Bucking *Grutter*: Why Critical Mass Should Be Thrown Off the Affirmative-Action Horse

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I. INTRODUCTION

Legal discourse is awash with metaphors like "slippery slope,"

* J.D., The University of Texas School of Law, 2011. I would like to thank Professor Justin Driver for a great class and for encouraging me through a difficult paper. I also thank my family and friends for their inexhaustible support, and Kathryn Olson and the staff of the Texas Journal on Civil Liberties and Civil Rights for editing my Note.

"color blind," and "ripeness."[1] These metaphors are often purely illustrative, such as "fruit of the poisonous tree" to describe derivative evidence tainted by the illegality of its source,[2] but they may also have substantive consequences. In 2003, the Supreme Court decided a pair of affirmative-action cases arising out of admissions plans at the University of Michigan,[3] and the notion of "critical mass" played an enormous role. Indeed, it was the key difference between the successful law school admissions program and the doomed undergraduate one.[4]

The trouble is that "critical mass" means something different to everyone. Judges and commentators who use the term rarely explain what they think it means or entails. Such an elusive concept makes for a brilliant rhetorical device but a poor basis for constitutional law: "[I]ts elasticity and indeterminacy . . . allow people to invoke the term to assert varying normative positions under various circumstances without actually making an extended argument to defend those positions."[5] An interest so compelling that courts will allow racial classifications to be employed in its pursuit "must constitute more than meaningless jargon."[6]

In this Note, I will describe the origins of the term "critical mass" and its use in legal discourse; lay the doctrinal groundwork for a discussion of the *Grutter* decision; examine the *Grutter* Court's reliance on critical mass, hopefully rehabilitating the theory against the objections of the dissenters; and analyze some of the social-science evidence that was offered in support of the critical mass theory of affirmative action. Ultimately, I hope to show that although critical mass is supportable in principle, it was not supported in *Grutter*. The concept is theoretically sound in the affirmative-action context, but the Court's slapdash analysis of the empirical evidence shows why critical mass is too illusory to be a useful doctrinal tool.

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[1] *See* Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97, 129 (2007).

[2] *See* Wong Sun v. United States, 371 U.S. 471, 487–88 (1963).

[3] Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

[4] The law school's plan sought to enroll a "critical mass" of minority students, *Grutter*, 539 U.S. at 316, while the undergraduate plan awarded a fixed bonus of twenty points to all applicants who were members of an "underrepresented racial or ethnic minority group," *Gratz*, 539 U.S. at 255.

[5] Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1380 (1996), *cited in* Addis, *supra* note 1, at 99 n.16. The concept of "diversity" itself suffers from the same flaw. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 962 (9th Cir. 2004) ("[T]he diversity rationale ha[s] often been criticized as 'amorphous,' 'abstract,' 'malleable,' and 'ill-defined.'"); Grutter v. Bollinger, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., dissenting) ("'[D]iversity' . . . is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue.").

[6] Maria Funk Miles, *Confusing Means with Ends*, 2005 BYU EDUC. & L.J. 245, 256 (2005).

II. THE THEORY OF CRITICAL MASS

A. Cases Invoking Critical Mass

The Supreme Court had made a number of cursory references to critical mass before *Grutter*. In a First Amendment case, the Court upheld a Los Angeles ordinance prohibiting the concentration of two or more "adult operations" in the same establishment.[7] The city enacted the ordinance after a 1977 study concluded that "concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities."[8] In his concurring opinion, Justice Kennedy observed that "[t]wo or more adult businesses in close proximity seem to attract a critical mass of unsavory characters . . . ."[9] He also referred to the "critical mass" of customers (as potential victims of crime) needed to attract ne'er-do-wells.[10]

In an Establishment Clause challenge, the Supreme Court held that the Ku Klux Klan could not be prevented from erecting a cross in a public forum near the Ohio state capitol.[11] The state argued that issuing a permit might "produce the perception that the cross [bore] the State's approval."[12] Justice Scalia's majority opinion rejected this argument, saying that such a "perception" standard would force states to "guess whether some undetermined critical mass of the community might . . . perceive the [state] to be advocating a religious viewpoint."[13] Scalia apparently thought that the meaning of "critical mass" was so obvious that it required no explanation.

The Court had even invoked the critical mass concept in a pre-*Grutter* university-admissions case.[14] In evaluating Virginia Military Institute's policy of excluding women, the majority adopted the trial judge's conclusion that active recruitment of women could "'achieve at least 10% female enrollment'—'a sufficient critical mass to provide the female cadets with a positive educational experience.'"[15] Again, "critical mass" was left undefined.

At the Court of Appeals level, the notion of critical mass has been invoked in cases involving employment discrimination,[16] zoning,[17] video

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[7] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).
[8] *Id.* at 430.
[9] *Id.* at 452 (Kennedy, J., concurring).
[10] *Id.* ("Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all.").
[11] Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).
[12] *Id.* at 763.
[13] *Id.* at 767.
[14] United States v. Virginia, 518 U.S. 515 (1996).
[15] *Id.* at 523 (quoting United States v. Virginia, 766 F. Supp. 1407, 1437–38 (W.D. Virginia 1991)).
[16] *See* Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169 (11th Cir. 2005); Phillips v. Bowen, 278 F.3d 103 (2d Cir. 2002); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

games,[18] antitrust,[19] campaign finance,[20] and securities regulation.[21] However, none of these cases makes a sincere effort to explain their use of "critical mass."

B. What Critical Mass Might Mean

The notion of critical mass comes from the theory of nuclear reactions; it is "the precise minimum level of fissionable . . . uranium that is required to start and sustain a chain reaction of nuclear fission."[22] A reaction "goes critical" when there is enough uranium in the sample that a "typical neutron emitted near the center of the sphere will likely collide with a uranium nucleus before reaching the outer surface."[23] In its original, scientific sense, critical mass has three features:

> [T]he existence of a precise minimum level of the required material for a change to take place; a change that is sudden and transformative; and that the change is not simply a function of a minimum level of the resource but also a function of how elements of that resource interact with one another.[24]

Since its first use in 1919,[25] the term "critical mass" has been extended to describe much more than atomic bombs, including many biological and social phenomena. As I discussed, the concept is so seductively intuitive that courts and commentators have used the term without considering what it can sensibly mean in a social-science context. *Grutter* itself proves that there is still "no agreement as to what the concept precisely means."[26]

One possibility, indeed the closest to the scientific sense, is that critical mass in the social sciences still means an exact number.[27] For example, a narcissist may agree to attend a party only if forty other people show up. Less specifically, a pedestrian may cross against a light only if enough other people cross that he feels sure he will not be hit by a car. In these cases, it is not only the number of other participants that is

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[17] *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 585 F.3d 364 (7th Cir. 2009).
[18] *See* E.S.S. Entm't 2000 v. Rock Star Videos, Inc., 547 F.3d 1095 (9th Cir. 2008).
[19] *See* Novell, Inc. v. Microsoft Corp., 505 F.3d 302 (4th Cir. 2007); Olson v. Nat'l Broad. Co., 855 F.2d 1446 (9th Cir. 1988).
[20] *See* Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975).
[21] *See* Braintree Labs., Inc. v. Citigroup Global Mkts., Inc., 2010 WL 3958862 (1st Cir. 2010).
[22] Addis, *supra* note 1, at 98.
[23] *Id.* at 103 (quoting Alan Lightman, *Megaton Man*, N.Y. REV. BOOKS, May 23, 2002, at 35).
[24] *Id.* at 98–99.
[25] *Id.* at 104 (citing Guenther Eichhorn & Michael J. Kurtz, *A Reader Answers: 'Critical Mass' Origin*, PHYSICS TODAY, May 2004, at 18).
[26] Addis, *supra* note 1, at 111.
[27] *See id.* at 124.

important, but "the immunity that those numbers provide . . . . One crosses a busy intersection against a red light not simply because a certain number of people have crossed, but because of perceived safety that come[s] with those numbers."[28] This idea makes sense in the affirmative action context: in a university class with a critical mass of minorities, minority students may be more inclined to speak not because of their numbers, but because of what those numbers "impl[y] about immunity from put-downs, ridicule and dismissive attitudes . . . ."[29]

The "safety in numbers" conception of critical mass must be tied to a proportion or range rather than an absolute number.[30] It is nonsensical to strictly model human behavior on neutrons,[31] and in a social setting, the nature of the participants matters as much as their numbers—critical mass "describes a highly contextual process."[32] Individual psychology matters, but that is not to say that "there is no threshold or that the threshold is unknowable or unpredictable."[33] It is certainly possible to measure when the average pedestrian is willing to jaywalk. Similarly, empirical studies should be able to determine the social and educational effects of minority representation in universities. The point of criticality will be determined not only by the size of a minority group, but also by the nature of its members, the nature of the majority-group members, and the environment of the institution.[34] Context matters.

This is the conception of critical mass underlying the majority opinion in *Grutter*; the recent Fifth Circuit case *Fisher v. University of Texas* makes the point explicitly. I will return to *Fisher* in Part IV-C.

III. THE DOCTRINAL FOUNDATION OF *GRUTTER*

A. Prior Cases Invoking Diversity

The appeal of diversity in education came long before *Grutter*. In 1950, the Supreme Court held that Texas's establishment of an inferior all-black law school did not satisfy the "separate but equal" requirement of *Plessy v. Ferguson*, observing that "[f]ew students and no one who has practiced law would choose to study in an academic vacuum, removed from the *interplay of ideas and the exchange of views* with which the law

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[28] *Id.* at 124–25.
[29] *See id.* at 125.
[30] *Id.*
[31] *See* Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 263 F. Supp. 2d 209, 263 (D. Mass. 2003) ("This is not a case of scientific precision . . . and scientific precision should not be required.").
[32] Addis, *supra* note 1, at 133.
[33] *Id.*
[34] *Id.* at 134.

is concerned."[35] Similarly, in *McLaurin v. Oklahoma*, after the state was forced to admit a black applicant to a graduate program, it required him to sit apart from other students and eat at a designated table in the cafeteria at a different time.[36] The Court declared this segregation policy unconstitutional, noting that it "impair[ed] and inhibit[ed] [McLaurin's] ability to study, *to engage in discussions and exchange views with other students*, and, in general, to learn his profession."[37]

B. *Bakke* and its Aftermath

The seeds of the diversity rationale employed in *Grutter* were sown mainly in the 1978 case *Regents of the University of California v. Bakke*.[38] Allan Bakke, a white male, was rejected by the University of California at Davis School of Medicine in both 1973 and 1974.[39] At the time, the medical school set aside 16 seats (out of a class of 100) for "disadvantaged . . . members of minority groups."[40] Applicants who indicated that they were disadvantaged minorities were considered separately from other applicants by a special admissions committee.[41]

Bakke sued the university, alleging that the set-aside program "operated to exclude him from the school on the basis of his race" in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[42] A chaotic set of opinions emerged. Justices Brennan, White, Marshall, and Blackmun concluded that the university's use of race was permissible "to remedy disadvantages cast on minorities by past racial prejudice."[43] Justices Stevens, Stewart, and Rehnquist, along with Chief Justice Burger, viewed the issue far more narrowly[44] and avoided the constitutional question altogether.[45] They held that the program's use of race violated Bakke's rights under Title VI, and that the university should be forced to admit him.[46]

Justice Powell's opinion, which was joined by no other Justice,

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[35] Sweatt v. Painter, 339 U.S. 629, 634 (1950) (emphasis added).
[36] 339 U.S. 637, 640 (1950).
[37] *Id.* at 641 (emphasis added).
[38] 438 U.S. 265 (1978).
[39] *Id.* at 266.
[40] *Id.* at 274 (internal quotation marks omitted).
[41] *Id.* at 275 ("[T]he general admissions committee . . . did not rate or compare the special candidates against the general applicants.").
[42] *Id.* at 277–78. Bakke further contended that the program violated the state constitution of California, but none of the opinions addressed that claim. *See id.* at 278.
[43] *Bakke*, 438 U.S. at 325 (opinion of Brennan, J.).
[44] *Id.* at 411 (opinion of Stevens, J.) ("It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.").
[45] *Id.* at 411–12.
[46] *Id.* at 266–67.

ended up being the decisive one. Like Justice Stevens, he concluded that the university's special-admissions program was an unlawful quota.[47] But he also held that the Equal Protection Clause was not a total bar to the consideration of race in university admissions,[48] a narrower version of the position taken by Justice Brennan.

Justice Powell decided that, of the four justifications asserted by the university, the only one that could withstand strict scrutiny was its interest in realizing the educational benefits brought about by a diverse student body.[49] He leaned heavily on "[a]cademic freedom, . . . a special concern of the First Amendment,"[50] reasoning that universities should be allowed to admit whoever will contribute the most to a "robust exchange of ideas."[51] Applicants from diverse backgrounds (of any sort) may bring "experiences, outlooks, and ideas that enrich the training of its student body."[52]

Ultimately, Justice Powell concluded that the UC-Davis program amounted to an impermissible racial quota, failing the narrow tailoring prong of the strict scrutiny test.[53] However, he offered guidance to universities wishing to pursue racial diversity through their admissions policies. He spoke approvingly of the Harvard admissions plan, which considered all applicants together but treated race as a "plus" factor.[54] Individual consideration was the crucial distinction. A constitutional admissions program must not reserve spots for members of one race, and it must consider nonracial attributes likely to promote educational pluralism, such as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [or] ability to communicate with the poor."[55]

The ungainly 4–1–4 split in *Bakke* led to a good deal of consternation. Indeed, the disagreement over whether Justice Powell's opinion was binding precedent at all lasted through the Sixth Circuit's consideration of *Grutter*.[56] Antonin Scalia, a law professor at the time of *Bakke*, grudgingly accepted Justice Powell's opinion as "the law of the land."[57] In a 1986 concurring opinion, Justice O'Connor (citing *Bakke*)

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[47] *Id.*

[48] *Bakke*, 438 U.S. at 314.

[49] *Id.* at 311–12. Justice Powell rejected the university's other defenses on Equal Protection grounds: (1) reducing the deficit of minorities in the medical profession; (2) countering the effects of societal discrimination; and (3) increasing the access of underserved communities to medical care. *See id.* at 306.

[50] *Id.* at 313.

[51] *Id.*

[52] *Id.* at 314.

[53] *Bakke*, 438 U.S. at 316–18 ("[T]he assignment of a fixed number of places to a minority group is not a necessary means toward that end.").

[54] *Id.* at 317.

[55] *Id.*

[56] *See* Ann Mallatt Killenbeck, Bakke, *With Teeth?: The Implications of* Grutter v. Bollinger *in an Outcomes-Based World*, 36 J.C. & U.L. 1, 17–19 (2009).

[57] Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L. Q. 147, 148 (1979). I call Professor

indicated that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."[58]

In the years between *Bakke* and *Grutter*, the Fourth, Seventh, Eighth, and Ninth Circuits all appeared to accept *Bakke* as binding.[59] But not everyone agreed. The Fifth Circuit stated strongly in *Hopwood v. Texas* that "Justice Powell's view in *Bakke* is not binding precedent" on the issue of whether diversity is a compelling interest.[60]

The Second Circuit, although it acknowledged that only the Fifth Circuit had ruled that diversity could never justify race-based preferences, pointed out a "lack of clear Supreme Court precedent" on the issue.[61] The Eleventh Circuit similarly reasoned that Justice Powell's opinion had only "persuasive value" and referred to the viability of diversity as a compelling interest an "open question."[62]

The reaction went critical, so to speak, in the University of Michigan cases. The trial judge in *Gratz* held that Justice Powell's opinion in *Bakke* established that diversity was a compelling interest for purposes of Equal Protection analysis.[63] In *Grutter*, the trial judge came to the opposite conclusion.[64] It gets worse. On appeal,[65] five judges of the Sixth Circuit sitting en banc treated Justice Powell's discussion of the diversity rationale as controlling,[66] while the four dissenting judges characterized it as self-indulgent dicta: "Any speculation regarding the circumstances under which race could be used was little more than an advisory opinion, as those circumstances were not before the court . . . ."[67]

Scalia's acceptance grudging because he also said that Justice Powell's opinion read more like schlock peddled by "committees of the American Bar Association on some insignificant legislative proposal" than legal analysis worthy of a Supreme Court opinion. *Id.*

[58] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–15 (1978) (opinion of Powell, J.)).

[59] *See* Talbert v. City of Richmond, 648 F.2d 925, 928–29 (4th Cir. 1981); Harp Adver. Ill., Inc. v. Vill. of Chicago Ridge, 9 F.3d 1290, 1292 (7th Cir. 1993); Nor-West Cable Commc'ns P'ship v. City of St. Paul, 924 F.2d 741, 748–49 (8th Cir. 1991); Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1201 (9th Cir. 2000) ("[A]t our level of the judicial system Justice Powell's opinion remains the law.").

[60] 78 F.3d 932, 944–45 (5th Cir. 1996). *Hopwood* famously went on to hold that a university's interest in diversity can never justify the use of race in admissions. *Id.* at 948 ("[T]he use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny.").

[61] Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 748 (2d Cir. 2000).

[62] Johnson v. Univ. of Ga., 263 F.3d 1234, 1245 (11th Cir. 2001).

[63] Gratz v. Bollinger, 122 F. Supp. 2d 811, 820 (E.D. Mich. 2000).

[64] Grutter v. Bollinger, 137 F. Supp. 2d 821, 847–48 (E.D. Mich. 2000) ("Justice Powell's discussion of the diversity rationale is not among the governing standards to be gleaned from *Bakke*.").

[65] Although both *Gratz* and *Grutter* were appealed, the Sixth Circuit decided only *Grutter*.

[66] *Grutter*, 288 F.3d at 747.

[67] *Grutter*, 288 F.3d at 787 (Boggs, C.J., dissenting).

C. Other Doctrinal Difficulties

There was an added complication to the Supreme Court's consideration of *Gratz* and *Grutter*. Justice Powell's opinion in *Bakke* applied strict scrutiny to UC-Davis's admissions program, even though Allan Bakke was white and the program's beneficiaries were racial minorities: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[68] Whatever disagreements there were about the precedential force of his opinion, the Supreme Court had certainly adopted that portion of it by the time it considered *Grutter*.[69] It decided, after some ado, that it was simply impossible to distinguish between "benign and harmful uses of racial classifications."[70] The clearest and strongest statement of this principle came in *Adarand Constructors, Inc. v. Peña*: "[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."[71]

In another twist, the disparate-impact case *Washington v. Davis* held that a plaintiff must prove discriminatory *intent* to prevail on an Equal Protection claim; the "racially disproportionate impact" of a government action is not enough.[72] The intersection of *Davis* and *Adarand* had a grotesque effect: "[F]acially neutral government action that preserved racial stratification was subject to only a rational basis test, but race-conscious government action that attempted to ameliorate racial stratification was subject to strict scrutiny."[73]

The doctrinal landscape when *Grutter* came to the Supreme Court seemed to be roughly this: (1) although diversity in educational settings had been recognized as a worthwhile goal,[74] there was profound disagreement on whether it constituted a compelling government interest;[75] (2) other non-remedial uses of racial classifications would be

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[68] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (opinion of Powell, J.).

[69] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) ("[T]he standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification.").

[70] Susan M. Maxwell, *Racial Classifications Under Strict Scrutiny: Policy Considerations and the Remedial-Plus Approach*, 77 TEX. L. REV. 259, 266 (1998) (citing *Croson*, 488 U.S. at 493 ("[T]here is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.")).

[71] 515 U.S. 200, 227 (1995). I call *Adarand*'s statement the strongest because it explicitly overruled *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547 (1990), which had authorized a two-tiered approach that depended on what group was disadvantaged by the government action.

[72] 426 U.S. 229, 239 (1976).

[73] Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1567 (2004).

[74] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317–18 (opinion of Powell, J.); *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting).

[75] *See, e.g.*, Hopwood v. Tex., 78 F.3d 932, 948 (5th Cir. 1996).

met with extreme skepticism; (3) although the remedial use of race to counteract specific instances of discrimination was appropriate, the goal of remedying general "societal discrimination" was too amorphous to serve as the basis for race-conscious government action;[76] and (4) all admissions plans that considered race as a factor would be subjected to strict scrutiny.[77]

IV. *GRUTTER V. BOLLINGER*

Barbara Grutter applied to the University of Michigan Law School in 1996 and was rejected.[78] She sued the university, claiming that its admissions policy violated the Equal Protection Clause because it used race as a "predominant factor, giving applicants who belong[ed] to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups."[79]

A. The Law School's Admissions Plan

In 1992, the University of Michigan Law School enacted an admissions policy designed to "achieve student body diversity" by focusing on "academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential to contribute to the learning of those around them."[80] The policy heavily weighed "hard factors," such as an applicant's Law School Admission Test (LSAT) score and undergraduate grade point average (GPA), but "even the highest possible score [did] not guarantee admission."[81] Under the policy, the admissions committee considered a number of "soft" variables as well: "[T]he enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection are all brought to bear in assessing an applicant's likely contributions to the intellectual and social life of the institution."[82]

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[76] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989) (stating that a government interest in undoing societal discrimination would demand "sheer speculation"); *Bakke*, 438 U.S. at 310 (opinion of Powell, J.) (dismissing the societal-discrimination rationale because it would "convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.").

[77] *See Bakke*, 438 U.S. at 291; Adarand Constructors, Inc. v. Peña 515 U.S. 200, 227 (1995).

[78] Grutter v. Bollinger, 539 U.S. 306, 316 (2003).

[79] *Id.* at 317 (internal quotation marks omitted).

[80] *Id.* at 314–15 (internal quotation marks omitted).

[81] *Id.* at 315.

[82] *Id.* (internal quotation marks omitted).

The law school's admissions policy gave "substantial weight" to the "many possible bases for diversity," but it also reaffirmed the law school's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the] student body in meaningful numbers."[83] The law school sought to enroll a "critical mass" of underrepresented minority students.[84]

The evidence offered by the law school left little doubt that the admissions plan had been carefully massaged to comply with Justice Powell's opinion in *Bakke*.[85] Throughout the litigation, the law school asserted only diversity as a justification for its admissions plan,[86] even though the trial judge wanted to address the issue of racial bias in admissions criteria.[87] The law school also refused to name a minimum percentage at every stage, knowing that any minimum could be viewed as an unconstitutional quota.[88]

Dennis Shields, the director of admissions at the time of Barbara Grutter's application, testified at trial that the policy was meant "to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body."[89] But he stressed that the plan "did not seek to admit any particular number or percentage . . . ."[90] Shields's successor, Erica Munzel, similarly testified that "critical mass" did not mean any particular "number, percentage, or range of numbers or percentages," adding that the law school's goal was to admit underrepresented minority students in numbers sufficient to encourage them "to participate in the classroom and not feel isolated."[91]

Jeffrey Lehman, the dean of the law school at the time of the suit, reiterated that the admissions committee "did not quantify critical mass in terms of numbers or percentages."[92] He cited the isolation concern as well, arguing that a critical mass would help prevent minority students from feeling like "spokespersons for their race."[93] The professor who

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[83] *Grutter*, 539 U.S. at 316.

[84] *Id.*

[85] Recall that Justice Powell invalidated the consideration of race in admissions to achieve racial balance, or to correct whatever "societal discrimination" may have led to minorities' underrepresentation in the class in the first place. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307, 310 (1978).

[86] *Grutter*, 539 U.S. at 327–28.

[87] William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055, 1120 n.309 (2001).

[88] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978).

[89] *Grutter*, 539 U.S. at 318.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 318–19.

[93] *Id.* at 319.

had chaired the policy-drafting committee in 1992, Richard Lempert, echoed these claims about diversity.[94] Interestingly, despite the policy's overt reference to historical discrimination, Lempert specifically denied that the law school's purpose was "to remedy past discrimination."[95] He conceded that "other groups, such as Asians and Jews, have experienced discrimination," but explained that they were not included in the policy because they "were already being admitted to the Law School in significant numbers."[96]

B. Justice O'Connor's Majority Opinion in *Grutter*

The *Grutter* Court did not resolve the controversy over the degree to which Justice Powell's opinion was binding.[97] But *Grutter* did end the dispute, declaring that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[98] In the majority opinion, Justice O'Connor reaffirmed *Adarand*'s holding that all racial classifications "'must be analyzed . . . under strict scrutiny,'"[99] meaning that "such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."[100] But she also emphasized that "[n]ot every decision influenced by race is equally objectionable" and that strict scrutiny "must take relevant differences into account."[101] In other words, context matters.[102]

The Court also stressed that universities are entitled to some latitude in deciding how much emphasis to put on student-body diversity: "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[103]

The holding of *Grutter* was that "the Law School ha[d] a compelling interest in attaining a diverse student body."[104] At this point, it is important to note the unfortunate conflation of the terms "diversity"

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[94] *Grutter*, 539 U.S. at 319.
[95] *Id.*
[96] *Id.*
[97] *See id.* at 325.
[98] *Id.*
[99] *Grutter*, 539 U.S. at 326 (quoting Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995)) (citations omitted).
[100] *Id.*
[101] *Id.* at 327 (internal quotation marks omitted); *see also* Gomillion v. Lightfoot, 364 U.S. 339, 343–44 (1960) ("[G]eneralizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.").
[102] *See id.*
[103] *Id.* at 328.
[104] *Grutter*, 539 U.S. at 328.

and "educational benefits of diversity" committed by both Justices Powell and O'Connor.[105] In my view, "diversity" standing alone means nothing more than the numerical representation of minority groups, which the Equal Protection Clause clearly prohibits.[106] On the other hand, the "educational benefits of diversity" are a constitutionally permissible goal:

> [Diversity] promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races. These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.[107]

Bakke too described the benefits of diversity:

> The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. . . . [T]he nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.[108]

"Critical mass," employed as a justification for affirmative action, can make sense only if its aim is to achieve the *benefits* flowing from diversity.[109] Just as a critical mass of uranium leads to a "sudden and transformative" change in the nuclear reaction and in the way its elements interact with one another,[110] a critical mass of minority students may produce the educational benefits Justice O'Connor described. But talking about critical mass as a means is nonsensical if pure numerical diversity is a valid end.

Justice O'Connor seems to overlook this crucial distinction.

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[105] *See generally* Miles, *supra* note 6.

[106] *See Grutter*, 539 U.S. at 329–30 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' That would amount to outright racial balancing, which is patently unconstitutional.") (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978); *Bakke*, 438 U.S. at 307 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

[107] *Grutter*, 539 U.S. at 330 (second alteration in original) (quoting Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001)) (internal quotation marks omitted).

[108] *Bakke*, 438 U.S. at 312 (first sentence quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)) (second sentence quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (internal quotation marks omitted).

[109] Patrick M. Garry, *How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied Upon in* Grutter, 35 PEPP. L. REV. 649, 652 (2008) ("It is the educational benefits deriving from diversity that were the real compelling interest behind the Law School's race-based admissions policy. Diversity, in effect, is only the means to the end."); *see also Grutter*, 539 U.S. at 354–55 (Thomas, J., dissenting) ("Attaining 'diversity,' whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself.").

[110] Addis, *supra* note 1, at 98–99.

Nevertheless, even though she used these terms interchangeably, she must have meant that the interest lies in realizing the educational benefits of having a diverse student body. Indeed, she later referred to the law school's "compelling interest in securing the educational benefits of a diverse student body."[111] The difference matters because, if the university's compelling interest is in the educational *benefits* of diversity, an admissions plan must *actually produce* those benefits to be constitutionally valid.[112]

Having held that the compelling interest requirement was met, the Court then turned to the second prong of the strict scrutiny test: narrow tailoring. In admissions, "a university may consider race or ethnicity only as a '"plus" in a particular applicant's file,' without 'insulat[ing] the individual from comparison with all other candidates for the available seats.'"[113] The majority determined that "[t]he Law School's goal of attaining a critical mass of underrepresented minority students [did] not transform its program into a quota."[114] *Grutter* adopted Justice Powell's view that "individualized consideration" was the linchpin of narrow tailoring:

> [A] university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. *The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.*[115]

C. The Dissenting Justices' Objections

The dissenting Justices in *Grutter* leveled two major criticisms at the majority opinion. First, they argued that granting any "deference" to the university was antithetical to strict scrutiny. Second, they were skeptical of the critical mass rationale, believing it to be a cover-up for otherwise-unconstitutional racial balancing.

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[111] *Grutter*, 539 U.S. at 333. *See also id.* at 330 ("[T]he Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce."). *But see id.* at 329 (characterizing the Court's holding as "conclu[ding] that the Law School has a compelling interest in a diverse student body").

[112] *See* Garry, *supra* note 109, at 652 ("If diversity produces no educational benefits, then diversity cannot be a compelling interest of an institution of higher education.").

[113] *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317).

[114] *Id.* at 335–36.

[115] *Id.* at 337 (emphasis added).

1. *The Majority Opinion's "Deference" to the University*

Chief Justice Rehnquist and Justices Thomas and Kennedy all contended that the majority's grant of "deference" to the university showed that it "[did] not apply strict scrutiny" to the law school's plan.[116] This is a sensible criticism, since a court applying strict scrutiny typically searches for reasons to *invalidate* the government action.[117] Indeed, strict scrutiny has been aphoristically described as "strict in theory, but fatal in fact."[118] "Deference," on the other hand, is the hallmark of the extremely permissive rational basis standard.

It is worth noting that, at least in federal courts, strict scrutiny results in invalidation in far from all cases.[119] The Supreme Court explicitly held before *Grutter* that strict scrutiny was not necessarily fatal.[120] More importantly, the dissenters mischaracterized Justice O'Connor's position: the deference "did not extend to whether diversity itself should be deemed a compelling interest."[121] It operated only to permit the law school to decide *whether* diversity was "essential to its educational mission,"[122] and *how* best to achieve the benefits of diversity. This fits with what follows in the opinion—an examination of the law school's conclusion that its plan would work: "The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*."[123] The majority Justices in *Grutter* did review the record, and they held that the benefits of diversity were a compelling interest only when *they* were satisfied that the evidence supported that conclusion.[124]

Compare this approach to *Williamson v. Lee Optical*, in which the Court considered a Due Process challenge to an Oklahoma statute that

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[116] *Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting) (also calling the Court's review "nothing short of perfunctory."). *See also id.* at 380 (Rehnquist, C.J., dissenting); *id.* at 362 (Thomas, J., dissenting) ("[T]he Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference.").

[117] *See* Paul Kahn, *The Court, the Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 6 (1987) ("[E]qual protection law has essentially identified 'exacting' judicial scrutiny with judicial invalidation.").

[118] Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring). *See also* Kathleen M. Sullivan, *Gerald Gunther: The Man and the Scholar*, 55 STAN. L. REV. 643, 645 (2002) (calling the phrase "one of the most quoted lines in legal literature").

[119] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 812–13 (2006) (discussing a statistical study that showed a survival rate of 30% in strict-scrutiny cases).

[120] *See* Adarand Constructors v. Peña, 515 U.S. 220, 237 (1995). Both *Grutter* and *Bakke* enlisted Korematsu v. United States, 323 U.S. 214 (1944) to support the proposition that government action analyzed under the strict scrutiny standard will sometimes be upheld. What is fascinating about *Korematsu* is that while the Court's majority held that the order excluding Japanese-Americans from certain areas *passed* strict scrutiny, *see Korematsu*, 323 U.S. at 219–20, the dissent declared that it *failed* even the rational basis test. *See id.* at 234–35 (Murphy, J., dissenting).

[121] Killenbeck, *supra* note 56, at 32.

[122] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

[123] *Id.*

[124] *See id.* at 330.

made it unlawful to sell eyeglasses without a prescription.[125] The unanimous Court acknowledged that the law "may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance [its] advantages and disadvantages."[126] Justice Douglas's opinion essentially *invented* reasons the statute might have been valid[127] and concluded: "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it."[128] That is deference.

Nevertheless, it is clear that the Court's scrutiny of the law school's plan in *Grutter* was not as strict as it might have been. To survive strict scrutiny, the government action must be necessary to achieve the compelling interest—the state "cannot rest upon a generalized assertion as to the [suspect] classification's relevance to its goals."[129] This scrutiny should be rigorous. In *Croson*, for example, the Supreme Court spent almost nine pages examining the relationship between the plan and its goals.[130] This is different from the Court's acceptance of critical mass as a means to achieve the benefits of diversity in *Grutter*, seeming to fudge the strict scrutiny standard by employing "a quite permissive reading of 'necessary.' . . . [T]he state of empirical knowledge about the educational benefits of diversity belies any claim of necessity."[131]

The reason this fudging is not as repugnant as the dissenting Justices claimed is that the necessity of a policy to further an interest is a comparatively poor question for judges to answer: "[T]hese decisions are a product of complex educational judgments in an area that lies . . . far outside the experience of courts."[132] Judges should certainly be the ones to decide if an interest is compelling. But if a policy's end is permissible, it seems appropriate to allow government actors to rely on their experience (and investigatory machinery) in deciding what means to employ. Such latitude is particularly fitting in the context of higher education, "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment."[133]

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[125] Williamson v. Lee Optical, Inc., 348 U.S. 483, 485 (1955).

[126] *Id.* at 487.

[127] *See id.* (listing three reasons the legislature "might" have adopted the law).

[128] *Id.* at 487–88 (emphasis added).

[129] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (citing McLaughlin v. Florida, 379 U.S. 184, 191 (1964) ("The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.")).

[130] *Croson*, 488 U.S. at 498–506.

[131] Paul Brest, *Some Comments on* Grutter v. Bollinger, 51 DRAKE L. REV. 683, 691 (2003).

[132] *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 231 (5th Cir. 2011) (quoting Grutter v. Bollinger, 539 U.S. 306, 328 (2003)) (internal quotation marks omitted).

[133] *Grutter*, 539 U.S. at 329.

2. *The Majority's Reliance on Critical Mass*

The dissenters' more interesting complaint is with the notion of critical mass itself, which they are no more eager to define than the majority Justices. As in so many other cases, all the Justices in *Grutter* gave only facile consideration to the meaning of "critical mass" before either subscribing to it wholeheartedly or dismissing it as bunk.

Justice Scalia viewed the very invocation of critical mass as a one-way ticket to "quota land."[134] Despite the law school's insistence that it did not mean any specific percentage,[135] Justice Scalia leaned hard on the university's lawyer to identify "some minimum":[136]

> Justice Scalia: "Is 2 percent a critical mass, Ms. Mahoney?"
>
> Maureen Mahoney: "I don't think so, Your Honor."
>
> Scalia: "Okay. 4 percent?"
>
> Mahoney: "No, Your Honor, what—"
>
> Scalia: "You have to pick some number, don't you?"
>
> Mahoney: "—Well, actually what—"
>
> Scalia: "Like 8, is 8 percent?"
>
> . . . .
>
> Scalia: "As long as you say between 8 and 12 . . . it's okay, because it's not a fixed number? Is that . . . that's what you think the Constitution is?"[137]

In his dissent, Justice Scalia referred to the critical mass theory as "a sham to cover a scheme of racially proportionate admissions" that would challenge "even the most gullible mind."[138] Chief Justice Rehnquist similarly accused the law school of employing "a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups."[139]

It is clear that Justice Scalia and Chief Justice Rehnquist were willing to accept only the purest analogy to the scientific concept of critical mass: the "*precise* minimum level of fissionable . . . uranium that is required to start and sustain a chain reaction of nuclear fission which

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[134] *See* Transcript of Oral Argument at 40, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_02_241/argument.

[135] *See Grutter*, 539 U.S. at 318–19.

[136] *See Grutter* Oral Argument, *supra* note 134, at 37.

[137] *Id.* at 39–40.

[138] *Grutter*, 539 U.S. at 347 (Scalia, J., dissenting).

[139] *Id.* at 386 (Rehnquist, C.J., dissenting).

will in turn lead to explosion."[140] They wanted "to match every aspect of the phenomenon to be comprehended with aspects of those from which the analogy is borrowed."[141]

But this narrow-minded approach "cabin[s] the new phenomenon to the very limits of the old . . . in absurd ways."[142] For one thing, even in its scientific context, critical mass is not strictly about numbers: "The density, purity, and shape of the uranium, as well as its mass . . . will determine whether or not the lump 'goes critical.'"[143] More importantly,

> [I]t is certainly the case that whether there is a critical mass of students in a particular class for a particular purpose is partly going to depend on the character and identity of the students admitted, the nature of the entire class with which they will interact, and the processes and institutions through which the interaction takes place. Put simply, *critical mass in the social field describes a highly contextual process.*[144]

"Highly contextual" and "quota" cannot both describe the same admissions plan. In the six years following the adoption of the program, minority students constituted between 13.5% and 20.1% of the law school's graduating classes.[145] And though it is true that the law school could not control how many minority applicants accepted offers of admission,[146] the ultimate representation of minorities in each class nonetheless "differ[ed] substantially from their representation in the applicant pool and varie[d] considerably . . . from year to year."[147] A true quota would not have left the composition of the class up to the applicants. The University of California's program in *Bakke*, for example, set aside 16 *seats* in the class of 100 for disadvantaged minority students,[148] no matter how many applied. Presumably, if a student accepted by the special admissions committee declined admission, his seat would be offered to the next-highest-rated student in the special program.

Scientific concepts can illustrate social phenomena, but applying them sanely can be very difficult.[149] Properly conceived—as an

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[140] Addis, *supra* note 1, at 98 (emphasis added).

[141] *Id.* at 131–32.

[142] *Id.* at 132.

[143] *Id.* at 133 (quoting THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 95 (1978)).

[144] *Id.* (emphasis added).

[145] Grutter v. Bollinger, 539 U.S. 306, 336 (2003). *See also* Grutter v. Bollinger, 137 F. Supp. 2d 821, 842 n.27 (E.D. Mich. 2001) ("From the graduation years 1986 to 1999, underrepresented minorities constituted at least 9.8% (1999) and as much as 19.2% (1994) of the class, except in 1998 when the percentage dipped to 5.4%.").

[146] *See Grutter*, 539 U.S. at 385 (Rehnquist, C.J., dissenting).

[147] *Id.* at 336.

[148] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (referring to the program's "reservation of a specified number of seats in each class").

[149] It is alluring to rely on the "physics of society" to "extract order from the microscopic chaos" of human existence, but it is often an absurd trap. PHILIP BALL, CRITICAL MASS: HOW ONE THING LEADS TO ANOTHER 68, 71 (2004). For example, Herbert Spencer tried to force social survival

imperfect analogy—critical mass is most sensibly transplanted to the social field as a highly contextual process that takes into account all the attributes of actors and institutions:[150] "The nature of the entire entering class, the nature of the minority students admitted, the environment or the institutional setup in which interaction is to take place, etc. all affect whether there is a critical mass in a given context to . . . bring about the desired change."[151] For instance, "[a] solitary but extraordinarily strong-willed minority person may constitute critical mass at one institution, where critical mass might require 1,000 weaker-willed persons on another campus."[152]

> Such a flexible framework is antithetical to the "needlessly rigid and neglectful"[153] character of a quota: "If numbers change depending on the nature of the profile of the students admitted and the nature of the interactive process in the given institution, then there cannot be a fixed number. . . . [S]uch a flexible process cannot admit a notion as rigid as a quota."[154]

Chief Justice Rehnquist also observed that the law school's plan tended to admit many more black applicants than Hispanic or Native American applicants.[155] This, he suggested, showed that critical mass was just a vehicle for racial balancing:

> If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," *one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans*. . . . In order for this pattern of admission to be consistent . . . one would have to believe that the objectives of "critical mass" offered by [the law school] are achieved with only half the number of Hispanics and one-sixth the number

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through the mold of Darwinian natural selection, and all he did was "create[] much confusion about Darwin's theory." *Id.* at 70–71. But he did leave his mark on American law. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[150] *See* Pamela E. Oliver & Gerald Marwell, *The Paradox of Group Size in Collective Action: A Theory of the Critical Mass*, 53 AM. SOC. REV. 1, 7 (1988) (pointing out that member *characteristics* are more important than group size in reaching the "critical mass" of people needed to take collective social action).

[151] Addis, *supra* note 1, at 134.

[152] Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 650 (2006) (I hasten to note that, as his title might indicate, Mr. Lizotte intended this statement to make the opposite point.).

[153] Comfort *ex rel* Neumyer Sch. Comm., 263 F. Supp. 2d 209, 264 (D. Mass. 2003) (specifically holding that critical mass is too flexible to be a quota).

[154] Addis, *supra* note 1, at 134.

[155] Grutter v. Bollinger, 539 U.S. 306, 381(2003) (Rehnquist, C.J., dissenting) ("From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-American, and between 47 and 56 were Hispanic.").

of Native Americans as compared to African-Americans.[156]

Justice Rehnquist concluded that the disparity "must result from careful race based planning by the Law School,"[157] and that the goal of the admissions plan must have been "not to achieve a 'critical mass,' but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool."[158] This is a powerful argument—how could it be that some racial groups required more students to reach the point of criticality than others?

Justice O'Connor responded only that ultimate minority *enrollment* did not match minority representation in the applicant pool,[159] and while that does distinguish the law school's plan from a quota, it is somewhat beside the point. But Chief Justice Rehnquist made too much of the admissions figures he cited. It is not a great stretch to think that using race as a "plus" factor could reduce, or even undo, the racial skew produced by the "hard" admissions criteria (LSAT score[160] and undergraduate GPA)[161] and yield a racially proportionate student body.[162]

Furthermore, if the concept of critical mass is highly contextual, then the point of criticality might easily differ among minority groups, "given the different historical circumstances under which the various groups suffered exclusions and discrimination, the different grounds for their exclusion . . . as well as the current condition in which they find themselves."[163] For the same reason it is impossible to define "critical mass" without considering the individuals, institutions, and practices involved, it is unrealistic to expect the point of criticality to be the same across all racial groups.

For instance, Justice Thomas pointed out in his dissent that "at Mississippi Valley State University, a public [Historically Black College], only 1.1% of the freshman class in 2001 was white. If [this] is a 'critical mass' of whites . . . then 'critical mass' is indeed a very small proportion."[164] I appreciate his example and draw the opposite conclusion—it shows exactly why context matters. Given the social status of whites, we should expect that it would not take many white

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[156] *Id.* (emphasis added).

[157] *Id.* at 385.

[158] *Id.* at 386.

[159] *See id.* at 336 (majority opinion) (pointing out only that ultimate minority enrollment did not match minority representation in the applicant pool).

[160] *See* Kidder, *supra* note 87, at 1081–82 (concluding that the LSAT "artificially exaggerates educational differences between Whites and students of color"); Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359, 376 (1987) (indicating that, from the 1980–81 test season through the 1985–86 season, whites' LSAT scores averaged 32.5, while those of blacks averaged 21.4).

[161] *See Grutter*, 539 U.S. at 318 ("[A] critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores.").

[162] Addis, *supra* note 1, at 139.

[163] *Id.* at 139–40.

[164] *Grutter*, 539 U.S. at 365 (Thomas, J., dissenting).

students to encourage them "to participate in the classroom" or prevent them from feeling "isolated or like spokespersons for their race."[165]

It is also possible that critical mass operates in the aggregate; although minority groups have different cultures and histories, there may be "a commonality among members of these groups in that their relationship with the majority has been one of exclusion, domination, and devaluation."[166] That is, participation in classroom discussion may be encouraged by "[t]he presence of people with roughly similar experiences in the social and political world, [even] though from different racial or ethnic groups and with specific histories and narratives."[167]

The Fifth Circuit nicely elaborated on the contextual nature of critical mass in the 2011 case *Fisher v. University of Texas*. The *Fisher* plaintiffs "presume[d] that critical mass must have some fixed upper bound that applies across different schools, different degrees, different states, different years, different class sizes, and different racial and ethnic subcomposition."[168] In fact, they brazenly claimed that the 10% critical mass figure suggested by the trial judge in the Virginia Military Institute case[169] should be a ceiling for minority enrollment in *all* critical mass programs.[170] The Fifth Circuit politely dismissed this argument as "confounded by *Grutter*."[171]

Fisher made explicit what *Grutter* only implied: that "there is no reason to assume that critical mass will or should be the same for every racial group or every university."[172] It also insisted that "what constitutes critical mass in the eyes of one school might not suffice at another," and that "whatever levels of minority enrollment sufficed more than a decade ago may no longer constitute critical mass today, given the social changes Texas has undergone during the intervening years."[173] *Fisher* nicely fills in the gaps of *Grutter*'s reasoning and provides explicit judicial support for the flexibility of the critical mass doctrine.

On the other hand, the Chief Justice was undeniably right when he protested that the Michigan law school "offer[ed] no race-specific reasons for such disparities."[174] The *theory* of critical mass stands up to the *Grutter* dissenters' indictments of it,[175] but "the legally cognizable

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[165] *See id.* at 318–19 (majority opinion).

[166] Addis, *supra* note 1, at 140.

[167] *Id.*

[168] Fisher v. Univ. of Tex., 631 F.3d 213, 243 (5th Cir. 2011).

[169] *See* United States v. Virginia, 766 F. Supp. 1407, 1437–38 (W.D. Virginia 1991) ("[I]t appears that VMI would be able to achieve at least 10% female enrollment while maintaining its ROTC requirements. This would be a sufficient "critical mass" to provide the female cadets with a positive educational experience.").

[170] *Fisher*, 631 F.3d at 244.

[171] *Id.*

[172] *Id.* at 238.

[173] *Id.* at 244.

[174] *Grutter*, 539 U.S. at 381 (Rehnquist, C.J., dissenting).

[175] I have discussed only two of their principal objections. Justice Thomas raised several other issues

interest—attaining a critical mass of underrepresented minority students—'is defined by reference to the educational benefits that diversity is designed to produce.'"[176] The law school's use of critical mass cannot withstand constitutional scrutiny unless the plan *actually* produces the educational benefits of diversity.

V. EMPIRICAL EVIDENCE OF THE EDUCATIONAL BENEFITS OF DIVERSITY

The University of Michigan law school itself defined critical mass "by reference to the educational benefits that diversity is designed to produce."[177] An analysis of the plan, then, must ask whether diversity leads to the purported benefits.

Increasing the number of minorities in a class, by itself, does nothing more than alter the aesthetic of the student body.[178] Unsurprisingly, "numeric diversity" (or "structural diversity") alone bears little correlation to positive educational outcomes.[179] Indeed, the author of the study relied upon most heavily by the University of Michigan, conceded that "[s]tructural diversity is essential but, by itself, usually not sufficient to produce substantial benefits."[180] Diversity *experiences* are the key to achieving educational benefits: "[I]nstitutions of higher education must bring diverse students together, provide stimulating courses covering historical, cultural, and social bases of diversity and community, and create opportunities and expectations for students to interact across racial and other divides."[181]

The need for more than the mere presence of minorities is consistent with the notion of diversity embraced by the Supreme Court in *Grutter*: "[T]he Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races."[182] A difficult two-stage question thus emerges: Does increased numeric diversity lead to more diversity experiences, and do those experiences lead to educational benefits?

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in his dissent, but they are outside the scope of this Note.

[176] *Fisher*, 631 F.3d at 245 (quoting *Grutter*, 539 U.S. at 330).

[177] *Grutter*, 539 U.S. at 300 (majority opinion).

[178] *See* Miles, *supra* note 6, at 259 ("Quite simply, no purpose is served by diversity alone. Diversity for diversity's sake is futile—and may even be harmful.").

[179] Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in* Grutter v. Bollinger *and* Gratz v. Bollinger, 59 STAN. L. REV. 761, 768 (2006) (citing ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED 362 (1993)).

[180] Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363, 377 (1999).

[181] *Id.*

[182] *Grutter*, 539 U.S. at 330 (internal quotation marks omitted).

There is "modest support for the intuitively appealing idea that increased numeric diversity will lead to increased diversity experiences."[183] In *The Shape of the River*, a frequently cited study on diversity in higher education, William Bowen and Derek Bok claim that "there is an unmistakable association between the relative size of the black student population and the degree of interaction between white and black students."[184] But their study must be approached with caution: "What Bowen and Bok have written is, in many ways, a brief for the continuation of the policies whose consequences they are examining. . . . [B]oth have for many years strongly supported race-sensitive admission policies. That support colors their analysis at nearly every point."[185] For instance, their study's reliance on an admittedly "small number of institutional observations"[186] undermines confidence in its conclusion.[187]

Another study by Mitchell Chang makes the same finding.[188] Disappointingly, in the Chang study, numeric diversity could account for only 1.5% of the increase in cross-racial socialization and 0.05% of the increase in discussion of racial issues.[189] These findings are "weaker than we would hope in establishing the first link in a two-stage causal story."[190] But since no study—and no theory—suggests the opposite,[191] the Chang and Bowen and Bok studies provide at least some validation for the intuitively comfortable notion that greater numeric diversity leads to more diversity experiences.[192]

Grutter, and most of the studies it cited, focused instead on the link between diversity and positive educational outcomes: "[N]umerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[193] The most important study presented in the briefs was by Patricia Gurin, a professor at the University of Michigan with extensive experience in social psychological research.[194] Her study concluded:

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[183] Pidot, *supra* note 179, at 783.

[184] WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 234 (1998). The Bowen and Bok study examined "the relation between the share of the student body that was black and the fraction of the white student body that came to know well two or more black students." *Id.*

[185] Terrance Sandalow, *The Shape of the River*, 97 MICH. L. REV. 1874, 1876 (1999).

[186] BOWEN & BOK, *supra* note 184, at 234.

[187] Pidot, *supra* note 179, at 782–83. For a fantastic book review of *Shape of the River*, see Sandalow, *supra* note 185.

[188] Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 175, 181 (Gary Orfield ed., 2001) [hereinafter DIVERSITY CHALLENGED] (finding a correlation between racial diversity with (1) cross-racial socializing and (2) discussion of racial issues).

[189] *Id.*

[190] Pidot, *supra* note 179, at 782.

[191] *Id.* at 783.

[192] *Id.*

[193] Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (internal quotation marks omitted).

[194] *See* Gurin, *supra* note 180, at 363.

> A racially and ethnically diverse university student body has far-ranging and significant benefits for all students, non-minorities and minorities alike. Students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting. In fact, *patterns of racial segregation and separation . . . can be broken by diversity experiences in higher education.*[195]

In support of this bold claim, the Gurin report examined "classroom diversity" (defined by enrollment in ethnic studies courses) and "informal interactional diversity" (including both close friendships and general interracial interactions) across three data sets.[196] The report analyzed the correlation between these two diversity metrics and "learning and democracy outcomes"[197] and found "strong evidence" linking diversity to both types of positive outcomes.[198]

There are many flaws in Gurin's report. First of all, it muddles the two-step question, "provid[ing] no empirical evidence linking increased numerical diversity and diversity experience."[199] Second, sheer enrollment in ethnic studies courses makes an unlikely proxy for classroom diversity.[200] Third, because there were few black and Hispanic students in her sample, Gurin "adopts a different threshold of significance for her analysis of black and Latina/o students than for white students—using a threshold of significance of $p<0.10$ for her minority data."[201] A threshold of $p<0.10$ means that the pattern exhibited by the data could be expected to occur at random 10% of the time, even without any relationship between the variables. This is particularly significant because "Gurin often finds correlations between diversity and her outcomes for minority students in 20–30% of her models, alarmingly close to the number of significant results one would expect to see given a random distribution."[202] Fourth, and perhaps most importantly, the report found only mixed outcomes for black and Hispanic students.[203]

The Chang study, discussed above, attempts to link numeric diversity to diversity experiences, but it suffers from some of the same

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[195] *Id.* at 364 (emphasis added).

[196] *Id.* at 382.

[197] *Id.* at 383. She defined "learning outcomes" as "engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." *Id.* at 365. "Democracy outcomes" represented students' ability to "understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of the common good." *Id.*

[198] *Id.* at 388, 399.

[199] *See* Pidot, *supra* note 179, at 778.

[200] *Id.* at 771 ("[U]sing [ethnic studies classes] as a proxy for the presence of racial diversity in the classroom hopelessly entangles effects of racial and ethnic heterogeneity with effects of particular curricular materials.").

[201] *Id.* at 775. Gurin used a threshold of $p<0.05$ for her analysis of white students.

[202] *Id.* at 775 n.80.

[203] *See id.* at 775–76.

flaws. For example, Chang uses a "discussion of racial issues" metric to measure diversity experiences.[204] But "such discussions can occur between members of the same race, [so] it is not clear whether it is cross-racial conversation or the subject matter of discussion that is driving these results."[205] A study by Sylvia Hurtado reports that students who studied with students of other races reported growth in all of seven civic outcomes, five job-related outcomes, and eight learning outcomes.[206] But the Hurtado study also suffers from small sample size, a small set of control variables, and small-magnitude results.[207]

A contrary study actually found "an *inverse* relationship between enrollment diversity and evaluations of educational quality by students, faculty, and administrators."[208] Justice Thomas even thought it persuasive enough to include in his dissent.[209] But this study used data from 140 colleges and universities, while "[o]nly the most selective colleges in the country use race-conscious admissions programs, and such schools only account for approximately 4% of the annual number of black baccalaureate degrees."[210] It is likely, therefore, that the results are "dominated by schools that have no race-conscious admissions."[211]

Paul Brest, the former dean of Stanford Law School, has observed that while diversity is valuable, "the evidence is impressionistic and the conclusions are speculative, or perhaps just hopeful."[212] Can we draw any more than that from all these studies? As Pidot laments, very little:

> Despite all of these data, *no clear picture emerges*. Virtually all of the studies have some degree of methodological flaw, and, at best, correlations exist between certain types of experiences (which may or may not be correlated with numeric diversity) and certain positive outcomes. Even these correlations, however, explain little of the variance in outcomes.

In aggregate, little data demonstrate a link between diversity and positive outcomes for students of color. Gurin's findings are mixed at best, and use a low threshold of significance. Other studies did not distinguish outcomes for white students and students of color.[213]

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[204] Pidot, *supra* note 179, at 780.

[205] *Id.*

[206] Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, *in* DIVERSITY CHALLENGED, *supra* note 188, at 187, 197.

[207] Pidot, *supra* note 179, at 781.

[208] Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve University Education?*, 15 INT'L J. PUB. OPINION RES. 8, 16 (2003) (emphasis added).

[209] *See* Grutter v. Bollinger, 539 U.S. 306, 364 (Thomas, J., dissenting).

[210] Pidot, *supra* note 179, at 784.

[211] *Id.*

[212] Brest, *supra* note 131, at 690–91.

[213] Pidot, *supra* note 179, at 794 (emphasis added).

VI. WHAT'S REALLY BEHIND THE *GRUTTER* DECISION

It seems inescapable that the primary factor in both *Grutter* and *Bakke* was the Justices' intuition. Recall Justice Powell's statement that an "atmosphere of speculation, experiment and creation . . . is *widely believed* to be promoted by a diverse student body."[214] His support consists entirely of platitudes. "People do not learn very much when they are surrounded only by the likes of themselves,"[215] he says in a footnote. He echoes the determination of the Harvard admissions plan that "[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer."[216]

Justice Powell's opinion was the only one that addressed diversity in *Bakke*, and no other Justice joined in it, making his conclusory approach even more disappointing:

> Justice Powell simply took as gospel the text preached by the higher education establishment. He did not require that the parties supporting affirmative action and diversity actually document the extent to which their intuition about these matters was supported by a detailed accounting of the actual benefits that would be attained. Nor did he ask them to provide any evidence that such outcomes actually occurred.[217]

Professor Heise of Cornell Law School asserts that the *Grutter* Court, on the contrary, "readily engaged with the social science evidence."[218] Professor Killenbeck of the University of Arkansas School of Law argues that Justice O'Connor "did not simply note and embrace the Michigan Law School plan . . . . Instead, she made the transition from educational theory to educational fact, stressing that the actual benefits for all students enrolled in a racially diverse educational setting are 'substantial' and are 'not theoretical but real.'"[219]

What these commentators accept as "ready engagement" is indistinguishable from utter question-begging. Justice O'Connor's treatment of the studies is limited to two sentences.[220] She does discuss

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[214] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (emphasis added) (internal quotation marks omitted).

[215] *See id.* at 312 n.48 (quoting president of Princeton University, who was quoting a former student).

[216] *Id.* at 316.

[217] Killenbeck, *supra* note 56, at 29.

[218] Michael Heise, *Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863, 864 (2008).

[219] Killenbeck, *supra* note 56, at 29. *See also id.* at 28 ("If we compare the[ir] approach[es] . . . it becomes clear that *Grutter* is *Bakke* with teeth.").

[220] *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students

the amicus briefs submitted by businesses and the military in more detail, but "these briefs advanced interests . . . that were not advanced by the University"[221] and had nothing to do with diversity's educational benefits at all.

There were many more studies on this issue than the ones I have described; Justice O'Connor did not explain why she found some of them convincing and some unconvincing.[222] Justice Thomas's dissent also failed to explain why the contrary study was persuasive and the other studies were not,[223] so it appears that the opposing Justices were playing the same game. None of them took care "to meaningfully analyze the data or refute the science contrary to their respective positions."[224] I suspect that Justice O'Connor's inadequate treatment of the studies was intentional, and that she referred to a compelling interest in "diversity" (instead of the "educational benefits of diversity") because she realized the data could not support a causal relationship between numerical diversity and its benefits.

The interaction between the law and social science has an uncomfortable history. First, these two fields use completely different standards. In social science, proof is impossible and is not attempted; given this impossibility, *Grutter*'s "proclamation that 'the educational benefits that diversity is designed to produce . . . are substantial' is not phrased with requisite caution. The Court proclaimed a compelling interest in the benefits of student body diversity only by relying on evidence that it is unlikely diversity has no effect."[225]

Second, change occurs in social science and constitutional law not only at different paces, but also in qualitatively different ways. Social science is flexible enough to accommodate change in a way that constitutional law is not.[226] Third, weighing empirical evidence is simply not an appropriate function of the judiciary: "Litigation's inherently adversarial context is ill-designed for a careful review of potentially conflicting research findings."[227] Judges act more "as legislators when they use evidence to choose a particular side."[228]

What emerges is a strong indication that the social-science evidence in *Grutter* was used "as a cover to lend an appearance of objectivity to a decision made on normative grounds, to dart political controversy."[229] Justice O'Connor is a shrewd politician, "sensitive to social and political

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for an increasingly diverse workforce and society, and better prepares them as professionals.").

[221] Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 377 (2003).

[222] Pidot, *supra* note 179, at 805.

[223] *See Grutter*, 539 U.S. at 364 (Thomas, J., dissenting).

[224] Pidot, *supra* note 179, at 807.

[225] Lizotte, *supra* note 152, at 630.

[226] *See* Heise, *supra* note 218, at 884. *See also* Pidot, *supra* note 170, at 806 ("If the social science of tomorrow somehow disproves the diversity rationale, will Barbara Grutter suddenly have suffered a constitutional injury?").

[227] *See* Heise, *supra* note 218, at 884.

[228] Lizotte, *supra* note 152, at 630.

[229] *Id.* at 668.

forces."[230] The *Grutter* Court faced "emphatic, near-unanimous reaffirmation of affirmative action."[231] The amicus briefs filed in *Grutter* supported the university by a four-to-one margin.[232] Many members of the House and Senate supported the university, and none opposed it.[233] The briefs of states supported the university 23–1. The university's other supporters included "labor, education, and civil-rights interests . . . Fortune 500 companies . . . [and] a coalition of former high-ranking officers and civilian leaders of the military."[234] Ninety-one colleges and universities filed briefs supporting the law school's plan, and none opposed it.[235] The brief by the Bush Administration "sought to steer a middle path on racial preferences,"[236] focusing on the narrow-tailoring requirement;[237] It appeared to take for granted that the use of race in admissions was sometimes justified.[238] Even two of the dissenting Justices accepted that the educational benefits of diversity could constitute a compelling interest.[239]

Inertia was likely at work too: "[A]t some point something becomes . . . settled, and institutions have changed the way they do work around a precedent and . . . it would be highly disruptive to change it."[240] *Grutter* reflected a desire to avoid that disruption: "Since . . . *Bakke*, Justice Powell's opinion . . . has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."[241] Aside from the majority Justices' own belief that

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[230] Devins, *supra* note 221, at 349–50 (noting that "swing" Justices "seem to look to signals sent to the Court by elected officials, elites, and the American people in sorting out their opinions").

[231] *Id.* at 369.

[232] *Id.* at 366 ("One hundred two amicus briefs were filed in Grutter and Gratz—eighty-three supporting the University of Michigan and nineteen supporting the petitioners.").

[233] *Id.* at 367.

[234] *Id.* at 368–69.

[235] Devins, *supra* note 221, at 368.

[236] *Id.* at 371.

[237] Brief of Amicus Curiae United States at 9, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

[238] *Id.* at 8 ("Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective.").

[239] *See* Grutter v. Bollinger, 539 U.S. 306, 392–93 (2003) (Kennedy, J., dissenting) ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity."); *id.* at 378–79 (Rehnquist, C.J., dissenting) ("I agree with the Court that, 'in the limited circumstance when drawing racial distinctions is permissible,' the government must ensure that its means are narrowly tailored to achieve a compelling state interest.").

[240] Brest, *supra* note 131, at 694. *See also* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda*[]. . . were we [first] addressing the issue [now] . . . stare decisis weigh[s] heavily against overruling it . . . . *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."); Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 856 (1992) ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion [guaranteed by *Roe v. Wade*].").

[241] *Grutter*, 539 U.S. at 323.

universities should be allowed to use race to achieve diversity, they were simply too pragmatic to take on such strong momentum and emphatic political will.[242]

VII. CONCLUSION

Justice Scalia correctly characterized affirmative action as an area full of "pretense" and "self-delusion."[243] The University of Michigan Law School's critical-mass plan was almost certainly dishonest; as Justice Souter recognized in *Gratz*, the university's true motivation was to remedy societal discrimination.[244] But even if the law school's reliance on critical mass was not a sham, it was certainly a shame: "Emphasizing the importance of diversity conveniently sidesteps the debate over whether our institutions are truly meritorious."[245] The diversity rationale for affirmative action "concurs in and reiterates 'the big lie,' the anti-affirmative action argument that pretends that white supremacy is extinct and presupposes a color-blind world, a world in which race-conscious remedies become invidious discrimination."[246]

The majority Justices in *Grutter* could have accomplished a great deal more if they had acknowledged the poisonous consequences of near-exclusive reliance on objective admissions criteria[247] and included a frank discussion of why those criteria produce racially skewed results.[248] Instead, their self-congratulatory opinion invoked the most uninspiring

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[242] Particularly Justice O'Connor, who "had never voted to approve a race-based preference scheme" before *Grutter*. Devins, *supra* note 221, at 377.

[243] Scalia, *supra* note 57, at 148.

[244] *See* Gratz v. Bollinger, 539 U.S. 244, 297–98 (2003) (Souter, J., dissenting) (noting the "disadvantage of deliberate obfuscation" in many affirmative-action plans and praising the University of Michigan's undergraduate admissions program, which awarded a fixed point bonus to minority applicants, for its frankness); *id.* at 304–05 (Ginsburg, J., dissenting) ("Without recourse to such plans, institutions of higher education may resort to camouflage. . . . If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."). *See also* Garry, *supra* note 109, at 656–57 ("If indeed diversity is 'at the heart' of the Law School's educational mission . . . it makes no sense that the school is operating an admissions system that does not on its own produce the desired diversity . . . .").

[245] Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 958 (2001).

[246] *Id.* at 953.

[247] *See* Grutter v. Bollinger, 539 U.S. 306, 370 (2003) (Thomas, J., dissenting) ("The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court. . . . Having decided to use the LSAT, the Law School must accept the constitutional burdens that come with this decision.").

[248] *See* R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1034 ("Merit is a functional concept—no quality or characteristic is inherently meritorious. Merit is necessarily defined with respect to particular contexts, goals, and values."); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1721 (1995) ("Merit is what the victors impose."); Sandalow, *supra* note 185, at 1914 (citing Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2052 (1991)) ("[M]erit standards for student admissions and faculty appointments are but a 'gate built by a white male hegemony that requires a password in the white man's voice for passage.'").

justification for affirmative action there is:

> [A]ffirmative action is a fundamentally moral policy. If affirmative action is legal, it is legal because equal protection permits, maybe demands, that the gatekeepers of national power and wealth acknowledge and correct for their own past discriminatory actions, and that they grant future access to power and wealth to persons who might otherwise be excluded. The diversity rationale, in contrast, is a purely functional justification, conspicuously lacking the moral component. It is a consolation prize.[249]

The majority opinion's unsatisfying analysis and its "refusal to decide whether Justice Powell's racial diversity rationale is binding Supreme Court precedent . . . create[] the impression that the Court was predisposed to reach a specific result on race-based diversity in higher education."[250] If the majority Justices were pre-committed to upholding the law school's plan, they should have at least defended the theory of critical mass as energetically as the dissenters attacked it. Treating the definition and constitutionality of critical mass as axiomatic will make it even harder for universities to develop meaningful and forthright affirmative-action programs. The only safe course for schools, it seems, is to follow the Michigan plan to the letter, paradoxically disabling universities from exercising the expertise, judgment, and autonomy the Supreme Court has deemed so important. I regret that my conclusion is this: The only thing to like about *Grutter* is that it could have been worse.

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[249] Lizotte, *supra* note 152, at 668.

[250] *See* L. Darnell Weeden, *After* Grutter v. Bollinger *Higher Education Must Keep Its Eyes on the Tainted Diversity Prize Legacy*, 19 BYU J. PUB. L. 161, 171 (2004).