

Constitutional Law—Law School’s Race-Conscious Admissions Policy Survives Equal Protection Analysis—*Grutter v. Bollinger*, 539 U.S. 306 (2003)

The Fourteenth Amendment of the United States Constitution guarantees all people the right to be treated equally.¹ Although the Equal Protection Clause extends this entitlement of equality to all races and ethnicities, the United States Supreme Court has held that certain race-conscious policies survive strict scrutiny analysis.² In *Grutter v. Bollinger*,³ the Supreme Court considered whether the University of Michigan Law School (Law School) violated the Fourteenth Amendment by using race as a factor in determining student admissions.⁴ The Court declared the Law School’s admissions program constitutional because it is narrowly tailored to achieve a compelling interest: the obtainment of educational benefits that emerge from student body diversity.⁵

The admissions policy at the Law School relies heavily on Law School Admission Test (LSAT) scores and undergraduate grade point averages (UGPA), but also expresses the Law School’s commitment to diversity by using procedures to admit students from different racial and ethnic backgrounds.⁶ Although the Law School does not outline a percentage requirement for diversity admissions, it does try to enlist a “critical mass” of underrepresented minority students.⁷ Barbara Grutter, a white applicant with a

1. U.S. CONST. amend. XIV. The Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

2. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (deciding all racial classifications imposed by federal or state officials must satisfy strict scrutiny). Racial classifications are constitutional only if they are narrowly tailored to further a compelling government interest. *Id.*; *see United States v. Paradise*, 480 U.S. 149, 185 (1987) (holding district court’s race-conscious relief order constitutional under strict scrutiny); *see also Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (rejecting undergraduate university’s admission policy for not complying with “narrowly tailored” requirement); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-08 (1989) (concluding no narrow tailoring nor compelling interest in city’s race-based apportionment of construction contracts); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (explaining preferential protection against layoffs of minorities must meet strict scrutiny test).

3. 539 U.S. 306 (2003).

4. *Id.* at 311 (determining whether equal protection prohibits school’s consideration of race in admissions policy).

5. *Id.* at 343 (holding Law School’s use of race met strict scrutiny requirements).

6. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 825-29 (E.D. Mich. 2001) (explaining particular commitment to establishing diversity through admitting African Americans, Hispanics, and Native Americans), *rev’d*, 288 F.3d 732 (6th Cir. 2002), *aff’d*, 539 U.S. 306 (2003). The policy also seeks diversity by admitting individuals with distinctive perspectives, experiences, and leadership qualifications. *Id.* at 827. In addition, the Law School bases admission on several “soft variables,” such as the enthusiasm of recommendations and the quality of the undergraduate institution. *Id.* at 826.

7. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 832 (E.D. Mich. 2001) (describing “critical mass” as meaningful representation of minorities to realize educational benefits of student diversity), *rev’d*, 288 F.3d 732

3.8 UGPA and 161 LSAT score, brought suit against the Law School and the University of Michigan's President Lee Bollinger after she was denied admission to the Law School.⁸ Grutter claimed that the Law School discriminated against her on the basis of her race and, thus, violated her Fourteenth Amendment equal protection rights.⁹

The district court held that the Law School's admissions policy contravenes Fourteenth Amendment principles.¹⁰ Applying strict scrutiny analysis, the court concluded that student diversity is not a compelling government interest.¹¹ Furthermore, the court argued that even if student diversity is a compelling interest, the Law School policy's use of race is not narrowly tailored to obtain this goal.¹² The Sixth Circuit Court of Appeals reversed, holding that student diversity is a compelling state interest and that the policy is narrowly tailored because it uses race merely as a "plus" factor in determining admissions.¹³ Agreeing with the appeals court, the Supreme Court held that the Law School's policy withstood strict scrutiny because the program is narrowly tailored to advance the government's compelling interest in achieving the educational benefits that derive from student body diversity.¹⁴

(6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003). According to several witnesses, by admitting a "critical mass" of minorities, the Law School's policy prevents such students from feeling isolated and, as a result, encourages them to contribute freely in the classroom. *Id.* at 832-36. Although the program does not require a certain percentage of minority students to be admitted, a "critical mass" generally falls in the range of eleven to seventeen percent. *Id.* at 840.

8. 539 U.S. at 316-17. Along with the Law School and President Bollinger, the other named defendants were the Regents of the University of Michigan, Dean Jeffrey Lehman, and Director of Admissions Dennis Shields. *Id.*

9. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 824 (E.D. Mich. 2001) (arguing Law School used race as predominant factor in admissions), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003). Grutter asserted that minority students have a greater chance of admission than non-minority students with similar credentials. *Id.* Grutter also claimed a violation of Title VI of the 1964 Civil Rights Act that forbids discrimination by institutions receiving federal funds. *Id.*

10. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001) (deciding use of race in admissions unconstitutional), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

11. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 847-49 (E.D. Mich. 2001) (holding student diversity not compelling interest to justify policy's use of race as factor), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003). The district court concluded that although racial diversity may provide educational and social benefits, it is not a compelling state interest. *Id.* at 850.

12. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850-53 (E.D. Mich. 2001) (identifying reasons why policy not narrowly tailored), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003). The district court proffered five reasons why the program is not narrowly tailored: the term "critical mass" is not properly defined; the Law School does not limit the duration of the use of race in its admissions process; the concept of "critical mass" is essentially a quota system; the Law School has no logical reason for its particular commitment to African Americans, Hispanics, and Native Americans; and, the Law School has not investigated race-neutral alternatives. *Id.*

13. *Grutter v. Bollinger*, 288 F.3d 732, 742-46 (6th Cir. 2002) (determining constitutionality of admissions program), *aff'd*, 539 U.S. 306 (2003). The appeals court emphasized that the Law School looks at all applicants individually and only uses race and ethnicity as a "plus" factor. *Id.* at 746. In addition, the court determined that the policy is narrowly tailored because it does not maintain a quota system nor set aside seats for underrepresented minority students. *Id.*

14. 539 U.S. at 343 (deciding Equal Protection Clause does not prohibit use of race in admissions

The purpose of the Fourteenth Amendment is to eliminate state-imposed racial discrimination.¹⁵ The Supreme Court has consistently held that preferring individuals solely because of their race or ethnicity is discriminatory under the Equal Protection Clause.¹⁶ Racial classifications, therefore, are extremely suspect and upheld only if they are narrowly tailored to achieve a compelling government interest.¹⁷ In addition, the Supreme Court has held that strict scrutiny applies to any classification of this nature, regardless of the race of the individuals benefited or burdened by the challenged act.¹⁸

In *Regents of the University of California v. Bakke*,¹⁹ the Supreme Court determined that the University of California at Davis Medical School's dual admissions system, which set aside sixteen seats for minority applicants in the special admissions program, was unconstitutional.²⁰ Applying strict scrutiny analysis, Justice Powell stated that attaining a diverse student body is a

decisions).

15. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (explaining purpose of Equal Protection Clause); *see Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938) (describing State's responsibility to provide equal protection of laws).

16. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., plurality opinion) (stating racial preferences violate Constitution); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (arguing distinctions between citizens based solely on race contravene principles of equality).

17. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (holding all racial classifications must satisfy strict scrutiny test); *see, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (explaining judicial inquiry used for racial classifications); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (noting two prongs of strict scrutiny examination); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J., plurality opinion) (describing standard of review as narrowly tailored means to serve compelling government interest); *see also United States v. Paradise*, 480 U.S. 149, 171 (1987) (looking closely to meaning of "narrowly tailored"). When determining whether a particular measure is narrowly tailored, the Court should look at the following factors: the necessity of the relief and availability of race-neutral alternatives, the flexibility and duration of the policy, the relationship between the numerical goal to the work force, and the impact of the policy on innocent third parties. *Paradise*, 480 U.S. at 171. *See generally* Arunabha Bhoomik, *The Affirmative Action Debate*, 40 HARV. J. ON LEGIS. 195 (2003) (analyzing race-neutral alternatives, such as class-based, "direct measures," and "X-percent" programs); John P. Cronan, *The Diversity Justification in Higher Education: Evaluating Disadvantaged Status in School Admissions*, 34 SUFFOLK U. L. REV. 305 (2001) (discussing pros and cons of class-based alternative system); Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521 (2002) (arguing top percentage plan not necessarily race neutral); Douglass C. Lawrence, Note, *Challenging Affirmative Action: Does Diversity Justify Race-Conscious Admissions Programs?*, 36 SUFFOLK U. L. REV. 83 (2002) (demonstrating overtaking of race-neutral policies by race-conscious admissions programs).

18. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (indicating racial preferences must receive most searching examination). The standard of scrutiny does not change merely because the people who are burdened by the classification have not been subject to governmental discrimination in the past. *Id.* at 273; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (explaining reasons strict scrutiny test applies to all racial classifications).

19. 438 U.S. 265 (1978).

20. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (Powell, J., plurality opinion) (holding special admissions program invalid under Fourteenth Amendment). *But see id.* at 378 (Brennan, J., dissenting in part) (arguing Davis program does not violate Constitution). Applying intermediate scrutiny, Brennan concluded that the Davis program was constitutional because remedying the effects of past discrimination was sufficiently important to validate the use of race in determining admissions. *Id.* at 362 (Brennan, J., dissenting in part).

compelling government interest because it introduces various experiences and outlooks into the classroom, as well as incorporates a diverse exchange of ideas.²¹ The Court, however, held that reserving a specific number of seats for individuals from particular minority groups was not narrowly tailored to achieve this objective.²² Comparing the Harvard College program to that of the Davis policy, Justice Powell argued that race can be considered as a “plus” factor in determining student admissions, but the use of a quota system violates the Fourteenth Amendment.²³

The fractured nature of the Supreme Court’s opinion in *Bakke* promulgated two decades of disagreement in circuit courts over whether student diversity qualifies as a compelling state interest.²⁴ In 1996, the Fifth Circuit held that the use of race to achieve student diversity opposes Fourteenth Amendment principles.²⁵ The Ninth Circuit, however, upheld *Bakke* as binding precedent

21. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-14 (1978) (Powell, J., plurality opinion) (discussing government’s compelling interest in diverse student body). *But see* Bhoumik, *supra* note 17, at 199 (stating diversity rationale invalid if no attempts made to diversify student body beyond race); Curt A. Levey, *Racial Preferences in Admissions: Myths, Harms, and Alternatives*, 66 ALB. L. REV. 489, 495-96 (2003) (explaining student diversity valuable but not necessarily compelling interest); Lawrence, *supra* note 17, at 99 (arguing race-conscious programs unjustly assume racial diversity equates to viewpoint diversity). *See generally* Brief of Amici Curiae Harvard Black Law Students Association, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (illustrating significance of having diverse student body in law school); Devon W. Carbedo & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149 (2003) (defining various functions and benefits of diversity); Danielle C. Gray & Travis LeBlanc, *Integrating Elite Law Schools and the Legal Profession: A View from the Black Law Students Associations of Harvard, Stanford, and Yale Law Schools*, 19 HARV. BLACKLETTER L.J. 43 (2003) (emphasizing law school’s duty to train racially diverse student body).

22. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-20 (1978) (Powell, J., plurality opinion) (concluding set-aside program takes away non-minority students’ right to compete for special admissions seats). *But see id.* at 378 (Brennan, J., dissenting in part) (stating set-aside program for minorities does not violate Equal Protection).

23. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-19 (1978) (Powell, J., plurality opinion) (explaining importance of looking at all applicants individually to determine diversity). Although race can be viewed as a factor to determine one’s potential contribution to diversity, the Court held that the Davis special admissions plan was not flexible enough to consider all elements of diversity offered by individual applicants. *Id.* at 317-20. *But see Sixth Circuit Upholds Affirmative Action at the University of Michigan Law School—Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), 116 HARV. L. REV. 720, 726-27 (2002) [hereinafter *Sixth Circuit Upholds Affirmative Action*] (questioning whether admissions policies can consider race as “plus” factor without paying attention to numbers).

24. *See* Bhoumik, *supra* note 17, at 199-203 (explaining different views in *Bakke*); Levey, *supra* note 21, at 492-93 (noting no Justice joined Powell’s diversity rationale in *Bakke*); Lawrence, *supra* note 17, at 87-93 (analyzing opinions of *Bakke* Justices); Jennifer L. Shea, Note, *Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions*, 78 IND. L.J. 587, 591-99 (2003) (describing confusion in interpreting *Bakke* decision). Without reaching the question of equal protection, four Justices concurred with Powell, declaring the Davis program unlawful; whereas, the other four Justices would have upheld the race-conscious policy, but concurred with Powell’s holding that schools could consider race in admissions. Bhoumik, *supra* note 17, at 199-200.

25. *Hopwood v. Texas*, 78 F.3d 932, 944-48 (5th Cir. 1996) (explaining objective of Equal Protection Clause to end racially-motivated action by government), *aff’d in part and rev’d in part*, 236 F.3d 256 (5th Cir. 2000). The Fifth Circuit held that Justice Powell’s opinion in *Bakke* was not binding precedent because no other Justice joined his position that diversity is a compelling government interest. *Id.* at 944.

and agreed that educational diversity is a compelling government interest.²⁶ Other circuit courts have avoided determining whether student diversity is a compelling interest by invalidating race-conscious programs because they were not narrowly tailored in accordance with strict scrutiny requirements.²⁷

In *Grutter v. Bollinger*, the Supreme Court finally put an end to the debate regarding student body diversity by holding that the race-conscious admissions policy at the Law School does not violate the Equal Protection Clause.²⁸ The Court concluded that there is a compelling interest in student body diversity because such diversity better prepares students to enter a diverse workforce by exposing them to a varied spectrum of cultures, ideas, and viewpoints.²⁹ The Court also grounded its decision partially on the fact that law schools give rise to many of the Nation's leaders.³⁰ The Court reasoned that law school enrollments must consist of students from different racial and ethnic backgrounds so that leadership opportunities are open to deserving individuals from every race and ethnicity.³¹

The Supreme Court further held that the admissions policy is narrowly tailored because the Law School considers all applicants individually and does not set racial quotas.³² In addition, the program seeks to admit a "critical mass" of underrepresented minority students by looking at race merely as a "plus" factor.³³ The Court bolstered its argument by acknowledging that the Law

26. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200-01 (9th Cir. 2000) (concluding Fourteenth Amendment permits use of race in admissions to achieve diversity). The Ninth Circuit held that Powell's opinion in *Bakke* was binding over issues dealing with race-conscious educational programs. *Id.*

27. *See Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1250-51 (11th Cir. 2001) (stating issue of student diversity as compelling interest unclear); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 701 (4th Cir. 1999) (explaining no Supreme Court resolution regarding student body diversity existed); *Wessmann v. Gittens*, 160 F.3d 790, 795-96 (1st Cir. 1998) (assuming *Bakke* still good law without actually deciding issue).

28. 539 U.S. at 343 (holding Law School admissions policy not in violation of Fourteenth Amendment).

29. *Id.* at 330 (describing benefits of student body diversity); *see supra* note 21 and accompanying text (tracing compelling interest in student diversity). *Contra Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996) (holding student diversity not compelling interest under strict scrutiny analysis), *aff'd in part and rev'd in part*, 236 F.3d 256 (5th Cir. 2000); *but see* 539 U.S. at 347 (Scalia, J., dissenting in part) (arguing maintaining prestigious institution should not qualify as satisfying compelling state interest); *id.* at 358 (Thomas, J., dissenting in part) (stating no compelling interest in having elite law school).

30. 539 U.S. at 332 (explaining how law schools train future leaders of America). *But see id.* at 360 (Thomas, J., dissenting in part) (indicating Law School trains very few citizens of Michigan).

31. *Id.* at 332 (describing societal significance of minorities achieving leadership roles).

32. *Id.* at 334-39 (looking at several characteristics of diversity besides race ensures individualized consideration of all applicants); *see also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-19 (1978) (illustrating individual qualifications contributing to diversity). *But see* 539 U.S. at 389 (Kennedy, J., dissenting) (arguing numerical goal of minority student admissions indistinguishable from quotas).

33. 539 U.S. at 335-38 (explaining Law School's goal of attaining "critical mass" of minorities does not represent quota system). *But see id.* at 375 (Rehnquist, C.J., dissenting) (stating "critical mass" equivalent to racial balancing); *Sixth Circuit Upholds Affirmative Action*, *supra* note 23, at 726-27 (questioning school's ability to consider race as "plus" factor without taking numbers into account). While the policy describes the significance of achieving a "critical mass" of underrepresented minority students, it does not explain why the Law School applies this concept differently among African Americans, Hispanics, and Native Americans. 539

School had seriously considered adopting race-neutral alternatives.³⁴ Additionally, the Court agreed that there would eventually be a termination point for the Law School's race-conscious admissions system.³⁵ Therefore, the Supreme Court held that the policy is constitutional under strict scrutiny analysis because the Law School's consideration of race in its admissions decisions is narrowly tailored to further the compelling interest of student body diversity.³⁶

The Supreme Court in *Grutter* correctly concluded that student diversity provides educational and societal benefits because the classroom experience is undeniably more valuable when students with distinctive perspectives and backgrounds share their opinions and views.³⁷ A diverse classroom environment not only improves the quality of higher education, but also prepares students to enter an increasingly diverse workforce.³⁸ Although the Court effectively clarified the Law School's interest in student diversity, it failed to explain the Law School's apparent commitment to achieve a particular type of racial diversity focused primarily on individuals of African-American, Hispanic, and Native-American descent.³⁹ The Court did not provide a reason for the Law School's disparate treatment between the favored minority targets and other minority groups who have also been discriminated against and underrepresented in undergraduate and graduate universities.⁴⁰ By allowing the Law School to target specific racial and ethnic groups in promoting a student body with diverse perspectives, the Court equated race with viewpoint and undermined the significance of other individual characteristics that contribute to diversity.⁴¹

U.S. at 375 (Rehnquist, C.J., dissenting).

34. See 539 U.S. at 340-41 (holding policy narrowly tailored even though Law School did not exhaust every neutral alternative). The Court agreed with the Law School that using a lottery system or decreasing the emphasis on UGPA and LSAT scores are not adequate race-neutral alternatives, for they would lower the academic quality of the Law School. *Id.*

35. *Id.* at 343 (concluding race-conscious admissions unlawful in twenty-five years). *But cf. id.* at 386-87 (Rehnquist, C.J., dissenting) (explaining program not narrowly tailored because no time limitation implemented for using race-conscious system).

36. *Id.* at 343 (holding policy does not violate Equal Protection Clause).

37. See *supra* note 21 and accompanying text (looking at pros and cons of treating student body diversity as compelling interest); see also *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001) (describing educational benefits of student diversity as important but not compelling), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

38. 539 U.S. at 330 (explaining how diverse student body prepares students to enter diverse workforce).

39. See *Grutter v. Bollinger*, 288 F.3d 732, 791-92 (6th Cir. 2002) (Boggs, J., dissenting) (arguing Law School gave no explanation for its racial preference), *aff'd*, 539 U.S. 306 (2003); *supra* note 6 and accompanying text (discussing policy's commitment to admitting African Americans, Hispanics, and Native Americans).

40. See *Grutter v. Bollinger*, 288 F.3d 732, 791-92 (6th Cir. 2002) (Boggs, J., dissenting) (indicating no rational basis for selecting particular minority groups to establish diversity), *aff'd*, 539 U.S. 306 (2003).

41. See *Grutter v. Bollinger*, 288 F.3d 732, 791-92 (6th Cir. 2002) (Boggs, J., dissenting) (questioning relevance of race when Law School only concerned with diversity of experience), *aff'd*, 539 U.S. 306 (2003). An admissions scheme that focuses on diverse experiences without regards to race, such as struggling with

The most evident flaw in the Supreme Court's holding is the determination that the Law School's admissions policy is narrowly tailored without providing sufficient evidence to support this conclusion.⁴² For example, the Law School ambiguously defines the term "critical mass" as a meaningful representation of underrepresented minority students, yet the Court did not explain why the Law School applies this concept differently among African Americans, Hispanics, and Native Americans.⁴³ Furthermore, the Court argued that the policy does not rely on quotas, but the insignificant variation in percentages of minority admissions throughout the years indicates some attention to numbers.⁴⁴ The Supreme Court has continuously held that race-conscious programs must have a durational limit to be narrowly tailored, but the Law School did not establish a termination point for its admissions policy.⁴⁵ Although the Court suggested that the Law School's policy will be unlawful in twenty-five years, the fact remains that the admissions board failed to limit its race-conscious system.⁴⁶ Finally, the Supreme Court baselessly held that the Law School seriously considered a race-neutral program because the Law School did not sufficiently prove that the board actually investigated alternative means to increase minority admissions.⁴⁷

Due to the considerable flaws in the Court's reasoning in *Grutter*, future litigation will try to answer several unresolved questions regarding racial preferences in education.⁴⁸ The Court's approval of the Law School's ambiguous definition of "critical mass" may result in future lawsuits arguing

poverty or overcoming illness, would also provide advantages to racial and ethnic minorities. *Id.* at 807; *see also* Lawrence, *supra* note 17, at 99 (emphasizing error of equating racial diversity with viewpoint diversity).

42. *See supra* note 12 and accompanying text (analyzing various reasons policy not narrowly tailored).

43. *See supra* note 7 and accompanying text (defining meaning of "critical mass"); *see also* 539 U.S. at 381-82 (Rehnquist, C.J., dissenting) (arguing Law School applies concept of "critical mass" differently among minorities). Admitting African-American students at a significantly higher number than the other two favored minority groups demonstrates that the Law School applies this concept of "critical mass" differently among minorities. 539 U.S. at 381-82 (Rehnquist, C.J., dissenting). Additionally, the Law School fails to explain why more African Americans are needed over Hispanics and Native Americans to promote student body diversity or achieve a "critical mass." *Id.* (Rehnquist, C.J., dissenting).

44. *See* 539 U.S. at 389 (Kennedy, J., dissenting) (arguing minor fluctuation among accepted minorities proves policy acts like quota system); *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850-51 (E.D. Mich. 2001) (discussing minority percentages enrolled each year), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

45. *See* 539 U.S. at 386-87 (Rehnquist, C.J., dissenting) (stating Law School recognizes but has not set termination point for race-conscious policy); *see also* *United States v. Paradise*, 480 U.S. 149, 171 (1987) (listing race-conscious system's duration as factor in determining if government policy narrowly tailored or not).

46. *See* 539 U.S. at 386-87 (Rehnquist, C.J., dissenting) (arguing Court's holding permits Law School to use racial preferences on permanent basis).

47. *See* *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 852 (E.D. Mich. 2001) (concluding Law School failed to consider race-neutral means), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003); *see also* Bhoomik, *supra* note 17, at 204-05 (discussing different race-neutral alternatives).

48. *See* 539 U.S. at 348 (Scalia, J., dissenting in part) (predicting issues in future lawsuits dealing with racial preferences).

whether this concept is indistinguishable from a quota system.⁴⁹ Additionally, lawsuits may explore what amount of minority admissions exceeds or falls short of the Law School's "critical mass" objective.⁵⁰ Furthermore, minority groups excluded from the Law School's "critical mass" representation may bring litigation challenging the institution's commitment to only particular races and ethnicities.⁵¹

The *Grutter* Court considered whether the race-conscious admissions policy at the University of Michigan Law School violates the Equal Protection Clause of the Fourteenth Amendment. The Court abandoned the rigorous examination that protects individuals from unfair racial classifications by holding that the admissions policy meets strict scrutiny requirements without providing sufficient evidence that the program is, in fact, narrowly tailored to achieve the Law School's interest in student diversity. Consequently, the Court's decision leaves the issue regarding racial preferences in educational institutions open for further interpretation.

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49. *Id.* (Scalia, J., dissenting in part) (foreseeing problems arising from issue of "critical mass").

50. *Id.* at 349 (Scalia, J., dissenting in part) (anticipating issues dealing with "critical mass").

51. *See id.* (Scalia, J., dissenting in part) (expecting nontargeted minority groups to bring suits).