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Affirmative Action and Diversity in Public Education: Legal Developments

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Summary

Almost four decades after the Supreme Court ruling in *Regents of the University of California v. Bakke*, the diversity rationale for affirmative action in public education remains a topic of political and legal controversy. Many colleges and universities have implemented affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Justice Powell, in his opinion for the *Bakke* Court, stated that the attainment of a diverse student body is "a constitutionally permissible goal for an institution of higher education," noting that "[t]he atmosphere of 'speculation, experiment, and creation' so essential to the quality of higher education is widely believed to be promoted by a diverse student body." In subsequent years, however, federal courts began to question the Powell rationale, unsettling expectations about whether diversity-based affirmative action in educational admissions and faculty hiring is constitutional under the equal protection clause of the Fourteenth Amendment.

After a series of conflicting lower court rulings were issued regarding the use of race to promote a diverse student body, the Supreme Court agreed to review the race-conscious admissions policies used by the undergraduate and law school admissions programs at the University of Michigan. In *Grutter v. Bollinger*, a 5 to 4 majority of the Justices held that the law school had a "compelling" interest in the "educational benefits that flow from a diverse student body," which justified its race-based efforts to assemble a "critical mass" of "underrepresented" minority students. But in the companion decision, *Gratz v. Bollinger*, six Justices decided that the University's policy of awarding "racial bonus points" to minority applicants was not "narrowly tailored" enough to pass constitutional scrutiny. The decisions resolved, for the time being, the doctrinal muddle left in *Bakke*'s wake. And because the Court's constitutional holdings translate to the private sector under the federal civil rights laws, nonpublic schools, colleges, and universities are likewise affected.

However, the *Grutter* and *Gratz* decisions did not address whether diversity is a permissible goal in the elementary and secondary educational setting. To resolve this question, the Supreme Court agreed to review two cases that involved the use of race to maintain racially diverse public schools and to avoid racial segregation. In a consolidated 2007 ruling in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court struck down the Seattle and Louisville school plans at issue, holding that they violated the equal protection guarantee of the Fourteenth Amendment.

More recently, the Court's decision to hear challenges in two separate affirmative action cases has once again revived the issue of diversity in higher education. In its 2013 ruling in *Fisher v. University of Texas at Austin*, the Court reaffirmed its holding in *Grutter*, but nevertheless vacated and remanded an appellate court's decision to uphold a race-conscious undergraduate admissions plan at the University of Texas at Austin. However, on remand, the appellate court upheld the university's admissions program for a second time, a decision that appeared to prompt the Court to agree to review the case yet again during its 2015 term. Meanwhile, in 2014's *Schuette v. Coalition to Defend Affirmative Action*, the Court upheld Michigan's Proposal 2, which prohibits the use of racial preferences in higher education.

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I. Introduction

Almost four decades after the Supreme Court ruling in *Regents of the University of California v. Bakke*,[1] the diversity rationale for affirmative action in public education remains a topic of political and legal controversy. Many colleges and universities have implemented affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Justice Powell, in his opinion for the *Bakke* Court, stated that the attainment of a diverse student body is "a constitutionally permissible goal for an institution of higher education," noting that "[t]he atmosphere of 'speculation, experiment, and creation' so essential to the quality of higher education is widely believed to be promoted by a diverse student body."[2]

In subsequent years, however, federal courts began to question the Powell rationale, unsettling expectations about whether diversity-based affirmative action in educational admissions and faculty hiring decisions is constitutional under the equal protection clause of the Fourteenth Amendment. In striking down the admissions process at the University of Texas School of Law, the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. Texas* concluded that any use of race in the admissions process was forbidden by the Constitution.[3] Reverberations of the 1996 *Hopwood* opinion are apparent in several subsequent cases, which voided race-conscious policies maintained by institutions of higher education, as well as public elementary and secondary schools. Some judges avoided resolving the precedential effect of Justice Powell's opinion by deciding the case on other grounds not dependent on the constitutional status of student diversity as a compelling state interest.[4] But, in *Johnson v. Board of Regents*, the Eleventh Circuit Court of Appeals sided with *Hopwood* by rejecting diversity as constitutional justification for a numerical "racial bonus" awarded minority freshman applicants to the University of Georgia. A circuit court conflict was created when the U.S. Court of Appeals for the Ninth Circuit relied on *Bakke* to uphold an affirmative action admissions policy to the University of Washington Law School that made extensive use of race-based factors. *Smith v. University of Washington* was the first federal appeals court to rely on Justice Powell's decision as binding precedent on the issue.[5]

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[1] 438 U.S. 265 (1978).

[2] *Id.* at 311-12.

[3] 78 F.3d 932, 944 (5th Cir. 1996) ("Justice Powell's view in *Bakke* is not binding precedent on the issue."), cert. denied, 518 U.S. 1033 (1996). See also Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354 (D.C.Cir. 1998) (stating, without addressing *Bakke*, that diversity cannot "be elevated to the 'compelling' level").

[4] See Brewer v. West Irondequoit Center School District, 212 F.3d 738, 747-49 (2d Cir. 2000) (noting that "there is much disagreement among the circuit courts as to ... the state of the law under current Supreme Court jurisprudence," but concluding that, regardless of *Bakke*, reducing racial isolation may be a compelling interest under Second Circuit precedent); Eisenberg v. Montgomery County Public Schools, 197 F.3d 123, 130 (4th Cir. 1999) (explaining that the status of educational diversity as a compelling interest is "unresolved," and rather than rule on the issue, decided the case solely on narrow tailoring grounds); Wessmann v. Gittens, 160 F.3d 790, 795, 800 (1st Cir. 1998) (While "[t]he question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled," the court concluded defendant's apparent interest in "racial balancing" of the student body was neither "a legitimate [n]or necessary means of advancing" diversity); Buchwald v. University of New Mexico School of Medicine, 159 F.3d 487, 499 (10th Cir. 1998) (noting the absence of "a clear majority opinion" in *Bakke*, but according qualified immunity to defendants who relied upon that case in adopting a preference based on durational residency); McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998) (citing *Bakke* for statement that "whether there may be compelling interests other than remedying past discrimination remains 'unsettled,'" but finding defendant's remedial justification valid).

[5] Smith v. University of Washington Law School, 233 F.3d 1188, 1201 (9th Cir. 2000) (pursuant to *Bakke*, "educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race conscious measures"), cert. denied, 532 U.S. 1051 (2001).

The judicial divide over *Bakke*'s legacy was vividly underscored by a pair of separate trial court decisions, one upholding for diversity reasons the race-based undergraduate admissions policy of the University of Michigan,[6] the other voiding a special minority law school admissions program at the same institution.[7] Restoring a degree of clarity to the law, the Supreme Court concluded its 2002 term with rulings in the Michigan cases. In *Grutter v. Bollinger*,[8] a 5 to 4 majority of the Justices held that the law school had a compelling interest in the "educational benefits that flow from a diverse student body," which justified its consideration of race in admissions to assemble a "critical mass" of underrepresented minority students. But in a companion decision, *Gratz v. Bollinger*,[9] six Justices decided that the university's policy of awarding racial bonus points to minority applicants was not narrowly tailored enough to pass constitutional scrutiny.

However, the *Grutter* and *Gratz* decisions did not address whether diversity is a permissible goal in the elementary and secondary educational setting. To resolve this question, the Court agreed to review two cases that involved the use of race to maintain racially diverse public schools. The cases were *Meredith v. Jefferson County Board of Education*—formerly *MacFarland v. Jefferson County Public Schools*—and *Parents Involved in Community Schools v. Seattle School District No. 1*.[10] In *Parents Involved in Community Schools v. Seattle School District No. 1*, a consolidated 2007 ruling that resolved both cases, the Court ultimately struck down the school plans at issue, holding that they violated the equal protection guarantee of the Fourteenth Amendment.[11]

More recently, the Court's decision to hear challenges in two separate affirmative action cases has once again revived the issue of diversity in higher education. In its 2013 ruling in *Fisher v. University of Texas at Austin*, the Court reaffirmed its holding in *Grutter*, but nevertheless vacated and remanded an appellate court's decision to uphold a race-conscious undergraduate admissions plan at the University of Texas at Austin.[12] However, on remand, the appellate court upheld the university's admissions program for a second time,[13] a decision that appeared to prompt the Court to agree to review the case yet again during its 2015 term.[14] Meanwhile, in 2014's *Schuette v. Coalition to Defend Affirmative Action*, the Court upheld Michigan's Proposal 2, which prohibits the use of racial preferences in higher education.[15]

The first part of this report briefly reviews the judicial evolution of race-based affirmative action, particularly in relation to public education. The report then reviews major rulings involving challenges to the use of race-conscious admissions, and concludes with a discussion of the implications for the future of affirmative action law.

[6] Gratz v. Bollinger, 122 F.Supp.2d 811 (E.D.Mich. 2000).

[7] Grutter v. Bollinger, 137 F. Supp. 2d 821, 848 (E.D. Mich. 2001) (concluding that "*Bakke* does not stand for the proposition that a university's desire to assemble a racially diverse student body is a compelling state interest").

[8] 539 U.S. 306 (2003).

[9] 539 U.S. 244 (2003).

[10] 416 F.3d 513 (6th Cir. 2003) (per curiam), cert. granted, 547 U.S. 1177 (2006); 426 F.3d 1162 (9th Cir. 2005) (en banc), cert. granted, 547 U.S. 1177 (2006).

[11] 551 U.S. 701 (2007).

[12] 133 S. Ct. 2411 (2013).

[13] Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014).

[14] Fisher v. Univ. of Tex. at Austin, 135 S. Ct. 2888 (2015).

[15] Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014).

II. Historical Background

The origins of affirmative action law may be traced to the early 1960s as first the Warren, and then the Burger Court, grappled with the seemingly intractable problem of racial segregation in the nation's public schools. Judicial rulings from this period recognized an "affirmative duty," cast upon local school boards by the equal protection clause, to desegregate formerly "dual school" systems and to eliminate "root and branch" the last "vestiges" of state-enforced segregation.[16] These holdings ushered in a two-decade era of massive desegregation—first in the South, and later the urban North—marked by federal desegregation orders frequently requiring drastic reconfiguration of school attendance patterns along racial lines and extensive student transportation schemes. School districts across the nation operating under these decrees have since sought to be declared in compliance with constitutional requirements in order to gain release from federal intervention. The Supreme Court eventually responded by holding that judicial control of a school system previously found guilty of intentional segregation should be relinquished if, looking to all aspects of school operations, it appears that the district has complied with desegregation requirements in "good faith" for a "reasonable period of time" and has eliminated "vestiges" of past discrimination "to the extent practicable."[17]

A statutory framework for affirmative action in employment and education was enacted by the Civil Rights Act of 1964. Public and private employers with 15 or more employees are subject to a comprehensive code of equal employment opportunity regulations under Title VII of the 1964 act. The Title VII remedial scheme rests largely on judicial power to order monetary damages and injunctive relief, including "such affirmative action as may be appropriate,"[18] to make discrimination victims whole. Except as may be imposed by court order or consent decree to remedy past discrimination, however, there is no general statutory obligation on employers to adopt affirmative action remedies. But the Equal Employment Opportunity Commission (EEOC) has issued guidelines to protect employers and unions from charges of "reverse discrimination" when they voluntarily take action to correct the effects of past discrimination.[19]

The term "affirmative action" resurfaced in federal regulations construing the 1964 act's Title VI, which prohibits racial or ethnic discrimination in all federally assisted programs or activities,[20] including public or private educational institutions. The Office of Civil Rights of the Department of Education interpreted Title VI to require schools and colleges to take affirmative action to overcome the effects of past discrimination and to encourage "voluntary affirmative action to attain a diverse student body."[21] Another Title VI regulation permits a college or university to take racial or national origin into account when awarding financial aid if the aid is necessary to

[16] See e.g. Green v. County Board, 391 U.S. 430 (1968); Swann v. Board of Education, 402 U.S. 1 (1971); Keyes v. Denver School District, 413 U.S. 189 (1973).

[17] Dowell v. Board of Education, 498 U.S. 237 (1991). See also Freeman v. Pitts, 503 U.S. 467 (1993) (allowing incremental dissolution of judicial control) and Missouri v. Jenkins, 515 U.S. 70 (1995) (directing district court on remand to "bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also `to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'").

[18] 42 U.S.C. 2000e-5(g).

[19] 29 C.F.R. Part 1608 (the guidelines state the EEOC's position that when employers voluntarily undertake in good faith to remedy past discrimination by race- or gender-conscious affirmative action means, the agency will not find them liable for reverse discrimination.).

[20] 42 U.S.C. 2000d et seq.

[21] 44 Fed. Reg. 58,509 (October 10, 1979).

overcome effects of past institutional discrimination.[22] Affirmative action in higher education also came before Congress in 1998, when the full House defeated a bill to prohibit federal aid to colleges and universities that consider race, ethnicity, or sex in the admission process.

The *Bakke* ruling in 1978 launched the contemporary constitutional debate over state-sponsored affirmative action. A "notable lack of unanimity" was evident from the six separate opinions filed in that case. One four-Justice plurality in *Bakke* voted to strike down as a violation of Title VI a special admissions program of the University of California at Davis medical school which set aside 16 of 100 positions in each incoming class for minority students, though the institution itself was not shown to have discriminated in the past. Another bloc of four Justices argued that racial classifications designed to further remedial purposes were foreclosed neither by the Constitution nor the Civil Rights Act and would have upheld the minority admissions quota. Justice Powell added a fifth vote to each camp by condemning the Davis program on equal protection grounds, while endorsing the nonexclusive consideration of race as an admissions criterion to foster student diversity.

In Justice Powell's view, neither the state's asserted interest in remedying societal discrimination, nor of providing role models for minority students was sufficiently compelling to warrant the use of a suspect racial classification in the admission process. But the attainment of a "diverse student body" was, for Justice Powell, "clearly a permissible goal for an institution of higher education" since diversity of minority viewpoints furthered "academic freedom," a "special concern of the First Amendment."[23] Accordingly, race could be considered by a university as a "plus" or "one element of a range of factors"—even if it "tipped the scale" among qualified applicants—as long as it "did not insulate the individual from comparison with all the other candidates for the available seats."[24] The "quota" in *Bakke* was infirm, however, since it defined diversity only in racial terms and absolutely excluded non-minorities from a given number of seats. By two 5-to-4 votes, therefore, the Supreme Court affirmed the lower court order admitting Bakke but reversed the judicial ban on consideration of race in admissions.

Bakke was followed by *Wygant v. Jackson Board of Education*,[25] where a divided Court ruled unconstitutional the provision of a collective bargaining agreement that protected minority public school teachers from layoff at the expense of more senior white faculty members. While holding the specific layoff preference for minority teachers unconstitutional, seven *Wygant* Justices seemed to agree in principle that a governmental employer is not prohibited by the equal protection clause from all race-conscious affirmative action to remedy its own past discrimination. Another series of decisions approved of congressionally mandated racial preferences to allocate the benefits of contracts on federally sponsored public works projects,[26] and in the design of certain broadcast licensing schemes,[27] while condemning similar actions taken by local governmental entities to promote public contracting opportunities for minority entrepreneurs.[28] However, in each of these cases, the Justices failed to achieve a consensus on

[22] 59 Fed. Reg. 8756 (February 23, 1994). See also Letter from Judith A. Winston, General Counsel, United States Department of Education, to College and University Counsel, July 30, 1996 (reaffirming that it is permissible in appropriate circumstances for colleges and universities to consider race in admissions decisions and granting financial aid).

[23] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978).

[24] *Id.* at 317.

[25] 476 U.S. 267 (1986).

[26] Fullilove v. Klutznick, 448 U.S. 448 (1980).

[27] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

[28] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

most issues, with bare majorities, pluralities, or—as in *Bakke*—a single Justice, determining the outcome of the case.

By the mid-1980s, the Supreme Court had approved the temporary remedial use of race- or gender-conscious selection criteria by private employers under Title VII of the 1964 Civil Rights Act.[29] These measures were deemed a proper remedy for "manifest racial imbalance" in "traditionally segregated" job categories, if voluntarily adopted by the employer,[30] or for entrenched patterns of "egregious and longstanding" discrimination by the employer, if imposed by judicial decree.[31] In either circumstance, however, the Court required proof of remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Thus, a "firm basis" in evidence, as revealed by a "manifest imbalance"—or "historic," "persistent," and "egregious" underrepresentation—of minorities or women in affected job categories was deemed an essential predicate to preferential affirmative action. Second, but of equal importance, all racial preferences in employment were to be judged in terms of their adverse impact on "identifiable" non-minority group members. Remedies that protected minorities from layoff, for example, were most suspect and unlikely to pass legal or constitutional muster if they displaced more senior white workers. But the consideration of race or gender as a "plus" factor in employment decisions, when it did not unduly hinder the legitimate expectations of non-minority employees, won ready judicial acceptance.[32] Affirmative action preferences, however, had to be sufficiently flexible, temporary in duration, and narrowly tailored to avoid becoming rigid quotas.

Not until 1989, however, did a majority of the Justices resolve the proper constitutional standard for reviewing equal protection challenges to governmental classifications by race enacted for a remedial or other benign legislative purpose. Disputes prior to *City of Richmond v. J.A. Croson*[33] yielded divergent views as to whether state affirmative action measures for the benefit of racial minorities were subject to the same strict scrutiny as applied to invidious racial discrimination under the equal protection clause, an intermediate standard resembling the test for gender-based classifications, or simple rationality. In *Croson*, a 5-to-4 majority settled on strict scrutiny to invalidate a 30% set-aside of city contracts for minority-owned businesses because the program was not narrowly tailored to a compelling governmental interest. While race-conscious remedies could be legislated in response to proven past discrimination by the affected governmental entities, racial balancing untailored to specific and identified evidence of minority exclusion was impermissible. *Croson* suggested, however, that because of its unique equal protection enforcement authority, a constitutional standard more tolerant of racial line-drawing may apply to Congress. This conclusion was reinforced a year later when, in *Metro Broadcasting, Inc. v. FCC*,[34] the Court upheld certain minority broadcast licensing schemes approved by Congress to promote the important governmental interest in broadcast diversity.

The two-tiered approach to equal protection analysis of governmental affirmative action was short-lived. In *Adarand Constructors, Inc. v. Pena,*[35] the Court applied "strict scrutiny" to a federal transportation program of financial incentives for prime contractors who subcontracted to

[29] 42 U.S.C. §§ 2000e et seq.

[30] United Steelworkers v. Weber, 443 U.S. 193 (1979).

[31] Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).

[32] United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transportation Agency, 480 U.S. 616 (1987).

[33] 488 U.S. 469 (1989).

[34] 497 U.S. 547 (1990).

[35] 515 U.S. 200 (1995).

firms owned by "socially and economically disadvantaged individuals," defined so as to prefer members of designated racial minorities. Although the Court refrained from deciding the constitutional merits of the particular program before it, and remanded for further proceedings below, it determined that all racial classifications by government at any level must be justified by a compelling governmental interest and narrowly tailored to that end. But the majority opinion sought to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" by acknowledging a role for Congress as architect of remedies for discrimination nationwide. "The unhappy persistence of both the practices and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response to it."[36] No further guidance was provided, however, as to the scope of remedial power remaining in congressional hands, or of the conditions required for its exercise. Bottom line, *Adarand* suggests that racial preferences in federal law or policy are a remedy of last resort and must be adequately justified and narrowly drawn to pass constitutional muster.

III. Legal Developments

Over the years, the Supreme Court has addressed the constitutionality of affirmative action in a variety of educational contexts, including both higher education and elementary and secondary education. Each of these contexts is discussed separately below.

Student Diversity in Higher Education Admissions

Beginning with *Bakke*, the Court has heard four different challenges to race-conscious admissions plans at institutions, including the recent *Fisher v. University of Texas at Austin* case.

Regents of the University of California v. Bakke

The emphasis in *Adarand* on past discrimination prompted a surge in judicial challenges to educational diversity as an independent justification for student and faculty affirmative action. The notion that diversity could rise to the level of a compelling interest in the educational setting sprang a quarter century ago from Justice Powell's opinion in the *Bakke* case. While concluding that a state medical school could not set-aside a certain number of seats for minority applicants, Justice Powell opined that a diverse student body may serve educators' legitimate interest in promoting the robust exchange of ideas. He cautioned, however, that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which ethnic origin is but a single though important element."[37]

Justice Powell split the difference between two four-Justice pluralities in *Bakke*. One camp, led by Justice Stevens, struck down the admissions quota on statutory civil rights grounds. Another led by Justice Brennan would have upheld the medical school's policy as a remedy for societal discrimination. Justice Powell held the dual admissions procedure to be unconstitutional, and ordered Bakke's admission. But, he concluded, the state's interest in educational diversity could warrant consideration of students' race in certain circumstances. For Justice Powell, a diverse student body fostered the robust exchange of ideas and academic freedom deserving of constitutional protection.

[36] *Id.* at 237.

[37] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

Justice Powell's theory of diversity as a compelling governmental interest did not turn on race alone. He pointed with approval to the "Harvard Plan," which defined diversity in terms of a broad array of factors and characteristics. Thus, an applicant's race could be deemed a "plus" factor that was considered on a par with personal talents, leadership qualities, family background, or any other factor contributing to a diverse student body. However, the race of a candidate could not be the "sole" or "determinative" factor. No other Justice joined in the Powell opinion.

Although Justice Powell's opinion announced the judgment of the Court, no other *Bakke* Justices joined him on that point. Justice Powell ruled the program at issue to be unconstitutional and the white male plaintiff entitled to admission, while four other Justices reached the same result on statutory rather than constitutional grounds. Another four Justice plurality concluded that the challenged policy was lawful, but agreed with Justice Powell that the state court had erred by holding that an applicant's race could never be taken into account. Only Justice Powell, therefore, expressed the view that the attainment of a diverse student body could be a compelling state interest.

For nearly two decades, colleges and universities relied on the Powell opinion in *Bakke* to support race-conscious student diversity policies. Consideration of race in admissions, which took various forms, stood pretty much unchallenged until *Hopwood v. State of Texas.*[38] A panel of the Fifth Circuit repudiated the Powell diversity rationale when it voided a special admission program of the University of Texas law school. Unlike *Bakke*, the Texas program entailed no explicit racial quota. But, in other respects, it was a classic dual-track system, with one standard for blacks and Hispanics and another for everyone else. Cutoff scores for minorities were lower as well. The Powell opinion was not binding precedent, the *Hopwood* panel ruled, since it was not joined by any other Justice. Thus, race could be considered in admissions only to remedy past discrimination by the law school itself, which was not shown in *Hopwood*.

Several other federal circuit courts, besides the Sixth Circuit in the Michigan case, looked at race-based college admissions after *Bakke.* For example, *Johnson v. Board of Regents*[39] struck down the award of "racial bonus" points to minority students as one of 12 factors—academic and nonacademic—considered for freshman admissions to the University of Georgia. The Eleventh Circuit majority was skeptical of the Powell opinion but did not take a stand on the diversity issue. Instead, the program failed the second requirement of strict scrutiny because it was not narrowly tailored. That is, it "mechanically awards an arbitrary 'diversity' bonus to each and every non-white applicant at a decisive stage in the admissions process."[40] At the same time, the policy arbitrarily limited the number of nonracial factors that could be considered, all at the expense of white applicants, even those whose social or economic background and personal traits would promote experiential diversity. On the other hand, the Ninth Circuit upheld the minority law school admissions program at the University of Washington on the basis of *Bakke*. The appeals court in *Smith v. University of Washington Law School*[41] concluded that the four Brennan Justices who approved of the racial quota in *Bakke* "would have embraced [the diversity rationale] if need be."[42] Justice Powell's opinion thus became the "narrowest footing" for approval of race in admission and was the "holding" of *Bakke*.

[38] 78 F.3d 932 (5th Cir. 1996), cert. denied 518 U.S. 1033 (1996).

[39] 263 F.3d 1234 (11th Cir. 2001).

[40] *Id.* at 1237.

[41] 233 F.3d 1188 (9th Cir. 2000).

[42] *Id.* at 1200.

Post-*Bakke* appeals courts, guided by *Marks v. United States*,[43] sliced and diced the various opinions in *Bakke* to come up with a controlling rationale. In *Marks*, the Supreme Court ruled that when a majority of Justices are unable to agree on a controlling rationale, the holding of the Court is the position of those Justices concurring in the judgment on the narrowest grounds. The pro-diversity circuits concluded that the Powell opinion approving race as a plus factor was narrower than the Brennan rationale, which would have upheld the race quota in *Bakke* on a societal discrimination theory. The opposing circuits had generally reasoned otherwise or concluded that the competing *Bakke* opinions defy rational comparison so that absent a majority consensus, the Powell opinion was without controlling weight. In no way bound by *Bakke*, Supreme Court review of the Michigan cases augured fundamental reexamination of issues raised by that earlier precedent.

The University of Michigan Cases

The judicial divide over the student diversity policies deepened with the University of Michigan cases. One federal district court in *Grutter* originally struck down the student diversity policy of the University of Michigan Law School,[44] while another judge upheld a procedure awarding points to "underrepresented minority" applicants to the undergraduate school.[45] Based on *Bakke*, the Sixth Circuit reversed *Grutter* and permitted the law school to consider race in admissions.[46] The Supreme Court granted *certiorari* in *Grutter* and agreed to review *Gratz* prior to judgment by the Sixth Circuit.

Undergraduate admission to the University of Michigan had been based on a point system or "student selection index." A total possible 150 points could be awarded for factors, academic and otherwise, that made up the selection index. Academic factors accounted for up to 110 points, including 12 for standardized test performance. By comparison, 20 points could be awarded for one, but only one, of the following: membership in an underrepresented minority group, socioeconomic disadvantage, or athletics. Applicants could receive one to four points for alumni relationships, three points for personal essay, five points for community leadership and service, six points for in-state residency, etc. In practice, students at the extremes of academic performance were typically admitted or rejected on that basis alone. But for the middle range of qualified applicants, these other factors were often determinative. Finally, counselors could flag applications for review by the Admissions Review Committee, where any factor important to the freshman class composition—race included—was not adequately reflected in the selection index score.

In upholding this policy, the district court in *Gratz* found that *Bakke* and the University's own evidence demonstrating the educational benefits of racial and ethnic diversity established a compelling state interest. And the award of 20 points for minority status was not a quota or dual-track system, as in *Bakke*, but only a plus factor, to be weighed against others in the selection process. Thus, the constitutional demand for narrow tailoring was satisfied. The *Gratz* district court also concluded that "vigorous minority recruitment" and other race-neutral alternatives to the current policy would not yield a "sufficiently diverse student body."

[43] 430 U.S. 188 (1977).

[44] 137 F. Supp. 2d 821 (E.D. Mich. 2001).

[45] Gratz v. Bollinger, 122 F. Supp. 811 (E.D. Mich. 2000).

[46] Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002).

Generally setting the bar for admission to the Michigan Law School was a selection index based on applicants' composite LSAT score and undergraduate GPA. A 1992 policy statement, however, made an explicit commitment to racial and ethnic diversity, seeking to enroll a critical mass of black, Mexican American, and Native American students. The objective was to enroll minority students in sufficient numbers to enable their participation in classroom discussions without feeling "isolated or like spokesmen for their race." To foster a variety of perspectives and experiences, admission officers consider a range of variables—for example, talents, interests, experiences, and underrepresented minority status—in their admissions decisions. In the course of each year's admissions process, the record showed, minority admission rates were regularly reported to track "the racial composition of the developing class." The 1992 policy replaced an earlier special admissions program, which set a written goal of 10%-12% minority enrollment and lower academic requirements for those groups. The district court in *Grutter* made several key findings: that there is a "heavy emphasis" on race in the law school admissions process; that over a period of time (1992-1998) minorities ranged from 11% to 17% of each incoming class; and that large numbers of minority students were admitted with index scores the same as or lower than unsuccessful white applicants.

Writing for the Sixth Circuit majority, Judge Martin adopted the Powell position in *Bakke* to find that the law school had a compelling interest in achieving a racially diverse student body, and that its admission's policy was narrowly tailored to that end. The factors considered by the university were found to treat each applicant as an individual and to be virtually indistinguishable from plus factors and the Harvard Plan approved by Justice Powell in *Bakke*. Neither did the law school's policy reserve seats on the basis of race. Rather, in pursuit of a critical mass, the policy was designed to ensure that a "meaningful number" of minority students were able "to contribute to classroom dialogue without feeling isolated." The majority opinion further emphasized that the admissions program was flexible, with no fixed goal or target; that it did not use separate tracks for minority and nonminority candidates; and that it did not function as a quota system.

Without waiting for a final appeals court decision, the Supreme Court agreed to review the *Gratz* undergraduate admissions case in tandem with the Sixth Circuit ruling in *Grutter*. The Supreme Court handed down its rulings in *Grutter* and *Gratz* in 2003. Writing for the majority in the former was Justice O'Connor, who was joined by Justices Stevens, Souter, Ginsburg, and Breyer in upholding the law school admissions policy. Chief Justice Rehnquist authored an opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined, striking down the university's undergraduate racial admissions program. Justice Breyer added a sixth vote to invalidate the racial bonus system in *Gratz*, but declined to join the majority opinion.

The Grutter Decision

A notable aspect of the *Grutter* majority opinion was the degree to which it echoed the Powell rationale from *Bakke.* Settling, for the present, the doctrinal imbroglio that had consumed so much recent lower court attention, Justice O'Connor quoted extensively from Justice Powell's opinion, finding it to be the "touchstone for constitutional analysis of race-conscious admissions policies."[47] But her opinion was not without its own possible doctrinal innovations. Overarching much of her reasoning were two paramount themes, which drew considerable criticism from Justice Thomas and his fellow dissenters. First, in applying strict scrutiny to the racial aspects of the law school admissions program, Justice O'Connor stressed the situational nature of constitutional interpretation. Thus, the majority opined, "[c]ontext matters when reviewing race-

[47] Grutter v. Bollinger, 539 U.S. 306, 323 (2003).

based governmental action" for equal protection purposes and "[n]ot every decision influenced by race is equally objectionable," but may depend upon "the importance and the sincerity of the reasons advanced by the governmental decisionmaker" for that particular use of race.[48]

Second, and equally significant, was the deference accorded to the judgment of educational decisionmakers in defining the scope of their academic mission, even in regard to matters of racial and ethnic diversity. "[U]niversities occupy a special niche in our constitutional tradition," Justice O'Connor stated, such that "[t]he Law School's educational judgment ... that diversity is essential to its educational mission is one to which we defer."[49] Institutional good faith would thus be presumed in the absence of contrary evidence. However, Justice Thomas's dissent, joined by Justice Scalia, took particular exception to what he viewed as "the fundamentally flawed proposition that racial discrimination can be contextualized"—deemed compelling for one purpose but not another—or that strict scrutiny permits deference to "the Law School's conclusion that its racial experimentation leads to educational benefits."[50] Indeed, the dissenters found such deference to be antithetical to the level of searching review demanded by strict scrutiny.

Satisfied that the law school had compelling reasons for pursuing a racially diverse student body, the Court moved to the second phase of strict scrutiny analysis. Narrow tailoring, as noted, requires a close fit between means and end when the state draws any distinction based on race. In *Grutter*, the concept of "critical mass," so troubling to several Justices at oral argument, won the majority's approval as "necessary to further its compelling interest in securing the educational benefits of a diverse student body."[51] In this portion of her opinion, Justice O'Connor drew chapter and verse from the standards articulated by Justice Powell in *Bakke*.

> We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.[52]

Justice O'Connor drew a key distinction between forbidden quotas and permitted goals, exonerating the law school's admission program from constitutional jeopardy. She observed that both approaches pay attention to numbers, but while the former are fixed and reserved exclusively for certain minority groups, the opinion continued, the law school's goal of attaining a critical mass of minority students required only a good-faith effort by the institution. In addition, Justice O'Connor noted, minority law school enrollment between 1993 and 2000 varied from 13.5% to 20.1%, "a range inconsistent with a quota."[53] Responding, in his separate dissent, the Chief Justice objected that the notion of a critical mass was a subterfuge for racial balancing since it did not explain disparities in the proportion of the three minority groups admitted under its auspices.

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[48] *Id.* at 327.

[49] *Id.* at 329.

[50] *Id.* at 358, 364.

[51] *Id.* at 334.

[52] *Id.*

[53] *Id.* at 336.

Other factors further persuaded the Court that the law school admissions process was narrowly tailored. By avoiding racial or ethnic bonuses, the policy permitted consideration of "all pertinent elements of diversity," racial and nonracial, in "a highly individualized, holistic review of each applicant's file."[54] Justice O'Connor also found that race neutral alternatives had been "sufficiently considered" by the law school, although few specific examples are provided. Importantly, however, the opinion made plain that exhaustion of every conceivable alternative is not constitutionally required, only a "serious good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[55] Consequently, the law school was not required to consider a lottery or lowering of traditional academic benchmarks—GPA and LSAT scores—for all applicants since "these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."[56] And, because the admissions program was based on individual assessment of all pertinent elements of diversity, it did not unduly burden non-minority applicants. Nonetheless, as she had during oral argument, Justice O'Connor emphasized the need for reasonable time limits and periodic reviews by institutions conducting such programs. To drive home the point, the majority concludes with a general admonition. "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[57]

Besides Justices Thomas and Scalia, and the Chief Justice, another dissenting opinion was filed by Justice Kennedy, who agreed with his brethren that the consistency of minority admissions over a period of years raised a suspicion of racial balancing that the law school was required by the rigors of strict scrutiny to rebut. Arguing from different statistics than the majority, he found "little deviation among admitted minority students from 1995 to 1998," which "fluctuated only by 0.3% from 13.5% to 13.8" and "at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range."[58] In addition, he contended, the use of daily reports on minority admissions near the end of the process shifted the focus from individualized review of each applicant to institutional concerns for the numerical objective defined by a critical mass. For these reasons, he agreed with his fellow dissenters that deference to the law school in this situation was "antithetical to strict scrutiny, not consistent with it."[59]

The Gratz Decision

The four *Grutter* dissenters were joined by Justices O'Conner and Breyer in striking down the racial bonus system for undergraduate admissions in *Gratz*. Basically, the same factors that saved the law school policy, by their absence, conspired to condemn the undergraduate program, in the eyes of the majority. Since the university's compelling interest in racial student diversity was settled in *Grutter*, the companion case focused on the reasons why the automatic award of 20 admission points to minority applicants failed the narrow tailoring aspect of strict scrutiny analysis. Relying, again, on the Powell rationale in *Bakke*, the policy was deemed more than a plus factor, as it denied each applicant individualized consideration by making race "decisive" for "virtually every minimally qualified underrepresented minority applicant."[60] Nor did the

[54] *Id.* at 337.

[55] *Id.* at 339.

[56] *Id.* at 340.

[57] *Id.* at 344.

[58] *Id.* at 389-90.

[59] *Id.* at 394.

[60] Gratz v. Bollinger, 539 U.S. at 272.

procedure for flagging individual applications for additional review rescue the policy since "such consideration is the exception and not the rule," occurring—if at all—only after the "bulk of admission decisions" are made based on the point system.[61] The opinion of the Chief Justice rejected the university's argument, based on administrative convenience, that the volume of freshman applications makes it impractical to apply a more individualized review. "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."[62] Finally, the majority made plain that its constitutional holding in *Gratz* is fully applicable to private colleges and universities pursuant to the federal civil rights laws. "We have explained that discrimination that violates the equal protection clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI [of the 1964 Civil Rights Act]."[63]

Justice O'Connor, concurring in *Gratz*, emphasized the automatic nature of the selection index scoring, which distinguished it from the law school program, and made impossible any nuanced judgments concerning the background, experiences, or qualities of a given candidate. She agreed that the Admissions Review Committee appeared to be an afterthought, particularly since the record was barren of evidence concerning its methods of operation and the decisionmaking process.

Dissenting opinions were filed jointly, by Justices Stevens and Souter, and separately by Justice Ginsburg. The former argued on technical grounds that since the named petitioners had already enrolled in other schools, and were not presently seeking freshman admission at the university, they lacked standing to seek prospective relief and the appeal should be dismissed. But Justice Souter argued separately on the merits that the Michigan undergraduate admission program was sufficiently different from the racial quota in *Bakke* to be constitutionally acceptable. At the very least, he felt, a more appropriate course would be to remand the case for further development of the record to determine whether the entire "admissions process, including review by the [Admissions Review Committee], results in individualized review sufficient to meet the Court's standards."[64] Meanwhile, Justice Ginsburg would have found that the Michigan program was constitutional. In her view, since only qualified applicants are admitted, the current policy is not intended to limit admissions of any racial or ethnic group, and admissions of nonminority groups are not unduly restricted. More broadly, she opined that government decisionmakers may properly distinguish between policies of inclusion and exclusion, because the former are more likely to comport with constitutional imperatives of individual equality.

Fisher v. University of Texas at Austin

At issue in *Fisher* was the constitutionality of the undergraduate admissions plan at the University of Texas at Austin (UT), which, in a stated effort to increase diversity, considers race as one factor among many when evaluating applicants to the school. The use of racial preferences in UT admissions has a complicated history. For many years, UT admitted students based on a simple formula that considered students solely on the basis of academic achievement and race. In 1996, however, the university was forced to abandon this admissions program in the wake of *Hopwood*

[61] *Id*. at 274.

[62] *Id*. at 275.

[63] *Id*. at 276.

[64] *Id*. at 297.

v. Texas,[65] an appellate decision holding that Justice Powell's opinion in *Bakke* was not controlling and that UT's race-conscious plan was unconstitutional.

After the *Hopwood* decision, Texas adopted a new Top Ten Percent (TTP) plan, which requires state universities to automatically admit any student who graduated from a state high school in the top 10% of his or her class. In general, approximately 80% of each class was admitted under this approach, while the remaining students were selected based on a number of race-neutral criteria measuring academic and personal achievement, including essays, leadership, awards and honors, work experience, extracurricular activities, community service, and special circumstances such as socioeconomic status or family responsibilities.

This race-neutral approach significantly increased minority enrollment at Texas universities, although disparities remained within certain majors and classrooms. However, in the wake of *Grutter*, UT reintroduced race as a factor as part of the evaluation of personal achievement. Abigail Fisher, a white student who did not qualify for admission under the TTP program, sued, claiming that she would have been admitted had race not been a factor and that the admissions program was therefore unconstitutional.[66] The Fifth Circuit upheld UT's admissions plan,[67] but Fisher appealed, and the Supreme Court agreed to review the case.[68]

Authored by Justice Kennedy, the majority opinion in *Fisher* begins by emphasizing that its earlier precedents regarding affirmative action in higher education—*Bakke*, *Grutter*, and *Gratz*—remain valid.[69] Collectively, these cases stand for the proposition that the government may promote racial diversity in higher education as long as such programs can withstand strict scrutiny. The Court, however, ruled that the Fifth Circuit had not sufficiently scrutinized UT's admissions program, and issued an order vacating and remanding the case to the lower court.

Specifically, the Court held that the Fifth Circuit had erred by applying an overly deferential form of strict scrutiny. According to the Court, the appellate court was correct in finding that *Grutter* calls for deference when evaluating whether an institution has established a compelling governmental interest under the first prong of the strict scrutiny test.[70] As a result, the courts should generally defer to a university's determination that racial diversity is essential to its educational goals. However, the Fifth Circuit was similarly deferential to UT's assertion that its admissions program was narrowly tailored, and this deference was improper, ruled the Court.[71]

In particular, the Court emphasized that UT bears the burden of proving that its admissions program is narrowly tailored to meet its diversity goal. For UT to meet this burden, "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity."[72] Because the Fifth Circuit relied on a deferential standard instead of conducting a more rigorous narrow tailoring inquiry, the Court held that the lower court had not performed the proper strict scrutiny analysis. As a result, the Court vacated the district court's decision and remanded the case to the Fifth Circuit for reconsideration under the correct standard.

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[65] 78 F.3d 932, 944 (5th Cir. 1996).

[66] Brief for Petitioner, Fisher v. Univ. of Tex. at Austin, 132 S. Ct. 1536 (2012) (No. 11-345).

[67] Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011).

[68] Fisher v. Univ. of Tex. at Austin, 132 S. Ct. 1536 (2012).

[69] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2417 (2013).

[70] *Id.* at 2419.

[71] *Id.* at 2419-22.

[72] *Id.* at 2420.

Justice Kennedy was joined in his opinion by Justices Roberts, Scalia, Thomas, Breyer, Alito, and Sotomayor, although Justices Scalia and Thomas filed separate concurring opinions in which both Justices stated that they would have voted to overrule *Grutter*.[73] In a lone dissent, Justice Ginsburg argued that programs such as UT's are constitutional and that supposedly race-neutral programs like UT's TTP plan are just as race-conscious as programs that explicitly take race into account.[74]

A little over a year after the Court issued its decision, the Fifth Circuit issued a new verdict in the *Fisher* case. On remand, the Fifth Circuit once again upheld UT's admissions plan, despite applying the more demanding standard of review set forth by the Supreme Court. Specifically, the Fifth Circuit concluded that UT had met this burden. According to the court, "UT Austin's holistic review program—a program nearly indistinguishable from the University of Michigan Law School's program in *Grutter*—was a necessary and enabling component of the Top Ten Percent Plan by allowing UT Austin to reach a pool of minority and non-minority students with records of personal achievement, higher average test scores, or other unique skills."[75] After reviewing the data, the court found that UT's "use of race in pursuit of diversity is not about quotas or targets, but about its focus upon individuals, an opportunity denied by the Top Ten Percent Plan."[76] As a result, the court concluded that UT's limited use of race in admissions was narrowly tailored to meet the university's diversity goals.

In the wake of the appellate court's ruling, the Supreme Court agreed once again to review the *Fisher* decision.[77] Although the reason for the repeat grant of certiorari is uncertain, the Court's decision to revisit the case appears to indicate some disagreement with the Fifth Circuit's ruling. It is not clear, however, whether this apparent dissatisfaction is directed at the lower court's reasoning in the *Fisher* case specifically or at the constitutionality of such affirmative action programs more broadly. In 2013, the Court managed to avoid this larger question by issuing a narrow ruling that focused on the equal protection standard of review, but, at the time, several of the Justices openly invited direct legal challenges to the use of race in higher education admissions. However, until such a challenge is successfully mounted in *Fisher* or another case, the limited use of race-conscious measures in higher education continues to remain constitutionally permissible for the time being.

Schuette v. Coalition to Defend Affirmative Action

The *Schuette* case represents an interesting twist on the typical inquiry into the constitutionality of affirmative action programs. Unlike the challenges in *Bakke*, *Grutter*/*Gratz*, and *Fisher*, which all questioned whether it is constitutionally permissible to promote racial diversity in higher education, *Schuette* involved an inquiry as to whether it is constitutionally permissible to ban all consideration of race in the higher education context. In the wake of the 2003 rulings in the University of Michigan cases, opponents of affirmative action in Michigan successfully lobbied for the passage of Proposal 2, which amended the Michigan state constitution to prohibit preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting. Opponents of Proposal 2 sued, and a panel of judges on the Sixth Circuit ruled that Proposal 2's ban on racial preferences in public education

[73] *Id.* at 2422.

[74] *Id.* at 2432-34. Justice Kagan did not participate in the case.

[75] Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 653 (5th Cir. 2014).

[76] *Id.* at 654.

[77] Fisher v. Univ. of Tex. at Austin, 135 S. Ct. 2888 (2015).

violates the equal protection clause of the U.S. Constitution.[78] This decision was subsequently upheld in a divided ruling by the full Sixth Circuit, sitting en banc,[79] but the Supreme Court reversed the lower court.[80]

In the appellate ruling, the majority opinion of the en banc Sixth Circuit relied extensively on two decades-old Supreme Court cases holding that an individual's ability to participate in the political process may not be disadvantaged on the basis of race. In *Hunter v. Erikson*,[81] local voters not only overturned an ordinance that prohibited housing discrimination, but also amended the city charter to require that any housing laws that prohibit racial discrimination could not take effect unless approved by a majority of voters. In other words, passage of regular housing laws required approval by the city council, while passage of housing laws designed to protect racial minorities required an extra legislative step and was therefore more difficult to achieve. In invalidating the measure, the Supreme Court held that this two-tiered system "place[d] special burden[s] on racial minorities within the governmental process" and ruled that the state may not "disadvantage any particular group by making it more difficult to enact legislation on its behalf."[82]

Likewise, in *Washington v. Seattle School District No. 1*,[83] the city enacted a student busing plan, but voters adopted a constitutional amendment to prohibit local school boards from establishing such plans. The Court struck down the amendment, noting that it imposed a disproportionate burden on the basis of race by requiring proponents of school busing laws to win support at a statewide level, unlike other school-related decisions that were approved by the local school board. According to the Court, the equal protection clause prohibits "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."[84]

Ultimately, the Court's approach to these precedents was highly fractured. Although the Court upheld the Michigan law by a vote of 6-2, there were three different opinions concurring in the judgment. In an opinion announcing the judgment of the Court, Justice Kennedy distinguished its rulings in cases such as *Hunter* and *Seattle*, noting that these cases involved state laws that encouraged or inflicted injuries on racial minorities, while Michigan's Proposal 2 reflected the right of its voters to decide whether race-conscious preferences should continue to be used. In particular, Justice Kennedy, as well as other Justices, appeared concerned about judicial interference in the political process and the viability of the political process doctrine itself. According to Justice Kennedy, the Court lacks the authority "to set aside Michigan laws that commit this policy determination [about governmental use of racial preferences] to the voters."[85]

In a concurring opinion, Justice Scalia argued that the political process cases should be overturned entirely and that Proposal 2 should be upheld under the equal protection clause because it reflects no racially discriminatory purpose. Justice Breyer also wrote separately, agreeing that Michigan's law is constitutional. The Constitution permits, but does not require, racial preferences, he wrote, and voters, not judges, should be the ones to determine whether such programs should be implemented. Justice Sotomayor, however, strongly dissented from the

[78] Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich., 652 F.3d 607 (6th Cir. 2011).

[79] Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466 (6th Cir. 2012)

[80] Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014).

[81] Hunter v. Erickson, 393 U.S. 385 (1969).

[82] *Id.* at 391, 393.

[83] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982).

[84] *Id.* at 467.

[85] Schuette, 134 S. Ct. at 1638.

Court's judgment. Detailing the nation's long history of racial inequality, she emphasized that "race matters" and urged her colleagues not to "wish away ... the racial inequality that exists in our society."[86]

As the fractured ruling indicates, the Court remains divided regarding the constitutionality of governmental actions that take race into account. For the moment, though, it appears that states are free to ban the use of racial preferences in public education—and in other contexts, such as public employment or contracting—should they wish to do so. As a result, the *Schuette* ruling could potentially result in a corresponding drop in minority enrollment at public colleges and universities located in such states, as has already occurred in states such as California and Florida, where similar bans were previously upheld.[87]

Desegregation and Racial Diversity in Public Elementary, Secondary, and Magnet Schools (K-12)

The use of affirmative action in public elementary and secondary school—whether to eliminate the vestiges of racial segregation or to promote diversity—has also been the subject of extensive judicial debate over the decades. Prior to 2007, the Supreme Court had never addressed the constitutionality of such programs, leaving the analysis to the lower courts, which were split on the issue. Indeed, the majority of the federal appeals courts to review such cases after *Grutter* and *Gratz* were decided upheld the use of race-conscious measures in public schools,[88] but these opinions conflicted with pre-*Grutter*/*Gratz* appellate rulings that rejected such racially based plans.[89]

Two of these post-*Grutter* cases are particularly significant. In *MacFarland v. Jefferson County Public Schools*,[90] issued on the first anniversary of the Michigan decisions and the 50th anniversary of *Brown v. Board of Education*, a federal district court in Kentucky upheld a Louisville district's voluntary consideration of race in making student assignments to achieve racial integration in the public schools. Jefferson County Public Schools (JCPS) were ordered by judicial decree to desegregate in 1975. Under the desegregation plan, each school was to have between 15% and 50% African American enrollment and students were bused, if necessary, to ensure racial diversity. Twenty-five years later, in 2000, the federal courts ended their supervision of the desegregation plan, but the JCPS voluntarily opted to maintain its integrated schools through a managed choice plan. The plan was challenged in a lawsuit by black parents whose children were denied admission to Central High School, which was already at the upper percentage limit for minority enrollment.

The district court found that the managed choice plan served numerous compelling state interests, "some of the same reasons for integrated schools that the Supreme Court upheld in *Grutter*."[91]

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[86] *Id.* at 1676.

[87] Brief of Civil Rights Project/Proyecto Derechos Civiles as Amicus Curiae in Support of Respondents at *13-14, Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (No. 12-682), 2012 U.S. Briefs 682, 12-13.

[88] Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005); McFarland v. Jefferson County Pub. Schs., 416 F.3d 513 (6th Cir. 2005); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162 (9th Cir. 2005), *but see* Cavalier ex rel. Cavalier v. Caddo Parish Sch. Bd., 403 F.3d 246 (5th Cir. 2005).

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

[90] 330 F. Supp. 2d 834 (W.D.Ky. 2004).

[91] *Id.* at 837.

Thus, the court accepted the school board's arguments that the plan improved the educational experience; that it produced educational benefits for students of all races over the last 25 years; and that it helped overcome the adverse effects of concentrations of poverty that impact black students to a greater extent than whites. "Integrated schools, better academic performance, appreciation for our diverse heritage and stronger, more competitive public schools are consistent with the central values and themes of American culture,"[92] reasoned the court. The decision also held that the student assignment plan was narrowly tailored in every respect except for its use of separate racial categories, which the district was required to revise for the 2005-2006 school year. For reasons "articulated in the well-reasoned opinion of the district court," the Sixth Circuit summarily affirmed the decision, without issuing a detailed written opinion.[93]

The constitutionality of race-conscious admissions to magnet or alternative schools, designed to promote elementary and secondary school desegregation, has also been before the courts. In *Parents Involved in Community Schools v. Seattle School District No. 1*,[94] the Ninth Circuit applied *Grutter* and *Gratz* to approve a school district's plan to maintain racially diverse schools. Under Seattle's controlled choice high school student assignment plan, students were given the option to attend high schools across the district, but if the demand for seats exceeded the supply at a particular school, a student's race was considered as a tie-breaker in determining admittance to the oversubscribed school. The racial tie-breaker applied only to schools whose student bodies deviated by more than 15 percentage points from the overall racial makeup of the district, then approximately 40% white and 60% nonwhite. The Seattle plan was voluntarily adopted to achieve diversity and limit racial isolation in the schools, not as a part of a desegregation remedy.

In an *en banc* decision, the Ninth Circuit ruled that the school district had a compelling interest in the educational and social benefits of racial diversity and in avoiding racially concentrated or isolated schools. Further, the court held that the district's plan was sufficiently narrowly tailored to pass constitutional muster. According to the court, the individualized and holistic review endorsed by the Supreme Court was not required of a noncompetitive, voluntary student assignment plan such as Seattle's, as long as the plan was otherwise narrowly tailored. The court held that Seattle's plan was sufficiently narrowly tailored, concluding that the 15 percentage point band was not a quota because it was flexible and did not reserve a certain number of fixed slots based on race. The court also ruled that the school district had made a good faith effort to consider race-neutral alternatives. Finally, the court concluded that the plan imposed a minimal burden—not being permitted to attend one's preferred school—that was shared by all students and that the plan, which was subject to regular reviews, was sufficiently limited in time and in scope. The ruling reversed an earlier three-judge appellate panel's contrary decision that the school district's plan to maintain racially diverse schools was not sufficiently narrowly tailored.

Ultimately, the Supreme Court granted review in *MacFarland v. Jefferson County Public Schools*—now *Meredith v. Jefferson County Board of Education*—and *Parents Involved in Community Schools v. Seattle School District No. 1* to consider the question of what steps, if any, a public school district may take to maintain racial diversity in elementary and secondary education.[95] In *Parents Involved in Community Schools v. Seattle School District No. 1*, a

[92] *Id.* at 852.

[93] McFarland v. Jefferson County Public Schools, 416 F.3d 513 (6th Cir. 2003).

[94] 426 F. 3d 1162 (9th Cir. 2005).

[95] 547 U.S. 1177 (2006).

consolidated ruling that resolved both cases, the Court struck down the school plans at issue, holding that they violated the equal protection guarantee of the Fourteenth Amendment.[96]

The *Parents Involved in Community Schools* Decision

Ultimately, the Supreme Court held that the Louisville and Seattle school plans violated the equal protection clause. However, the decision was fractured, with five different Justices filing opinions in the case. Announcing the judgment of the Court was Chief Justice Roberts, who led a plurality of four Justices in concluding that the school plans were unconstitutional because they did not serve a compelling governmental interest. Although Justice Kennedy, who concurred in the Court's judgment striking down the plans, disagreed with the plurality's conclusion that the diversity plans did not serve a compelling governmental interest, he found that the school plans were unconstitutional because they were not narrowly tailored.[97] In addition, Justice Thomas filed a concurring opinion, and Justices Stevens and Breyer filed separate dissenting opinions.

In the portion of his opinion that was joined by Justice Kennedy and that therefore announced the judgment of the Court, Chief Justice Roberts began by noting that the Court had jurisdiction in the case, thereby rejecting a challenge to the standing of the plaintiff organization Parents Involved in Community Schools (PICS).[98] Chief Justice Roberts then turned to the substantive merits of the claims involved, reiterating that governmental racial classifications must be reviewed under strict scrutiny. As a result, the Court examined whether the school districts had demonstrated that their assignment and transfer plans were narrowly tailored to achieve a compelling governmental interest.

In assessing the compelling interest prong of the strict scrutiny test, Chief Justice Roberts noted that the Court has recognized two interests that qualify as compelling where the use of racial classifications in the school context is concerned: remedying the effects of past intentional discrimination and promoting diversity in higher education.[99] However, the Chief Justice found that neither of these interests was advanced by the school plans at issue. According to the Chief Justice, because Seattle schools were never intentionally segregated and because the lifting of its desegregation order demonstrated that Louisville schools had successfully remediated past discrimination in its schools, neither school district could assert a compelling interest in remedying past intentional discrimination.[100]

Likewise, the Court argued that the *Grutter* precedent did not govern the current cases. According to Chief Justice Roberts, the compelling interest recognized in *Grutter* was in a broadly defined diversity that encompassed more than just racial diversity and that focused on each applicant as an individual.[101] Because race was the only factor considered by the school districts rather than other factors that reflected a broader spectrum of diverse qualifications and characteristics and because the plans did not provide individualized review of applicants, the plurality opinion found that the school districts' articulated interest in diversity was not compelling. Added the Chief Justice, "[e]ven when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/'other' terms in Jefferson

[96] 551 U.S. 701 (2007).

[97] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007).

[98] *Id*. at 718-20 (2007).

[99] *Id*. at 720-22.

[100] *Id.* at 721-22.

[101] *Id*. at 722.

County."[102] In rejecting *Grutter* as applicable precedent, the Court also noted that the decision had rested in part on the unique considerations of higher education and that those considerations were absent in the elementary and secondary education context.[103]

Even if the school districts had met the first prong of the strict scrutiny test by establishing a compelling governmental interest in the use of racial classifications to make school assignments, the Court found the school plans would still have failed the second prong of the test because they were not sufficiently narrowly tailored to meet their stated goals. According to Chief Justice Roberts, in both Seattle and Louisville, only a few students were assigned to a non-preferred school based on race. As a result, "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications,"[104] especially in light of the fact that such racial classifications are permissible in only the most extreme circumstances. Additionally, the Court was concerned that the school districts had failed to consider methods other than racial classifications to achieve their goals, despite a requirement that narrowly tailored programs consider race-neutral alternatives.

Although Justice Kennedy joined the above portions of the plurality opinion, thereby forming a majority in favor of striking down the school plans, he did not join the remainder of the plurality opinion, which concluded for additional reasons that the school plans were unconstitutional.[105] In these portions of his opinion, Chief Justice Roberts faulted the school plans for tying their diversity goals to each district's specific racial demographics rather than to "any pedagogical concept of the level of diversity needed to obtain the asserted educational benefits."[106] In other words, each district tried to establish schools with racial diversity that mirrored the percentages of racial groups in their respective overall populations. This effort, according to the Chief Justice, amounted to unconstitutional racial balancing because the plans were not in fact narrowly tailored to the goal of achieving the educational and social benefits that allegedly flow from racial diversity but rather were tailored to racial demographics instead. Indeed, Chief Justice Roberts wrote, "[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[107] Such racial balancing could not, in the Chief Justice's view, amount to a compelling governmental interest even if pursued in the name of racial diversity or racial integration.

In another portion of the plurality opinion not joined by Justice Kennedy, Chief Justice Roberts criticized Justice Breyer's dissent for misapplying precedents that recognized a compelling interest in remedying past discrimination. According to the Chief Justice, the Court has recognized a compelling interest in remedying past discrimination when that discrimination is caused by governmental action but not when caused by other factors, such as social or economic pressures. Noting that the Seattle school district was never segregated due to state action and the Louisville school district had eliminated all vestiges of state segregation, the Chief Justice therefore argued that the cases cited by Justice Breyer as precedents for race-conscious school

[102] *Id.* at 723.

[103] *Id.* at 725.

[104] *Id.* at 734.

[105] *Id.* at 725-33, 735-44.

[106] *Id.* at 726.

[107] *Id.* at 730.

integration efforts were inapplicable to the current case.[108] The plurality opinion concluded with a discussion of *Brown v. Board of Education*,[109] in which the Court held that the deliberate segregation of schoolchildren by race was unconstitutional. According to the plurality:

> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.... The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[110]

Although he joined the Court in striking down the school plans, Justice Kennedy wrote a separate concurring opinion that provides additional insight into how the Justices might handle future cases involving the consideration of race in the educational context. As noted above, Justice Kennedy declined to sign on to the plurality opinion in full, in part because he disagreed with its implication that diversity in elementary and secondary education, at least as properly defined, does not serve a compelling governmental interest. According to Justice Kennedy, "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue,"[111] but neither Seattle nor Louisville had shown that its plans served a compelling interest in promoting diversity or that the plans were narrowly tailored to achieve that goal.

Justice Kennedy also pointedly criticized the plurality opinion for "imply[ing] an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.... In the administration of public schools by the state and local authorities, it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."[112] Justice Kennedy identified several ways in which schools, in his view, could constitutionally pursue racial diversity or avoid racial isolation, including strategic site selection of new schools, altering attendance zones, providing resources for special programs, and recruiting students and faculty.[113] According to Justice Kennedy, such measures would be constitutional because, while race-conscious, they are not based on classifications that treat individuals differently based on race. However, Justice Kennedy would not limit schools to facially neutral methods of achieving diversity, saying that racial classifications might be permissible if based on "a more nuanced, individual evaluation of school needs and student characteristics" similar to the plan approved in *Grutter*.[114] Although no other Justice joined his concurrence, Justice Kennedy's unique role in providing the pivotal swing vote in the case makes his concurring opinion significant to any future legal developments regarding the use of racial classifications in the education context.

Although Justice Thomas joined the plurality opinion written by Chief Justice Roberts in full, he also wrote a separate concurring opinion that took issue with certain aspects of Justice Breyer's dissent. Among other things, Justice Thomas disagreed with the dissent's assertion that the school plans were necessary to combat school resegregation, arguing that neither Seattle nor Louisville faced the type of intentional state action to separate the races that the school districts in *Brown*

[108] *Id.* at 735-40.

[109] 347 U.S. 483 (1954).

[110] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. at 747-48.

[111] *Id.* at 783.

[112] *Id.* at 787-88.

[113] *Id.* at 789.

[114] *Id.* at 790.

had.[115] In addition, Justice Thomas contested the dissent's argument that a less strict standard of review should apply when racial classifications are used for benign purposes, in part because Justice Thomas disagreed that the school plans—which, he wrote, inevitably exclude some individuals based on race and therefore may exacerbate racial tension—are as benign as the dissent asserted. More importantly, Justice Thomas argued that the perception of what constitutes a benign use of race-conscious measures is nothing more than a reflection of current social practice that relies too heavily on the good intentions of current public officials. According to Justice Thomas, "if our history has taught us anything, it has taught us to beware of elites bearing racial theories," adding in a footnote, "Justice Breyer's good intentions, which I do not doubt, have the shelf life of Justice Breyer's tenure."[116]

As noted above, both Justices Stevens and Breyer dissented from the Court's decision to strike down the school plans. In his brief dissent, Justice Stevens, who also joined Justice Breyer's dissent, described the Court's reliance on *Brown* as a "cruel irony" because it ignored the historical context in which *Brown* was decided and the ways in which subsequent precedents applied the landmark decision to uphold school integration efforts.[117] Meanwhile, in a lengthy and passionate dissent nearly twice as long as Chief Justice Roberts's opinion, Justice Breyer argued that the Court's holding:

> distorts precedent, ... misapplies the relevant constitutional principles, ... announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, ... threatens to substitute for present calm a disruptive round of race-related litigation, and ... undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality.[118]

IV. Conclusion

The Michigan cases resolved an issue that had vexed the lower federal courts for a quarter-century. Historically, judicial insistence on strict scrutiny has largely condemned governmental distinctions based on race, except in the most narrowly circumscribed circumstances. To the short list of governmental interests sufficiently compelling to warrant race-based decisionmaking, a majority of the Court added the pursuit of diversity in higher education. But this expansion has been curtailed somewhat by the Court's more recent pronouncement involving elementary and secondary school plans to promote racial diversity, its less deferential approach in *Fisher*, and its subsequent decision to reconsider UT's admissions plan during the upcoming term.

Although the Court's decision to strike down the Seattle and Louisville school assignment and transfer plans likely had a profound impact on similar plans at many of the nation's elementary and secondary schools, the *Parents Involved in Community Schools* case did not completely foreclose the possibility that school districts may constitutionally pursue certain measures to avoid racial isolation, prevent resegregation, and promote racial diversity in their schools. However, it is not entirely clear what these measures might entail. While the facially race-neutral methods identified in Justice Kennedy's concurring opinion—such as engaging in strategic site selection of new schools, altering attendance zones, providing resources for special programs, and

[115] *Id.* at 749-50.

[116] *Id.* at 782, n. 30.

[117] *Id.* at 798-803.

[118] *Id.* at 803-04.

recruiting students and faculty—seem more likely to survive judicial scrutiny, the fate of other kinds of race-conscious school plans may become apparent only as a result of legal developments that emerge over time. Indeed, there is evidence that some school districts are abandoning race-based school assignment plans in favor of plans based on socioeconomic status, which is a non-suspect classification for purposes of constitutional review.[119] Likewise, some colleges and universities have taken similar steps in anticipation of judicial rulings limiting the use of race in higher education.[120]

Meanwhile, the seeds of future controversy may lie in questions arguably raised but not fully addressed by the latest rulings. For example, the Court's latest rulings left unanswered the constitutional status of racially exclusive diversity policies not directly involving admissions, such as the legality of race-based scholarship and financial aid, recruitment and outreach, or college preparation courses that exclusively target minority populations. In addition, the question of whether schools or universities may completely avoid constitutional shoals by adopting race-neutral plans to increase racial diversity may not be fully answered by the Court's latest rulings. Such race-neutral alternatives include percentage plans like those approved in Texas, Florida, and California that guarantee college admission to top graduates from every state high school, regardless of race. In addition to percentage plans, educational authorities have experimented with other forms of alternative action, or policies designed to promote racial diversity without relying on racial preferences. Class-based affirmative action, for example, takes socioeconomic status or the family educational background of students into account. Such strategies may include replacing race and ethnicity with other socioeconomic and geographical proxies for diversity; increasing need-based financial aid programs; improving low-performing primary and secondary schools; providing additional educational services at such schools; and considering diversity or hardship essays in which applicants describe challenging life experiences such as poverty, English as a second language, or having a family member in prison.

By avoiding the use of explicit racial classifications and dual-track admission policies, these efforts are far less susceptible to facial challenge as an equal protection violation. Programs involving the explicit consideration of race remain most at risk. But policies that employ nonracial factors as a proxy for race may be vulnerable if the purpose or intent is to benefit minority groups. In *Washington v. Davis*[121] and related rulings,[122] the Supreme Court determined that a race-neutral law with a disparate racial impact on minority groups is subject to strict scrutiny if it is enacted with a racially discriminatory purpose. Racial motive was made a constitutional touchstone for equal protection analysis, and whether reflected by a racial classification or other evidence of discriminatory purpose, strict scrutiny was triggered by evidence of such intent. Similarly, alternatives to traditional racial diversity policies may not

[119] Emily Bazelon, *The Next Kind of Integration*, N.Y. Times, July 20, 2008, at MM38.

[120] Rosa Ramirez, "Colleges' Plan B for Diversity," *National Journal*, October 11, 2012, at http://www.nationaljournal.com/thenextamerica/education/colleges-plan-b-for-diversity-20121009.

[121] 426 U.S. 229 (1976).

[122] Cf. Personnel Administrator v. Feeney, 442 U.S. 256 (1979). In Feeney, the Court upheld a state law giving a preference to veterans for civil service employment, which had a significant discriminatory effect against female applicants. Notwithstanding the obvious impact of such a preference, the Court upheld it on the ground that "'[d]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279. Although Feeney involved a claim of sex-based discrimination, the test there announced for determining whether a purpose is "discriminatory" with respect to a particular trait has been applied to claims of racial discrimination as well. See Hernandez v. New York, 500 U.S. 352, 360 (1991).

escape strict judicial scrutiny if an objecting non-minority applicant is able to show that the plan was racially motivated. The same limitations may apply to private institutions, which are immune from constitutional limitations, under Title VI of the 1964 Civil Rights Act.

Beyond education, issues may inevitably arise concerning the implications of *Grutter*, *Parents Involved in Community Schools*, and *Fisher* on efforts to achieve racial diversity in other social and economic spheres. To date, the Court has permitted race-conscious hiring criteria by private employers under Title VII, either as a remedy for past discrimination or to redress a "conspicuous racial imbalance in traditionally segregated job categories,"[123] but refused to find that a state's interest in faculty diversity to provide teacher role models was sufficiently compelling to warrant a race-conscious layoff policy.[124] Lower courts are similarly divided, though a few have applied an "operational need analysis" to uphold police force diversity policies, recognizing "that 'a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves,' may constitute a compelling state interest."[125] But current standards under the federal civil rights laws generally allow for consideration of race in hiring and promotion decisions only in response to demonstrable evidence of past discrimination by the employer or within the affected industry. No rule of deference like that extended to educational institutions has been recognized for employers, nor is one likely to be applied in the wake of *Parents Involved in Community Schools* or *Fisher*.

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[123] United Steelworkers of America v. Weber, 443 U.S. 179 (1979). In Johnson v. Transportation Agency, 480 U.S. 616 (1980), the Court extended this analysis to gender-conscious affirmative action programs in regard to use of a "plus" factor in hiring and promotion decisions.

[124] Wygant v. Board of Education, 476 U.S. 267 (1986).

[125] Patrolmen's Benevolent Assoc. v. City of New York, 310 F.3d 43, 52 (2d Cir. 2002) (quoting Barhold v. Rodriguez, 863 F.2d 233, 238 (2d Cir. 1988)); Reynolds v. City of Chicago, 296 F.3d 524 (7th Cir. 2002). See also Cotter v. City of Boston, 323 F.3d 160, 172 n. 10 (1st Cir. 2003) (declining to address question of compelling interest but expressing sympathy for "the argument that communities place more trust in a diverse police force and that the resulting trust reduces crime rates and improves policing").