

4-20-2008

How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied Upon in Grutter

Patrick M. Garry

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>

 Part of the [Civil Rights and Discrimination Commons](#), [Education Law Commons](#), and the [Legal Education Commons](#)

Recommended Citation

Patrick M. Garry *How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied Upon in Grutter*, 35 Pepp. L. Rev. 3 (2008)

Available at: <http://digitalcommons.pepperdine.edu/plr/vol35/iss3/4>

This Symposium is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied Upon in *Grutter*

Patrick M. Garry*

- I. INTRODUCTION
- II. THE NATURE OF THE *GRUTTER* DIVERSITY INTEREST
 - A. *The Grutter Decision*
 - B. *Diversity As a Means to Educational Benefits*
 - C. *The Court's Unprecedented Deference to Academic Institutions*
 - D. *Alternative Ways of Achieving Educational Benefits*
- III. CONCLUSION

I. INTRODUCTION

In *Grutter v. Bollinger*,¹ the Supreme Court recognized student body diversity as a compelling state interest that justified the use of racial preferences in selecting applicants for admission to public university law schools.² Never before in its strict scrutiny analysis had the Court recognized diversity as a compelling interest that could sustain a racial discrimination challenge brought under the Fourteenth Amendment's Equal Protection Clause. Normally, any state action reviewed under a strict scrutiny approach is destined for invalidation, for as Gerald Gunther once put it: "[S]trict' in theory and fatal in fact."³ But in *Grutter*, the Court bucked the trend and upheld the race-based admissions policy.

Given the rarity of a state action surviving strict scrutiny review, it is instructive to examine the nature of the diversity interest recognized by the Court in *Grutter*, especially since it is a diversity that seems to completely transform the way strict scrutiny is applied. Instead of rigorously examining

* Associate Professor, University of South Dakota School of Law.

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

2. *Id.* at 325.

3. Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

the stated purposes and aims of the racial discrimination at issue, the Court appeared to give great deference to whatever goals and justifications the government offered.⁴ The Court did not, as it so often does in other applications of strict scrutiny, conduct an independent, skeptical inquiry into the stated rationales for the government's action;⁵ nor did the Court seriously consider whether the government failed to pursue other less discriminating alternatives that would have produced the same desired racial diversity among its students; nor did the Court engage in any real effort to determine whether the government had even established a sufficient trustworthiness in matters of diversity so as to be rewarded with such deference.

This Article will examine the nature of the diversity interest recognized in *Grutter*. It will ask the questions that courts normally ask during a strict scrutiny review, but which *Grutter* failed to ask. And in doing so, this Article will question whether higher education, in connection with the issue of diversity, should be given the deference that the Court granted it.

II. THE NATURE OF THE *GRUTTER* DIVERSITY INTEREST

A. *The Grutter Decision*

At issue in *Grutter* was the University of Michigan Law School's (hereinafter "Law School") race-conscious admissions policy.⁶ Petitioner Barbara Grutter, a white applicant to the Law School who had qualifying test scores and grade point average, filed suit after she was denied admission, claiming that the Law School had discriminated against her on the basis of race in violation of the Fourteenth Amendment's Equal Protection Clause.⁷ The Law School admitted that it used a race-conscious admissions policy to enroll a critical mass of certain minorities, and that this critical mass was "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."⁸ According to the Law School, only a critical mass could achieve the "educational benefits of diversity."⁹

4. *Grutter*, 539 U.S. at 328.

5. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1997).

6. *Grutter*, 539 U.S. at 311.

7. Barbara Grutter also possessed numerous 'diversity' factors: "She is one of nine children, the daughter of an itinerant, financially struggling Protestant minister [and had] worked in an inner-city clinic for two years to save money for community college." June Kronholz, *Does a White Mom Add Diversity?* WALL ST. J., June 25, 2003, at B3.

8. *Grutter*, 539 U.S. at 318. At trial, the Director of Admissions for the law school testified that the race of applicants must be considered "because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores." *Id.*

9. *Id.* at 319. According to the Court, when such a critical mass is present, "racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a

In her opinion for the Court, Justice O'Connor recognized that the Law School's admissions policy "must be analyzed by a reviewing court under strict scrutiny."¹⁰ When strict scrutiny is employed, a race-based action can survive only if it is narrowly tailored to serve a compelling government interest.¹¹ Relying upon Justice Powell's opinion in *Bakke*,¹² Justice O'Connor ruled that the attainment of a diverse student body in the realm of higher education becomes a compelling government interest because of the unique and vital educational benefits it provides.¹³ According to Justice O'Connor, diversity promotes "cross-racial understanding," helps students to "better understand persons of different races," and leads to a "more enlightening and interesting" classroom discussion.¹⁴

Normally, the use of strict scrutiny spells the demise of whatever government action is being challenged.¹⁵ It is highly unusual for the Court

variety of viewpoints among minority students." *Id.* at 320.

10. *Id.* at 326 (quoting *Adarand Constructors*, 515 U.S. at 227). Since the Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," any governmental action based on race classifications must be subject to "detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Id.* (quoting U.S. CONST. amend. XIV; *Adarand*, 515 U.S. at 227).

11. *Id.*

12. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978). The *Bakke* decision produced six separate opinions, none of which produced a majority of the Court. Justice Powell provided the fifth vote which broke the logjam between the four Justices who would have upheld the racial set-aside program on the ground that race could be used to remedy the injuries caused by past racial prejudice. *Id.* at 325 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices never even reached the constitutional question, but struck down the program for statutory reasons. *Id.* at 408 (Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). Justice Powell's opinion announcing the judgment of the Court invalidated the set-aside program, yet reversed the state court's injunction against any use of race whatsoever. *Id.* at 271-72 (Powell, J., plurality opinion). Thus, according to O'Connor's opinion in *Grutter*, the only holding in *Bakke* was that a "[s]tate has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Grutter*, 539 U.S. at 322-23 (quoting *Bakke*, 438 U.S. at 320).

13. *Grutter*, 539 U.S. at 323-35.

14. *Id.* at 330 (stating that the Law School's admissions policy is "defined by reference to the educational benefits that diversity is designed to produce").

15. The Court has previously held that racial classifications are "presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964)). Almost never do government actions survive strict scrutiny. In fact, "when the Court has applied strict scrutiny to a race-conscious measure designed to assist minorities, it has never upheld the measure." Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J., 427, 433 (1997). See generally *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny to overt race preferences in government contracting). Lower courts have previously used strict scrutiny to invalidate race-conscious policies in public university admissions. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). Before 1995, affirmative action programs implemented by the federal

to apply strict scrutiny, as it did to the Law School's admissions policy, and still uphold the policy or program at issue.¹⁶ The fact that the Law School's admissions policy survived strict scrutiny—a feat which almost no other state interest ever accomplishes—indicates that the Court may have treated the diversity interest, as it pertains to the educational arena, in a very unique way.

B. Diversity as a Means to Educational Benefits

It is the educational benefits deriving from diversity that were the real compelling interest behind the Law School's race-based admissions policy.¹⁷ Diversity, in effect, is only the means to the end.¹⁸ If diversity produces no educational benefits, then diversity cannot be a compelling interest of an institution of higher education.

The compelling interest that supported the Law School's admissions policy was not simply a statistical racial diversity.¹⁹ If it was, it would have been struck down as a quota.²⁰ Instead, the diversity that amounted to a constitutionally compelling interest was a diversity that produced certain educational benefits, such as a classroom discussion that is "livelier, more spirited, and simply more enlightening and interesting."²¹ Thus, racial diversity is a presumed means to a desired end. But if that is true, then diversity is valuable only if it produces the designated educational benefits.

government only needed to pass the "intermediate scrutiny" test. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990). But in *Adarand Constructors, Inc. v. Peña*, the Court shifted its stance and held that strict scrutiny applies to all government affirmative action programs. 515 U.S. at 235 (holding that "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest").

16. According to the dissent, however, the Court made no serious effort to scrutinize the Law School's claim that it "has a compelling interest in securing the educational benefits of a diverse student body." *Grutter*, 539 U.S. at 356 (Thomas, J., concurring in part and dissenting in part). The dissent described the Court's approach as "unprecedented deference to the Law School—a deference antithetical to strict scrutiny." *Id.* at 362. In his dissent, Chief Justice Rehnquist argued that "[a]lthough the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference." *Id.* at 380 (Rehnquist, C.J., dissenting). Justice Kennedy stated that the Court, "in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's . . . assurances that its admissions process meets with constitutional requirements." *Id.* at 388-89 (Kennedy, J., dissenting). Essentially, according to Justice Kennedy, the Court "does not apply strict scrutiny" here. *Id.* at 387.

17. *Id.* at 328 (majority opinion).

18. *Id.* at 354-55 (Thomas, J., concurring in part and dissenting in part) (stating that attaining diversity is "the mechanism by which the Law School obtains educational benefits, not an end of itself").

19. The Law School's policy was not "simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" *Id.* at 329 (majority opinion) (quoting *Bakke*, 438 U.S. 265, 307 (1978)).

20. See *id.* at 336.

21. *Id.* at 330.

And these benefits can result only from the airing of a wide multitude of viewpoints and perspectives within the educational setting.

The most obvious benefit, as the Court mentions, is livelier classroom discussions.²² But this scenario contains several presumptions, none of which were ever proven in *Grutter*. First, are the professors even allowing or facilitating classroom discussion in their courses, or are the courses primarily lecture courses? Second, are the racial groups admitted under the race-based admissions program enrolling in classes in which they can air their unique viewpoints that result from their racial identity and experiences? Third, if so, are those groups actually expressing their unique viewpoints in front of the class? One measure of whether a school is serious about achieving a more lively classroom discussion is whether it has adopted new policies requiring its professors to institute classroom discussion in their courses and to ensure that all viewpoints are raised. There is no indication in *Grutter* that the Law School did so.

Another educational benefit of diversity would be if student study groups or extracurricular organizations were diversified so as to encourage an airing of diverse viewpoints within the group or organization. But again, there is no evidence to indicate this happened in *Grutter*.²³ Rather, the contrary seems to be occurring. The social environment in higher education appears to be drifting toward a more segregationist pattern. Increasingly, universities are allowing dorms that house only certain racial groups; academic departments are emerging that serve primarily to enroll certain racial groups; and social and extracurricular groups are becoming more segregated.²⁴

Finally, when educational benefits are seen as the real goal, then racial diversity in the student body may be only a second-best way of reaching that goal. Since faculty are the leaders of the educational environment in universities and law schools, and hence are in the best position to produce educational benefits, it stands to reason that faculty diversity is more urgent and vital than student diversity. Thus, under a strict scrutiny approach, faculty diversity should be fully pursued before student diversity is

22. *Id.*

23. The district court judge found that racial diversity is quite different from the viewpoint diversity espoused by the Law School's policy. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir.), *cert. granted*, 537 U.S. 1043 (2002), and *aff'd*, 539 U.S. 306 (2003).

24. See PATRICK M. GARRY, CULTURAL WHIPLASH: THE UNFORESEEN CONSEQUENCES OF AMERICA'S CRUSADE AGAINST RACIAL DISCRIMINATION 45, 58-59 (2006).

attempted in a way that infringes on the equal protection rights of student applicants.²⁵

C. *The Court's Unprecedented Deference to Academic Institutions*

Contrary to the normal application of strict scrutiny, the Court in *Grutter* accorded great deference to the Law School.²⁶ Contrary to how the Court treats most state actors when evaluating possible violation of constitutional rights, it presumed good faith on the part of the Law School when determining that only a certain kind of racially mixed student body can produce certain educational benefits.²⁷ But the issue is, despite the fact that strict scrutiny normally forecloses such deference, should institutions of higher education be given the presumption of good faith?²⁸ Have they shown themselves to be deserving of such high trust?²⁹

25. For a more detailed discussion of this issue, see *infra* notes 40-51 and accompanying text. If a racially diverse student body leads to a “livelier, more spirited” classroom discussion, *Grutter*, 539 U.S. at 330, logic dictates that a truly diverse faculty would more directly and immediately lead to such an outcome. Thus, if an institution of higher education has a compelling interest in racially diversifying its students, it has an even greater interest in racially diversifying its faculty. One problem, though, is tenure. A law school’s student body turns over every three years; and every fall an entirely new class of students is admitted. Consequently, student diversity can be achieved somewhat quickly. But faculty diversity is another matter. Because of the tenure system, very few openings occur each year; consequently, true diversity will come very slowly, especially if none of the tenured professors resign or retire. For one proposal dealing with how to achieve faculty diversity more quickly, see Patrick M. Garry, *The Next Step in Diversity: Extending the Logic of Grutter v. Bollinger to Faculty Tenure*, 82 DENV. U. L. REV. 1 (2004).

26. See *Grutter*, 539 U.S. at 328 (stating that the Law School’s judgment “is one to which we defer”); see also *id.* at 329 (stating that “‘good faith’ on the part of a university is ‘presumed’” (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978))).

27. This contrasts with how the Court strictly scrutinized state motives in First Amendment Establishment Clause cases (see *McCreary County v. ACLU*, 545 U.S. 844, 861-63 (2005) (scrutinizing and rejecting the government’s stated purpose for its Ten Commandments display); *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (rejecting the government’s stated purpose for its statute authorizing a daily moment of silence in public schools)), in free speech cases (see *Reno v. ACLU*, 521 U.S. 844, 869, 875-76 (1997) (rejecting the government’s findings that sexually explicit material is easily available to children on the Internet, and refusing to defer to Congress’ judgment that only a ban on sexually explicit speech could prevent children from being exposed to it); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 819 (2000) (rejecting the government’s findings of how serious a problem signal bleed is)), and in cases involving attempted governmental regulation of the sale and distribution of violent video games to minors (see Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 139 (2004) (citing cases in which courts rejected government findings regarding causation between playing violent video games and engaging in aggressive, violent behavior)).

28. Justice O’Connor suggested that the reason for the unusual deference toward a racially discriminatory policy lay in the First Amendment’s protection of academic freedom and educational autonomy. See *Grutter*, 539 U.S. at 328-29 (stating that the “freedom of a university to make its own judgments as to education includes the selection of its student body” (quoting *Bakke*, 438 U.S. at 312)). However, educational autonomy is a highly suspect basis for judicial deference on something as important as racial discrimination. Even with the First Amendment and freedom of speech, the Court has not given deference to educational institutions. In *Tinker v. Des Moines Independent Community School District*, the Court refused to let a school censor an anti-war symbol

Even according to many academic insiders, higher education's climate of racial enlightenment is suspect. Academics and civil rights activists claim that college campuses are the site of pervasive racism.³⁰ As one scholar

worn by students throughout the school day. 393 U.S. 503 (1969). The school argued that during the height of the Vietnam War, such symbols would cause disruption within the school. *Id.* at 508. But even though this was an issue that touched upon the educational and learning environment of the school, the Court refused to defer. *Id.* at 514. Likewise, in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, the Court declined to defer to a school's decision to remove some "just plain filthy" books from the school library. 457 U.S. 853, 857 (1982). But this issue again went to the very heart of the school's educational mission—e.g., the kind of books and materials to which it was exposing its students. *Grutter*, on the other hand, involved an issue less central to the educational function of the school. It did not involve the behavior of students who are already in a classroom, nor did it involve the kind of books that are filling library bookshelves and being read by students. Instead, *Grutter* involved a kind of pre-education decision—e.g., which students to admit.

The Court's decision in *United States v. Virginia* also indicates that *Grutter* cannot be explained on the basis of educational autonomy or academic freedom. 518 U.S. 515 (1996). In *Virginia*, the Court found an equal protection violation in a state military college's exclusion of women. *Id.* at 519. This finding occurred even though the college argued that "single-sex education provides important educational benefits," as well as "character development and leadership training." *Id.* at 535. Furthermore, the Court acknowledged the school's argument that "single-sex schools can contribute importantly to [educational] diversity." *Id.* at 534 n.7. Yet despite these educational-benefits arguments, and despite the fact that the Court evaluated the case under a lower level of scrutiny than that used in *Grutter*, the Court did not recognize educational autonomy and defer to the judgment of the school. *Id.* at 533, 555 (stating that the test used for evaluating gender-based classifications is "whether the proffered justification is 'exceedingly persuasive,'" and that such classifications warrant "heightened scrutiny"). For other cases negating a judicial grant of deference to educational institutions, see *Perry v. Sinderman*, 408 U.S. 593 (1972) (overturning the firing of a college professor without any due process hearing); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (overturning the termination of a public school teacher who had publicly criticized the Board of Education).

29. As Justice Thomas in his dissent noted, one "must also consider the Law School's refusal to entertain changes to its current admissions system that might produce the same educational benefits." *Grutter*, 539 U.S. at 355 (Thomas, J., concurring in part and dissenting in part). According to Justice Thomas, "[i]f the Law School is correct that the educational benefits of 'diversity' are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law School's reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all." *Id.* at 356 n.4.

On the matter of the trustworthiness of higher education, Jerome Karabel outlines the unpredictable, selective, and discriminating posture of higher education in his book about how Harvard, Princeton and Yale went from discriminating against Jewish students to discriminating in favor of three racial groups—African-Americans, American Indians, and Hispanics. See generally JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* (2005). Further calling into question the trustworthiness of higher education to single-handedly determine diversity issues is the former admissions director of the University of Michigan Law School, who testified that faculty members were "breathtakingly cynical" about who qualified as underrepresented minorities, citing a faculty debate, in which one professor objected to Cubans being counted as Hispanics since Cubans "were Republicans." *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting).

30. See Patrick M. Garry, *A Half-Century Since Brown: The Legal Academy's Views of Racism*,

writes, “racism on campus is real and substantial.”³¹ It is argued, by a member of academia, that a “subtle institutional racism” contaminates the higher education environment.³² Even liberal academics themselves are described as helplessly racist; although they try to deny their historical connections to racial supremacy, “they often exhibit colonialist impulses when writing about race without even knowing it.”³³ Legal scholars point to the disparity between the percentage of minority students in higher education and the percentage of full-time minority faculty as evidence of continuing discrimination.³⁴ Others accuse universities and law schools of subtly reinforcing racial stereotypes through their use of discriminatory testing and admissions standards.³⁵

Even if the stated purpose behind the Law School’s racial preferences in *Grutter* was to increase minority enrollment, its overall admissions policies undermine that goal. It was acknowledged by the Law School that its selective admissions criteria and reliance on Law School Admission Test (“LSAT”) scores effectively precluded a “critical mass” enrollment of the desired racial minorities.³⁶ Therefore, if the school valued the educational benefits of diversity as much as it claimed, it could lessen its reliance on the LSAT and on other admissions factors that work to depress minority enrollment.³⁷ If indeed diversity is “at the heart” of the Law School’s

42 IDAHO L. REV. 209, 212-13 (2005).

31. Darryl Brown, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 299-300 (1990).

32. *Id.* at 312, 323.

33. Thomas West, *The Racist Other*, 17 JAC Issue 2 (1997), available at http://www.jacweb.org/Archived_volumes/Text_articles/V17_I2_West.htm.

34. See Edgar G. Epps, *Affirmative Action and Minority Access to Faculty Positions*, 59 OHIO ST. L.J. 755, 761 (1998).

35. See Rubinfeld, *supra* note 15, at 433. Professor Rubinfeld argues that just as the segregation of schools was held unconstitutional in *Brown*, so too should “reliance on the SAT, the LSAT, and all the other standardized tests” that unfairly convey the message that minorities cannot compete. *Id.* at 454. The SAT, it is argued, reflects the country’s “legacy of racial injustice.” K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 125, 138 (1996).

36. *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003) (recognizing that a “critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores”).

37. As Justice Thomas in his dissent argued, the Law School “maintains an exclusionary admissions system that it knows produces racially disproportionate results,” and racial discrimination is “not a permissible solution to the self-inflicted wounds of this elitist admissions policy.” *Id.* at 350 (Thomas, J., concurring in part and dissenting in part). According to Justice Thomas:

[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nonetheless, law schools continue to use the test and then attempt to “correct” for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School’s continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court.

educational mission, then nothing would be more important than achieving a diverse student body.³⁸ And if nothing is more important than that, it makes no sense that the school is operating an admissions system that does not on its own produce the desired diversity without the need for racial preferences that conflict with equal protection norms. Moreover, if higher education were that serious about achieving the educational benefits of diversity, it would eliminate its practice of legacy admits, which actually contradicts the goal of a more widely diverse student body.³⁹

Another way in which the commitment of higher education to the educational benefits of diversity is called into question is in the maintenance of its faculty tenure system. According to many diversity advocates, the most effective way of ensuring student diversity is through first achieving faculty diversity.⁴⁰ Indeed, a diverse faculty is even more important than a diverse student body, in terms of producing lively and enlightening classroom discussions that transcend the individual experiences of the students.⁴¹ As one minority law student reports, “women and minorities can feel silenced” by white male professors.⁴²

Minority students may not enroll at an institution that does not have sufficient minority faculty; even if they do enroll, they may find themselves alienated and eventually drop out or transfer.⁴³ It is argued that “[t]he absence of minority faculty members lessens the probability that minority

Id. at 369-70.

Having decided to use the LSAT, the Law School must accept the constitutional burdens that come with this decision. The Law School may freely continue to employ the LSAT and other allegedly merit-based standards in whatever fashion it likes. What the Equal Protection Clause forbids, but the Court today allows, is the use of these standards hand-in-hand with racial discrimination.

Id. at 370.

38. *Id.* at 329 (majority opinion).

39. These legacy admits give preference to children of alumni. *See id.* at 368 (Thomas, J., concurring in part and dissenting in part).

40. *See Garry, supra* note 25, at 8-9.

41. *See Paul Brest & Miranda Oshige, Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 864 (1995) (stating that it is “largely the faculty who set an institution’s tone and agenda”).

42. Rachel Moran, *Diversity and Its Disconnects*, 88 CAL. L. REV. 2241, 2282 (2000). In general, students say that “the professor play[s] a significant role in setting the tone for discussion” in the classroom. *Id.* at 2287.

43. *See Abigail Thernstrom, Voting Rights: Another Affirmative Action Mess*, 43 UCLA L. REV. 2031, 2048 (1996) (citing the argument of the need for minority faculty to connect with and serve as a positive influence to minority students); *see also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1080 (1991) (arguing that white teachers, unaware of race and cultural differences, can unwittingly disadvantage black students by asking questions in ways that conform to white middle-class customs).

students will complete graduate and professional programs at the same rate as white students.”⁴⁴ One research study asserts that the best predictor of graduation rates of African-American graduate and professional students is the presence of minority faculty members.⁴⁵ Therefore, by implication, if an institution does not have the right ratio and kind of minority faculty, it may not be able to attract and keep a critical mass of minority students. Consequently, if a diverse faculty does not exist, then the educational benefits of diversity in which the state has a compelling interest cannot occur. But there is a substantial obstacle to faculty diversity, an obstacle much greater than those facing the achievement of student diversity. This obstacle is the tenure system.⁴⁶

“At many law schools, more than eighty to ninety percent of the full-time, tenure-track faculty are in fact tenured.”⁴⁷ This huge overhead of permanently employed faculty members means that only a small fraction of faculty positions open up each year, and it is out of this small number that law schools can attempt to achieve faculty diversity.⁴⁸ It can be quite common at the vast majority of the nation’s law schools that during a student’s enrollment not one faculty position will turn over.⁴⁹ Consequently, despite the school’s professed commitment to diversity and affirmative action among the faculty, absolutely nothing will be done. And because the faculty lags in its diversity, the student body will most probably lag in its diversity, despite all the meticulously drafted race-conscious admissions policies.⁵⁰

44. Epps, *supra* note 34, at 759.

45. See JAMES E. BLACKWELL, MAINSTREAMING OUTSIDERS: THE PRODUCTION OF BLACK PROFESSIONALS 64-72 (1981).

46. To meet the strict scrutiny test, mandating that any measure restricting equal protection rights be narrowly drawn, universities should have to prove that they have tried everything else to achieve the educational benefits of diversity before infringing on the equal protection rights of student applicants. One clear alternative that should be pursued first is to cast off all institutional barriers on the immediate achievement of a diversified faculty, even if the elimination of those barriers would infringe upon certain property rights of faculty members (but these infringements might pale next to the number of equal protection infringements occurring under race-based admissions policies—and besides, the courts tend to analyze infringements on economic rights with much less scrutiny than infringements on personal rights like free speech and equal protection); however, the Law School introduced no evidence that it had made any effort to explore this alternative.

47. See Garry, *supra* note 25, at 11.

48. The tenure system “diminishes an institution’s opportunity to recruit and retain a younger and more diverse faculty.” James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 170 (2000).

49. Consider the following scenario: a law school has a faculty of ten, with all professors under the age of forty, all tenured and all white males. Conceivably, in twenty-five years, when the *Grutter* affirmative action mandate expires, the faculty at this hypothetical law school will have made no progress toward diversity.

50. In the case of law school students, their academic legal training is limited to three years. Given the arguments for diversity made in *Grutter*, it is all the more vital that these law students experience a diverse legal education as soon as possible. For the rest of their lives, they will be

According to critics, academic tenure was born in a racist age, and if the remnants of discrimination exist everywhere else in society, they certainly must exist in the tenure system.⁵¹ Many currently tenured faculty were awarded their tenure at a time when, by the implicit acknowledgment of the Law School in *Grutter*, women and minorities were being shut out. Thus, maintaining the tenure system, which perpetuates a nondiverse faculty, frustrates the achievement of real student diversity. It also frustrates the goal of achieving the educational benefits of diversity, since faculty have more impact on the liveliness of classroom discussions than do students.

D. Alternative Ways of Achieving Educational Benefits

If institutions of higher education were truly committed to the educational benefits of diversity, then why would those institutions not pursue such benefits directly, through measures aimed specifically at achieving viewpoint diversity within the classroom, rather than indirectly, through measures aimed at achieving a racially diverse student body which may or may not produce the desired viewpoint diversity? Indeed, the first step in bringing viewpoint diversity to the classrooms is to have a sufficiently viewpoint-diverse faculty. But the achievement of this diversity is becoming increasingly less probable in today's higher education environment.

Surveys have shown that higher education faculty is relatively ideologically and politically homogenous in their left-of-center views.⁵² One study of several universities found that nearly 90% of liberal arts professors were Democrats.⁵³ A 2002 study of faculty voter registration found a drastically skewed ideological make-up in higher education. At

active in business and professional groups and enterprises, but they have only three years in which to avail themselves of all the educational benefits of diversity.

51. The beginnings of tenure in the U.S. higher education system dates back to 1900. See Fishman *supra* note 48, at 165.

52. See Rachel Zabarkes Friedman, *Waking Up*, NAT'L REVIEW, Oct. 13, 2003, at 44 (describing student dissatisfaction with "the radical left-wing views of their professors").

53. David Brooks, *People Like Us*, THE ATLANTIC MONTHLY, Sept. 2003, at 32. Of the forty-two professors in the English, history, sociology, and political-science departments at Brown University, all were Democrats. *Id.* According to another survey of more than 1000 academics, Democratic professors outnumber Republicans by at least seven to one in the humanities and social sciences. John Tierney, *Republicans Outnumbered In Academia, Studies Find*, N.Y. TIMES, Nov. 18, 2004, at A23. This ideological tilt can also be found in the academy's political donations. During the 2004 campaign season, for instance, 94% of Harvard University's employees' political donations went to the Democratic Party. Ruth R. Wisse, *John Kerry U*, WALL ST. J., Oct. 25, 2004, at A18. At Cornell, the figure was 93%; at Dartmouth, 97%; and at Yale, 93%. *Id.*

Brown University, for instance, liberal-leaning professors outnumbered conservative-leaning professors 54 to 3; at the University of Colorado, the ratio was 116 to 5; at UCLA, it was 141 to 9; and at Syracuse, it was 50 to 2.⁵⁴ Another study conducted two years later found that among younger, untenured faculty members at Berkeley and Stanford, the ratio of Democrats to Republicans was 31 to 1.⁵⁵ According to one Harvard professor, “[w]e have 60 members in the department of government [and] [m]aybe three are Republicans.”⁵⁶ Moreover, religious diversity is almost nonexistent among university faculty. Eugene Volokh states that “the lack of religious diversity at many schools is at least as severe as the lack of racial diversity.”⁵⁷ As noted in *The Atlantic Monthly*, “it’s appalling that evangelical Christians are practically absent from entire professions, such as academia.”⁵⁸

Furthermore, if the Law School in *Grutter* was so genuinely serious about diversity, why would it single out just three racial groups for admissions preferences?⁵⁹ Why would it ignore all the other minority racial groups present in America? Moreover, if higher education believes that the experience of being black in America translates into its own particular viewpoint, then why would not higher education ensure that the black students it admitted were African-American students descended from ancestors who suffered from slavery and legalized segregation, rather than just upper-class African or Caribbean immigrants who have no such experiences?⁶⁰ And finally, if the educational benefits of diversity are so

54. Karl Zinsmeister, *Case Closed*, RedOrbit.com, Jan. 19, 2005, http://www.redorbit.com/news/science/120197/case_closed/#. This compares with a 1995 study that shows similar differences: at Cornell, 171 Democrats to 7 Republicans; and at Stanford, 163 Democrats to 17 Republicans. *Id.*; see also Jeff Jacoby, *Intellectual Diversity? Not on Campus*, TOWNHALL.COM, Dec. 4, 2004, http://www.townhall.com/columnists/jeffjacoby/2004/12/04/intellectual_diversity_not_on_campus. A poll of Ivy League professors commissioned by the Center for the Study of Popular Culture found that while 64% said they were liberal or somewhat liberal, only 6% said they were even somewhat conservative. *Id.*

55. Zinsmeister, *supra* note 54. This, according to the conductors of the study, “strongly suggests the problem has gotten worse over the past decades.” *Id.*

56. Yilu Zhao, *Taking the Liberalism Out of Liberal Arts*, N.Y. TIMES, Apr. 3, 2004, at B11.

57. Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2072 (1996). Professor Volokh estimates that law school faculty members are approximately 75% less likely to attend religious services than the public at large, and is about four times as likely to have no religion. *Id.* at 2072-73.

58. Brooks, *supra* note 53, at 32.

59. The policy specifically mentions preferences only given to African American, Hispanic and Native American students. See *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003). It did not extend preferences to other racial groups like those of Asian or Middle-Eastern descent. Nor did the Law School sufficiently explain why there existed such a disparity in the number of individuals admitted from each of these groups—a failure that the strict scrutiny approach normally condemns. *Id.* at 382-83 (Rehnquist, C.J., dissenting).

60. See GARRY, *supra* note 24, at 21. The Court in *Grutter* recognized this aspect of diversity when it stated: “By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.” *Grutter*, 539 U.S. at 338.

great, then why is not the academic community roundly criticizing the Historically Black Colleges for their racially homogenous student bodies?⁶¹

III. CONCLUSION

A close examination of the *Grutter* decision leads to the question of whether the educational benefits of diversity were in fact the compelling interest that inspired the Court's approval of the Law School's race-based admissions program. After all, if the compelling interest supporting the Law School's program was the educational benefits from diversity, why did the Court discuss how diversity served the interests of business, the military, and society as a whole?⁶² Why did the Court discuss how diversity leads to a greater public faith in the openness of social institutions?⁶³ Why did the Court assert the nation's need for a diverse social leadership?⁶⁴

Perhaps what contributed to the Court's decision regarding diversity as a compelling interest were notions that the Justices did not want to articulate: an implicit rejection of the idea that beneficial racial classifications are just as invalid as burdensome classifications, or that diversity was just a ruse for the real goal of remedying past societal discrimination.⁶⁵ As Justice Thomas stated in his dissent, the diversity pursued by elite educational institutions is not an "educational benefits" diversity, but an aesthetic diversity—the desire to look like an institution of racial integration, to cast off the white guilt associated with racism, and yet at the same time to maintain themselves as

The faculty member who chaired the committee that drafted the race-conscious admissions policy testified that the policy aimed at including "students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination." *Id.* at 319. But in dissent, Justice Thomas calls the Law School's version of diversity merely aesthetic: "That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them." *Id.* at 354 n.3 (Thomas, J., concurring in part and dissenting in part). Thus, to Justice Thomas, the elite universities are merely using a discrete class of racial minorities to racially legitimize their elite institutions.

61. *Grutter*, 539 U.S. at 365 (giving statistics on the lack of racial diversity in Historically Black Colleges).

62. *Id.* at 331-32 (majority opinion). In this respect, the Court diverts away from Justice Powell's use of diversity in *Bakke*, which was confined to its effects on classroom learning. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

63. *Grutter*, 539 U.S. at 331-32.

64. *See id.*

65. "[M]any of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds." Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 34 (2002).

elite institutions.⁶⁶ As Justice Thomas pointed out, this use of diversity is not for the sake of the students or the learning environment, but for the image of the institution.⁶⁷

In order to reach its decision in *Grutter*, the Court had to radically change the application of its strict scrutiny approach.⁶⁸ For instance, the Court stated that narrow-tailoring did not require the consideration of any alternative, like an admissions lottery or a lowering of admissions standards, that would achieve racial diversity but lower the academic quality of the students. However, this approach contrasts starkly with other strict scrutiny cases such as *Reno v. ACLU*, where the Court concluded that a less restrictive alternative—user-based Internet screening—although not currently workable would “soon be widely available.”⁶⁹ Although the *Grutter* Court ruled that narrow tailoring “does not require exhaustion of every conceivable race-neutral alternative,”⁷⁰ the Court in *Playboy Entertainment* essentially held that any possible alternative would doom the time-channeling law and that the government would have to show that all possible alternatives were not at all workable.⁷¹

Thus, in the Court’s view, revising the strict scrutiny approach was apparently the less radical way to sustain the Law School’s racial preferences, since the diversity interest had already been articulated in Justice Powell’s *Bakke* concurrence. Indeed, the only compelling interest existing in precedent that could support such a program was diversity; the remedying of past societal discrimination had already been rejected as a compelling interest. But instead of transforming to the point of unrecognition the strict scrutiny approach, perhaps the Court should have just recognized that the remedying of past societal discrimination could now, in fact, constitute a compelling interest.

66. *Grutter*, 539 U.S. at 355 (Thomas, J., concurring in part and dissenting in part).

67. *See id.* at 355-56, 372.

68. The Court admits it is using a different application of strict scrutiny, but that the context of higher education demands deference. *See id.* at 329 (majority opinion).

69. *Reno v. ACLU*, 521 U.S. 844, 876-77 (1997).

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

71. *See United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 816-18 (2000) (holding that less restrictive means were available, regardless of how inconvenient or how inaccessible those means were). Also, whereas in *Grutter* the Court stated that a narrowly tailored race-conscious admissions program “must not unduly burden individuals who are not members of the favored racial and ethnic groups,” the Court in *Playboy Entertainment* essentially found that any burden on free speech rights would render the law unconstitutional. *Grutter*, 539 U.S. at 341.