Hispanic managers sensitive to local consumer preference”).
of paramount importance in the fulfillment of its mission.” Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission . . . .

The above language is critically important because in it Justice O’Connor explicitly recognizes that academic institutions are special. Their primary purpose is the exchange of ideas and the purveyance of knowledge, values that are of constitutional stature. In addition, these institutions are charged with teaching and training persons to reach their individual goals and to maximize their contributions to society. In the above quote (and throughout the majority opinion), Justice O’Connor stresses how diversity is essential to fulfillment of these ends. She seems to accept that homogeneity does not produce the best learning experiences and that solely admitting persons with the strongest intellectual capacities or the best records of scholarly achievement will not create the most intellectually stimulating and rigorous environments. Rather, she seems convinced that (1) the most effective educational experiences occur when institutions bring together individuals with a variety of interests, talents, and backgrounds and that (2) exposure to difference enriches students’ understanding of themselves and the world around them. Consequently, they are better trained to interact in an increasingly diverse and interconnected world.

153. 539 U.S. at 329-30 (internal citations omitted). As indicated in the quoted text, Justice Powell made similar observations in Bakke. In concluding that colleges and universities have a compelling state interest in diversity, Justice Powell noted our deep national commitment to academic freedom, which includes the right of universities to select their student bodies. Because academic freedom is of “transcendent value to all of us,” Justice Powell argued that it was “a special concern of the First Amendment.” 438 U.S. at 312-13 (“[I]n arguing that its universities must be accorded the right to select those students who will contribute the most to the robust exchange of ideas, petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance to the fulfillment of its mission.”). To further support and explain his conclusion that diversity in higher education is a compelling state interest, Justice Powell invoked the marketplace-of-ideas concept, observing:

The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues . . . . The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body . . . .

Id. (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

154. See also Gratz, 122 F. Supp. 2d at 821 (noting “the public graduate or professional school context is distinguishable from the employment, minority business set-aside, and re-districting contexts in that, unlike the other cited contexts, the higher education context implicates ‘the uneasy marriage of the First and Fourteenth Amendments.’”) (quoting Hopwood, 78 F.3d at 965 n.21 (Wiener, J., concurring)).
b. Diversity in the workplace

It is a small step from arguing that academic institutions ought to be able to use race-conscious admissions policies to achieve racially diverse student bodies to asserting that employers should be able to use race-conscious hiring policies to obtain racially diverse workforces. Yet, the legal consequences of this shift are immense. While many (though not all) people find the diversity argument persuasive in the context of higher education, diversity advocates face several challenges to its successful invocation in the workplace.

As an initial matter, it is important to note that public and private employers are subject to different constitutional and statutory provisions. Public employers are governed by the equal protection requirements of the Constitution. On the other hand, private employers, like Microsoft, are subject to the dictates of Title VII of the Civil Rights Act of 1964.\footnote{42 U.S.C. §§ 2000e-2000e17. Certain public employers are also subject to Title VII. Interestingly, the Supreme Court has not had to determine whether the standards under Title VII and under the Equal Protection Clause are the same. In Johnson v. Santa Clara County, where a local agency was sued under Title VII, no constitutional issue was raised by the parties. Thus, the Court had no occasion to address this question. 480 U.S. 616, 616 n.2 (1987). The Court did, however, note that where a constitutional issue is properly raised "public employers must justify the adoption of a voluntary affirmative action program under the Equal Protection Clause." Id.} That statute prohibits discrimination in employment on the basis of race, color, religion, national origin, and sex.\footnote{42 U.S.C. § 2000e-2.} While Title VII permits employers to draw explicit distinctions on the basis of religion, national origin, and sex when those criteria are bona fide occupational qualifications,\footnote{Id. § 2000e-2(e) ("Notwithstanding any other provision of this title, . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .").} the statute does not permit distinctions on the basis of race except in a remedial capacity.\footnote{See Johnson v. Transp. Agency, 480 U.S. 616 (1987) (holding that Title VII's prohibitory language against racial discrimination does not condemn all voluntary race-conscious affirmative action plans); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (same). Notwithstanding the statutory language, courts will allow race-conscious measures when absolutely necessary for purposes of authenticity (e.g., the hiring of White officers to infiltrate the KKK or a Black actor to play the role of Martin Luther King, Jr.).}

Importantly, the Supreme Court has never considered whether Title VII permits an employer to adopt race-conscious hiring practices to obtain a diverse workforce.\footnote{The Court came close to addressing this issue in Taxman v. Piscataway Township Board of Education, 91 F.3d 1547 (1995), cert. granted, 521 U.S. 1117 (1997), cert. dismissed, 522 U.S. 1010 (1997) (considering a Title VII challenge to school board's decision to retain a Black teacher over a White teacher during reduction in force in order to promote racial diversity). The Supreme Court granted certiorari in the case. Piscataway} The closest cases on point are United Steelworkers of America v.
Weber\textsuperscript{160} and Johnson v. Transportation Agency of Santa Clara County.\textsuperscript{161} These cases suggest that, under Title VII, a private employer’s affirmative action plan need not meet the same rigorous standards required of a public employer under Grutter and Gratz.\textsuperscript{162} Due to the Court’s increasingly restrictive views on affirmative action, it is reasonable to assume that the Court would construe Title VII more narrowly were Weber and Johnson decided today. As things stand, however, these cases are still good law. Thus, under Title VII a private employer may have greater leeway to enact a race-conscious hiring policy than a public employer would under a constitutional law analysis. The problem, however, is that private employers are also subject to 42 U.S.C. § 1981, which prohibits discrimination on the basis of race in the making of contracts.\textsuperscript{163} In Gratz and Grutter, the Court stated that the standard under § 1981 is the same as the standard under the equal protection provision.\textsuperscript{164} Thus, even if a private employer’s plan would not violate Title VII under Weber and Johnson, an employer could still be liable under § 1981 if it did not comply with the requirements set forth in Grutter and Gratz. In a nutshell, this means that for all intents and purposes (at least when it comes to race) private and public employers are both subject to the same standards, the standards set forth in Grutter and Gratz.

This then raises the central question of whether the Court is likely to uphold the constitutionality of an employer’s race-conscious hiring policy after Grutter and Gratz. To pass strict scrutiny, employers must establish a compelling state interest in a diverse workforce. In making this showing, employers will assert many interests served by a diverse workforce, including the employer’s ability: (1) to recruit and retain employees; (2) to serve diverse

\textsuperscript{160} 443 U.S. 193.

\textsuperscript{161} 480 U.S. 616.

\textsuperscript{162} Weber, 443 U.S. 193 (allowing race-conscious plans that “break down old patterns of racial segregation and hierarchy and that are structured to open unemployment opportunities to Negroes in occupations which have been traditionally closed to them and that do not unnecessarily trammel the interests of white employees”); see Johnson, 480 U.S. 616 (same when considering gender-based program).

\textsuperscript{163} 42 U.S.C. § 1981. Section 1981 states, in part: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . . [T]he term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

\textsuperscript{164} Gratz, 539 U.S. at 276 (stating that “purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate section 1981”); Grutter, 539 at 343 (noting that “the prohibition against discrimination in section 1981 is co-extensive with the Equal Protection Clause”).
markets both domestically and internationally; (3) to create a labor force that can work together effectively; and (4) to develop and implement innovative ideas and problem-solving techniques. Indeed, all of these arguments were alluded to by the various corporate entities that filed amicus curiae briefs in favor of the University of Michigan in *Grutter* and *Gratz*. For example, in their brief, sixty-five leading American businesses maintained that a diverse workforce, was important to [their] continued success in the global marketplace.... [because:] (1) a diverse group of individuals ... has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives; (2) such individuals are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those consumers; (3) a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world; [and] (4) individuals who have been educated in a diverse setting are likely to contribute to a positive work environment, by decreasing incidents of discrimination and stereotyping.\textsuperscript{165}

General Motors made similar arguments in its amicus brief.\textsuperscript{166} In addition, General Motors observed:

[T]here can be little doubt that racial and ethnic diversity in the senior leadership of the corporate world is crucial to our Nation’s economic prospects. In a country in which minorities will soon dominate the labor force, commensurate diversity in the upper ranks of management is increasingly important. A stratified work force, in which whites dominate the highest levels of the managerial corps and minorities dominate the labor corps, may foment racial divisiveness. It also would be retrogressive, eliminating many of the productivity gains businesses have made through intensive efforts to eradicate discrimination and improve relations among workers of different races.\textsuperscript{167}

Few would doubt the validity of these assertions. The problem is that the above interests do not implicate the type of constitutional values (e.g., equal protection and free speech) or involve the sort of “compelling interests” that the Court has accepted in the past and in the Michigan cases (e.g., remedying past discrimination, protecting academic freedom and educational autonomy). Not only are these workplace interests likely to be viewed as qualitatively less compelling, the Court may be reluctant to accept that a diverse workforce is


\textsuperscript{166} Brief of Amici Curiae General Motors Corporation in Support of Respondents, *Grutter*, 539 U.S. 306 (Nos. 02-241 and 02-516). General Motors argued that in its experience “only a well educated, diverse work force, comprising people who have learned to work productively and creatively with individuals from a multitude of races and ethnic, religious, and cultural backgrounds, can maintain America’s competitiveness in the increasingly diverse and interconnected world economy.” *Id.* at 2.

\textsuperscript{167} *Id.* at 23-24.
necessary to achieve them. It is quite easy to see and to accept that when remedying past discrimination against a particular racial group, one must consider the race of the group harmed. Similarly, in the context of higher education, one can readily see the importance of a diverse student body to the exchange of ideas and the learning process. In that context, diversity is inextricably interwoven with the central function of the university. That is to say, if the mission of academic institutions is to make cakes, then a diverse student body is the equivalent of flour.\footnote{168}

The same considerations arguably do not hold true for employers. Missing the extremely close nexus between diversity and the employer’s objectives. That is, while a diverse workforce may improve an employer’s ability to secure certain ends (e.g., effective recruitment of minorities, creative problem solving, servicing of a diverse clientele), a diverse workforce is arguably not essential to those ends. To continue the above analogy, instead of flour, in this context diversity is merely the icing on the cake.\footnote{169}

Although it is highly unlikely that the Court will expansively extend \textit{Grutter} and \textit{Gratz} to the employment arena, there are indications in the opinion that the Court might permit race-conscious hiring in a few very limited circumstances. Notably, both during oral arguments and in the majority opinion in \textit{Grutter}, the Court was quite taken with the brief filed on behalf of former military officers. Justice O’Connor notes:

What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “based on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle [sic] mission to provide national security.” The primary sources for the Nation’s officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. At present, “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” To fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, and it must train and educate highly qualified, racially diverse officer corps in a racially diverse setting.”\footnote{170}

\footnote{168. Conversation with William Van Alstyne, Lee Professor, William and Mary (Marshall-Wythe) School of Law, Williamsburg, Virginia (Sept. 8, 2003).}

\footnote{169. Even if one could show a close nexus between diversity and the employer’s interest, the Court will likely still reject the claim by arguing that the overall interest or objective is insufficiently important. For example, an employer’s argument that a diverse workforce will lead to creative problem solving sounds remarkably similarly to a university’s argument that a diverse student body increases the marketplace of ideas. While the Court may find the latter acceptable, it may reject the former on the grounds that the underlying interest being protected in the educational arena (e.g., academic freedom) is more important than the mission of a particular employer outside that arena (e.g., Microsoft’s desire to more effectively serve its customers).}

\footnote{170. \textit{Grutter}, 539 U.S. at 331 (quoting Brief of Lt. Gen. Julius W. Becton, Jr., et al. as}
This language is important because the Court seems to suggest that there are some contexts, outside of the academic arena, where race-conscious measures to secure diversity might be acceptable (e.g., in the military). It is indeed a small step from arguing that military academies should be allowed to use race-conscious admissions policies to asserting that military employers should be able to use race-conscious hiring and recruitment techniques to secure a diverse officer corps. If the quoted language is susceptible to this reading, then one might argue that a nonmilitary employer's need for diverse leadership within its organizational ranks should justify race-conscious hiring.

To prevent this type of extension of Grutter and Gratz, the Court will likely focus on the importance of the mission being pursued and the centrality of diversity to achievement of it. Thus, with the military, the Court may conclude that (1) the interest in national security is sufficiently compelling and (2) if diverse leadership is necessary for the armed forces to carry out this mission, then race-conscious measures can be used to achieve it. The same may hold true for a police department that may desire to hire more officers of color on the theory that diversity will improve its relations with the surrounding community and enable it to do its job (i.e., protecting public safety) more effectively. This reasoning might not, however, extend to Microsoft's desire to diversify its management ranks in order to improve internal workplace dynamics and customer relations. Again, the different results stem from the Court's views as to the importance of the interest being served and the necessity of diversity to accomplishing it.

In sum, while the eternal optimist might find crumbs of hope in Grutter and Gratz, it is unlikely that the Court will extend its ruling very far into the employment context. Indeed, given that it was so difficult to get five Justices to sign off on the use of race-conscious measures in the educational arena (an area many Justices consider special), it is even more doubtful that the Court will venture down this path for employment.

CONCLUSION

It is perhaps fitting to end by considering the larger question with which this Article began. Can antidiscrimination advocates successfully use the diversity rationale to achieve what they sought to secure through traditional affirmative action measures, that is, broad-based inclusion of historically underrepresented groups? The analysis set forth herein suggests that, as things currently stand, the answer to this question is most likely no. After taking two steps backwards in the 1990s with a series of opinions that gutted affirmative action, in Grutter and Gratz the Court took one step forward. While many antidiscrimination advocates viewed this as a positive development, the war for inclusion is far from over. As the analysis in Part III makes clear, there will be

Amici Curiae in Support of Respondents 27) (internal citations omitted).
sustained pressure for the Court to reverse Grutter and Gratz, especially if another conservative Justice joins the bench. In addition, lower courts will have to grapple with determining what programs are sufficiently narrowly tailored. And, legal questions will continue to surface about the applicability of Grutter and Gratz in contexts other than higher education, like the workplace. Fights about the future of diversity measures will occur both on the federal constitutional level and through state-wide ballot initiatives patterned after California’s Proposition 209.

If the diversity argument is to be useful in these future battles, then much work has to be done. As Parts I and II demonstrate, while diversity has certain ideological and symbolic advantages, there are pitfalls inherent in the current discourse. To avoid these drawbacks, antidiscrimination advocates, legal scholars, and the general public must shy away from abstractions and start talking about diversity in very focused and grounded terms. Hard questions cannot be avoided—questions like: Why must we pursue particular types of diversity? What purposes are served by diversity measures? What are the costs? In addition, antidiscrimination advocates must go about the difficult work of explaining and tackling the unique challenges to inclusion that certain groups experience and that the current discourse glosses over. While victory is not assured, if antidiscrimination advocates do these things, they will proceed in battle more fully equipped with persuasive arguments and a better understanding of what ultimately is at stake.