

TRoubLED WATERS AHEAD FOR RACE-BASED
ADMISSIONS

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I. INTRODUCTION	64
II. OVERVIEW OF THE NEW LEGAL STANDARD	64
III. ISSUES FOR FUTURE LITIGATION	69
A. <i>The Diversity Rationale</i>	71
B. <i>Narrow Tailoring</i>	80
1. Restrictions on the Scope of Race-Based Admissions	81
2. Time-Related Restrictions on Race-Based Admissions	92
C. <i>Deference</i>	98
IV. CONCLUSION	99

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I. INTRODUCTION

Supporters of race-based affirmative action breathed a sigh of relief on June 23, 2003 when the U.S. Supreme Court's split decision in the University of Michigan cases approved the continued use of race in admissions. But a studied analysis of *Grutter v. Bollinger*,¹ *Gratz v. Bollinger*,² and their context suggests that the decisions offer only a temporary and limited reprieve for race-based admissions policies.³ The marked contrast between existing admissions policies and the new legal standard, the Court's imposition of durational limits on racial admissions preferences, and the sharp tensions within the *Gratz* and *Grutter* decisions all suggest a host of issues for future legal challenges to race-based admissions. Such litigation will likely force a decreased emphasis on—if not the complete elimination of—race as a factor in admissions, and might even hasten the demise of the diversity rationale itself by demonstrating that it is unworkable.

This article begins by summarizing the new legal standard for race-based admissions that resulted from the *Grutter* and *Gratz* decisions. It then describes and discusses potential issues for future litigation in this area, including various issues of narrow tailoring and important questions concerning a school's reliance on the diversity rationale. Along the way, the article also touches on the relationship between these issues and the broader question of the diversity rationale's long term viability.

II. OVERVIEW OF THE NEW LEGAL STANDARD

In *Grutter*, five Justices voted to uphold the “[University of Michigan] Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse

1. 539 U.S. 306 (2003).

2. 539 U.S. 244 (2003).

3. See Keith R. Walsh, *Color-Blind Racism in Grutter and Gratz*, 24 B.C. THIRD WORLD L.J. 443, 443 (2004) (“Read together with its companion case, *Gratz v. Bollinger*, however, it is clear [from *Grutter*] that only the most limited use of race in admissions will withstand the Court’s application of strict scrutiny to racial classifications.”).

student body.”⁴ As a central part of its strict scrutiny analysis, the Court deferred to the Law School’s judgment “that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest.”⁵ Turning to the narrow tailoring prong of its analysis, the Court accepted the Law School’s assertions that its admissions program does not involve a quota or “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity,” and that the program “adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.”⁶ In *Gratz*, on the other hand, the Justices were faced with an undergraduate admissions system that admittedly and “automatically distribute[d] 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race.”⁷ Six Justices agreed that this use of race by the University’s College of Literature, Science, and the Arts was not narrowly tailored and was, therefore, unconstitutional.⁸

Given the Court’s ruling that the educational benefits of diversity satisfy the compelling interest prong of strict scrutiny, the focus of future legal challenges to race-based admissions will—at least in the short-term—focus on the narrow tailoring requirements laid down by *Gratz* and *Grutter*. Those restrictions on the use of race in admissions can be thought of as falling into two categories. One category contains restrictions on the current scope of racial admissions preferences. The other category concerns the obligation of schools to transition away from race-based methods of achieving diversity.

4. *Grutter*, 539 U.S. at 343. The Law School’s admissions policy was upheld under 42 U.S.C. § 1981 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), as well as on constitutional grounds. *Id.* at 343.

5. *Grutter*, 539 U.S. at 333. *See id.* at 327 (under strict scrutiny, “[w]hen race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied”).

6. *Grutter*, 539 U.S. at 337.

7. *Gratz*, 539 U.S. at 270. The undergraduate admissions program defined “underrepresented minorities” as African-Americans, Hispanics, and Native Americans. *Id.* at 253–54. Interestingly, the Law School’s admissions policies counted only Mexican-Americans and Puerto Ricans raised in the United States as Hispanic for purposes of awarding preferences. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 839–40 (E.D. Mich. 2001), *rev’d* 288 F.3d 732 (6th Cir. 2002).

8. *Gratz*, 539 U.S. at 275. The undergraduate admissions policy was also found to violate 42 U.S.C. § 1981 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). *Id.* at 275–76.

Concerning the current scope of preferences, the Michigan decisions held that “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁹ Therefore, a race-based “admissions program must be ‘flexible enough to consider all pertinent elements of diversity . . . and to place them on the same footing for consideration.’”¹⁰ The Supreme Court upheld the University of Michigan Law School’s race-based admissions system, in part, because it “considers race as *one factor among many*.”¹¹ In contrast, the Court struck down the University’s undergraduate admissions policy, in part, because race was being used as a “decisive factor.”¹²

Accordingly, colleges must engage “in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”¹³ In such a review, “the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it*.”¹⁴ Moreover, because race must be used in a “nonmechanical way,”¹⁵ universities may not treat race as if it “automatically ensured a specific and identifiable contribution to a university’s diversity.”¹⁶ In summary, the scope-related restrictions in the Michigan decisions, if complied with, should result in admissions policies that place less emphasis on race and more on factors such as

9. *Grutter*, 539 U.S. at 325 (quoting *Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978)). See also *id.* at 392–93 (Kennedy, J., dissenting) (“There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity.”).

10. *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317). Justice Lewis Powell, in his pivotal opinion announcing the judgment of the Court, added that the various diversity factors need “not necessarily [be accorded] the same weight.” *Bakke*, 438 U.S. at 317. Apparently, however, Powell did not envision one factor being disproportionately weighted *consistently* from year to year. See *id.* at 317–18 (“[T]he weight attributed to a particular quality may vary from year to year depending upon the ‘mix’ both of the student body and the applicants for the incoming class.”).

11. *Grutter*, 539 U.S. at 340 (emphasis added).

12. *Gratz*, 539 U.S. at 274.

13. *Grutter*, 539 U.S. at 337.

14. *Gratz*, 539 U.S. at 272–73 (quoting *Bakke*, 438 U.S. at 324).

15. *Grutter*, 539 U.S. at 334. See *Builders Ass’n v. Chicago*, 298 F. Supp. 2d 725, 742 (N.D. Ill. 2003) (“As [*Grutter*] and its companion case, *Gratz v. Bollinger*, . . . make clear, . . . racial and ethnic classifications . . . cannot be made by some mechanical formulation.”).

16. *Gratz*, 539 U.S. at 271.

unusual experiences or viewpoints, as well as socioeconomic, educational, or other types of disadvantage.¹⁷

A more direct boost for the gradual elimination of race from the admissions process comes from the Supreme Court's requirement that colleges engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."¹⁸ It is not yet clear whether serious, good faith consideration requires experimentation with race-neutral methods, but a recent case suggests that it requires, at very least, a formal on-the-record evaluation of such methods.¹⁹ Race-neutral approaches have been in operation in states where racial preferences were banned by state ballot initiatives, state executive action, or federal court rulings.²⁰ The Court, noting the "wide variety of alternative approaches," said each institution should "draw on the most promising aspects of these race-neutral alternatives" and conduct "periodic reviews to determine whether racial preferences are still necessary" in order to "terminate its race-conscious admissions program as soon as practicable."²¹

The Court emphasized "that '[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.' Accordingly, race-conscious admissions policies must be limited in time [because]

17. At least one supporter of race-based admissions sees this trend as foreshadow[ing] defeat for diversity advocates in the war being waged against the consideration of race to achieve educational prerogatives . . . [T]he [Grutter] majority may have frustrated advocates' ability to present the *racial* diversity rationale as a constitutionally viable justification for race conscious admissions policies, and ultimately may have done more harm than good.

Tanya Washington, *The Diversity Dichotomy: The Supreme Court's Reluctance to Give Race a Capital "R"*, 72 U. CIN. L. REV. 977, 978 (2004) (emphasis added).

18. *Grutter*, 539 U.S. at 339.

19. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 377 F.3d 949, 972 (9th Cir. 2004) ("The Board members' blithe dismissal of a sincerely presented proposal simply cannot satisfy the constitutional requirement that the government earnestly appraise race-minimal alternatives prior to adopting race-conscious policies. Matters not formally evaluated cannot be 'rejected' in a constitutionally-relevant sense: Such appraisal . . . must be conducted 'on the record.'").

20. The Court explicitly mentions California, Florida, and Washington, the three states where race-based admissions are prohibited by state law. *Grutter*, 539 U.S. at 342. In response to federal court decisions, *Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234 (11th Cir. 2001), and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), race-neutral admissions policies were also implemented in Georgia and Texas.

21. *Grutter*, 539 U.S. at 342-43.

racial classifications . . . are potentially so dangerous”²² In order to effectuate this “durational requirement,”²³ the Justices called for “sunset provisions in race-conscious admissions policies”²⁴ and expressed, at very least, an expectation—and arguably a requirement—that such policies end within twenty-five years.²⁵ Establishing these time limits as an essential part of narrow tailoring is one of the likely goals of future litigation. After all, a more permissive reading ignores the immediately preceding paragraphs in *Grutter*, which emphasize that the grant of compelling interest status to student diversity is conditional on a time limit. Even supporters of race-based admissions appear to view these time limits as an important part of *Grutter*’s holding.²⁶ In any case, a school still using race-based admissions twenty-five years from now will, at best, be doing so without the Supreme Court’s clear sanction. Although the time limits in *Grutter* are certainly not airtight, they represent a marked change from Justice Powell’s opinion in *Regents of the University of California v. Bakke*, which ignored the problem of durational limits.²⁷ Arguably, had *Bakke* laid down time limits, the Michigan lawsuits, filed two decades later, would not have been necessary.

Though supporters of racial preferences were relieved by the Michigan decisions, even they recognize that the Court’s sanction of race-based admissions is limited. Consider the joint statement issued in July 2003 by some of the most prominent legal scholars on the other side of the debate, including Laurence Tribe, Christopher Edley, and Drew Days. The statement, published by the Harvard University Civil Rights Project, acknowledges that the decisions have resulted in “additional narrow tailoring requirements addressing race-neutral alternatives, undue burdens, and time limits”²⁸ that

22. *Id.* at 341–42 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)) (citation omitted).

23. *Id.* at 342.

24. *Id.*

25. *Id.* at 343.

26. See, e.g., Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1244 (2004) (“[T]he Court appears to have imposed an external, judicial stopping point The Court said, in essence, that it did not want to give the University carte blanche for all time.”); Washington, *supra* note 17, at 978 (The *Grutter* majority “seize[d] upon a twenty-five-year sunset provision”).

27. *Bakke*, 438 U.S. 265 (1978).

28. ERWIN CHEMERINSKY ET AL., REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES: A JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, HARVARD UNIVERSITY CIVIL RIGHTS PROJECT 17 (2003),

“must be incorporated into *all* analyses of race-conscious policy making.”²⁹ More specifically, the scholars concede that “even a holistic, non-numerical system can be constitutionally vulnerable, if a racial ‘plus’ factor is assigned automatically to all racial minority applicants”³⁰ Instead, “[a]dmissions officials are required to evaluate each applicant on the basis of all of the information in the file, including a personal statement . . . and a personal essay describing the applicant’s potential contribution to the diversity of the Law School.”³¹ Moreover, “a policy that offers such a heavy advantage to minority applicants that it virtually guarantees their admission” is “not sufficiently flexible to satisfy narrow tailoring.”³²

Perhaps most importantly, the Harvard statement concedes that, “[a]lthough an institution may have a permanent interest in gaining the benefits of a diverse student body, its use of race to advance that goal is subject to time limits.”³³ The liberal scholars envision a transition towards race-neutral admissions policies, acknowledging the Court’s “understanding that diversity will continue to be a compelling interest, but that less race-conscious measures will be required to produce it”³⁴ Therefore, “the effectiveness of race-neutral policies at other schools should be monitored”³⁵ as part of “an institution’s documentation of its good faith efforts to develop effective [race-neutral] solutions.”³⁶

III. ISSUES FOR FUTURE LITIGATION

“The University of Michigan decisions have settled one set of legal questions, but we can expect many more to arise in our courts,” said the joint statement published by the Harvard Civil Rights Project.³⁷ Those injured by racial admissions preferences

available at http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf.

29. *Id.* at 18 (emphasis added).

30. *Id.* at 19.

31. *Id.* at 11.

32. *Id.* at 9.

33. CHEMERINSKY ET AL., *supra* note 28, at 11.

34. *Id.*

35. *Id.* at 11.

36. *Id.* at 10.

37. *Id.* at 26. See David Schimmel, *Affirming Affirmative Action: Supreme Court Holds Diversity to be a Compelling Interest in University Admissions*, 180 ED. LAW REP. 401, 415

will continue to seek redress in the courts. And those philosophically opposed to preferences will undoubtedly pursue litigation aimed at 1) ensuring that the circumscribed sanction of *Grutter* and *Gratz* does not expand into something more in practice—in part, by putting meat on the bones of the new standard—and 2) eventually putting the diversity rationale in front of the Supreme Court again. The legal issues that potentially will be raised by the plaintiffs in such litigation—essentially the “areas where institutions must be careful not to overstep the bounds of the *Grutter* and *Gratz* cases”—are too many to fully enumerate in this article.³⁸ However, I will lay out some of the most interesting ones here, without regard to whether they are the issues most likely to be raised or to succeed. A similar though far briefer discussion of “future lawsuits” can be found in Justice Scalia’s opinion in *Grutter*.³⁹

While there are still several important open questions concerning a school’s reliance on the diversity rationale, most of the relevant issues in the short term concern the narrow tailoring part of the strict scrutiny test. However, in the long term, litigation over issues of narrow tailoring can call into question the viability of the diversity rationale itself. Narrow tailoring is intended to fit the means to the end⁴⁰—here, achieving the educational benefits of diversity—such that where narrow tailoring proves difficult to enforce or interpret, it suggests that the end or its link to the means is poorly defined. Specifically, narrow tailoring litigation can serve to highlight the tensions, ambiguities, fictions, and other weaknesses that I believe plague the Michigan decisions.⁴¹ While a thorough

(2003) (concluding that unresolved issues in the wake of *Grutter* “will lead to confusion, to controversy, and to litigation.”).

38. CHEMERINSKY ET AL., *supra* note 28, at 16.

39. *Grutter*, 539 U.S. at 348–49 (Scalia, J., concurring in part, dissenting in part).

40. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (Narrow tailoring “ensures that the means chosen fit this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (plurality opinion of O’Connor, J.))).

41. See Stephen B. Presser, *A Conservative Comment on Professor Crump*, 56 FLA. L. REV. 789, 806 (2004) (referring to the “inconsistencies and weaknesses in the majority opinion in *Grutter*”); *id.* at 798 (referring to “a recent article in a political science journal defending *Grutter* as a necessary exercise in deception to achieve a greater good” (citing Daniel Sabbagh, *Judicial Uses of Subterfuge: Affirmative Action Reconsidered*, 118 POL. SCI. Q. 411, 411, 435–36 (2003))); Washington, *supra* note 17, at 977 (approving of the “favorable result reached by the *Grutter* majority,” but calling its opinion “poorly reasoned”); Michael S. Greve, *The Term the Constitution Died*, FEDERALIST OUTLOOK, July

discussion of these problems is beyond the scope of this article, I will touch on them here where appropriate. The important point for now is that such problems could very well result in Circuit Court splits and doubts about the coherence and workability of the *Grutter* rationale. This, in turn—along with changes in the Supreme Court’s personnel—could prompt the Court to reexamine the fundamentals of the Michigan decisions, including the diversity rationale itself.⁴² Critics of race-based admissions and the diversity rationale that supports it can take encouragement from the fact that a decade ago—in *Adarand Constructors, Inc. v. Peña*—the Supreme Court overruled a fundamental holding on affirmative action that it had handed down just five years earlier.⁴³

A. *The Diversity Rationale*

In the short term, the diversity rationale for using race in admissions is clearly established, at least under federal law. However, there are still a number of interesting issues concerning when schools may rely on the diversity rationale to defend their race-based admissions policies. One of the still open questions is whether the diversity rationale applies to K–12 education. *Grutter* relied on the academic freedom granted to *universities*⁴⁴ and on assertions that “*universities* occupy a special niche in our constitutional tradition” and “represent the training ground for a large number of the Nation’s leaders,” such that “nowhere is the importance of [inclusive institutions] more acute than in the context of *higher* education.”⁴⁵ Therefore, K–12 schools that use race in admissions are vulnerable to the argument that *Grutter*’s holding on diversity is limited to higher

25, 2003 (stating that the majority opinion in *Grutter* “flunks even a modest test of internal coherence”), available at http://aei.org/publications/pubID.18112,filter./pub_detail.asp. While some tensions were also present in Justice Powell’s *Bakke* opinion, they were, at very least, exacerbated by the Michigan decisions. For example, *Grutter* and *Gratz* make it clearer that race cannot be a decisive factor in admissions, while also establishing, as a permissible goal, a critical mass defined by race.

42. See *A Win for Affirmative Action*, N.Y. TIMES, June 24, 2003, at A30 (editorial) (“One resignation on the Court could produce the opposite result [of *Grutter*] in a few years.”).

43. In *Adarand*, the Court ruled that “all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny,” 515 U.S. at 227, thus overruling the holding in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), “that ‘benign’ federal racial classifications need only satisfy intermediate scrutiny.” *Adarand*, 515 U.S. at 225.

44. See *Grutter*, 539 U.S. at 328 (“Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”).

45. *Grutter*, 539 U.S. at 329, 332 (emphasis added).

education. The joint statement from Harvard concedes that “K–12 decision makers may not enjoy the same academic freedoms as their higher education counterparts, and among the educational benefits of diversity in higher education is the ‘robust exchange of ideas,’ which is less applicable to education in the lower grade levels.”⁴⁶

Nonetheless, in the wake of *Grutter*, a federal district court and the U.S. Court of Appeals for the Ninth Circuit have each concluded that diversity is a compelling interest in the K–12 context.⁴⁷ However, the applicability of *Grutter* to K–12 remains unsettled. For example, the Ninth Circuit partially divorced its holding on diversity in K–12 education from the moorings of *Grutter* by conceding that 1) “[r]ather than primarily seeking the *internal academic benefits* of diversity, the [School] District’s chief focus is on the *broader social benefits* diversity can stimulate,”⁴⁸ and 2) “neither of *Grutter*’s grounds for affording deference [on the compelling interest question] is present here. First, secondary schools do not occupy the same ‘special niche in our constitutional tradition’ as higher education, and the Court has never held they possess a similar First Amendment right of academic freedom.”⁴⁹ In any case, the question of whether diversity is compelling in the K–12 context will likely continue to come before the lower courts as educators test the limits imposed by recent, pre-*Grutter* decisions involving magnet schools,⁵⁰ and as the large number of students potentially disadvantaged by the use of race in grades K–12—far more than attend the highly competitive colleges where race plays a large role in admissions⁵¹—supply an ample number of plaintiffs. The relevance of the *Grutter* and *Gratz* narrow tailoring standard to

46. CHEMERINSKY ET AL., *supra* note 28, at 23.

47. *Parents Involved*, 377 F.3d 949 (striking down district’s use of race in student assignment as not narrowly tailored); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004) (upholding some aspects of a school board’s race-conscious student assignment plan).

48. *Parents Involved*, 377 F.3d at 982.

49. *Id.* at 981 (quoting *Grutter*, 539 U.S. at 330).

50. See, e.g., *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

51. See ROBERT LERNER & ALTHEA K. NAGAI, PERVERSIVE PREFERENCES: RACIAL AND ETHNIC DISCRIMINATION IN UNDERGRADUATE ADMISSIONS ACROSS THE NATION (2001) (reporting that racial preferences “appear to be more extensive at the more competitive schools”), available at <http://www.ceousa.org/docs/multistate.doc>.

K–12 education will be determined in the lower courts as well, but that issue is not within the scope of this article.⁵²

Even in higher education, the diversity rationale does not automatically provide legal cover for using race in admissions, because strict scrutiny requires that the proffered compelling interest for a racial classification be the actual motive, rather than an insincere or post-hoc rationalization.⁵³ Although this issue wasn't raised in the University of Michigan cases,⁵⁴ a finding that a school was disingenuous in describing its motive would negate the presumption of good faith that undergirds the *Grutter* Court's conclusion that schools have a compelling interest in an intellectually diverse student body.⁵⁵ Thus, a school

52. For example, at the lower end of the K–12 range, it probably does not even make sense to speak of diverse viewpoints and a highly individualized, holistic review of each applicant's file. To the extent that the *Grutter* and *Gratz* narrow tailoring standard is applicable to K–12 education, schools will have a difficult time meeting it, because K–12 race-based admissions procedures tend to be very formulaic. For example, the plan struck down in *Eisenberg* “compares the countywide percentage for each racial/ethnic group to the percentage of each group attending a particular school, and also determines whether the percentage of each racial/ethnic group in that school has either increased or decreased over the past three years. Based on that information, Montgomery County then assigns to each racial/ethnic group within each school a diversity category” for purposes of evaluating a student's request to transfer to a magnet school. *Eisenberg*, 197 F.3d at 126.

Category 1 refers to racial groups, the percentage of which is higher than the countywide percentage for that group and has increased over time rather than moved closer to the countywide percentage Category 2 refers to racial/ethnic populations which, although higher than the countywide percentage, have tended to decline over time Categories 3 and 4 indicate a racial/ethnic percentage within a school that is below the countywide percentage. Category 3 is reserved for those racial/ethnic groups, the percentage of which has tended to decline over time; while category 4 includes those populations the percentage of which has tended to increase.

Id. at 126–27.

53. See *Grutter*, 539 U.S. at 327 (“[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”); *id.* at 324 (“Justice Powell rejected an interest in ‘increasing the number of physicians who will practice in communities currently underserved,’ concluding that even if such an interest could be compelling in some circumstances the program under review was not ‘geared to promote that goal.’”) (quoting *Bakke*, 438 U.S. at 306, 310); *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (holding that “to be a compelling interest, the State must show that the alleged objective was the legislature's ‘actual purpose’ for the discriminatory classification”).

54. See Brian T. Fitzpatrick, *The Diversity Lie*, 27 HARV. J.L. & PUB. POL'Y 385, 389 (2003) (The Michigan plaintiffs “never challenged the University's sincerity in its proffered justification for [race-based admissions].”).

55. See *Grutter*, 539 U.S. at 329.

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, and that “good

would lose its cover if it could be demonstrated that the benefits of broad-based intellectual diversity are not the real motive behind its race-based admissions policy. In fact, Justice Scalia suggests exactly this vulnerability in his *Grutter* dissent when he says that future “suits may challenge the bona fides of the institution’s expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*.”⁵⁶ Scalia notes that schools that extol the benefits of multiculturalism “but walk the walk of tribalism and racial segregation on their campuses” are likely to be “[t]empting targets.”⁵⁷ Similarly, schools that are unconcerned with diversity of faculty viewpoints or that enact speech codes that dull the diversity of viewpoints in the classroom may also have their motives questioned.⁵⁸ Depending on the deference afforded by the courts, many schools may be vulnerable on the issue of motive, because the educational benefits of diversity are often viewed, even by preference supporters, as a justification of convenience.⁵⁹

Closely related to the question of motive is the issue of racial balancing. This issue is a potential source of legal vulnerability

faith” on the part of a university is “presumed” absent “a showing to the contrary.”

Id. (quoting *Bakke*, 438 U.S. at 318–19).

56. *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part, dissenting in part).

57. *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part, dissenting in part). See Fitzpatrick, *supra* note 54, at 393 (reporting that “many elite universities go out of their way to facilitate and encourage racial segregation outside the classroom.”).

58. See Robert P. George, *Gratz and Grutter: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1636–37 (2003) (reporting that “few people who shape university policy notice, much less care about, the absence of diversity of political and religious viewpoint and affiliation in institutions that allegedly prize the engagement of ideas. It is therefore difficult to credit the claim that a desire for the intellectual benefits of diversity really motivates the defense of preference schemes.”); Fitzpatrick, *supra* note 54, at 392 (reporting that “[a] number of elite universities profess to support racial preferences in order to create ‘livelier’ classroom discussions yet simultaneously censor those discussions. These efforts have included speech codes directed at quashing any comments that might offend students of certain racial groups.”).

59. See, e.g., Washington, *supra* note 17, at 978 (referring to the “the prevailing view that the racial diversity argument is a pretensed justification for race-conscious state action.”). See also Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) (stating that “[e]veryone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued”); Daniel Golden, *Affirmative-Action Ruling Could Outlaw Minority Internships: Some Backers of Racial Preference Take Stand Beyond Diversity: Society Wins With Integrated Elite*, WALL ST. J., June 13, 2003, at B1 (quoting Columbia Law School Professor Samuel Issacharoff as stating that “[t]he commitment to diversity is not real. None of these universities has an affirmative-action program for Christian fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint.”).

for universities engaged in race-based admissions, because “outright racial balancing [remains] patently unconstitutional.”⁶⁰ Whether a particular school is engaged in racial balancing or, instead, is paying only “[s]ome attention to numbers”⁶¹ in pursuit of broad-based intellectual diversity is a factual determination that each court will have to make based on the evidence. But if the former is found to be true, then the school is engaging in “discrimination for its own sake,” and the diversity rationale cannot protect it.⁶²

In particular, schools will be vulnerable if their admissions data reveals patterns of the type described, in Chief Justice Rehnquist’s *Grutter* dissent, as indicative of racial balancing.⁶³ Rehnquist noted that

the correlation between the percentage of the Law School’s pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying “some attention to the numbers.”⁶⁴

Similarly, Rehnquist noted that the Law School had “*never* offered any race-specific arguments explaining why significantly more individuals from one underrepresented minority group are needed in order to achieve ‘critical mass’”⁶⁵ The Chief Justice concluded that “the Law School’s disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of ‘critical mass’ is simply a sham,”⁶⁶ and its real purpose “is revealed as a naked effort to achieve racial balancing.”⁶⁷ Of course, the old-fashioned type of racial and

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

61. *Id.* at 336 (quoting *Bakke*, 438 U.S. at 323).

62. *Gratz*, 539 U.S. at 270 (quoting *Bakke*, 438 U.S. at 307).

63. Rehnquist described racial balancing as an issue of narrow tailoring. *Grutter*, 539 U.S. at 379 (Rehnquist, J., dissenting). However, because the racial balancing issue is closely related to the motive question, I group it with other issues that go to the heart of a school’s reliance on the diversity rationale.

64. *Grutter*, 539 U.S. at 383 (Rehnquist, J., dissenting) (quoting *Bakke*, 438 U.S. at 323).

65. *Id.* at 382 (Rehnquist, J., dissenting).

66. *Id.* at 383 (Rehnquist, J., dissenting).

67. *Id.* at 379 (Rehnquist, J., dissenting). See George, *supra* note 58, at 1638 (“[T]he common result, and the evident goal, of preference programs is to secure minority representation on campus more or less in line with the representation of each minority beyond the walls of the institution.”).

ethnic discrimination might also be a motive for the disparate inter-minority treatment described by Rehnquist.⁶⁸

While it is true that Rehnquist's dissent was joined by only three other Justices, the majority contested only the facts, not the legal reasoning in the Chief Justice's discussion of inter-minority disparities.⁶⁹ Thus, it is very much an open question whether Rehnquist's line of argument will succeed in future cases.⁷⁰ In fact, Justice Scalia anticipated lawsuits based on this issue when he said that "litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority 'critical mass.'"⁷¹

If the diversity rationale and critical mass theory are to be a workable justification for racial discrimination in admissions, they must, at a minimum, be defined precisely enough to be distinguishable from the prohibited practice of racial balancing. Many would argue that they are not.⁷² The difficulty of distinguishing the permissible from the prohibited has the

68. See, e.g., *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting).

Dean Allan Stillwagon . . . testified that faculty members were 'breath-takingly cynical' in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans.

Id.

69. See *Grutter*, 539 U.S. at 336 ("[T]he number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year.").

70. The University of Michigan plaintiffs did not make this argument, but in light of Rehnquist's dissent, future litigants are likely not only to pursue the argument, but also to do the discovery necessary to strengthen it.

71. *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part, dissenting in part). See also *id.* at 374 (Thomas, J., concurring in part, dissenting in part) ("I join the Court's opinion insofar as it confirms that this type of racial discrimination [among preferred minorities] remains unlawful.").

72. See, e.g., *id.* at 355 (Thomas, J., concurring in part, dissenting in part) ("The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational 'benefits' not simply the forbidden interest in 'racial balancing' that the majority expressly rejects?"); Michael Rosman, *Uncertain Direction: The Legacy of Gratz and Grutter*, JURIST (Sept. 2003), at <http://jurist.law.pitt.edu/forum/symposium-aa/rosman.php> (describing *Grutter* as "[g]iving us yet another rephrasing of the diversity interest that sounds very much like racial balancing, while at the same time condemning racial balancing," and concluding that "the litany of interests just identified make it even more difficult than it was after Bakke to discern legitimate from illegitimate motives."); See also Presser, *supra* note 41, at 807 (concluding that the *Grutter* "majority has attempted no real definition [of the compelling interest] at all."); Washington, *supra* note 17, at 977 (supporting the diversity rationale, but stating that the "Grutter majority's acknowledgment of the compelling interest at issue was so abstruse . . .").

potential to make the diversity rationale, as envisioned by the *Grutter* Court, unworkable in practice, thus hastening its demise. Ironically, this problem can be attenuated by successful challenges to race-based admissions policies based on the type of racial balancing analysis done by Chief Justice Rehnquist. While the line between seeking a critical mass and engaging in racial balancing is a poorly defined one when underrepresented minorities are viewed as one mass, the two concepts become more distinguishable when one examines different treatment and definitions of critical mass for different minority groups. Thus, the lower courts may well gravitate to Rehnquist's distinction as they struggle to apply the Michigan decisions in a coherent and practical way.

No matter how much courts struggle with the ambiguities and contradictions in the Michigan decisions, it probably is fruitless at this point in time to argue that the *genuine* pursuit of broad-based diversity in higher education is not a compelling interest under the U.S. Constitution. However, since *Grutter* is about exceptions to the federal equal protection rights of student applicants, rather than about any positive constitutional right of educators to use race, it may be fruitful to argue that the use of race in admissions violates a state's civil rights statutes or the equal protection guarantee of its constitution. The point is that the diversity rationale may not fare as well under state law as it did in the U.S. Supreme Court. State courts will be particularly hesitant to incorporate the diversity exception into their state constitutions if the *Grutter* rationale is proving to be unworkable in federal cases. In any case, in states with favorable precedent or sympathetic Supreme Courts, we are likely to see state law claims against race-based admissions systems, challenging not only the diversity rationale, but the requirements of narrow tailoring as well. In the end, the University of Michigan's victory in *Grutter* will do it no good if the Michigan Supreme Court finds that diversity-based preferences violate the state's prohibition of racial and ethnic discrimination.⁷³ A legal defeat for the diversity

73. See MICH. CONST. art. 1, § 2 ("No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin."). A recent decision by the Michigan Supreme Court suggests that the Court, as currently constituted, is highly suspicious of race-based affirmative action. See *Lind v. City of Battle Creek*, 681 N.W.2d 334 (2004) (overruling a 1997 holding that a

rationale in Michigan or another state could affect the momentum and public perception of race-based admissions as substantially as two events in 1996: the *Hopwood v. Texas*⁷⁴ decision by the Fifth Circuit and California voters' passage of Proposition 209.⁷⁵

A final type of challenge to the heart of the *Grutter* decision would neither focus on the diversity rationale itself, nor be raised by the plaintiffs. Instead, the challenge would key into the underlying premise that universities should be given considerable deference in determining what sort of student body would produce the greatest educational benefits. It is just a matter of time before some educational institution—whether in higher education or K–12—attempts to use *Grutter's* deference standard to defend its own less politically correct form of discrimination. Because all forms of racial discrimination are analyzed under the same standard, there is no doctrinal reason—though there may be political reasons—why unconventional or politically incorrect forms of discrimination should receive harsher scrutiny than so-called “benign” discrimination.⁷⁶ In fact, one cannot even reliably distinguish between benign and non-benign discrimination, as the problem of Asian-American college applicants exemplifies.⁷⁷

non-minority plaintiff bears a higher burden in maintaining an employment discrimination case under the Michigan's Civil Rights Act).

74. 78 F.3d 932 (5th Cir. 1996).

75. CAL. CONST. art. I, § 31(a) (“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

76. See, e.g., *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227 (“holding ‘benign’ state and federal racial classifications to different standards does not square with” principles “central to this Court’s understanding of equal protection”).

77. See *Metro Broadcasting*, 497 U.S. at 615 (O’Connor, J., dissenting) (“Divorced from any remedial purpose and otherwise undefined, ‘benign’ means only what shifting fashions and changing politics deem acceptable. Members of any racial or ethnic group, whether now preferred . . . or not, may find themselves politically out of fashion and subject to disadvantageous but ‘benign’ discrimination.”); Brief of Amici Curiae Asian American Legal Foundation at 15, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516) (noting that “[t]he struggle by Chinese American schoolchildren [challenging a race-based school assignment plan in San Francisco designed to promote diversity] was particularly ironic in that, for much of the preceding century and a half, Americans of Chinese descent had struggled against racial discrimination, often in San Francisco”), available at <http://www.girardgibbs.com/aalf.pdf>. See also Leo Rennert, *President Embraces Minority Programs*, SACRAMENTO BEE, Apr. 7, 1995, at A1 (quoting President Bill Clinton who said, in support of race-based admissions, that “there are universities in California that could fill their entire freshman classes with nothing but Asian Americans”).

Unconventional types of racial discrimination for the sake of claimed educational benefits could take many forms, but consider the example given by Justice Clarence Thomas in his *Grutter* dissent: “It follows, therefore, that an [historically black college’s] assessment that racial homogeneity will yield educational benefits would similarly be given deference. An HBC’s rejection of white applicants in order to maintain racial homogeneity seems permissible, therefore, under the majority’s view of the Equal Protection Clause.”⁷⁸ It is but one small step from that premise to say that an all-white school can reject *minority* applicants to achieve what it believes to be a compelling interest in the educational benefits of racial homogeneity.⁷⁹ Such a defense would likely fail exactly because it is politically incorrect. And if it succeeded, it would not directly undermine the conventional form of race-based admissions at issue in the Michigan cases. However, such a defense—whether successful or not—would serve to remind the courts and the public that “the ‘diversity-discretion’ model,” as Professor Alan Dershowitz notes, “lacks real substantive content [and therefore] is inherently capable of manipulation for good or evil results.”⁸⁰ This

78. *Grutter*, 539 U.S. at 365 (Thomas, J., concurring in part, dissenting in part). That the Court’s stated reasoning can be used to justify less politically correct forms of discrimination adds credence to Justice Thomas’s hypothesis that

[t]he absence of any articulated legal principle supporting the majority’s principal holding suggests another rationale. I believe what lies beneath the Court’s decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, and that racial discrimination is necessary to remedy general societal ills.

Id. at 371 (Thomas, J., concurring in part, dissenting in part).

79. See William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 796–98 (1979) (arguing that a compelling interest in segregated schools would have been easy for states to articulate and difficult for the courts to disprove). Cf. Michael Kavey, *Private Voucher Schools and the First Amendment Right to Discriminate*, 113 YALE L.J. 743, 743–44 (2003) (“What if the school administrators object on principle—perhaps religious principle—to racial integration, coeducational schooling, or homosexuality? Doesn’t the First Amendment protect the schools’ views?”).

80. Alan Dershowitz et al., *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm Or Pretext*, 1 CARDOZO L. REV. 379, 404 (1979) (noting, in part, that, early in the 20th century, the diversity rationale was used by universities to justify discrimination against Jews in admissions). See *Metro Broadcasting*, 497 U.S. at 614–15 (O’Connor, J., dissenting) (The FCC’s “asserted [diversity] interest would justify discrimination against members of any group found to contribute to an insufficiently diverse broadcasting spectrum, including . . . justify[ing] limitations on minority members’ participation in broadcasting.”); *Grutter v. Bollinger*, 288 F.3d 732, 793 (6th Cir. 2002) (Boggs, J., dissenting) (“I refer to the ‘religious-conscious’ policies . . . to give preference in admissions to Gentiles as opposed to Jews. The policies were also designed to produce a mixture of students in the school that was closer to the proportion that

realization highlights one of the central weaknesses of the diversity rationale, which, when forced to the forefront, can only serve to call the long term viability of the rationale into question.

B. Narrow Tailoring

While there will doubtless be continuing litigation over the compelling interest prong of the *Grutter* rationale, the most fertile ground for future litigation will likely be a variety of narrow tailoring issues concerning the scope and duration of preferences as well as the use of race-neutral methods of achieving diversity. It is worth noting that most of the federal court decisions striking down racial admissions preferences have been grounded in issues of narrow tailoring. Six times the U.S. Courts of Appeal have addressed whether a school's race-based admissions policies are narrowly tailored to achieve an interest in diversity. Five times the answer has been no.⁸¹ And all but one of those five decisions occurred before the Michigan decisions highlighted new areas of narrow tailoring vulnerability. Also keep in mind that it is the defendant schools—not the plaintiffs—who have the burden of proving compliance with the various requirements of narrow tailoring.⁸²

prevailed in society, and a proportion that was thought to be socially and educationally beneficial.”).

81. Race-based admissions policies were struck down on narrow tailoring grounds in *Parents Involved in Community Schools v. Seattle Sch. Dist.*, 377 F.3d 949, 972 (9th Cir. 2004), *Johnson v. Bd. of Regents of the Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001), *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999), *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), and *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998). However in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), the Sixth Circuit held that the University of Michigan Law School's race-based admissions system was narrowly tailored. Only the Fifth Circuit struck down a race-based admissions system on compelling interest grounds. *Hopwood*, 78 F.3d 932.

82. See *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 865 (9th Cir. 1998) (“[T]he School District will bear the burden of proving that [its use of race in student assignment] is a ‘narrowly-tailored measure that furthers compelling government interests.’” (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995))); *Johnson*, 263 F.3d at 1251 (“[I]t is the burden of the party proposing a racial preference to show that its approach is narrowly tailored to achieving its asserted interest.”); *Berkley v. U.S.*, 59 Fed. Cl. 675, 682 (2004) (“Under a heightened scrutiny standard, the burden of proof shifts from the plaintiffs to the government. In the case of a racial classification, the government must prove that the challenged action served a compelling governmental interest and that the challenged action was narrowly tailored to further that interest.” (citing *Gratz*, 539 U.S. 244)).

1. *Restrictions on the Scope of Race-Based Admissions*

The narrow tailoring standard that resulted from the Michigan decisions contains several important and immediate restrictions on the scope of racial admissions preferences. The historic foundation for these restrictions is, for the most part, Justice Powell's lone opinion in *Bakke*.⁸³ However, these restrictions—including the language that was borrowed from Powell's opinion—have taken on a new urgency in higher education for at least a couple of reasons. First, a very common aspect of race-based admissions systems—the automatic award of bonus points based on race—was struck down in *Gratz*. In contrast, the *explicit* quota system struck down in *Bakke* has long since disappeared from the scene. Second, *Bakke* was a twenty-five year old “splintered decision,” whose “only holding for the Court” was a vague statement “that a ‘State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.’”⁸⁴ *Grutter* and *Gratz*, on the other hand, both produced majority opinions.

Turning now to the details of scope-related narrow tailoring, it is important to note that the mere elimination of a point-based admissions system is not sufficient to meet the requirement that race be used in a “flexible, nonmechanical way,”⁸⁵ such that it does not “automatically ensure[] a specific and identifiable contribution to a university's diversity.”⁸⁶ Even the joint statement published by the Harvard Civil Rights Project concedes that *Gratz* “makes clear that policies which automatically and inflexibly assign benefits on the basis of race . . . are constitutionally suspect.”⁸⁷ Thus, any admissions system that gives minority applicants a preference without a “highly individualized, holistic”⁸⁸ showing of how that applicant will contribute to broad-based intellectual diversity is vulnerable to challenge. Larger schools will be particularly vulnerable, because of the difficulty of conducting highly individualized

83. 438 U.S. 265 (1978).

84. *Grutter*, 539 U.S. at 322–23 (quoting *Bakke*, 438 U.S. at 320).

85. *Grutter*, 539 U.S. at 334.

86. *Gratz*, 539 U.S. at 271. See *Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305, at 1332 (S.D. Fla. 2004) (“[F]lexibility in theory means little when there is rigidity in practice.”) (citing *Gratz*, 539 U.S. at 269-274).

87. CHEMERINSKY ET AL., *supra* note 28, at 2.

88. *Grutter*, 539 U.S. at 337.

reviews of many thousands of applicants. In fact, until *Gratz* and *Grutter* came down, the University of Michigan contended that “the volume of applications . . . make it impractical for the [undergraduate college] to use the [individualized] admissions system upheld” in *Grutter*.⁸⁹ But the Supreme Court was clear that administrative ease is no defense: “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.”⁹⁰

Larger schools in particular may be tempted to limit the “highly individualized” review to a subset of their applicants. But universities that take this approach will be at risk if the filtering process uses race at all. Because such a filtering process is race-based, it must also comply with all the requirements of narrow tailoring. Recall that, in *Gratz*, the College admissions system was struck down, in part, because the “individualized review is only provided *after* admissions counselors automatically distribute the University’s version of a [racial] ‘plus.’”⁹¹

In addition, race-based admissions policies will be vulnerable if they do not *explicitly* give non-minority applicants “the opportunity to highlight their own potential diversity contributions.”⁹² Schools could meet this requirement, for example, by requesting of each applicant and “seriously consider[ing]” an “essay describing the ways in which the applicant will contribute to the life and diversity of the [school].”⁹³

Another important aspect of narrow tailoring is the Supreme Court’s prohibition against using race as a “decisive factor.”⁹⁴ The devil is in the details of what “decisive” means, but there are at least two ways that schools will be vulnerable. One is if a school gives “such a heavy advantage to minority applicants that it virtually guarantees their admission.”⁹⁵ Michigan’s

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

90. *Gratz*, 539 U.S. at 275.

91. *Id.*, 539 U.S. at 247.

92. *Grutter*, 539 U.S. at 338.

93. *Id.* at 338.

94. *Gratz*, 539 U.S. at 274. See *McFarland*, 330 F. Supp. 2d 834, 859 (W.D. Ky. 2004) (stating that race “may be used as a permissible ‘tipping’ factor.”) (citing *Grutter*, 539 U.S. at 339 (citing *Bakke*, 438 U.S. at 316)).

95. CHEMERINSKY ET AL., *supra* note 28, at 9.

undergraduate admissions system was struck down in *Gratz*, in part, because it did exactly that.⁹⁶ Decisiveness can also be defined in a more relative sense, looking at whether “the factor of race [is] decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.”⁹⁷ This type of decisiveness is largely coextensive with the problem of unequal footing of diversity factors, discussed later in this section. In any case, a large disparity between the average grades and test scores of minority and non-minority admittees, while not unlawful in and of itself, will be evidence that race is being used in a decisive manner, in both the relative and absolute sense.

It is the nation’s most selective schools, where the magnitude of the racial bonus tends to be greatest,⁹⁸ that will be potentially the most vulnerable to the charge that race is decisive. However, the degree of vulnerability on this and other narrow tailoring issues will depend on whether the lower courts focus more on what the Supreme Court said or, instead, what it did—namely, uphold a law school admissions policy that relied on race just as heavily as the undergraduate system.⁹⁹ This distinction is discussed at greater length below in Section III-C.

Schools will also be at risk if their race-based admissions policies consistently admit *substantially* more than a “critical mass” of underrepresented minorities¹⁰⁰—that is, more than about ten to twelve percent of the student body, which the University of Michigan determined is the threshold minority enrollment necessary to achieve the educational benefits of diversity.¹⁰¹ The *Grutter* Court found only that “a ‘critical mass’ of

96. *Gratz*, 539 U.S. at 270.

97. *Gratz*, 539 U.S. at 271 (quoting *Bakke*, 438 U.S. at 317).

98. See LERNER & NAGAI, *supra* note 51.

99. *Grutter*, 137 F. Supp. 2d at 841 (finding “mathematically irrefutable proof that race is indeed an enormously important factor” in the Law School’s admissions process).

100. See *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part, dissenting in part) (“[S]uits may claim that the institution’s racial preferences have gone below or above the mystical Grutter-approved ‘critical mass.’”).

101. See *Grutter*, 539 U.S. at 390 (Kennedy, J., dissenting) (“The percentage of minority offers [at UM Law School], however, at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range.”); *Grutter*, 137 F. Supp. 2d at 840, 851 (finding that “the law school has an unwritten policy of constituting each entering class so that at least 10–12% are students from underrepresented minority groups . . . 10–12% is the approximate percentage that has been established as the minimum level needed to achieve a ‘critical mass’ of students from these groups”;

underrepresented minorities is necessary to further [the] compelling interest in securing the educational benefits of a diverse student body.”¹⁰² The Court did not find that additional minority enrollment—beyond a critical mass—is compelling or even more beneficial, and it certainly did not sanction an admissions policy based on that assumption. A court could easily find that such an admissions policy is not narrowly tailored, because it “unduly burden[s] individuals who are not members of the favored racial and ethnic groups.”¹⁰³ While honest people will disagree over how much leeway a university has on this issue, it would be fair to say that a school that uses racial admissions preferences to consistently achieve minority enrollment well in excess of twelve percent will be operating without constitutional cover.

In addition to presenting a narrow tailoring problem, excess use of racial preferences will also bring into question a school’s motives—suggesting, for example, that it is pursuing racial balancing or catering to special interests, rather than seeking the educational benefits of a critical mass. As previously discussed, this could endanger the school’s legal reliance on the diversity rationale. The good news for universities is that, if they use race-neutral methods of achieving diversity, minority enrollment well in excess of a critical mass does not carry increased legal vulnerability. After all, when no racial preferences are used, strict scrutiny is not applicable and, thus, increased minority enrollment can only be good news.

The fact that the Supreme Court did not sanction a critical mass of unlimited size is apparently of concern to the University of Texas at Austin, which is reintroducing race-based admissions.¹⁰⁴ The University faces a problem in that its pre-

“Beginning in the 1970s, law school documents begin referring to 10–12% as the desired percentage.”).

102. *Grutter*, 539 U.S. at 333.

103. *Grutter*, 539 U.S. at 341 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting)). See *Parents Involved*, 377 F.3d at 975 (2004) (holding that school district’s student assignment plan failed narrow tailoring, in part, because it used race beyond the point necessary to make its schools sufficiently diverse to yield the claimed educational benefits); *Petit v. City of Chi.*, 352 F.3d 1111, 1116 (7th Cir. 2003) (“A race-conscious admissions program . . . must ‘work the least harm possible to other innocent persons competing for the benefit.’” (quoting *Grutter*, 539 U.S. at 341)).

104. W. Gardner Selby, *Funding Case is Personal for Lawyer*, SAN ANTONIO EXPRESS-NEWS, Sept. 7, 2004, at B1 (reporting that “UT Austin, citing subsequent U.S. Supreme Court rulings, plans to restore race as a factor in 2005”).

Grutter race-neutral admissions policies resulted in a freshman class with total black and Hispanic enrollment of seventeen percent, well above the critical mass figure sanctioned by the Court.¹⁰⁵ The University now argues that a critical mass is needed “at the classroom level.”¹⁰⁶ I can only assume that this attempted redefinition is motivated by a realization that courts will not be sympathetic to an argument that, in the University’s judgment, it needs a campus-wide critical mass greater than seventeen percent. I suspect that attempts in Texas or elsewhere to invent creative new definitions of critical mass will fail in the courts. Instead, such attempts may serve to undermine critical mass theory and the *Grutter* rationale by pointing out that the theory is malleable enough to justify virtually any degree of discrimination.

In addition to using race in a decisive or mechanical manner or stretching the size of a critical mass, risky practices include treating race as *substantially* more important than nonracial diversity factors.¹⁰⁷ In part, Michigan’s undergraduate admissions system was found to be unconstitutional because “the points available for other diversity contributions . . . are capped at much lower levels.”¹⁰⁸ That system violated the principle that race must be just “one factor among many,”¹⁰⁹ such that “all pertinent elements of diversity” are placed “on the same footing for consideration.”¹¹⁰ Without a point system, it will be more

105. Todd Ackerman, *Texas at Center of Debate over Race, Admissions*, HOUS. CHRON., Dec. 14, 2003, at A43 (reporting that at UT-Austin 13.6% of incoming freshmen are Hispanic and 3.4% are black).

106. See Todd Ackerman, *Rice, UT Push Role for Race in Admissions*, HOUS. CHRON., Nov. 25, 2003, at A1 (reporting University officials’ assertion that race-neutral “programs have failed to produce a ‘critical mass’ of minority students at the classroom level [because] a 2002 survey found 52 percent of medium-size classes had no blacks and 79 percent had one or none.”). Note that the article contains no explanation as to why Hispanics could not contribute to the critical mass.

107. See Peter H. Schuck, *Reflections On Grutter*, JURIST (Sept. 2003), at <http://jurist.law.pitt.edu/forum/symposium-aa/schuck.php> (“[W]e can expect much future litigation over whether the use of race as a ‘plus factor’ in a given affirmative action plan is excessive . . .”).

108. *Gratz*, 539 U.S. at 279. Interestingly, the University of Michigan’s undergraduate admissions system was struck down despite awarding the same twenty points for *some* other diversity factors as it did for race. Those factors included being from a socio-economically disadvantaged background, attending a predominantly minority high school, being an athlete, or being identified by the University’s Provost as having a special characteristic. This could indicate that schools will have a hard time demonstrating compliance with this requirement, but it is also a measure of the confusing nature of the *Gratz* and *Grutter* decisions. *Id.* at 294–95 (Souter, J., dissenting).

109. *Grutter*, 539 U.S. at 340.

110. *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317).

difficult for courts to evaluate the relative importance of various diversity factors. But it will not be impossible. For instance, a plaintiff could assemble statistical data that compares the odds of admission for minority applicants to the odds for similarly situated candidates who are diverse in other ways.

A *modest* imbalance in the importance of nonracial diversity factors will not be enough to render an admissions system unconstitutional, given that the various elements of diversity need “not necessarily [be accorded] the same weight.”¹¹¹ The origin of this “same weight” language is Justice Powell’s opinion in *Bakke*, which added that “the weight attributed to a particular quality may vary from year to year”¹¹² Thus, while the heavily disproportionate weighting of race is legally risky, it is less so if it occurs sporadically in response to “the applicants for the incoming class,” rather than persisting from year to year.¹¹³

Given that all pertinent elements of diversity must be placed on the same footing, it would seem that universities are most vulnerable to allegations that they treat nonracial diversity factors in a *qualitatively* different way. If the lower courts are willing to enforce the equal footing requirement, qualitative differences will render many race-based admissions systems vulnerable, unless they adapt to the *Grutter* and *Gratz* decisions. For example, it appears that, prior to the Michigan decisions, few if any schools sought a critical mass for any diversity factor other than race, even though the reasoning behind critical mass theory applies equally well to diversity factors such as socioeconomic status, religion, age, and sexual orientation.¹¹⁴

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

112. *Bakke*, 438 U.S. at 317–18.

113. *Id.* at 318.

114. *See* Fitzpatrick, *supra* note 54, at 391.

To whatever extent a critical mass of black, Hispanic, and Native American students can contribute to ‘livelier, more spirited, more enlightening’ classroom discussion . . . surely a critical mass of Mormon and Arab-American students can do so as well. . . . [Yet,] it appears that none of the elite universities who similarly employ racial preferences and who filed briefs in support of the University of Michigan seeks to enroll a critical mass of Mormon and Arab-American students.

Id. For an additional example of the reasoning behind critical mass theory, *see Grutter*, 539 U.S. at 318–20 (“The current Dean of the Law School, Jeffrey Lehman . . . indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.” “[T]estimony indicated that when a critical mass of underrepresented minority students is present, . . . nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.” (quoting App. to Pet. for Cert. at

The *Grutter* and *Gratz* plaintiffs did not raise this issue, but this would seem to be the type of *qualitative* difference that makes for unequal footing.

Do not be surprised to see a lawsuit by, say, Muslim students, questioning why a university puts religious diversity on a very different footing than racial diversity. The plaintiffs would surely point out that the school does not seek a critical mass of Muslims or underrepresented religious minorities in general.¹¹⁵ Even if we limit the topic to race and ethnicity, a lawsuit by Arab-American students would raise questions about why few, if any, schools include Arabs among the racial and ethnic groups that contribute to the conventional critical mass and, thus, deserve preferences.¹¹⁶ Since these suits would involve religion or ethnicity, strict scrutiny would govern the equal protection claims. But, regardless of their legal merits, these lawsuits would make a compelling point at a time in our nation's history when learning about Muslim and Arab viewpoints would seem to have enormous educational value. At very least, such suits would serve to emphasize the degree to which real-world admissions practices are at odds with the theoretical basis for *Grutter's* compelling interest holding. Eventually, the Michigan decisions may be seen to have ignored too much reality to provide a workable framework for evaluating race-based admissions.

215a)). Given this reasoning, it is difficult to explain why universities seem unconcerned about the children of poor families feeling isolated on campus or like spokespersons for their social class. See David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 501 (2004) ("Poverty law issues might be illuminated by the presence of people who have experienced poverty But universities have not sought out the poor. In fact, the viewpoints of poor persons are systematically absent from higher education."); David G. Savage, *Ranks of Poor are Thin at Top Colleges: Report Finds Diversity Goes Only So Far*, L.A. TIMES, Apr. 6, 2003, at A34 (reporting that "[t]he most 'underrepresented' group of Americans at the nation's top colleges and universities is not African Americans or Latinos, but students from low-income families," given that "[o]nly 3% of freshmen at the 146 most selective colleges and universities come from families in the bottom quarter of Americans ranked by income.").

115. See *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part, dissenting in part) ("[L]itigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority 'critical mass.'").

116. See Fitzpatrick, *supra* note 54, at 391 ("[I]t appears that none of the elite universities who similarly employ racial preferences and who filed briefs in support of the University of Michigan seeks to enroll a critical mass of Mormon and Arab-American students.").

Underinclusiveness—whether concerning the exclusion of religion and other diversity factors, or the exclusion of certain groups along a single dimension of diversity—raises more than just narrow tailoring issues. It also goes to the heart of reliance on the diversity rationale, because it calls into question a university's motives.¹¹⁷ Is the school seeking racial diversity for its own sake or to please politically powerful interest groups, rather than in pursuit of a compelling interest in the educational benefits of broad-based intellectual diversity? Only the last motive is a constitutionally permissible one.

At first glance, several of the narrow tailoring requirements contained in the Michigan decisions—such as equal footing for nonracial diversity factors and the prohibition against the mechanical or decisive use of race—seem to be in tension with the Court's approval of Michigan's critical mass theory.¹¹⁸ The various points of tension arise because of a seemingly fundamental contradiction: Michigan defines "critical mass" in terms of a uni-dimensional diversity based solely on race and ethnicity, while various narrow tailoring requirements envision a "far broader"¹¹⁹ type of diversity. As an illustration of the tension, consider the Court's command that universities not treat race as if it "automatically ensured a specific and identifiable contribution to a university's diversity."¹²⁰ That requirement seemingly cannot be squared with the University of Michigan's critical mass theory, which assumes exactly the opposite, namely that a minority student's race—taken alone—automatically contributes to the educational benefits of diversity by helping to achieve the all-important critical mass of minorities. Moreover, under the University's critical mass theory, the minority student's contribution is "specific and identifiable": if 100 minorities are needed to achieve a critical mass, then each and every minority student makes a contribution equal to one percent of the educational value of the critical mass.

117. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 52–53 (1994) (striking down a local ordinance on First Amendment grounds under strict scrutiny, because the law was underinclusive to serve its purported goal and this "diminish[ed] the credibility of the government's rationale").

118. *Gutter*, 539 U.S. at 333, 335 (approving "[t]he Law School's goal of attaining a critical mass of underrepresented minority students," and deferring to the school's determination that a critical mass "is necessary to further its compelling interest in securing the educational benefits of a diverse student body").

119. *Gutter*, 539 U.S. at 325 (quoting *Bakke*, 438 U.S. at 315).

120. *Gratz*, 539 U.S. at 271.

A second type of tension is best illustrated by imagining a university which has determined that it will not be able to admit a critical mass of minorities if it continues to put race “on the same footing” as “all [other] pertinent elements of diversity.”¹²¹ That school will have to make a choice. It can continue to put race on the same footing as other diversity factors, no matter how far short of a critical mass the admitted class falls. Alternatively, the school can elevate race to a special footing, whereby the weight—or qualitative treatment—of race is determined not by reference to broad-based diversity but by reference to reaching the minimum threshold for a critical mass.¹²² In his dissenting opinion in *Grutter*, Justice Kennedy describes a similar tension, in which “critical mass becomes inconsistent with individual consideration in . . . specific aspects of the [Law School’s] admissions process.”¹²³ However, while Justice Kennedy sees the problem as a failure of the Law School to implement proper procedures,¹²⁴ I view the tension as fundamental, arising not because of faulty procedures, but because of Michigan’s very definition of critical mass, which ignores all aspects of diversity save for race.

I suspect that schools facing legal challenges to their race-based admissions policies will try to use the tension between critical mass theory and the narrow tailoring requirements to their advantage. Specifically, I envision schools arguing—implicitly if not explicitly—that the narrow tailoring limits should be interpreted generously as long as the institution is acting in a “good faith” effort to attain a critical mass of minorities. Although it is possible that some courts will be sympathetic to such an argument, a careful reading of the

121. *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317).

122. A strong argument can be made that the minimum threshold for a critical mass functions as a quota, but that argument has been made often enough that a further discussion of it here would add little. See, e.g., *Grutter*, 137 F. Supp. 2d at 851 (finding that “the law school has an unwritten policy of constituting each entering class so that at least 10–12% are students from underrepresented minority groups [T]he fact of the matter is that approximately 10% of each entering class is effectively reserved for members of particular races The practical effect of the law school’s policy is indistinguishable from a straight quota system.”).

123. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting). See, e.g., *id.* at 392 (The Law School’s “consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself.”).

124. See *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting) (“The Law School made no effort to guard against this danger The admissions program could have been structured to eliminate at least some of the risk that the promise of individual evaluation was not being kept.”).

University of Michigan decisions makes it clear that there is no textual or precedential basis for the argument. Notably, the Supreme Court upheld the Law School's admissions system, in part, because the Court was convinced that the School did not modify the weight given to race depending on how close it was to meeting its critical mass goal.¹²⁵

Even if the attainment of a critical mass—rather than the educational benefits of diversity—were itself the compelling governmental interest, compelling interests may be pursued only “so long as the narrow-tailoring requirement is also satisfied.”¹²⁶ In fact, a careful reading of the decisions reveals that the Court's statements on critical mass are simply a pronouncement that the “goal of attaining a critical mass of underrepresented minority students does not transform [a] program into a quota.”¹²⁷ In other words, the goal of a critical mass, without more, does not run afoul of the Court's prohibition against quotas.¹²⁸ But such a pronouncement says nothing about the critical mass objective being immune from the many other narrow tailoring restrictions discussed above. Thus, far from being an overriding and contradictory imperative, the attainment of a critical mass is merely “a permissible goal”¹²⁹ that allows a university to pay “[s]ome attention to numbers,”¹³⁰ so long as all the other requirements of strict scrutiny are met. In fact, were a school to elevate critical mass from a permissible goal to an imperative, its search for a critical mass of minorities would become a quota.¹³¹

125. See *Grutter*, 539 U.S. at 336 (“[T]he Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports.”).

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

127. *Grutter*, 539 U.S. at 335–36.

128. *Grutter*, 539 U.S. at 334 (“To be narrowly tailored, a race-conscious admissions program cannot use a quota system . . .”).

129. *Grutter*, 539 U.S. at 335 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part)).

130. *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323) (emphasis added).

131. *Grutter*, 539 U.S. at 335 (distinguishing Michigan's goal of a critical mass from an unlawful quota, because “[i]n contrast, ‘a permissible goal . . . requires only a good-faith effort’” (quoting *Sheet Metal Workers*, 478 U.S. at 495) (ellipsis in original)). See *id.* at 348 (Scalia, J., concurring in part, dissenting in part) (“Some future lawsuits . . . will focus on whether a university has gone beyond the bounds of a ‘good faith effort’ and has so zealously pursued its ‘critical mass’ as to make it an unconstitutional *de facto* quota system, rather than merely ‘a permissible goal.’” (quoting *Sheet Metal Workers*, 478 U.S. at 495)).

Despite the fact that the critical mass objective provides no protection against a narrow tailoring challenge—save for the charge of using a quota—I expect that many universities will, in practice, aggressively stretch the limits of narrow tailoring. This may be particularly true in the short-term, given the scarcity of lower court precedent on the application of the new narrow tailoring standard. I take this view, in part, because the circumscribed use of race sanctioned by the Michigan decisions is strikingly at odds with much of the reality on the ground—especially at highly selective schools¹³²—at the time of the Michigan decisions.¹³³ Moreover, prior to the decisions, schools that addressed the issue typically claimed that they couldn't achieve a critical mass of minorities if they were forced to rely less on race,¹³⁴ and the early signs are that universities are not relaxing their commitment to—or minimum definitions of—critical mass.¹³⁵ While fundamental changes to the reality on the ground remain a possibility, most statements by university

132. The magnitude of the racial preference tends to be greatest at the nation's most selective universities. See generally LERNER & NAGAI, *supra* note 51.

133. For example, the empirical evidence indicates that, under any reasonable definition of “consider[ing] race as one factor among many,” *Grutter*, 539 U.S. at 340, compliance with this narrow tailoring requirement has been the exception rather than the rule. See Lino A. Graglia, *The “Affirmative Action” Fraud*, 54 WASH. U. J. URB. & CONTEMP. L. 31, 36 (1998) (“The virtual nonexistence of blacks at the level of academic achievement required for admission to highly selective schools means that their admission in substantial numbers requires that the ordinary admission criteria be not merely bent or relaxed, but virtually ignored.”); LERNER & NAGAI, *supra* note 51 (“Blacks have far greater probabilities of admission than do similarly qualified whites at a large variety of schools.”); Schuck, *supra* note 107 (“[A] leading researcher finds that black applicants ‘enjoy an advantage equivalent to an increase of two-thirds of a point in [GPA]—on a four point scale—or [the equivalent of] 400 points on the SAT.’”).

134. See, e.g., Brief of Amici Curiae Amherst et al. at 12, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (arguing that “enforced elimination of the Harvard College approach [approved in *Bakke*] would have drastic resegregating impact . . . [T]he percentage of black students matriculating would drop from roughly 7.1% of the student body to 2.1%.”). See also Peter Kirsanow, *Michigan Impossible: Grutter Compliance May be a Problem*, NATIONAL REVIEW ONLINE (July 1, 2003) (reporting that “if race/ethnicity were only a ‘plus’ rather than an exponent, many colleges could not remotely approach a critical mass”), at <http://www.nationalreview.com/comment/comment-kirsanow070103.asp>.

135. See, e.g., UNIVERSITY OF MICHIGAN UNDERGRADUATE ADMISSIONS 2004–05: APPLICATION, GUIDELINES AND PROCESS: THE ADMISSIONS REVIEW PROCESS (2003) (stating that “The University [of Michigan] will continue to seek a critical mass of students from these underrepresented groups.” “[A]t the present time, these groups include African-Americans/Blacks, Hispanics/Latinos, and Native Americans or Alaskans.”), available at <http://www.admissions.umich.edu/process/review/categories>; Ackerman, *supra* note 106 (reporting that the University of Texas at Austin was proposing to reintroduce race-based admissions because race-neutral methods had failed to “produce a ‘critical mass’ of minority students at the classroom level”).

officials in the wake of the Michigan decisions indicated few if any changes were planned.¹³⁶

In other words, the tension between the limited use of race envisioned by the Court and the reality on the ground is likely to persist.¹³⁷ This is sure to produce a large amount of litigation, which will put the Michigan decisions to their greatest test. As reality clashes with doctrine, lower court decisions will likely produce a generous supply of conflicting interpretations and circuit splits.¹³⁸ The conflicts, in turn, will stretch the coherence and workability of the *Gratz* and *Grutter* standard, perhaps to its breaking point.

2. Time-Related Restrictions on Race-Based Admissions

Moving beyond the static, scope-related restrictions on race-based admissions, we come to what I call the time-related restrictions in the new narrow tailoring standard. These concern the phasing out of race-based admissions, and the phasing in of race-neutral alternatives. While it is tempting to think of these as a single transition, that view is not entirely accurate. After all, the Court's command that "race-conscious admissions policies must be limited in time"¹³⁹—as well as Michigan's concession that "race-conscious programs must have reasonable durational limits"¹⁴⁰—were not predicated on the success of race-neutral alternatives, much less academe's perception of that success.¹⁴¹

Although there *may* be other ways to meet the requirement for a durational limit, the Supreme Court, at very least, strongly suggests that race-conscious admissions policies contain "sunset

136. See Justin Pope, *One Year After Ruling, Colleges Find Affirmative Action Isn't Easy*, ASSOCIATED PRESS, June 21, 2004 (reporting that "[m]ost selective colleges would claim there have been few changes because none were necessary").

137. See Daniel Sabbagh, *Judicial Uses of Subterfuge: Affirmative Action Reconsidered*, 118 POL. SCI. Q. 411, 431 (2003) ("[T]he average SAT scores of black and Hispanic applicants may lag too far behind those of white and Asian applicants for a suitable degree of diversity to obtain if one is to consider race and ethnicity simply as 'one factor among others.'").

138. Schimmel, *supra* note 37, at 415 (concluding that unresolved issues in the wake of *Grutter* "will lead to confusion [and] controversy").

139. *Grutter*, 539 U.S. at 342.

140. *Grutter*, 539 U.S. at 342 (quoting Brief for Respondents Bollinger et al. at 32).

141. See George W. Jordan III, *Race-Conscious University Admissions: Challenges in Attaining Student Body Diversity in the Grutter/Gratz Era*, HOUS. LAWYER, Jan.-Feb. 2004, at 16. ("*Grutter* and *Gratz* hold messages . . . to universities [including] prepare to put the brakes on and stop the use of race altogether.").

provisions.”¹⁴² Although it will be up to the lower courts to add detail about what sunset provisions should look like, a race-based admissions system likely will be vulnerable if its sunset provision—or alternate “durational requirement”¹⁴³—is more like a vague aspiration than a concrete plan with not-too-distant milestones. While schools will surely be given some flexibility in adhering to their termination plans, it seems reasonable to expect that unanticipated extensions of the deadlines be, at the very least, explicitly and openly approved by the university’s governing body.

Unfortunately, the early indications are that schools are not taking sunset provisions or alternate durational limits seriously. Instead, universities appear to be relying on vague assurances that they will conduct periodic re-evaluations to see if racial preferences are still necessary.¹⁴⁴ However, the Court’s language indicates that it saw “periodic reviews” as only part of the solution to the “durational requirement.”¹⁴⁵

It is important to remember that “the durational requirement” is intended to function as a cap, not as a license to delay the consideration and adoption of race-neutral alternatives.¹⁴⁶ Even if a university adopts durational limits, it must, nonetheless, engage *now* in “serious, good faith consideration of workable race-neutral alternatives” and “draw on the most promising aspects of these race-neutral alternatives as they develop” in order to *reduce* its reliance on race.¹⁴⁷ Given the Supreme Court’s recognition that “a wide variety of

142. *Grutter*, 539 U.S. at 342. See *Hershell Gill Engineers v. Miami-Dade County*, 333 F. Supp. 2d 1305, 1332 (S.D. Fla. 2004) (striking down minority contracting preferences, in part, because “none of the [challenged] programs have built-in durational limits (e.g., a sunset provision after a certain number of years)”).

143. *Grutter*, 539 U.S. at 342.

144. See, e.g., UNIVERSITY OF MICHIGAN UNDERGRADUATE ADMISSIONS 2004–05: APPLICATION, GUIDELINES AND PROCESS: FAQ (2003) (stating that “the University [of Michigan] has concluded that race is one of many factors that must be considered to ensure that a broadly diverse class is enrolled The University will continue to monitor this process carefully and review it on a regular and ongoing basis.”), available at <http://www.admissions.umich.edu/process/faq>.

145. *Grutter*, 539 U.S. at 342 (“[T]he durational requirement can be met by sunset provisions in race-conscious admissions policies *and* periodic reviews to determine whether racial preferences are still necessary” (emphasis added)). See *Parents Involved*, 377 F.3d at 966 (“[T]he [*Grutter*] Court observed that . . . periodic reviews (*along with* an eventual legal cutoff) ensure that the Law School’s use of race will be time-limited.” (emphasis added)).

146. *Grutter*, 539 U.S. at 342.

147. *Id.* at 339, 342.

alternative approaches” were already in operation in states with race-neutral admissions policies,¹⁴⁸ the Court clearly envisions the transition to race-neutral methods as a process that should start sooner rather than later. Otherwise, a university is “unduly burden[ing] individuals who are not members of the favored racial and ethnic groups” by relying on race to a greater extent than is necessary.¹⁴⁹ Thus, schools should not pretend that the transition from race-based to race-neutral admissions is an all or nothing process, in order to justify the delay of reforms. Even if a school determines that race-neutral methods will not allow it to *eliminate* race from the admissions process, it still has an obligation to use those methods to *reduce* its reliance on race.¹⁵⁰ Recall that the Harvard statement acknowledged that “the Court’s language expresses its understanding that . . . *less* race-conscious measures will be required to produce [diversity].”¹⁵¹

Litigation against universities that are dragging their feet will focus not just on narrow tailoring, but on motive as well. Unless a school can convince a court that it has good-faith educational reasons for delaying a transition to race-neutral means of achieving diversity, it will be vulnerable to the charge that its racial preferences are motivated more by politics or political correctness than by the educational benefits of diversity. And once a school’s motives are called into question, its entire reliance on the diversity rationale is threatened.

Grutter did hold that, when considering race-neutral alternatives, “a university [need not] choose between maintaining a reputation for excellence or fulfilling a commitment to [diversity].”¹⁵² However, a less selective school will have a more difficult time arguing that race-neutral methods would force it “to abandon the academic selectivity that is the cornerstone of its educational mission.”¹⁵³ In the same vein,

148. *Id.* at 342. See *supra* note 20.

149. *Grutter*, 539 U.S. at 341 (quoting *Metro Broadcasting*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting)).

150. See *Parents Involved*, 377 F.3d at 970 (striking down school board’s student assignment system, in part, because “although numerous alternative admissions structures have been proposed to solve the School District’s oversubscription dilemma *without so prominently featuring race* in the equation, not all have been (or ever were) seriously considered by the Board” (emphasis added)).

151. CHEMERINSKY ET AL., *supra* note 28, at 11 (emphasis added).

152. *Grutter*, 539 U.S. at 339.

153. *Id.* at 340. See LERNER & NAGAI, *supra* note 51. (“The more selective colleges and universities are more likely to use preferences for black applicants than are their less

universities will be hard-pressed to explain a failure to adopt those race-neutral methods of promoting diversity that require no sacrifice in academic excellence. One such method is more aggressive outreach, which does nothing to lower the academic selectivity of the admissions process.¹⁵⁴ Consider the University of Georgia, which, after eliminating race from its admissions criteria in 2002, saw a modest increase in minority enrollment, because it substituted more aggressive outreach to potential applicants.¹⁵⁵

Schools can also promote diversity without lowering their academic standards by eliminating non-merit-based admissions criteria that have an unintended disparate impact on minorities.¹⁵⁶ Eliminating legacy preferences, as well as preferences for state residents in a state with few minorities, are just two examples.¹⁵⁷ Schools that fail to use such methods to at least reduce their reliance on race make themselves vulnerable to the argument that they are “unduly burden[ing] individuals who are not members of the favored racial and ethnic groups.”¹⁵⁸ How much weight courts will give to this argument is unknown, but I would not want to be a university official explaining to a

selective counterparts, but few colleges and universities use *no* black-white preferences at all.”).

154. See *McFarland*, 330 F. Supp. 2d 834, 864 (W.D. Ky. 2004) (holding that race-conscious student assignment plan for some schools was not narrowly tailored, in part because school district could have but did not “enhance its recruitment efforts”).

155. See Clarissa Collier, *Georgia Preview Day Aimed at Minorities*, RED AND BLACK (University of Georgia), Dec. 3, 2002 (reporting on University of Georgia admissions, including outreach programs, an increase in black freshman enrollment from four point eight percent to five point four percent, and an increase in overall minority freshman enrollment from thirteen percent to fourteen percent); Michael A. Fletcher, *Universities Alter Recruiting; Race-Neutral Admission Tactics Found to Boost Diversity*, WASH. POST, Dec. 3, 2002, at A10 (reporting that, “[i]mmediately after a federal appeals court outlawed the University of Georgia’s race-conscious affirmative action program last year, the school initiated a stepped-up plan for recruiting minority students”); Patrik Jonsson, *The Georgia Students on This Recruiter’s Mind*, CHRISTIAN SCI. MON., Dec. 13, 2002, at 3 (reporting “a slight gain” in racial minorities among University of Georgia freshmen after “a statewide ban on racial preferences took effect”). See also La Monica Everett-Haynes, *Outreach Efforts Work, A&M Says: Increase Seen in Minority Admissions*, HOUS. CHRON., May 28, 2004, at A33 (reporting that Texas A&M President Robert Gates attributes dramatic gains in minority enrollment to outreach efforts).

156. Note that eliminating non-merit-based admissions criteria can actually increase a university’s academic selectivity by allowing the school to focus more exclusively on merit-based criteria.

157. See, e.g., Todd Ackerman, *A&M Abolishes Legacy Program*, HOUS. CHRON., Jan. 10, 2004, at A1 (reporting on the decision of Texas A&M University, as well as the University of California schools, to eliminate legacy preferences from their admissions systems).

158. *Grutter*, 539 U.S. at 341 (quoting *Metro Broadcasting*, 497 U.S. at 630 (O’Connor, J., dissenting)).

judge why his school prefers explicit racial discrimination to the elimination of admissions criteria with a disparate impact on minorities.

Ironically, *Grutter's* reliance on a “critical mass” theory to justify racial preferences will strengthen the arguments for race-neutral alternatives. Supporters of race-based admissions will always be able to point to a handful of schools where minority enrollment declined somewhat when race-neutral admissions replaced a race-based regime (much as their opponents will point to schools where minority enrollment increased). However, the legal test for the sufficiency of race-neutral methods is not whether minority enrollment declines, but, instead, whether a critical mass of underrepresented minorities is attained. Given this standard, the evidence is clearly in favor of race-neutral alternatives. In the states that implemented race-neutral admissions policies before *Grutter*, even the flagship universities—such as the University of California-Berkeley, the University of Texas at Austin, Texas A&M, the University of Georgia, and the University of Florida—attained a critical mass of underrepresented minorities,¹⁵⁹ and often more minorities than under the previous race-based regimes.¹⁶⁰ This evidence makes it difficult for schools in any state to claim, year after year,

159. Based on the University of Michigan's determination, “critical mass” is defined here as at least ten to twelve percent of the student body. See *supra* note 101.

160. See, e.g., *Grutter*, 539 U.S. at 367 (Thomas, J., concurring in part, dissenting in part) (noting that Boalt Hall, the University of California at Berkeley's law school, “enrolled 20 blacks and 28 Hispanics in its first-year class for 1996 [using race-based admissions]. In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels.” (citation omitted)); Collier, *supra* note 155 (reporting, after the end of race-based admissions, an increase in black freshman enrollment from four point eight percent to five point four percent at the University of Georgia and an increase in overall minority freshman enrollment from thirteen percent to fourteen percent); Jonsson, *supra* note 155 (reporting “a slight gain” in racial minorities among University of Georgia freshmen after “a statewide ban on racial preferences took effect”); Jonathan D. Glater, *Diversity Plan Shaped in Texas Is Under Attack*, N.Y. TIMES, June 13, 2004, at A1 (reporting that “the new freshman class [at the University of Texas at Austin] will be, for the first time, more diverse than classes were before the United States Court of Appeals for the Fifth Circuit struck down affirmative action in higher education in 1996”); Everett-Haynes, *supra* note 155 (reporting that, at Texas A&M, “20 percent of the 6,400-student freshman class will be minorities”); Florida Department of Education, Division of Colleges and Universities Facts and Figures: Student Enrollment in State University System Institutions (2003) (showing that the University of Florida's undergraduate enrollment of underrepresented minorities—African-Americans, Hispanics, and Native Americans—stood at 21.1% in 2003, a higher percentage than in any previous year, dating back to at least 1990), at <http://www.fldcu.org/factbook/enrollment.asp>.

that a “serious, good faith consideration of workable race-neutral alternatives”¹⁶¹ reveals that there are none.

Such a claim will be particularly problematic in the five states that have successfully used race-neutral admissions. Consider that schools may not use race-based admissions unless they demonstrate that “racial preferences are still necessary to achieve student body diversity.”¹⁶² Therefore, schools that have already achieved diversity through race-neutral means will have a very hard time defending a return to race-based policies. Nonetheless, both Rice University and the University of Texas at Austin plan to reintroduce race-based admissions policies.¹⁶³ Yet, by UT-Austin President Larry Faulkner’s own report, black and Hispanic enrollment recovered fully and minority academic performance increased at his flagship college after race-neutral methods were substituted for race-based admissions following *Hopwood v. Texas*.¹⁶⁴ Faulkner may soon have to explain to a court why he decided to reintroduce race despite this success.

A final point about race-neutral alternatives concerns their interaction with the durational limits on race-based admissions—the twenty-five year cap, sunset provisions, and the like. As the various deadlines approach, I believe it will become more and more obvious that race cannot be eliminated from the admissions process merely by waiting for the racial gap in grades and standardized test scores to close. As Justice Clarence Thomas noted, “No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years.”¹⁶⁵ That will leave race-neutral alternatives as the only proven way to maintain diversity while also meeting the deadlines for the elimination of race. Thus, as the years go by, schools that continue to eschew race-neutral methods will not be able to seriously claim that they have a plan for meeting

161. *Grutter*, 539 U.S. at 339.

162. *Id.* at 342.

163. Ackerman, *supra* note 106.

164. Larry Faulkner, ‘Top 10 Percent Law’ Functioning Well, DALLAS MORN. NEWS, Oct. 24, 2000, at 15A. See also Glater, *supra* note 160 (reporting that “diversity was restored” and “data collected by the university showed that students admitted under the [race-neutral] 10 percent rule consistently get better grades than other students”).

165. *Grutter*, 539 U.S. at 376 (Thomas, J., concurring in part, dissenting in part). See Presser, *supra* note 41, at 800 (referring to “the intractability of the gap between the standardized test scores and grades of blacks and other minorities when compared to those for whites and Asians”).

Grutter's “durational requirement.”¹⁶⁶ That will not be acceptable to most courts, since *Grutter* emphasized that the grant of compelling interest status to student body diversity is conditional on a time limit.¹⁶⁷ Without an embrace of race-neutral alternatives by the higher education community, diversity and satisfaction of the durational requirement will become increasingly incompatible objectives. As a result, one of the central underpinnings of the *Grutter* decision—durational limits as a justification for diversity’s compelling interest status—will be rendered untenable. If that happens, the diversity rationale will be hanging by a thread.

C. Deference

The success of all future litigation over race-based admissions will depend on how much deference lower courts show to universities when comparing their behavior to the *Grutter* and *Gratz* standard, and on whether courts—including future Supreme Courts—follow what the *Grutter* Court said or what it did.¹⁶⁸ What the Court *said* was that it 1) was upholding a policy that uses race as merely a plus factor on a roughly equal footing with other diversity factors,¹⁶⁹ and 2) was applying a strict scrutiny standard that remains an “exacting standard” and demands, among other things, that the preferential treatment be “precisely tailored.”¹⁷⁰ What the *Grutter* Court *did*—although you have to look outside the majority opinion to know it—was uphold a quota-like policy that uses race as a decisive super factor,¹⁷¹ using a standard more deferential than the *intermediate* scrutiny applied to the Virginia Military Institute.¹⁷²

166. *Grutter*, 539 U.S. at 342.

167. *Id.*

168. See Rosman, *supra* note 72 (“suggest[ing] that there are many systems of admission using racial preferences that *could be found* to be illegal under [*Grutter* and *Gratz*] if a lower court were so inclined”).

169. *Grutter*, 539 U.S. at 335.

170. *Id.* at 323.

171. See *Grutter*, 137 F. Supp. 2d at 837, 841 (finding “mathematically irrefutable proof that race is indeed an enormously important factor” in the Law School’s admissions process.” For example, “the relative odds of acceptance for Native American, African American, Mexican American and Puerto Rican applicants were many times greater than for Caucasian applicants.” “For perspective, attaining a relative odds of 2 or 3 for cure of a disease is often the goal of a medical study.” (quoting Exhibit 137, p. 8)); Presser, *supra* note 41, at 799 (referring to “the majority’s approval of what we might label the thinly disguised quota system in *Grutter*”).

172. *United States v. Virginia*, 518 U.S. 515 (1996). See *Grutter*, 539 U.S. at 366 (Thomas, J., concurring in part, dissenting in part) (“[I]n *Virginia*, where the standard of

Though the Supreme Court found that the Law School was paying only “[s]ome attention to numbers”¹⁷³ and would “like nothing better than to find a race-neutral admissions formula,”¹⁷⁴ schools cannot be confident that other courts will be so generous. However, the very fact that the lower courts can reasonably follow either what the Supreme Court said or, instead, what it did raises the question of whether the Michigan decisions gave us a workable standard or a standardless standard.¹⁷⁵ The answer to that question will become clear as the lower courts work through the various litigation issues discussed here. However, I suspect that time will prove that the *Grutter* and *Gratz* standard is, indeed, unworkable. If that proves true, the issue of race-based admissions will be before the High Court again sooner rather than later.

IV. CONCLUSION

As this article has made clear, there will be numerous avenues of attack for future legal challenges to race-based admissions. I expect those challenges to be aimed, in the short term, at ensuring that the Supreme Court’s temporary and limited reprieve for race-based admissions is not transformed into an endorsement of the status quo by universities or the lower courts. In the long term, litigation will also be aimed at putting the diversity rationale in front of the High Court again. The

review dictated that greater flexibility be granted to VMI’s educational policies than the Law School deserves here, this Court gave no deference.”); Marisa Lopez, *Constitutional Law: Lowering the Standard of Strict Scrutiny*, 56 FLA. L. REV. 841, 849, 851 (2004) (“In Virginia, six justices invalidated the institute’s admissions policy, holding that deferential review was error under intermediate scrutiny. Five of those same Justices upheld the policy in the instant case, holding that deferential review and a good faith presumption were appropriate under strict scrutiny.” The “Court relied almost exclusively on Respondents’ testimony.”). See also *Grutter*, 539 U.S. at 380 (Rehnquist, J., dissenting) (“Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.”); Schuck, *supra* note 107 (“Justice O’Connor’s strict scrutiny has all the strictness of an indulgent mother who gives her affable son the keys to the family car without questioning him about his drinking.”). Even supporters of the diversity rationale concede that a deferential standard was used. See, e.g., Washington, *supra* note 17, at 978 (stating that the *Grutter* “majority dispensed with a searching examination of the appreciable nexus between racial heterogeneity and an enhanced learning environment, opting instead for the convenience of blind deference to the Law School”).

173. *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323).

174. *Id.* at 343 (quoting Brief for Respondents Bollinger et al. at 34).

175. See Lopez, *supra* note 172, at 851 (“It is unclear whether future courts will apply the analysis of [*Grutter*] despite its tendency to produce outcomes that conflict with *Virginia*.”).

specifics of future litigation will depend on the details of universities' revised admissions policies. However, one thing is certain: The legal landscape for race-based admissions will be littered with potholes.

The greatest number of potential issues for litigation concern the narrow tailoring requirements laid down by *Gratz* and *Grutter*, involving both the scope and duration of preferences, as well as the use of race-neutral methods of achieving diversity. Concerning the current scope of preferences, the mere elimination of a point-based admissions system is not enough. Any admissions policy that gives minorities a preference without a highly individualized showing of how the applicant will contribute to broad-based intellectual diversity is vulnerable to challenge. Schools that chose, for efficiency sake, to limit the most highly individualized review to a subset of their applicants, must ensure that the filtering process, if race-based, also complies with narrow tailoring requirements. And non-minority applicants must be given the opportunity to describe their potential contributions to diversity. Moreover, race cannot be a decisive factor in the admissions process. And any race-based admissions system will be at risk if it consistently admits much more than a critical mass of minorities. Schools must also be wary of treating race as substantially more important than nonracial diversity factors or otherwise putting race on a special footing. Universities need to be concerned about underinclusiveness, not only in their treatment of other diversity factors, but also in their exclusion of certain groups from those receiving diversity-based preferences.

The time-related restrictions laid down by the Michigan decisions involve both the phasing out of race-based admissions and the phasing in of race-neutral alternatives. Strengthening those restrictions and ensuring that the lower courts treat them as an essential part of narrow tailoring is one of the likely goals of future legal challenges. Such challenges will also seek to ensure that schools remember that the Court's grant of compelling interest status to student diversity was made conditional on time limits. There has been much discussion of the Court's twenty-five year time limit and the degree to which it is binding. But one thing is clear: Universities still using race-based admissions twenty-five years from now will, at best, be doing so without the constitutional cover of *Grutter*. In the

shorter term, schools need to take concrete steps to implement the Court's call for sunset provisions in race-conscious admissions policies.

However, neither sunset provisions nor the twenty-five year limit give schools a license to delay the serious consideration and adoption of race-neutral alternatives for promoting diversity. Given the Supreme Court's recognition that a wide variety of such alternatives are already available, the Justices clearly envision the transition to race-neutral methods as a process that should start sooner rather than later, without unnecessary delay in reducing the role of race in admissions. Universities using race will be particularly vulnerable if they fail to speedily incorporate those race-neutral techniques that require no sacrifice in academic excellence, including the elimination of non-merit-based admissions criteria that disparately impact minorities. Schools should keep in mind that the legal test for the sufficiency of race-neutral alternatives is met when a critical mass of underrepresented minorities is attained. Schools will make themselves inviting targets for litigation if they return to race-based admissions policies to further boost minority enrollment after successfully achieving a critical mass through race-neutral means.

Schools should also remember that the attainment of a critical mass is a permissible goal that allows a university to pay *some* attention to numbers; it is not an excuse for giving short thrift to the various requirements of narrow tailoring. Finally, schools would be wise to keep the legal burden of proof in mind. If schools push the limits of the new standard for race-based admissions and wind up getting sued, it is they who will have the burden of proving compliance with all the requirements of narrow tailoring.

However, narrow tailoring concerns are only a portion of the legal obstacles that race-based admissions policies will face in the coming years. For one thing, there are a number of interesting issues concerning when schools may rely on diversity as a justification for racial preferences. There is language in *Grutter* suggesting that K-12 schools may not be able to rely as firmly as universities, or perhaps at all, on the diversity rationale. Even in higher education, the diversity rationale does not automatically provide legal cover for using race in admissions. A school will lose its cover if it can be demonstrated that the benefits of

broad-based intellectual diversity are not the real motive behind its race-based admissions policy. In particular, the goal of racial balancing remains unconstitutional. And even broad-based diversity may be found insufficient to justify racial admissions preferences under state constitutions and civil rights statutes.

In the longer term, the viability of the *Grutter* diversity rationale itself may be called into question, as litigation over narrow tailoring issues and who can rely on the diversity rationale expose the fictions, tensions, and even incoherence that plague the Michigan decisions. For example, the difficulty lower courts will have in distinguishing permissible from prohibited uses of race has the potential to make the *Grutter* diversity rationale and narrow tailoring standard unworkable in practice. The very fact that the lower courts can reasonably be guided either by what the Supreme Court said or, instead, by what it actually upheld in *Grutter*, suggests a standardless standard.

The tension between the limited use of race envisioned by the Court and the reality on the ground at selective universities across the nation is just one of the many stress fractures and ambiguities that threaten the *Grutter* rationale's long term viability. Consider the tension between the concept of critical mass—defined in terms of a uni-dimensional diversity—and the far broader type of diversity envisioned by the Court and reflected in its narrow tailoring requirements. Consider also that, for critical mass theory and the diversity rationale to be workable justifications for race-based admissions, they must, at a minimum, be defined precisely enough to be distinguishable from the prohibited practice of racial balancing. Yet, who can doubt that the distinction is murky at best?

Then there are the temporal strains that will threaten the coherence of *Grutter's* rationale and standard in the future. Consider the long odds against the disappearance of the racial gap in academic performance in the next twenty-five years, as well as the inertial and political forces that will make it difficult for the academe to completely abandon the use of race. Those factors make it all too likely that racial diversity, or critical mass, and satisfaction of *Grutter's* time-related limits—both essential components of the Court's compromise—will become increasingly incompatible objectives in the coming years. If that happens, the compromise—and with it, *Grutter's* remaining

coherence—will tear apart before the courts are ever faced with figuring out the meaning of the twenty-five year deadline.

In the nearer term, the sharp tensions and conspicuous ambiguities that plague the Michigan decisions are sure to produce, at very least, a large amount of litigation. As reality clashes with doctrine, a generous supply of conflicting interpretations and circuit court splits can be expected. In turn, these conflicts may well stretch the *Grutter* rationale to its breaking point. Whether prompted by circuit splits, unworkable doctrine, or changes in the Supreme Court's personnel, the fundamentals of the Michigan decisions may well be in front of the Justices long before twenty-five years have passed. Though the final chapter will not be written for many years, I see in the strains and flaws of the Michigan decisions the beginning of the end for race-based admissions and the diversity rationale.