Denver Law Review

Volume 82 | Issue 1 Article 3

January 2004

The Next Step in Diversity: Extending the Logic of Grutter v. Bollinger to Faculty Tenure

Patrick M. Garry

The Next Step in Diversity: Extending the Logic of Grutter v. Bollinger to Faculty Tenure

THE NEXT STEP IN DIVERSITY: EXTENDING THE LOGIC OF *GRUTTER V. BOLLINGER* TO FACULTY TENURE

PATRICK M. GARRY†

I. INTRODUCTION

Prior to 2003, the United States Supreme Court had decided only one case involving affirmative action policies in higher education. In *Regents of University of California v. Bakke*,[1] the Court overturned a medical school's racial set-aside program that reserved 16 out of 100 admission slots for members of certain minority groups.[2] Twenty-five years later, the Court in *Grutter v. Bollinger*[3] upheld the University of Michigan Law School's race-conscious admissions policy.[4] This decision hinged on the issue of whether diversity constitutes a compelling interest that can justify the "use of race in selecting applicants for admission to public universities."[5] Never before had the Court recognized diversity as a compelling interest that could sustain a challenge brought under the Fourteenth Amendment's Equal Protection Clause.[6] In making that recognition, the Court relied heavily on the arguments of law school faculty and administrators regarding the vital educational benefits derived from classroom diversity.[7] Such diversity, the argument maintained, was essential for the development and training of society's future leaders.[8]

The *Grutter* Court accepted without question the arguments pressing for student-body diversity to be ruled a compelling interest.[9] However, if a racially diverse student body leads to a "livelier, more spirited" classroom discussion and a "better understanding" of different races,[10] logic dictates that a truly diverse faculty would more directly and immediately lead to such an outcome. If an institution of higher education has a compelling interest in racially diversifying its students, it has an even

---

† Assistant Professor, Univ. of South Dakota School of Law; J.D., Ph.D. University of Minnesota.

1. 438 U.S. 265 (1978).
2. *Bakke*, 438 U.S. at 271.
3. 539 U.S. 306 (2003). The companion case to *Grutter*, decided at the same time and involving the admissions policies to the University of Michigan undergraduate program, was *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).
4. *Grutter*, 539 U.S. at 307-10.
5. *Id.* at 322.
6. *Id.* at 341.
7. *Id.* at 308.
8. Not only did minority students have to be admitted so as to create this diversity, but a "critical mass of underrepresented minority students" was needed. *Id.* at 319.
9. *Id.* at 307-08.
10. *Id.* at 330.

greater interest in racially diversifying its faculty. The problem, though, is tenure. A law school's student body turns over every three years; and every fall an entirely new class of students is admitted. Consequently, student diversity can be achieved somewhat quickly. But faculty diversity is another matter. Because of tenure, very few openings occur each year. While new hires may be subjected to affirmative action guidelines, true diversity will come very slowly, especially if none of the tenured professors resign or retire.

There is no group in society more committed to affirmative action and racial diversity than the nation's higher education faculty.[11] At the same time, under the logic of *Grutter*, there is no group in society more vital to the training and education of America's diverse population. Given this urgent and vital need for diversity, this article asserts that the arguments made in *Grutter* for a race-based student admissions policy extend logically to a university's dismantling of its tenure system so as to achieve a faculty as equally diverse as its students.

II. THE SUPREME COURT'S DECISION IN *GRUTTER*

At issue in *Grutter* was the University of Michigan Law School's (Law School) race-conscious admissions policy.[12] Petitioner Grutter, a white applicant to the Law School who had qualifying test scores and grade point average, filed suit after she was denied admission, claiming that the Law School had discriminated against her on the basis of race in violation of the Fourteenth Amendment's Equal Protection Clause.[13] The Law School admitted that it used a race-conscious admissions policy to enroll a critical mass of certain minorities, and that this critical mass was "a number that encourages under represented minority students to participate in the classroom and not feel isolated."[14] According to the Law School, only a critical mass could achieve the "educational benefits

11. *See infra* notes 34 and 36.

12. *Grutter*, 539 U.S. at 306. This policy, implemented as a means of achieving student diversity, "[affirmed] the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers." *Id.* The policy "requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives." *Id.* at 315. The policy "seeks to guide admissions officers in producing classes both diverse and academically outstanding." *Id.* at 316. What the race-conscious policy attempted to do was to enroll a "critical mass" of certain minority students. *Id.*

13. *Id.* at 316-317. The president of the University of Michigan at the time of the lawsuit's filing was Lee Bollinger. *Id.* at 316.

14. *Id.* at 318. At trial, the Director of Admissions for the law school testified that the race of applicants must be considered "because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores." *Id.* The faculty member who chaired the committee that drafted the race-conscious admissions policy testified that the policy aimed at including "students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination." *Id.* at 319.

of diversity."[15] As Justice O'Connor stated in her opinion for the Court, *Grutter* presented an issue of national importance—"[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[16]

In her opinion, Justice O'Connor recognized that the Law School's admissions policy "must be analyzed by a reviewing court under strict scrutiny."[17] When strict scrutiny is employed, a race-based action can survive only if it is narrowly tailored to serve a compelling government interest.[18] Relying upon Justice Powell's opinion in *Bakke*, Justice O'Connor ruled that "the attainment of a diverse student body" did indeed constitute a compelling state interest that justified the use of race in admissions decisions.[19] However, Justice O'Connor limited that ruling to the area of higher education, stating that universities occupy "a special niche in our constitutional system."[20] When reviewing race-based governmental action, even under a strict scrutiny analysis, courts must consider the "context" and all "relevant differences," Justice O'Connor

---

15. *Id.* at 319. When such a critical mass is present, "racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Id.* at 320.

16. *Id.* at 322. This issue had been previously addressed by the Fifth Circuit in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that diversity is not a compelling state interest) and by the Ninth Circuit in *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000) (ruling that diversity is a compelling state interest).

17. *Id.* at 331. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.* at 326 (quoting U.S. CONST. amend. XIV). Therefore, any governmental action based on race classifications must be subject to "detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Id.* at 326 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that "government may treat people differently because of their race only for the most compelling reasons")).

18. *Id.* at 327. While much of the Court's opinion, as well as the dissenting opinions, addressed the 'narrowly-tailored' requirement, this article will focus on the 'compelling government interest' requirement of strict scrutiny review.

19. *Id.* (stating that "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions"). According to Justice O'Connor's rendition of his opinion, Justice Powell had been careful to state that race was only one factor among many that a university may properly consider when compiling a diverse student body. *Id.* As Justice Powell wrote, the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

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

20. *Grutter*, 539 U.S. at 329.

wrote.[21] Upon such consideration, diversity in the realm of higher education becomes a compelling government interest because of the unique and vital "educational benefits" it provides.[22]

According to Justice O'Connor's opinion, diversity promotes "cross-racial understanding," helps students to "better understand persons of different races," and leads to a "more enlightening and interesting" classroom discussion.[23] Diversity not only prepares students to be good citizens, but helps train them to be society's future leaders.[24] Furthermore, since education "is the very foundation of good citizenship," diversity in our colleges and universities demonstrates that "public institutions are open and available to all segments of American society, including people of all races and ethnicities."[25] Thus, higher education, and particularly the nation's law schools, plays an indispensable role in conveying "generic lessons in socialization and good citizenship."[26] This is a role that sets higher education apart, in terms of affirmative action policies, from other social or economic institutions or organizations.

The Court applied the strict scrutiny test the way it did because of the special nature of higher education. Normally, the use of strict scrutiny spells the demise of whatever government action is being challenged.[27] Rarely does the Court apply strict scrutiny, as it did to the Law

---

21. *Id.* at 327. According to Justice O'Connor, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.* "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Id.* at 328.

22. *Id.* For this reason, it is doubtful that *Grutter* applies to affirmative action programs outside of the educational area.

23. *Id.* at 330. According to the Court, the educational benefits of diversity are "important and laudable." *Id.* The Court also cited studies which show that student diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.*

24. *Id.* at 332. Institutions of higher education, and particularly law schools, "represent the training ground for a large number of our Nation's leaders." *Id.* (citing Sweatt v. Painter, 339 U.S. 629, 634 (1950) (describing law school as a "proving ground for legal learning and practice")). As the Court recognized, persons with law degrees occupy more than half of the seats in the U.S. Senate. *Id.* The Court also cited Justice Powell's opinion in *Bakke*, which stated that the "'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." *Id.* at 324, quoting *Bakke*, 438 U.S. at 313. According to Justice O'Connor, "law schools cannot be effective in isolation from the individuals and institutions with which the law interacts." *Id.* at 332.

25. *Id.* at 331-32. "And nowhere is the importance of such openness more acute than in the context of higher education." *Id.* at 332. This openness is vital for instilling the confidence of a heterogeneous society in the integrity of its educational institutions. *Id.* The Court likened higher education to the military, in the sense that America's "most selective institutions must remain both diverse and selective." *Id.* at 331.

26. *Id.* at 348 (Scalia, J., concurring in part, dissenting in part).

27. The Court has previously held that racial classifications are "presumptively invalid and can be upheld only upon an extraordinary justification." Shaw v. Reno, 509 U.S. 630, 643-44 (1993). Almost never do government actions survive strict scrutiny. In fact, "when the Court has applied strict scrutiny to a race-conscious measure designed to assist minorities, it has never upheld the measure." Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J., 427, 433 (1997). *See generally* City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to overturn race prefer-

School's admissions policy, and still uphold the policy or program at issue.[28] Thus, the only explanation for the *Grutter* outcome is that in the field of higher education, diversity provides an extra-compelling governmental interest.[29] If this is the case, then diversity should also justify

---

ences in government contracting). Lower courts have previously used strict scrutiny to invalidate race-conscious policies in public university admissions. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996). *See also* Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996) (invalidating race preferences in employee layoff policies). Strict scrutiny, as the highest standard of constitutional review, has been famously termed by Gerald Gunther as "strict in theory and fatal in fact." Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Before 1995, affirmative action programs implemented by the federal government only needed to pass the intermediate scrutiny test. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 564-65 (1990). But in *Adarand Constructors, Inc. v. Peña*, the Court shifted its stance and held that strict scrutiny applies to all government affirmative action programs. 515 U.S. 200, 235 (1995) (holding that "federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest").

28. According to the dissent, the Court made no serious effort to scrutinize the Law School's claim that it "has a compelling interest in securing the educational benefits of a diverse student body." *Grutter*, 539 U.S. at 356 (Thomas, J., concurring in part and dissenting in part). The dissent described the Court's approach as "unprecedented deference to the Law School—a deference antithetical to strict scrutiny." *Id.* at 362. In his dissent, Chief Justice Rehnquist argued that "[a]lthough the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference." *Id.* at 380 (Rehnquist, C.J., dissenting). Justice Kennedy stated that the Court, "in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's assurances that its admissions process meets with constitutional requirements." *Id.* at 389 (Kennedy, J., dissenting).

29. Justice O'Connor suggested that the reason for the unusual deference toward a racial discriminatory policy lay in the First Amendment's protection of academic freedom and educational autonomy. *Id.* at 329 (citing *Bakke*, 438 U.S. at 312) (stating that the "freedom of a university to make its own judgments as to education includes the selection of its student body"). However, educational autonomy is a highly suspect basis for judicial deference on something as important as racial discrimination. Even with the First Amendment and freedom of speech, the Court has not given deference to educational institutions. In *Tinker v. Des Moines Sch. Dist.*, the Court refused to let a school censor an anti-war symbol worn by students throughout the school day. 393 U.S. 503, 514 (1969). The school argued that, during the height of the Vietnam War, such symbols would cause disruption within the school. *Id.* at 510. But even though this was an issue that touched upon the educational and learning environment of the school, the Court refused to defer. *Id.* at 514.

Likewise, in *Bd. of Educ. v. Pico*, the Court declined to defer to a school's decision to remove some "just plain filthy" books from the school library. 457 U.S. 853, 857 (1982). But this issue again went to the very heart of the school's educational mission—e.g., the kind of books and materials to which it was exposing its students. *Grutter*, on the other hand, involves an issue less central to the educational function of the school. It does not involve the behavior of students who are already in a classroom, nor does it involve the kind of books that are filling library bookshelves and being read by students. Instead, *Grutter* involves a kind of pre-education decision—e.g., whom to admit as students. In a sense then, *Grutter* involves a gate-keeping function, performed prior to any educational function. Thus, there is less of a need to respect the educational autonomy of the Law School in this regard. Moreover, the notion of academic freedom and educational autonomy are justified in part by the courts' acknowledgment that they are not the best judges of such matters. *See generally* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

The courts, with regard to education, have traditionally taken a hands-off approach and left educational matters to the educators. For instance, in a situation like *Tinker*, where possible disruption of the actual school environment is concerned, courts defer and recognize that educators are in the best position to judge. Similarly, in cases like *Pico*, where the choice of learning and textual materials is concerned, the courts consider that educators are in a better position to judge. But in *Grutter*, which entails a race-based admissions policy, the courts are actually in a better position to judge, and hence should be less likely to defer. Perhaps the courts cannot adequately determine the effect of sexual innuendo on children (as in *Bethel*) or the role and standards of a

other governmental actions that would not otherwise be permissible in any other area.

The fact that the Law School's admissions policy survived strict scrutiny—a feat that almost no other state interest ever accomplishes—means that diversity in the educational arena is an interest that surpasses all other government interests. Furthermore, it means that racial diversity constitutes a subject matter that the courts will treat differently than any other area of constitutional protection. For instance, a program that restricts the speech rights of a particular group of people will almost automatically be struck down, but a program that infringes on the equal protection rights of a particular racial group may survive if the purpose is to create racial diversity. Because of this apparently unique mixture of diversity, education and race, it is asserted below that the same arguments presented in *Grutter* can also justify governmental encroachment on the property rights of tenured faculty.

III. THE EXTENSION OF *GRUTTER* TO FACULTY DIVERSITY

The argument used by the University of Michigan for the achievement of a critical mass of underrepresented minorities was that without such numbers, minority students would feel isolated and pressured to act like spokespersons for their race.[30] According to the Law School, only a critical mass of minority students would provide a meaningful opportunity for all students to reexamine racial stereotypes and produce the educational benefits that diversity has to offer.[31] However, as the dissent pointed out, it is the educational benefits that are the real goal or compelling interest behind the Law School's race-based admissions policy.[32]

---

school newspaper (as in *Hazelwood*), but courts are definitely in a position to adequately judge the constitutionality of race-based actions.

The Court's decision in *United States v. Virginia* also indicates that *Grutter* cannot be explained on the basis of educational autonomy or academic freedom. 518 U.S. 515 (1996). In *Virginia*, the Court found an equal protection violation in a state military college's exclusion of women. *Virginia*, 518 U.S. at 545-46. This finding occurred even though the college argued that "single-sex education provides important educational benefits," as well as "character development and leadership training." *Id.* at 535. Furthermore, the Court acknowledged that several amici urged that "single-sex schools can contribute importantly to [educational] diversity." *Id.* at 534 n.7. Yet despite these educational-benefits arguments, and despite the fact that the Court evaluated the case under a lower level of scrutiny than that used in *Grutter*, the Court did not recognize educational autonomy and defer to the judgment of the school. *Id.* at 533, 555 (stating that the test used for evaluating gender-based classifications is "whether the proffered justification is exceedingly persuasive," and that such classifications warrant "heightened scrutiny"). *See also* Jeffrey A. Barnes, *The Supreme Court's "Exceedingly [Un]persuasive" Application of Intermediate Scrutiny in* United States v. Virginia, 31 U. RICH. L. REV. 523, 523 (1997) (noting that the Court in *Virginia* applied a "form of intermediate scrutiny").

30. *See* Respondent's Brief at 26, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

31. As the Court's opinion stated, "diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students." *Grutter*, 539 U.S. at 333. The Court accepted without question the Law School's conclusion, based on its experience, "that a critical mass of under represented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." *Id.*

32. *Id.* at 355 (Thomas, J., concurring in part and dissenting in part).

Diversity, in effect, is only the means to the end.[33] If diversity produced no educational benefits, then diversity would not be a compelling interest of an institution of higher education. But when educational benefits are recognized as the real goal, then student diversity must be recognized as the second-best way of reaching that goal. Since faculty are the leaders of the educational environment in universities and law schools and, hence, are in the best position to produce educational benefits, then it stands to reason that faculty diversity is more urgent and vital than student diversity.

As a group in general, university faculty have been strongly supportive of affirmative action.[34] Law schools in particular have put immense pressure on themselves to diversify. Schools that fail to make progress in diversifying their student bodies risk loss of accreditation from the American Bar Association and the American Association of Law Schools.[35] In *Grutter*, ninety-one colleges and universities filed briefs in support of the University of Michigan; not one college or university filed a brief opposing affirmative action.[36] A recent survey of 500 law school faculty members found that an overwhelming majority supported efforts to achieve diversity in the classroom.[37] Not only have law school faculty been outspoken advocates for affirmative action in academia, but they have argued for its implementation elsewhere.[38]

---

33. "And, for law schools especially, racial and cultural diversity is crucial in order to prepare students to be effective and responsible lawyers, academics and judges in an increasingly multi-racial, multi-ethnic and multi-cultural world." Brief of Amici Curiae Judith Areen et al. at 3, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

34. Robert Atwell, president of the American Council on Education, has characterized the legal arguments against racial preferences as "bogus." Elizabeth Shogren, *In U.S. Reversal, Minority-Based Scholarships OK*, L.A. TIMES, Feb. 18, 1994, at A1. In general, "there is an abundance of commentary by educators on the pedagogical value of attaining a racially diverse student body." Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 393, 411 (1998). *See also* Richard A. White, *Law School Faculty Views on Diversity In the Classroom and the Law School Community*, (May, 2000), at http://www.aals.org/statistics/diverse3.pdf (discussing widespread law faculty support for diversity in the classroom).

35. Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 795 (1995).

36. Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 368 (2003) (explaining that the briefs argued that "pluralistic, widely representative colleges provide a more enriching learning environment and better preparation for life in a multicultural world"). *See also* Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where Do Universities Go From* Gratz *and* Grutter*?*, 33 J.L. & EDUC. 21, 48 (2004) (describing the amici briefs filed by universities in support of the University of Michigan's race-based admissions policy as arguing that "diversity is essential for the interplay of ideas in a nation that is becoming increasingly diverse").

37. *See* Eckes, *supra* note 36, at 49. Prominent law faculty members have argued that students benefit in an ethnically diverse classroom. *See* Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1159-60 (1996). Psychology professors have also argued that students learn better in a diverse educational environment. *See* Eckes, *supra* note 36, at 50. The presidents of sixty-two major research universities have publicly defended the use of race in admissions decisions. *See* Association of American Universities, *On the Importance of Diversity in University Admissions*, N.Y. TIMES, Apr. 24, 1997, at A27.

38. *See* Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1071 (1989) (arguing that legal scholars "must continue to

In espousing the value of diversity in higher education,[39] legal scholars have argued that any hope in making racial progress lies "in the unique ability of colleges and universities to bring together persons of all racial backgrounds to achieve the educational benefits of diversity and, ultimately, to create a more just, racially integrated society."[40] This call for diversity in higher education includes and recognizes the need for faculty diversity.[41] Indeed, a diverse faculty is even more important than a diverse student body, in terms of producing enlightening classroom experiences.[42] As one minority law student reports, "women and minorities can feel silenced" by white male professors.[43]

Faculty diversity appears to be a necessary condition to student diversity. Minority students may not enroll at an institution that does not have sufficient minority faculty; and even if they do enroll, they may find themselves alienated and eventually drop out or transfer.[44] More-

---

work for greater diversity at home on university faculties" and to "defend affirmative action from attack in other institutions as well").

39. *See* Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1615-16 (2003). *See also* Robert A. Sedler, *Affirmative Action, Race, and the Constitution: From* Bakke *to* Grutter, 92 KY. L.J. 219, 235 (2003-2004) (arguing that if "racial minorities are truly to be full and equal participants in all important areas of American life, this should include minority representation in substantial numbers at the elite universities and at their law schools and medical schools as well"). Law faculty also report that students value and welcome diversity. In one survey, nearly fifty percent of the law students said that diverse classes offer "more serious discussions of alternative perspectives than homogeneous classes." Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2266 (2000). Numerous published studies argue that diversity serves the educational mission of the nation's law schools. *See, e.g.*, GARY ORFIELD & DEAN WHITLA, DIVERSITY AND LEGAL EDUCATION: STUDENT EXPERIENCES IN LEADING LAW SCHOOLS 4-6, 15 (1999); Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 865 (2000).

40. Brief of Amici Curiae NAACP Legal Defense Fund and the ACLU at 2, *Grutter*, 539 U.S. 306 (2003) (No. 02-241).

41. Diversity, in this sense, means racial diversity. *See* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1882 (1996) (stating that because "a professor's experiences, outlooks, and ideas do correlate in some measure with his or her race, an unbiased decisionmaker could conclude that race can sometimes be a reasonable proxy for intellectual diversity").

42. *See* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 864 (1995) ("It is largely the faculty who set an institution's tone and agenda").

43. Moran, *supra* note 39, at 2282 (reporting that opinions expressed in a student survey included one student's statement that "most professors are White males, so White males feel more comfortable participating" in the classroom). In general, students say that "the professor play[s] a significant role in setting the tone for discussion" in the classroom. *Id.* at 2287.

44. *See* Abigail Thernstrom, *Voting Rights: Another Affirmative Action Mess*, 43 UCLA L. REV. 2031, 2048 (1996) (citing the argument for the need of minority faculty to connect with and serve as a positive influence to minority students). *See also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1080 (1991) (arguing that white teachers, unaware of race and cultural differences, can unwittingly disadvantage black students by asking questions in ways that conform to white middle-class customs). According to supporters, affirmative action is needed not only to give students authority figures with whom they can connect, but also to eliminate "black invisibility" by demanding that whites see "blacks in positions of power, authority, and responsibility—as teachers . . . ." *Id.* at 1109. Various surveys have concluded that minority students can feel discrimination from and have very little interaction with white faculty. *See, e.g.*, Sylvia Hurtado, *Graduate School Racial Climates and Academic Self-Concept Among Minority Graduate Students in the 1970's*, 102 AM. J. EDUC. 330 (1994); Sylvia Hurtado & Deborah Faye Carter, *Effects of College Transition and Perceptions of the Campus Racial Climate on Latino College Students' Sense of Belonging*, 70 SOCIOLOGY OF EDUC. 324, 325-38 (1997).

over, there is an argument that the absence of minority faculty "lessens the probability that minority students will complete graduate and professional programs at the same rate as white students."[45] A research study asserts that the best predictor of graduation rates of African-American graduate and professional students is the presence of minority faculty members.[46] Schools that had African-American faculty members were found to have graduated more African-American students.[47] Therefore, by implication, if an institution does not have a critical mass of minority faculty, it may not be able to attract and keep a critical mass of minority students.[48]

The chain of argument goes as follows: to achieve student diversity, a diverse faculty must be present; and to achieve a diverse faculty, affirmative action programs must be implemented. Without such programs, minority faculty members and candidates face unfair and prejudicial barriers; and if they have not graduated from prestigious schools, minority candidates may not be able to compete with those candidates who have.[49] According to academic supporters of affirmative action, minority scholars often face discrimination regarding their fields of research.[50] Furthermore, because they are less likely than their white col-

---

45. Edgar G. Epps, *Affirmative Action and Minority Access to Faculty Positions*, 59 OHIO ST. L.J., 755, 759 (1998).

46. *See* JAMES E. BLACKWELL, MAINSTREAMING OUTSIDERS: THE PRODUCTION OF BLACK PROFESSIONALS 64 (Philip Eisen ed., General Hall, Inc.1981).

47. *See id.* at 70.

48. *See* Epps, *supra* note 45, at 759-60. Furthermore, the "research suggests that the presence or absence of minority faculty members in graduate and professional schools is a relatively good informal indicator of an institution's commitment to the goal of equal opportunity for minorities in higher education." *Id.* at 759. Professors Brest and Oshige argue that minority faculty "tends to make minority students feel that they are welcomed at the institution." Brest & Oshige, *supra* note 42 at 865. Minority faculty often provide "counsel, support, and comfort for minority students." *Id.* "[T]he presence of minority faculty lends reality to the possibility of academic careers for minority students." *Id.* Moreover, minority faculty have a beneficial effect on white students who may never before have "encountered members of minority groups in positions of authority." *Id.*

49. *See* Richard Delgado & Derrick Bell, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 361-362 (1989).

50. *See* Aleinikoff, *supra* note 44 at 1085 (arguing that "scholarship done by minority scholars on minority issues is frequently greeted with skepticism from majority members of the academy."). According to Professor Aleinikoff, race-consciousness is "an entrenched structure of thought," even among faculty members, that can lead people "to interpret situations and actions differently when the race of the actors varies." *Id.* at 1067. "The stories that African-Americans tell about America—stories of racism and exclusion, brutality and mendacity—simply do not ring true to the white mind." *Id.* at 1069. To ask whites to give credibility to these stories would be "to ask whites to give up too much of what they 'know' about the world." *Id.* Moreover, "[w]hite perceptions of black inferiority cannot be overcome by repressing our implicit recognition of race," but "only when whites *see* blacks as equals." *Id.* at 1108 (emphasis added). It is argued that what qualifies as acceptable research topics is largely defined by the values and experiences of the majority racial group. "Faculty of color voice a common concern that their work is undervalued and that they are treated differently in the academy than their peers." Epps, *supra* note 45, at 769 (quoting Caroline Sotello Viernes Turner & Samuel L. Myers, Jr., *Faculty Diversity and Affirmative Action*, *in* AFFIRMATIVE ACTION'S TESTAMENT OF HOPE: STRATEGIES FOR A NEW ERA IN HIGHER EDUCATION 132 (Mildred Garcia ed., State University of New York Press 1997)). In the humanities, for instance, a minority scholar may have to spend an inordinate amount of time "justifying the inclusion of African-American literature, art, or music in the curriculum." *Id.* Consequently, as Professor

leagues to be tenured, "they are more vulnerable to threats, open or unspoken."[51] Minority faculty also can find themselves deluged with administrative and academic advising duties. Apparently, since there are relatively few minority faculty members, the few that are on staff end up advising and counseling the majority of minority and female students.[52] Moreover, minority faculty are said to be "overburdened with committee responsibilities," since the university wants to staff as many committees as possible with the few minority faculty members available.[53]

Given these arguments, affirmative action policies aimed at faculty composition are essential, because if a diverse faculty does not exist, then the educational benefits of diversity in which the state has a compelling interest cannot occur. But there is a substantial obstacle to faculty diversity, an obstacle much greater than those facing the achievement of student diversity. That obstacle is the tenure system.

In *Grutter*, the Court recognized that since a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race," any race-conscious admissions policy must be limited in duration.[54] The Court accepted the Law School's assertion that it would "terminate its race-conscious admissions program as soon as practicable."[55] However, by limiting the time duration of these affirmative action admissions policies, the Court has imposed a degree of urgency on the matter.[56] Indeed, by even accepting a race-based admissions policy, the Court recognized that the country cannot wait for unregulated social conditions to produce the desired diversity, but rather that racial diversity in the nation's institutions of higher education must

---

Epps argues, "the minority scholar is constrained by the culture of the major research university to select research paradigms, research topics, and publication outlets that conform to the traditions of institutions that have historically excluded minorities." *Id.*

51. Chen, *supra* note 41, at 1887. Minority scholars contend that institutions must look beyond the traditional measurements of academic achievement or potential when evaluating minority candidates for faculty positions. *See* Amado M. Padilla, *Ethnic Minority Scholars, Research, and Mentoring: Current and Future Issues*, EDUC. RESEARCHER, May, 1994, at 24-27.

52. *See* Epps, *supra* note 45, at 767 (claiming that minority faculty end up becoming "mentors to many more students than is typical for university faculty"). Because "students looking for supportive role models seek out the limited number of minority (and women) professors for advice and moral support," minority (and women) faculty members find themselves swamped with "writing letters of recommendation and helping with graduate or professional school selection, job and fellowship applications, and post-doctoral research opportunities." *Id.*

53. *Id.*

54. Grutter v. Bollinger, 539 U.S. at 341. According to the Court, the requirement that all race-conscious admissions policies have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Id.* (quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 510 (1989)).

55. *Grutter*, 539 U.S. at 342. As Justice O'Connor stated, "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [of diversity]." *Id.* at 343.

56. *See id.*

come rapidly.[57] Therefore, because the tenure system operates as a huge brake on any significant and immediate progress regarding the compelling interest of diversity, it should likewise suffer the same fate as racially-homogenous student bodies.

At many law schools, more than eighty to ninety percent of the full-time, tenure-track faculty are in fact tenured.[58] This huge overhead of permanently employed faculty members means that only a small fraction of faculty positions open up each year, and it is out of this small number that law schools are attempting to achieve faculty diversity.[59] Quite commonly, at the vast majority of the Nation's law schools, during a student's enrollment not one faculty position will turn over. Consequently, despite the school's professed commitment to diversity and affirmative action among the faculty, absolutely nothing will be done. And because the faculty lags in its diversity, the student body will most probably lag in its diversity, despite all the meticulously drafted race-conscious admissions policies.

IV. THE DIVERSITY ARGUMENT FOR TENURE TERMINATION

Tenure termination may impose some significant effects on a selected group of people.[60] However, these effects are justified, perhaps even mandated, by the very arguments accepted by the Court in *Grutter*.

The quest for diversity of employee personnel would not justify a business corporation firing all its non-minority employees.[61] Yet as

---

57. *See, e.g.*, Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 682 (1998) (arguing that "[a]ffirmative action grows out of the frustration with the apparent intractability of this country's inability to achieve [racial equality]"); Chen, *supra* note 41 at 1849 (stating that "[d]eliverance [from the need of affirmative action] cannot come soon enough").

58. The University of Dayton Law School, for instance, reports that 85 percent of its faculty are tenured. *See* http://www.udayton.edu/~vpadmin/fbookfiles/hr/fall03/tenurefac.pdf (n.d.). At St. Mary's Law School, 91 percent are tenured. *See* Gloria Padilla, *Decision to Deny Tenure Sparks Protest at St. Mary's*, SAN ANTONIO EXPRESS-NEWS, April 7, 1999, at 1B.

59. The tenure system "diminishes an institution's opportunity to recruit and retain a younger and more diverse faculty." James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 170 (2000). In over 300 years, for instance, Harvard University has never fired a tenured professor. *Id.* at 173.

As argued in the amicus brief of several deans of prominent national law schools, university education for most students "typically occurs early in life and then ends." Brief of Amici Curiae Judith Areen et al. at 9, *Grutter*, 539 U.S. 306 (2003) (No. 02-241). Therefore, in the case of law school students, their academic legal training is limited to three years. Given the arguments for diversity made in *Grutter*, it is all the more vital that these law students experience a "diversity" legal education as soon as possible. For the rest of their lives, they will be active in business and professional groups and enterprises, but they have only three years in which to avail themselves of all the educational benefits of diversity. This alone should make the need for immediate and complete faculty diversity all the more acute.

60. Some degree of economic hardship is inevitable in any affirmative action program. *See infra* notes 97-110. In desegregation programs, for instance, some students have to endure bussing over long distances in order to achieve school diversity. Swann v. Charlotte-Mecklenburg Bd. of Ed., 362 F. Supp. 1223, 1232 (D.C.N.C., 1973) (acknowledging that the desegregation plan will require many children to be "bussed out of their home neighborhoods, often for long distances").

61. Since Justice O'Connor's *Grutter* opinion focuses on the educational benefits conferred by diversity, and on the need for these benefits to prepare the future leaders of tomorrow, her case

Grutter recognized, higher education is unique. It is a special institution in the social, political and economic life of the nation.[62] Consequently, if only diversity can produce the necessary educational benefits described by the Court, and if the educational system is vital for the sustenance of democracy, then education is an area in which extraordinary measures must be taken to achieve that diversity.

As the Court stated in *Grutter*, the strict scrutiny test requires that any governmental racial discrimination meet two requirements: first, it must serve a compelling state interest; and second, it must be narrowly tailored to meet that interest.[63] Thus, any race-based distinction must be the most narrowly drawn distinction possible.[64] Given this constitutional command, it can be argued that the path toward educational diversity does not wind through the larger and ill-defined pool of potential students, but through the specific and existing faculty staffs of the law schools. Since student diversity is largely dependent on faculty diversity, then the way to achieve the former is to focus narrowly on the latter.

Another reason why tenure should be abolished as a means of achieving more rapid faculty diversity is that the persons who will be most impacted are the persons who in American society most eagerly advocate on behalf of diversity and affirmative action.[65] If there is any fundamental tenet of a democratic society, it is that those adversely affected by a decision should have some say in or agreement with that de-

---

for affirmative action would not apply to private businesses. *See also* Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of* Grutter*?*, 92 KY. L.J. 263, 263-64 (2003-2004) (asserting that *Grutter* "does not directly apply to the affirmative use of race or other protected characteristics in the workplace," and that the Court "was careful to limit its discussion to the question" of whether diversity was a compelling interest that can justify the use of race in university admissions policies).

62. *Grutter*, 539 U.S. at 330 (stating that "[w]e have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society") quoting Plyler v. Doe, 457 U.S. 202, 221 (1982). *See also* Brown v. Board of Education, 347 U.S. 483, 493 (1954) (stating that education "is the very foundation of good citizenship").

63. As the *Grutter* opinion stated: "[e]ven in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" *Grutter*, 539 U.S. at 331 (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996)). *See also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226-27 (1995) (stating that all governmental racial classifications are subject to strict scrutiny).

64. *See Grutter*, 539 U.S. at 331.

65. *See supra* notes 34-38 and accompanying text. Many academics argue that color blindness is a futile delusion because of the past and present race discrimination in America. *See, e.g.*, Stanley Fish, *Reverse Racism or How the Pot Got to Call the Kettle Black*, ATLANTIC MONTHLY, Nov. 1993, at 128, 130. Others argue that affirmative action is indispensable to alleviate the stigma and prejudice facing minorities in America. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 295-302 (Harvard Univ. Press 1985); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1331 (1987).

Affirmative action programs at the university level even extend to shaping how scientists conduct their research. For instance, federal law requires that federally-funded research involve women and minorities both as researchers and as subjects of research in clinical studies. *See* Sally L. Satel, *Science by Quota*, NEW REPUBLIC, Feb. 27, 1995, at 14.

cision. And it certainly cannot be argued that the majority of law school faculty do not agree with the need or wisdom of affirmative action.[66]

Many legal scholars claim that race-conscious admissions policies are needed in universities to remedy the blatant racism practiced by those institutions in the past.[67] The courts have long held that affirmative action policies are warranted when governmental agencies—e.g., public universities—have engaged in past racial discrimination.[68] In such cases, diversity as a compelling interest is not even needed to justify the race-conscious remedial actions.[69] Consequently, on the basis of remedying

66. *See* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, YALE L. & POL'Y REV., 1, 9 (2002) (stating that the educational system, like no other domain, "practices and supports [affirmative action] so enthusiastically"). According to a former chancellor at the University of California at Berkeley, a university without affirmative action is akin to educational apartheid, "almost as pervasive and insidious as the strictest segregation in South Africa." Chang-Lin Tien, *Diversity and Excellence in Higher Education*, in DEBATING AFFIRMATIVE ACTION, 237, 239 (Nicolaus Mills ed., Delta 1994). Other scholars argue that affirmative action in higher education is "the best long-term remedy for the private beliefs and behavior that perpetuate the effects of racial caste." Akhil Amar & Neal Katyal, Bakke's *Fate*, 43 UCLA L. REV. 1745, 1779 (1996). It has been reported that "virtually all competitive law schools" operate "a quota system." Michael S. Greve, *The Newest Move in Law Schools' Quota Game*, WALL ST. J., October 5, 1992, at A12. A former dean of the University of California at Berkeley Boalt Hall Law School has publicly admitted to huge discrepancies in the academic qualifications between blacks and other students. *Id.*

67. *See generally* Brief of Amici Curiae Judith Areen et al. at 3, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) (stating that "today the Law School argues it would have 'too many' whites if it could not discriminate in its admission process").

68. For instance, to remedy the injuries caused by past discrimination, the courts can impose an affirmative hiring and promotional remedy, which prevails until a designated percentage of minority workers has been reached. *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987) (holding that "the effects of past discrimination in the Department 'will not wither away of their own accord' and that 'without promotional quotas the continuing effects of this discrimination cannot be eliminated.'" (quoting the District Court in Paradise v. Prescott, 585 F. Supp. 72, 75 (M.D.Ala. 1983); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) (upholding the police department's mandatory hiring quotas to correct past discrimination); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) (holding that police department quota relief was necessary to eliminate unconstitutional past hiring policies).

Courts may also order such remedies against labor unions which have engaged in past racial discrimination. *See* Local 28, Sheet Metal Workers' Int'l. Ass'n. v. EEOC, 478 U.S. 421 (1986) (upholding remedies, including preferential affirmative action hiring and the imposition of substantial fines, to remedy the effects of pervasive past discrimination). In fact, until *Grutter*, the constitutional justification of affirmative action was primarily limited to serving as a remedy for past discrimination. *See Adarand Constructors*, 515 U.S. at 214-20 (recounting the history of Supreme Court decisions on racial discrimination).

As noted earlier in *Hopwood*, the Fifth Circuit ruled that diversity did not constitute a compelling government interest and suggested that perhaps the only governmental interest compelling enough to justify a race-based admissions policy was to remedy the present effects of prior discrimination by that particular governmental body. *Hopwood*, 78 F.3d at 944-46. Consequently, prior to *Grutter*, the only constitutionally compelling interest recognized by the Court that satisfied the strict scrutiny test was the remediation of the effects of past race discrimination. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 612 (1990) (holding "modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination").

69. The Court has endorsed the attempts by institutions who voluntarily try to achieve more racial equality, even when there is no direct evidence of previous discriminatory behavior. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 627-31 (1987) (ruling that an employer need not prove its own past discriminatory acts so as to justify its adoption of an affirmative action program, only that the employer demonstrate discrepancies in certain segregated job categories).

past discrimination alone, substantial affirmative action mandates can be imposed—substantial enough to justify the dismantling of tenure.

There is no shortage of statements, testimony, and research by legal scholars regarding the racial discrimination that has existed, and that continues to exist, in the nation's institutions of higher education.[70] These scholars assert that even today, unequivocal symptoms exist "indicating that racial equality has not yet found its way to many institutions of higher education," and that there is "ample evidence that there exists some form of discrimination" even at some of the nation's elite law schools.[71] In both *Hopwood* cases, federal investigators claimed to have found pervasive and egregious discrimination in the recent past of Texas's higher education system.[72] As a University of Texas law professor who also served as counsel for the University in the *Hopwood* cases writes: "[W]e were able to persuade the trial court that the vestiges of discrimination were not merely the lore of a bygone era."[73]

Legal scholars point to the disparity between the percentage of minority students in higher education and the percentage of full-time minor-

---

70. *See* Greenberg, *supra* note 39, at 1618 (recalling being told that approximately forty years ago, at a time when some of today's senior legal faculty were obtaining or applying for tenure, the University of Michigan "accepted only one black applicant each year"); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 312 (1990) (describing the burden on blacks of persistent, unconscious racism). Even on racially integrated faculties, Ross argues, a black law professor "must overcome widespread assumptions of inferiority held by students and colleagues, while white colleagues enjoy the benefit of the positive presumption and of the contrast with their black colleague." *Id. See also* Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Law Schools*, 20 U.S.F. L. REV. 385 (1986).

See, e.g., Yollander Hardaway, *Affirmative Action: Does the Fifth Circuit's* Hopwood *Ruling Place Affirmative Action on Shaky Ground?*, 122 EDUC. L. REP. 1089, 1101 (1998) (stating that "recent studies concerning minorities and higher education reveal present vestiges of past discrimination"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987) (arguing that racism is an illness that "infects almost everyone"); Darryl Brown, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 322 (1990) (discussing the "daily repetition of subtle racism and subordination in the classroom and on campus").

Also, Professor Aleinikoff states that racism in America is "widespread, deeply ingrained, passed from generation to generation." T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 352 (1992). "It is becoming increasingly clear . . . that the academic world that many students of color experience . . . [is one] in which minority students feel as if they are outsiders—too often the victims of stereotypical (and essentialist) assumptions and, with increasing frequency, outright racist behavior." *Id.* at 367. "The increase in overt acts of racism on college campuses in recent years is well documented," with professors "often send[ing] similar messages" of racism. *Id.* As Professor Aleinikoff argues, what needs to be changed is "the institutional culture" of universities—a culture that is "overwhelmingly white," in which access "to power hierarchies is generally limited to whites." *Id.* at 369-70.

71. Kent Kostka, *Higher Education,* Hopwood*, and Homogeneity: Preserving Affirmative Action and Diversity in a Scrutinizing Society*, 74 DENV. U. L. REV. 265, 279-80 (1996).

72. Hopwood v. Texas, 861 F. Supp. 551, 555-56 (W.D. Tex. 1994), *rev'd by* 78 F.3d 932 (5th Cir. 1996).

73. Issacharoff, *supra* note 57, at 681 (expressing also his deep skepticism about even those universities that have implemented affirmative action programs). He argues that "it is highly unlikely in this day and age that the institutions of higher education that have heavily internalized a commitment to affirmative action are at the same time remedying their own discrimination." *Id.*

ity faculty as evidence of continuing discrimination.[74] Others accuse universities and law schools of subtly reinforcing racial stereotypes through their use of discriminatory testing and admissions standards.[75] Implicit within these accusations is the larger criticism that racial discrimination is deeply ingrained in America's current system of higher education.[76] As Critical Race Theory proclaims, the standards used to measure achievement in higher education are a "gate built by a white male hegemony that requires a password in the white man's voice for passage."[77]

The faculty of the nation's higher education institutions have been the most vociferous critics of the nation's racial practices and attitudes.[78] They fault society, including institutions of higher education, for not admitting to this racism and to the need for affirmative action.[79] They further argue that minorities are oppressed not just by individual racist attitudes, but also "and more importantly by intractable hierarchical and institutional structures that a more passive, slow-moving non-

---

74. *See* Epps, *supra* note 45, at 761. The percentage of minorities in the full-time faculty ranks of higher education is approximately half of the percentage of minorities in the student ranks. *Id.* The persistence of discrimination in higher education can be seen from the fact that "minorities are still tremendously underrepresented in undergraduate and graduate programs nationwide, including law." Kostka, *supra* note 71, at 281. "Socialized biases that extend far beyond formal admission barriers cannot be quantified or eliminated by merely opening up the doors to disadvantaged racial minorities; there still exists a pervasive discriminatory atmosphere in society that disadvantages many, and thus, justifies race-based remedies." *Id.*

75. *See* Rubenfeld, *supra* note 27, at 426. Professor Rubenfeld argues that just as segregating schools was held unconstitutional in *Brown*, so too should "reliance on the SAT, the LSAT, and all the other standardized tests" that unfairly convey the message that minorities cannot compete be found unconstitutional. *Id.* The use by law schools of the Law School Admission Test (LSAT) has been strongly criticized by supporters of affirmative action. The "substantial disparate effect" that the LSAT has on minorities "has been well-documented." Brief of Amici Curiae Society of American Law Teachers at 16, *Grutter*, 539 U.S. 306 (2003) (No. 02-241).

The SAT, it is argued, reflects the country's "legacy of racial injustice." K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 125 (Princeton Univ. Press 1996). The racial discrimination of the SATs are demonstrated by the fact that "when average SAT scores are broken down by class and race, we also see enormous gaps between black and white students within the same income groups." *Id.* at 140.

76. Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, (1991).

77. *Id.* at 2052. For a description of Critical Race Theory, *see* Tanya Kateri Hernandez, *Comparative Judging of Civil Rights: A Transnational Critical Race Theory Approach*, 63 LA. L. REV. 875, 877 (2003) (arguing that "Critical Race Theory is a strain of legal scholarship that challenges the ways in which race and racial power are constructed and represented in legal culture and, more generally, in society as a whole"). *See also* John O. Calmore, *Random Notes of an Integration Warrior—Part 2: A Critical Response to the Hegemonic "Truth" of Daniel Farber and Suzanna Sherry*, 83 MINN L. REV. 1589, 1592 (1999) (stating that "Critical race theory primarily investigates how the law contributes to and diminishes racial subordination").

78. *See, e.g., supra* notes 65-70 and accompanying text. These sweeping criticisms are reflected in the arguments put forth by respondents in *Grutter*. "The inescapable conclusion is that this is not a 'color blind' society," but one that is "a socially-constructed racial hierarchy with whites firmly on top." Brief of Amici Curiae NAACP Legal Defense and Educational Fund and the ACLU at 22, *Grutter*, 539 U.S. 306 (2003) (No. 02-241). "[R]acial discrimination persists across all class levels and affects even those African Americans with advanced skills and credentials." *Id.* at 19.

79. *See* Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 733 (1999) (stating that it is rarer still that a university "defending a plan [for affirmative action] will be willing to assert its own past discrimination as justification for affirmative measures").

discrimination principle cannot effectively dislodge."[80] Yet despite this comprehensive criticism of the many ways in which higher education discriminates against minorities, faculty members rarely address the problematic tenure system.

The tenure system most likely qualifies as one of those intractable hierarchical and institutional structures that sustains the racial discrimination of the past. Academic tenure was born in a racist age, and if the remnants of discrimination exist everywhere else in society they certainly must in the tenure system.[81] Many currently tenured faculty were awarded tenure at a time when, by the very admissions of faculty members, women and minorities were being shut out. Consequently, it seems logical that tenure as an institutional structure rooted in a past of oppressive racism should suffer the same fate that other remnants of racism have experienced. To the degree that tenure has placed white males into positions of power and privilege—and, given the overwhelming numbers of white male tenured professors, it apparently has—then that instrument of racial privilege should be dismantled. Only then will women and minorities, who have previously been excluded from those positions, finally assume their rightful and long-neglected place.[82]

V. BREAKING DOWN THE TENURE BARRIER TO DIVERSITY

In a way, the academic community has enjoyed a free ride on the racial-virtue train. Faculty members have been eager advocates of affirmative action and, yet, because of tenure they have had to incur no costs or burdens in the social crusade for diversity. Moreover, by adopting the diversity argument, academia has been able to shift focus away from the more backward-looking remedial rationale for affirmative action. This is because the diversity argument incorporates a "future-oriented vision,"[83] and, thus, "ascribes no guilt, calls for no arguments about compensation."[84] So, by supporting affirmative action policies aimed at students and new faculty hires, white male faculty members can

---

80. Schuck, *supra* note 66, at 28.

81. The beginnings of tenure in the U.S. higher education system dates back to 1900. *See* Fishman, *supra* note 59, at 165.

82. Institutions of higher education "continue to perpetuate racial disadvantage," Brief of Amici Curiae NAACP Legal Defense and Educational Fund and the ACLU at 3, *Grutter*, 539 U.S. 306 (2003) (No. 02-241). And for "far too long, the doors to those positions [within higher education] have been shut to Negroes." *Id.* at 26.

The Supreme Court has endorsed a narrow version of what could be construed as a restitution argument, permitting affirmative action where identifiable past discrimination has been proved, when this discrimination continues to affect individual victims, and when the racial preference is narrowly tailored to remedy this particular discrimination. Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976) (allowing affirmative action to dismantle a seniority status promotion system to remedy prior discrimination); *see, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 448-49 (1980) (holding affirmative action in federally funded public construction projects constitutional).

83. *See* Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WISC. L. REV. 105, 107 (1993).

84. Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2060 (1996).

ease whatever guilt or discomfort they might feel on racial issues, while at the same time incurring no risk of being forced to suffer any professional or economic hardship themselves.[85]

Surveys have shown that university faculty tend to be "ideologically and politically far more liberal, Democratic, statist, and secular than other Americans."[86] But their insulation from any adverse effects of affirmative action programs casts a certain suspicion on the arguments of faculty members in support of such programs. They are seen as safely immune from the burdens or consequences of their beliefs. Indeed, most of the Supreme Court's affirmative action decisions have involved not the professional or intellectual classes, but occupations such as police officers and firefighters.[87] The bulk of the judicial affirmative action docket has been directed at, as the Court once described it, "the work of the manual laborer, as distinguished from that of the professional . . . or, indeed, of any class whose toil is that of the brain."[88]

Of course, imposing an affirmative action program that does away with faculty tenure would indeed place some significant burdens on currently tenured faculty. However, such a program may be the only way a university or law school can effectively and immediately achieve the educational benefits of diversity, which constituted the compelling state interest under *Grutter*.[89] If a public university, pursuing the compelling interest of diversity, focused on its faculty make-up and disbanded the tenure system as a means of achieving diversity, it would be exercising

---

85. Most university professors "are profoundly uncomfortable at the thought of teaching a class or being on a faculty containing only whites and Asians." Schuck, *supra* note 66, at 36 (adding that "tenured professors have little or nothing to fear personally from affirmative action for students or faculty"). Affirmative action, in fact, benefits tenured faculty "by eliminating the discomfort they would feel in classes and faculty meetings without non-Asian minorities, and they bear few of the program's costs." *Id.*

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

87. *See generally* Martin v. Wilks, 490 U.S. 755 (1989) (allowing firefighters to challenge prior consent decrees); *see generally* United States v. Paradise, 480 U.S. 149, 150 (1987) (upholding 50 percent promotion requirement for black state troopers under the Equal Protection Clause); Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986) (discrimination suit brought by minority firefighters); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (addressing a fire department's suit over racially biased hiring, promotion, and lay-off practices).

88. Rector, etc. of Church of the Holy Trinity v. United States, 143 U.S. 457, 463 (1892).

89. The termination of tenure, for the sake of achieving diversity, could be achieved in two ways. The first, and the one most consistent with the *Grutter* reasoning, would be if the public academic institution itself implemented change. In this way, it could rely upon the academic freedom and educational autonomy justification relied on by Justice O'Connor. The second way, however, would be for the state to abolish tenure. It could do so in the name of the compelling state interest of diversity, which in turn produces educational benefits, which in turn produces better and more enlightened social leaders of the future. Arguably, according to *Grutter*, the state has as compelling an interest in diversity as does the Law School. After all, the benefits of diversity extend far beyond the boundaries of the academic community. They include the development of good democratic citizens, the nurturing of enlightened social and political leaders, and the promotion of racial harmony in society, through the strengthening of trust in minorities that social institutions are open to them. *See Grutter*, 539 U.S. at 328-29 (deferring to law schools' judgment on issues of student admission and diversity).

just the kind of academic freedom cited by Justice O'Connor as one of the reasons for upholding the race-based admissions policy in *Grutter*.[90] Granted, the now untenured faculty members would feel some loss of economic and professional security, but they would all be eligible to reapply for a faculty position under the new affirmative action policy. Moreover, mere economic loss or professional insecurity cannot be a barrier to an interest as compelling as diversity.

Even outside the higher education arena, where diversity is not such a compelling interest, affirmative action programs impose financial and professional costs on nonfavored racial groups. For example, in the field of public and private contracting, laws often impose "set-asides, quotas, and other preferences for minority contractors."[91] Public housing projects are subject to affirmative action mandates; and private developers receiving public funds are often required to implement set-asides or quotas for minority groups.[92] Each year, over 100 million dollars in race-based financial aid is distributed by colleges and universities.[93] In professional schools alone, ten percent of all available scholarship money goes exclusively to minority students.[94] At Harvard University, all minority graduate students receive full tuition, room, and board irrespective of their financial need.[95] Obviously, when this money is given to certain minority students, it is denied to nonminority students, thus causing them to suffer a definite financial injury.[96]

Courts have approved affirmative action programs that levy some economic burdens on nonminority groups. In *United States v. Paradise*,[97] the Court upheld a promotion scheme for the Alabama State Troopers requiring that one African-American be promoted for every one white promotion.[98] In *Fullilove v. Klutznick*,[99] the Court endorsed an affirmative action program that mandated that a certain percentage of government business be awarded to minorities.[100] In *Wittmer v. Peters*,[101] three white candidates who had applied for lieutenant positions in an Illinois correctional boot camp, where nearly seventy percent of the

90. *Id.* at 328.

91. Schuck, *supra* note 66, at 9; *see generally* TAMAR JACOBY, SOMEONE ELSE'S HOUSE: AMERICA'S UNFINISHED STRUGGLE FOR INTEGRATION 9 (Free Press 1998) (attacking modern affirmative action practices).

92. Schuck, *supra* note 66, at 10.

93. Kennedy, *supra* note 35, at 789.

94. *Id.*

95. *Id.*

96. "In an era of diminishing educational budgets, affirmative action quite literally takes the form of preferential finance." Chen, *supra* note 41, at 1899.

97. 480 U.S. 149 (1987).

98. *Paradise*, 480 U.S. at 171 (holding that the "one-for-one promotion requirement was narrowly tailored to serve its several purposes").

99. 448 U.S. 448 (1980).

100. *Fullilove*, 448 U.S. at 473 (in which ten percent of federal construction funds went to minority businesses, so long as the bids were competitively priced).

101. 87 F.3d 916 (7th Cir. 1996).

inmates were black men,[102] sued when a black candidate was selected for the position, even though he had ranked far below the white candidates on an employment test.[103] Conceding that race was a factor in the hiring process, the state defended its decision on the grounds of "penological necessity."[104] The state argued that a black lieutenant was needed because the black inmates "are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp."[105] Similarly, in the university setting, the elimination of tenure can be justified on the basis of educational necessity.

In *United Steelworkers of America v. Weber*,[106] the Court held that private and governmental employers could adopt race-conscious employment policies designed to increase the employment of minorities in jobs where they had been traditionally underrepresented.[107] Also, in *Weber*,[108] the Supreme Court approved of an employer's decision to reserve fifty percent of the openings in a certain training program to black employees.[109] The training program and the reservation of fifty percent of its openings to blacks, according to the Court, was an effort to "eliminate traditional patterns of racial segregation."[110]

These cases establish some precedence for abolishing tenure. First, because the ranks of tenured faculty in higher education have traditionally been racially segregated,[111] very few blacks have held such positions.[112] Additionally, the economic costs incurred by faculty members who have had their tenure status revoked may be no more than the economic costs incurred by nonminority businesses or employees in the above-referenced cases. Indeed, the detenured faculty members may even retain their positions, since there would be no bar to their reapplying. Moreover, given the special nature of education, as recognized in *Grutter*, the achievement of diversity in the nation's universities should justify greater costs than those tolerated in other areas of American life.

---

102. *Wittmer*, 87 F.3d at 917.
103. *Id.*
104. *Id.*
105. *Id.* at 920.
106. 443 U.S. 193 (1979).
107. *Weber*, 443 U.S. at 193.
108. *Id.*
109. *Id.* at 197-98.
110. *Id.* at 201.
111. *See* Brian Baskin, *Top Universities Struggle to Hire Black Faculty, Study Shows*, Brown Daily Herald, *at* http://uwire.com/content/topnews030502001.html (Mar. 3, 2002) (citing a study in which, for instance, Brown University was ranked second out of the nation's 27 top schools with 4.1 percent of its tenured professors being black).
112. *See generally*, ASS'N OF AM. LAW SCH., STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS (2002-03), *available at* http://www.aals.org/statistics/2002-03/page2.html.

In *Grutter*, Justice O'Connor emphasized that the strict scrutiny standard did not preclude some judicial deference to the Law School's judgment that diversity was essential to its educational mission.[113] Since law schools are "the training ground for a large number of our Nation's leaders,"[114] and since in order "to cultivate a set of leaders with legitimacy in the eyes of the citizenry it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity,"[115] the Court granted a kind of leeway that it has never before granted. What *Grutter* did that *Hopwood* did not do was recognize the incontrovertible nexus between higher education and society.[116] As suggested in *Grutter*, higher education, more than any other profession, is inextricably linked to the social fabric and political processes.[117]

This societal importance of higher education means that the need for diversity is more urgent and immediate than in any other segment of society. Students devote only a few years to higher education, but spend the rest of their lives in their professional, occupational and community roles. Therefore, if students need diversity to become well-rounded citizens and future leaders, then they need it very quickly. Indeed, as critics have pointed out, a nondiverse education can be devastating on students.[118]

Affirmative action programs in the past have often been defeated because of the burden they place on the non-favored racial group.[119] But this burden is different when it comes to tenured faculty in higher education. By revoking their tenure, according to the implied arguments of many scholars, the university is not unduly depriving faculty members of a well-earned property interest as much as it is taking back a discriminatory privilege set up during a period in our nation's past when minorities and women were blatantly excluded. It is argued that the tenure standards and expectations which persist today incorporate the vestiges of past discrimination.[120] Therefore, just as it was wrong for the non-slave

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

114. *Id.* at 334.

115. *Id.*

116. *See Grutter*, 539 U.S. at 306; *Hopwood*, 78 F. 3d at 932.

117. As also implied by *Grutter*, although the link between government construction contracts and societal discrimination may be ambiguous, higher education provides society with leadership and a forum for the dissemination of ideas. *See Grutter*, 539 U.S. at 332-33.

118. Professor Epps states the scenario:

> The voices of minority and women students may be silenced in different ways. For example, when one speaks up in a class discussion, the professor and white males may listen politely and then continue the discussion as if no comment had been made; or the topics of interest to minority and women students may be considered trivial or peripheral. Exclusion may take the form of not including such students in study groups or cooperative research projects. It may also take the form of denying teaching or research assistantships to students who do not fit the mainstream ideal.

Epps, *supra* note 45, at 765.

119. *See supra* note 87 and accompanying text.

120. *See* Epps, *supra* note 45, at 765. "Unless these types of structural barriers to success are eliminated, it will be difficult to increase the representation of minority and women students in

owning descendants of slave owners to claim innocence while living off the inheritance provided by their ancestors, it is wrong for tenured white male faculty today to advocate for affirmative action while enjoying an academic position that has racist roots.

Legal scholars argue that all of America suffers from "unconscious racism."[121] If this is so, then all of America's institutional structures are tainted with racism. Since tenure is one of the oldest and most powerful structures in American higher education, then it too incorporates the discriminatory effects of unconscious racism and should be abolished.[122] If the academic arguments about racism in America are true, then the tenured faculties in the nation's universities have been among society's biggest benefactors of that racism, since for decades white males have been obtaining lifetime tenure positions at the expense of women and minorities.

Even though tenured teachers have a "property interest in their tenure,"[123] it is not an interest "created by the Constitution."[124] Nor does it rise to the level of a fundamental right protected under the Equal Protection Clause.[125] Consequently, the property interest of a tenured faculty member falls lower on the ladder of constitutional rights than does the equal protection interest of the white applicant in *Grutter*. Thus, if the compelling interest of diversity justifies an infringement of an equal protection right, it certainly can support an infringement of a lower-priority property interest.[126]

Most tenure policies provide for termination in the event of extraordinary instances of "institutional need."[127] Examples of such institutional

---

faculty positions. These practices represent a form of institutionalized elitism that makes it difficult for minority and women graduate students to compete on an equal basis with white men." *Id.*

121. *See, e.g.*, Ross, *supra* note 70, at 313 (discussing the ways in which white males are benefited, to the disadvantage of minorities, by society's unconscious racism).

122. In *Croson*, the Court stated that the remedying of past discrimination was the only compelling interest that could justify an affirmative action, set-aside program. City of Richmond v. J. S. Croson Co., 488 U.S. 469, 497 (1989). Racial inequality "has also provided unfair advantages to whites as a group, who have disproportionately benefitted." Brief of Amici Curiae NAACP Legal Defense and Educational Fund and the ACLU at 23, *Grutter*, 539 U.S. 306 (2003) (No. 02-241). Thus, there is the need to "dismantle the institutional protection of benefits for whites that have been based on white supremacy and maintained at the expense of Blacks." *Id.* at 27. Indeed, the argument can be made that the tenure system at a public university represents a state-sponsored policy sustaining the vestiges of racism.

123. Gilbert v. Homar, 520 U.S. 924, 928-29 (1997) (holding that an employee's due process rights had not been violated because due process could be satisfied by a prompt post-suspension hearing).

124. Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972) (holding that a professor does not have a protected interest in continued employment when he is merely a contract employee).

125. Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199 (1979) (holding that the school board's refusal to renew the teacher's contract did not constitute an equal protection deprivation).

126. The Constitution does not permit a university to "achieve diversity on the cheap." Sedler, *supra* note 39, at 238.

127. *See* Gwen Seaquist & Eileen Kelly, *Faculty Dismissal Because of Enrollment Declines*, 28 J. L.& EDUC. 193, 193 (1999). Such instances of institutional need include declining enrollments and program downsizing. *Id.* at 207.

need include financial emergencies brought on by declining enrollment and severe budget cutbacks.[128] Sometimes, tenure termination is allowed when programs or departments are reorganized.[129] Therefore, if budget shortfalls and department reorganization are sufficient to justify a termination of tenure, then clearly the constitutionally compelling need for diversity can also support such a termination.[130]

VI. CONCLUSION: THE QUEST FOR REAL DIVERSITY

The value of diversity to higher education rests on the same rationale that Justice Holmes first used to justify the protection of unpopular speech.[131] Only through a truly open marketplace of ideas can a democratic society acquire the truth and insights needed to govern itself.[132] Likewise, the diversity that a university community needs is a marketplace-of-ideas diversity, a viewpoint diversity. This is the nature of the diversity recognized by *Grutter* as a compelling state interest.[133]

Higher education is devoted to intellectual development and learning. Consequently, the most valuable diversity is one of intellectual or ideological diversity. Racial diversity is but a proxy for viewpoint diversity.[134] It is a presumptive substitute, based on the theory that people of

---

128. The University of Illinois at Chicago tenure policy allows for tenure termination in the event of "grave institutional financial stringency." Jemimah Noonoo, *What is Tenure?* CHICAGO FLAME-NEWS, February 17, 2004, *at* http://www.chicagoflame.com/global_user_elements/printpage.cfm?storyid=222483. Virginia Commonwealth University provides for dismissal of tenured faculty upon a "[b]ona fide financial emergency in a department or school, or reorganization or termination of programs as defined by established University policies and procedures." *Procedure for Termination of Employment of Tenured Faculty Members, at* http://www.vcu.edu/ireweb/policies/tenure.htm. According to the Southern Illinois University tenure policy, a tenured faculty member's employment is subject to "generally applicable amendments to personnel policies of the [university]." *Tenure Policy and Guidelines, at* http://www.siue.edu/PROVOST/FHB/7-16-1.html.

129. *See* Seaquist, *supra* note 127, at 193 (stating that instances of institutional need justifying tenure termination include declining enrollments and program downsizing); *See also Procedure for Termination of Employment of Tenured Faculty Members, at* http://www.vcu.edu/ireweb/policies/tenure.htm.

130. There may be even more reasons to terminate faculty tenure. One prominent criticism is that tenure solidifies and encourages incompetence. According to one study conducted over a three year time period, almost fifty percent of all senior tenured law faculty did not publish anything. *See* Michael I. Swygert & Nathaniel E. Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373, 381 (1985).

131. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (rejecting the majority's affirmation of a conviction for conspiracy to violate the Espionage Act of Congress).

132. *Abrams*, 250 U.S. at 616.

133. *Grutter*, 539 U.S. at 330 (citing the benefits of diversity as being a "livelier, more spirited, and simply more enlightening and interesting" classroom discussion. *Id.* (quoting Respondents' Brief for Certiorari to the Unites States Court of Appeals for the Sixth Circuit, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 02-241)).

134. *Id.* at 307 (stating that the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element"). *Id.* (quoting *Bakke*, 438 U.S. at 315). On the other hand, although the University of Michigan Law School purported to consider other types of diversity such as unusual employment experiences and extracurricular activities, race was the most identifiable diversity factor that separates one applicant from another. *Grutter*, 137 F. Supp. 2d at 827-28. But the argument is that educators truly believe that viewpoint diversity strengthens education, they should pursue it

different races have different viewpoints. However, the next step in achieving real diversity is to go beyond using race as a proxy for viewpoint diversity.

With the *Grutter* recognition of diversity as a compelling interest, universities have now been put on notice. They have been told that the nation's future depends on citizens and leaders educated in an academic environment of diverse ideas. They have been empowered to aggressively and creatively pursue this diversity. They have been informed that the compelling interest of diversity can justify infringement of the most fundamental of rights.

Countless scholars have stressed the urgent need for a diverse faculty that can in turn foster a diverse classroom experience and encourage the development of a diverse student body.[135] As these scholars have argued, the ranks of America's higher education faculty are woefully lacking in racial and gender diversity.[136] However, those are not the only areas of diversity that are lacking. Religious diversity is almost nonexistent among university faculty. Eugene Volokh states that "the lack of religious diversity at many schools is at least as severe as the lack of racial diversity."[137] As noted in *The Atlantic Monthly*, "it's appalling that evangelical Christians are practically absent from entire professions, such as academia."[138] But if there is a compelling interest in discriminating on the basis of race so as to promote an educational atmosphere with a supposedly more diverse set of student views, then surely it would be proper and even necessary to discriminate among viewpoints so as to achieve a balanced mix of opinions and beliefs in the faculty and student body. Under the *Grutter* logic of diversity, faculty membership should reflect all viewpoints, even those of religious conservatives.

In addition to a lack of religious diversity, university faculty are also strikingly nondiverse in their political ideology. For instance, law faculty tend to be seventy percent less likely to be Republican than the public at large.[139] A study of several universities found that nearly 90 percent of liberal arts professors were Democrats.[140] Thus, if universities

---

directly rather than using race as a proxy. *Id.* at 849-50 (explaining that viewpoint diversity may be equally attainable by non-minority students).

135. *See supra* notes 34-38 and accompanying text. *See also* White, *supra* note 34.

136. *See* Baskin, *supra* note 111.

137. Volokh, *supra* note 84, at 2072. Professor Volokh estimates that law school faculty are approximately 75 percent less likely to attend religious services than the public at large. *Id.* at 2072.

138. David Brooks, *People Like Us*, THE ATLANTIC MONTHLY, September, 2003, at 32.

139. Volokh, *supra* note 84, at 2073 n. 23.

140. Brooks, *supra* note 138, at 32. Of the forty-two professors in the English, history, sociology, and political-science departments at Brown University, all were Democrats. *Id.* In his dissent in *Grutter*, Justice Kennedy recounted the testimony of one law school dean who described a faculty debate whether Cubans should be counted as Hispanics: "[o]ne professor objected on the grounds that Cubans were Republicans." *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting). A study of various university faculties showed that at Cornell the ratio of liberal to conservative faculty members was 166 to 6, at Stanford it was 151 to 17, at UCLA it was 141 to 9, and at the University of

can discriminate on the basis of race to achieve diversity, they should be able to discriminate on the all-important basis of political ideology. If they require themselves to screen faculty candidates for racial and gender diversity, they should surely be required to screen for viewpoint diversity. In pursuit of the cause of diversity, and extending the logic of *Grutter*, perhaps the content of libraries or the content of law review articles should be monitored or regulated so as to achieve the proper balancing of viewpoints. Certainly the types of books available in a school library have a significant effect on the educational environment of the school, as well as on the liveliness and nature of discussion in the classroom.

Colorado it was 116 to 5. Jeff Jacoby, "Intellectual Diversity," *Townhall.com*, December 5, 2004 at www.townhall.com/columnists/jeffjacoby/printjj20041204.shtml. A poll of Ivy League professors had liberals outnumbering conservatives by more than ten to one. *Id.* And in a survey of more than 1700 social science professors, a Santa Clara University researcher found that between 80 and 90 percent identify as 'liberals' and vote Democratic. David Horowitz, "It's Time for Fairness and Inclusion in Our Universities," *FrontpageMagazine.com*, December 14, 2004, at www.frontpagemag.com/articles/printable.asp?ID=16301. The same study showed that among junior faculty at Stanford and Berkeley, the ratio of liberals to conservatives was 30 to 1. *Id.*