GRUTTER v. BOLLINGER

In Grutter v. Bollinger (2003), a majority of the Supreme Court ruled that the Constitution "does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." The Court noted however, that "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *The case should be inserted in the text at p. 558.*

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined, and in which SCALIA and THOMAS, JJ., joined in part insofar as it is consistent with the views expressed in Part VII of the opinion of THOMAS, J. GINSBURG, J., filed a concurring opinion, in which BREYER, J., joined. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined as to Parts I-VII. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a dissenting opinion.

Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

I

A

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." App. 110. More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Ibid.* In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." App. 111. The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. *Id.*, at 83-84, 114-121. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. *Id.*, at 112. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems." *Id.*, at 111.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. *Id.*, at 113. Nor does a low score automatically disqualify an applicant. *Ibid.* Rather, 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 114. So-called " 'soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution." *Ibid.*

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Id.*, at 118. The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." *Id.*, at 118, 120. The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." *Id.*, at 120. By enrolling a " 'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e]

their ability to make unique contributions to the character of the Law School." *Id.*, at 120-121.

The policy does not define diversity "solely in terms of racial and ethnic status." *Id.*, at 121. Nor is the policy "insensitive to the competition among all students for admission to the [L]aw [S]chool." *Ibid.* Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession." *Ibid.*

B

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991 until 1998). Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d; and Rev. Stat. § 1977, as amended, 42 U.S.C. § 1981.

Petitioner further alleged that her application was rejected because the Law School uses race as a "predominant" factor, giving applicants who belong to certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." App. 33-34. Petitioner also alleged that respondents "had no compelling interest to justify their use of race in the admissions process." *Id.*, at 34. Petitioner requested compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race. *Id.*, at 36. Petitioner clearly has standing to bring this lawsuit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).

The District Court granted petitioner's motion for class certification and for bifurcation of the trial into liability and damages phases. The class was defined as " 'all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School.' " App. to Pet. for Cert. 191a-192a.

The District Court heard oral argument on the parties' cross-motions for summary judgment on December 22, 2000. Taking the motions under advisement, the District Court indicated that it would decide as a matter of law whether the Law School's asserted interest in obtaining the educational benefits that flow from a diverse student body was compelling. The District Court also indicated that it would conduct a bench trial on the extent to which race was a factor in the Law School's admissions decisions, and whether the Law School's consideration of race in admissions decisions constituted a race-based double standard.

During the 15-day bench trial, the parties introduced extensive evidence concerning the Law School's use of race in the admissions process. Dennis Shields, Director of Admissions when petitioner applied to the Law School, testified that he did not direct his staff to admit a particular percentage or number of minority students, but rather to consider an applicant's race along with all other factors. *Id.*, at 206a. Shields testified that at the height of the admissions season, he would frequently consult the so-called "daily reports" that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender). *Id.*, at 207a. This was done, Shields testified, to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body. *Ibid.* Shields stressed, however, that he did not seek to admit any particular number or percentage of underrepresented minority students. *Ibid.*

Erica Munzel, who succeeded Shields as Director of Admissions, testified that " 'critical mass' " means " 'meaningful numbers' " or " 'meaningful representation,' " which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. *Id.*, at 208a-209a. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass. *Id.*, at 209a. Munzel also asserted that she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores. *Ibid.*

The current Dean of the Law School, Jeffrey Lehman, also testified. Like the other Law School witnesses, Lehman did not quantify critical mass in terms of numbers or percentages. *Id.*, at 211a. He indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race. *Ibid.* When asked about the extent to which race is considered in

admissions, Lehman testified that it varies from one applicant to another. *Ibid.* In some cases, according to Lehman's testimony, an applicant's race may play no role, while in others it may be a " 'determinative' " factor. *Ibid.*

The District Court heard extensive testimony from Professor Richard Lempert, who chaired the faculty committee that drafted the 1992 policy. Lempert emphasized that the Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom. *Id.*, at 213a. When asked about the policy's " 'commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against,' " Lempert explained that this language did not purport to remedy past discrimination, but rather to include 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. *Ibid.* Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers. *Ibid.*

Kent Syverud was the final witness to testify about the Law School's use of race in admissions decisions. Syverud was a professor at the Law School when the 1992 admissions policy was adopted and is now Dean of Vanderbilt Law School. In addition to his testimony at trial, Syverud submitted several expert reports on the educational benefits of diversity. Syverud's testimony indicated that when a critical mass of underrepresented minority students 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 215a.

In an attempt to quantify the extent to which the Law School actually considers race in making admissions decisions, the parties introduced voluminous evidence at trial. Relying on data obtained from the Law School, petitioner's expert, Dr. Kinley Larntz, generated and analyzed "admissions grids" for the years in question (1995-2000). These grids show the number of applicants and the number of admittees for all combinations of GPAs and LSAT scores. Dr. Larntz made " 'cell-by-cell' " comparisons between applicants of different races to determine whether a statistically significant relationship existed between race and admission rates. He concluded that membership in certain minority groups " 'is an extremely strong factor in the decision for acceptance,' " and that applicants from these minority groups " 'are given an extremely large allowance for admission' " as compared to applicants who are members of nonfavored groups. *Id.*, at 218a-220a. Dr. Larntz conceded, however, that race is not the predominant factor in the Law School's admissions calculus. 12 Tr. 11-13 (Feb. 10, 2001).

Dr. Stephen Raudenbush, the Law School's expert, focused on the predicted effect of eliminating race as a factor in the Law School's admission process. In Dr. Raudenbush's view, a race-blind admissions system would have a " 'very dramatic,' " negative effect on underrepresented minority admissions. App. to Pet. for Cert. 223a. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. *Ibid.* Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. *Ibid.* Under this scenario, underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent. *Ibid.*

In the end, the District Court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. Applying strict scrutiny, the District Court determined that the Law School's asserted interest in assembling a diverse student body was not compelling because "the attainment of a racially diverse class ... was not recognized as such by *Bakke* and is not a remedy for past discrimination." *Id.*, at 246a. The District Court went on to hold that even if diversity were compelling, the Law School had not narrowly tailored its use of race to further that interest. The District Court granted petitioner's request for declaratory relief and enjoined the Law School from using race as a factor in its admissions decisions. The Court of Appeals entered a stay of the injunction pending appeal.

Sitting en banc, the Court of Appeals reversed the District Court's judgment and vacated the injunction. The Court of Appeals first held that Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest. According to the Court of Appeals, Justice Powell's opinion with respect to diversity comprised the controlling rationale for the judgment of this Court under the analysis set forth in *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). The Court of Appeals also held that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor" and because the Law School's program was "virtually identical" to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion. 288 F.3d 732, 746, 749 (C.A.6 2002).

Four dissenting judges would have held the Law School's use of race unconstitutional. Three of the dissenters, rejecting the majority's *Marks* analysis, examined the Law School's interest in student body

diversity on the merits and concluded it was not compelling. The fourth dissenter, writing separately, found it unnecessary to decide whether diversity was a compelling interest because, like the other dissenters, he believed that the Law School's use of race was not narrowly tailored to further that interest.

We granted certiorari, 537 U.S. 1043, 123 S.Ct. 617, 154 L.Ed.2d 514 (2002), to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. Compare *Hopwood v. Texas,* 78 F.3d 932 (C.A.5 1996) (*Hopwood I*) (holding that diversity is not a compelling state interest), with *Smith v. University of Wash. Law School,* 233 F.3d 1188 (C.A.9 2000) (holding that it is).

II

A

We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." *Id.,* at 325, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. *Id.,* at 408, 98 S.Ct. 2733 (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 provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever. The only holding for the Court 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." *Id.,* at 320, 98 S.Ct. 2733. Thus, we reversed that part of the lower court's judgment that enjoined the university "from any consideration of the race of any applicant." *Ibid.*

Since this Court's splintered decision in *Bakke,* Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies. See, *e.g.,* Brief for Judith Areen et al. as *Amici Curiae* 12-13 (law school admissions programs employ "methods designed from and based on Justice Powell's opinion in *Bakke* "); Brief for Amherst College et al. as *Amici Curiae* 27 ("After *Bakke,* each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion ... and set sail accordingly"). We therefore discuss Justice Powell's opinion in some detail.

Justice Powell began by stating that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Bakke,* 438 U.S., at 289-290, 98 S.Ct. 2733. In Justice Powell's view, when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.,* at 299, 98 S.Ct. 2733. Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny.

First, Justice Powell rejected an interest in " 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession' " as an unlawful interest in racial balancing. *Id.,* at 306-307, 98 S.Ct. 2733. Second, Justice Powell rejected an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.,* at 310, 98 S.Ct. 2733. Third, Justice Powell rejected an interest in "increasing the number of physicians who will practice in communities currently underserved," concluding that even if such an interest could be compelling in some circumstances the program under review was not "geared to promote that goal." *Id.,* at 306, 310, 98 S.Ct. 2733.

Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." *Id.,* at 311, 98 S.Ct. 2733. With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment." *Id.,* at 312, 314, 98 S.Ct. 2733. Justice Powell emphasized that nothing less than 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 313, 98 S.Ct. 2733 (quoting *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 603,

87 S.Ct. 675, 17 L.Ed.2d 629 (1967)). In seeking the "right to select those students who will contribute the most to the 'robust exchange of ideas,' " a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S., at 313, 98 S.Ct. 2733. Both "tradition and experience lend support to the view that the contribution of diversity is substantial." *Ibid.*

Justice Powell was, however, careful to emphasize that in his view race "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.*, at 314, 98 S.Ct. 2733. For Justice Powell, "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that can justify the use of race. *Id.*, at 315, 98 S.Ct. 2733. Rather, "[t]he 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." *Ibid.*

In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks.* In that case, we explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S., at 193, 97 S.Ct. 990 (internal quotation marks and citation omitted). As the divergent opinions of the lower courts demonstrate, however, "[t]his test is more easily stated than applied to the various opinions supporting the result in [*Bakke*]." *Nichols v. United States*, 511 U.S. 738, 745-746, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). Compare, *e.g., Johnson v. Board of Regents of Univ. of Ga.*, 263 F.3d 1234 (C.A.11 2001) (Justice Powell's diversity rationale was not the holding of the Court); *Hopwood v. Texas*, 236 F.3d 256, 274-275 (C.A.5 2000) (*Hopwood II*) (same); *Hopwood I*, 78 F.3d 932 (same), with *Smith v. University of Wash. Law School*, 233 F.3d 1188 (Justice Powell's opinion, including the diversity rationale, is controlling under *Marks*).

We do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks.* It does not seem "useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States, supra,* at 745-746, 114 S.Ct. 1921. More important, for the reasons set out below, 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.

B

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 2. Because the Fourteenth Amendment "protect[s] *persons,* not *groups,*" all "governmental action based on race--a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited--should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (emphasis in original; internal quotation marks and citation omitted). We are a "free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (internal quotation marks and citation omitted). It follows from that principle that "government may treat people differently because of their race only for the most compelling reasons." *Adarand Constructors, Inc. v. Peña,* 515 U.S., at 227, 115 S.Ct. 2097.

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *Ibid.* This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to " 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*

Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Peña, supra,* at 237, 115 S.Ct. 2097 (internal quotation marks and citation omitted). Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." 515 U.S., at 229-230, 115 S.Ct. 2097. But that observation "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Id.*, at 230, 115 S.Ct. 2097. When race-based action is necessary to further a compelling

governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

Context matters when reviewing race-based governmental action under the Equal Protection Clause. See *Gomillion v. Lightfoot*, 364 U.S. 339, 343-344, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (admonishing that, "in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). In *Adarand Constructors, Inc. v. Peña*, we made clear that strict scrutiny must take " 'relevant differences' into account." 515 U.S., at 228, 115 S.Ct. 2097. Indeed, as we explained, that is its "fundamental purpose." *Ibid.* 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.

III

A

With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." Brief for Respondents Bollinger et al. i. In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.

We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke*. It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. See, *e.g., Richmond v. J.A. Croson Co., supra*, at 493, 109 S.Ct. 706 (plurality opinion) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"). But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985); *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n. 6, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978); *Bakke*, 438 U.S., at 319, n. 53, 98 S.Ct. 2733 (opinion of Powell, J.).

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. See, *e.g., Wieman v. Updegraff*, 344 U.S. 183, 195, 73 S.Ct. 215, 97 L.Ed. 216 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S., at 603, 87 S.Ct. 675. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke, supra*, at 312, 98 S.Ct. 2733. From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,' " a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S., at 313, 98 S.Ct. 2733 (quoting *Keyishian v. Board of Regents of Univ. of State of N. Y., supra*, at 603, 87 S.Ct. 675). Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary." 438 U.S., at 318-319, 98 S.Ct. 2733.

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." Brief for Respondents Bollinger et al. 13. The Law School's interest is not

simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke*, 438 U.S., at 307, 98 S.Ct. 2733 (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. *Ibid.; Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992) ("Racial balance is not to be achieved for its own sake"); *Richmond v. J.A. Croson Co.*, 488 U.S., at 507, 109 S.Ct. 706. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." App. to Pet. for Cert. 246a. These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." *Id.*, at 246a, 244a.

The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." …

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as *Amici Curiae* 5; Brief for General Motors Corp. as *Amicus Curiae* 3-4. What is more, high- ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security." Brief for Julius W. Becton, Jr. et al. as *Amici Curiae* 27. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. *Id.*, at 5. At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." *Ibid.* (emphasis in original). To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." *Id.*, at 29 (emphasis in original). We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." *Ibid.*

We 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. *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). This Court has long recognized that "education ... is the very foundation of good citizenship." *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." Brief for United States as *Amicus Curiae* 13. And, "[n]owhere is the importance of such openness more acute than in the context of higher education." *Ibid.* Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S.Ct. 848, 94 L.Ed. 1114 (1950) (describing law school as a "proving ground for legal learning and practice"). Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. See Brief for Association of American Law Schools as *Amicus Curiae* 5-6. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. *Id.*, at 6.

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. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with

which the law interacts." See *Sweatt v. Painter, supra,* at 634, 70 S.Ct. 848. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." Brief for Respondent Bollinger et al. 30. To the contrary, 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. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

B

Even 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." *Shaw v. Hunt,* 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (internal quotation marks and citation omitted). The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' ... th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.,* 488 U.S., at 493, 109 S.Ct. 706 (plurality opinion) …

To be narrowly tailored, a race-conscious admissions program cannot use a quota system--it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke, supra,* at 315, 98 S.Ct. 2733 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a " 'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." *Id.,* at 317, 98 S.Ct. 2733. In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Ibid.*

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke,* truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See *id.,* at 315-316, 98 S.Ct. 2733. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. *Ibid.* Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. *Ibid.*

We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." *Richmond v. J.A. Croson Co., supra,* at 496, 109 S.Ct. 706 (plurality opinion). Quotas " 'impose a fixed number or percentage which must be attained, or which cannot be exceeded,' " *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986) (O'CONNOR, J., concurring in part and dissenting in part), and "insulate the individual from comparison with all other candidates for the available seats." *Bakke, supra,* at 317, 98 S.Ct. 2733 (opinion of Powell, J.). In contrast, "a permissible goal ... require[s] only a good-faith effort ... to come within a range demarcated by the goal itself," *Sheet Metal Workers v. EEOC, supra,* at 495, 106 S.Ct. 3019, and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants," *Johnson v. Transportation Agency, Santa Clara Cty.,* 480 U.S. 616, 638, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987).

Justice Powell's distinction between the medical school's rigid 16-seat quota and Harvard's flexible use of race as a "plus" factor is instructive. Harvard certainly had minimum *goals* for minority enrollment, even if it had no specific number firmly in mind. See *Bakke, supra,* at 323, 98 S.Ct. 2733 (opinion of Powell, J.) ("10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States"). What is more, Justice Powell flatly rejected the argument that Harvard's program was "the functional equivalent of a quota" merely because it had some " 'plus' " for race, or gave greater "weight" to race than to some other factors, in order to achieve student body diversity. 438 U.S., at 317-318, 98 S.Ct. 2733.

The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." *Id.,* at 323, 98 S.Ct. 2733. "[S]ome attention to numbers," without more, does not transform a flexible admissions system into a rigid quota. *Ibid.* Nor, as Justice KENNEDY posits, does the Law School's consultation of the "daily reports," which keep track of the racial and ethnic composition of the class (as well as of residency and gender), "suggest[ ] there was no further attempt at individual review save for race itself" during the final stages of the admissions process. See *post,* at 2372 (dissenting opinion). To the contrary, the Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports. Brief for Respondents Bollinger et al. 43, n. 70 (citing App. in Nos. 01-1447 and 01-1516(CA6), p. 7336). Moreover, as Justice KENNEDY concedes, see *post,* at 2372, between 1993 and 2000, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.

***

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke, supra,* at 318, n. 52, 98 S.Ct. 2733 (opinion of Powell, J.) (identifying the "denial ... of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program).

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto,* of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger, post,* the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Bakke, supra,* at 317, 98 S.Ct. 2733 (opinion of Powell, J.).

We also find that, like the Harvard plan Justice Powell referenced in *Bakke,* the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences. See App. 120.

The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear "[t]here are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. *Id.,* at 118-119. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic--*e.g.,* an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." *Id.,* at 83-84. All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. See Brief for Respondents Bollinger et al. 10; App. 121-122. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body. Justice KENNEDY speculates that "race is likely

outcome determinative for many members of minority groups" who do not fall within the upper range of LSAT scores and grades. *Post,* at 2371 (dissenting opinion). But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke,* and indeed of any plan that uses race as one of many factors. See 438 U.S., at 316, 98 S.Ct. 2733 (" 'When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor' ").

Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (alternatives must serve the interest " 'about as well' "); *Richmond v. J.A. Croson Co.,* 488 U.S., at 509-510, 109 S.Ct. 706 (plurality opinion) (city had a "whole array of race-neutral" alternatives because changing requirements "would have [had] little detrimental effect on the city's interests"). Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. See *id.*, at 507, 109 S.Ct. 706 (set-aside plan not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means"); *Wygant v. Jackson Bd. of Ed., supra,* at 280, n. 6, 106 S.Ct. 1842 (narrow tailoring "require[s] consideration" of "lawful alternative and less restrictive means").

***

The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission. The United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State. Brief for United States as *Amicus Curiae* 14-18. The United States does not, however, explain how such plans could work for graduate and professional schools. More-over, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

We acknowledge that "there are serious problems of justice connected with the idea of preference itself." *Bakke,* 438 U.S., at 298, 98 S.Ct. 2733 (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 308, 98 S.Ct. 2733. To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups." *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 630, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting).

We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.

… We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.

We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti,* 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have

reasonable durational limits." Brief for Respondents Bollinger et al. 32.

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.

The requirement that all race-conscious admissions programs 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." *Richmond v. J.A. Croson Co.,* 488 U.S., at 510, 109 S.Ct. 706 (plurality opinion); …

We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. See Brief for Respondents Bollinger et al. 34; *Bakke, supra,* at 317-318, 98 S.Ct. 2733 (opinion of Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary). It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV

In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Consequently, petitioner's statutory claims based on Title VI and 42 U.S.C. § 1981 also fail. See *Bakke, supra,* at 287, 98 S.Ct. 2733 (opinion of Powell, J.) ("Title VI ... proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *General Building Contractors Assn., Inc. v. Pennsylvania,* 458 U.S. 375, 389-391, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) (the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause). The judgment of the Court of Appeals for the Sixth Circuit, accordingly, is affirmed.

It is so ordered.

Justice THOMAS, with whom Justice SCALIA joins as to Parts I-VII, concurring in part and dissenting in part.

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority:

"[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice.* The American people have always been anxious to know what they shall do with us .... I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! ... And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! ... [Y]our interference is doing him positive injury." What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, reprinted in 4 The Frederick Douglass Papers 59, 68 (J. Blassingame & J. McKivigan eds. 1991) (emphasis in original).

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (Law School). The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny."

No one would argue that a university could set up a lower general admission standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admission standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti. Nevertheless, I concur in part in the Court's opinion. First, I agree with the Court insofar as its decision, which approves of only one racial

classification, confirms that further use of race in admissions remains unlawful. Second, I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years. See *ante*, at 2346-2347 (stating that racial discrimination will no longer be narrowly tailored, or "necessary to further" a compelling state interest, in 25 years). I respectfully dissent from the remainder of the Court's opinion and the judgment, however, because I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.

I

The majority agrees that the Law School's racial discrimination should be subjected to strict scrutiny. *Ante*, at 2337-2338. Before applying that standard to this case, I will briefly revisit the Court's treatment of racial classifications.

The strict scrutiny standard that the Court purports to apply in this case was first enunciated in *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). There the Court held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." *Id.*, at 216, 65 S.Ct. 193. This standard of "pressing public necessity" has more frequently been termed "compelling governmental interest," see, *e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). A majority of the Court has validated only two circumstances where "pressing public necessity" or a "compelling state interest" can possibly justify racial discrimination by state actors. First, the lesson of *Korematsu* is that national security constitutes a "pressing public necessity," though the government's use of race to advance that objective must be narrowly tailored. Second, the Court has recognized as a compelling state interest a government's effort to remedy past discrimination for which it is responsible. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

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Finally, the Court has rejected an interest in remedying general societal discrimination as a justification for race discrimination. See *Wygant, supra*, at 276, 106 S.Ct. 1842 (plurality opinion); *Croson*, 488 U.S., at 496-498, 109 S.Ct. 706 (plurality opinion); *id.*, at 520-521, 109 S.Ct. 706 (SCALIA, J., concurring in judgment). "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" because a "court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant, supra*, at 276, 106 S.Ct. 1842 (plurality opinion). But see ***Gratz v. Bollinger,*** --- U.S. ----, 123 S.Ct. 2411, --- L.Ed.2d ----, 2003 WL 21434002 (2003) (GINSBURG, J., dissenting).

***

The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (THOMAS, J., concurring in part and concurring in judgment).

II

Unlike the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it wishes to obtain "educational benefits that flow from student body diversity," Brief for Respondents Bollinger et al. 14. This statement must be evaluated carefully, because it implies that both "diversity" and "educational benefits" are components of the Law School's compelling state interest. Additionally, the Law School's refusal to entertain certain changes in its admissions process and status indicates that the compelling state interest it seeks to validate is actually broader than might appear at first glance.

Undoubtedly there are other ways to "better" the education of law students aside from ensuring that the student body contains a "critical mass" of underrepresented minority students. Attaining "diversity," whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself. The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational "benefits" *not* simply the forbidden interest in "racial balancing," *ante*, at 2339, that the majority expressly rejects?

***

One must also consider the Law School's refusal to entertain changes to its current admissions system that might produce the same educational benefits. The Law School adamantly disclaims any race-neutral alternative that would reduce "academic selectivity," which would in turn "require the Law School to become a very different institution, and to sacrifice a core part of its educational mission." Brief for Respondents Bollinger et al. 33-36. In other words, the

Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status.

The proffered interest that the majority vindicates today, then, is not simply "diversity." Instead the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution. Unless each constituent part of this state interest is of pressing public necessity, the Law School's use of race is unconstitutional. I find each of them to fall far short of this standard.

III

A

A close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a "compelling interest in securing the educational benefits of a diverse student body." *Ante,* at 2341. No serious effort is made to explain how these benefits fit with the state interests the Court has recognized (or rejected) as compelling, see Part I, *supra,* or to place any theoretical constraints on an enterprising court's desire to discover still more justifications for racial discrimination. In the absence of any explanation, one might expect the Court to fall back on the judicial policy of *stare decisis.* But the Court eschews even this weak defense of its holding, shunning an analysis of the extent to which Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), is binding, *ante,* at 2337, in favor of an unfounded wholesale adoption of it.

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B

Under the proper standard, there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school. Likewise, marginal improvements in legal education do not qualify as a compelling state interest.

1

While legal education at a public university may be good policy or otherwise laudable, it is obviously not a pressing public necessity when the correct legal standard is applied. Additionally, circumstantial evidence as to whether a state activity is of pressing public necessity can be obtained by asking whether all States feel compelled to engage in that activity. Evidence that States, in general, engage in a certain activity by no means demonstrates that the activity constitutes a pressing public necessity, given the expansive role of government in today's society. The fact that some fraction of the States reject a particular enterprise, however, creates a presumption that the enterprise itself is not a compelling state interest. In this sense, the absence of a public, American Bar Association (ABA) accredited, law school in Alaska, Delaware, Massachusetts, New Hampshire, and Rhode Island, see ABA-LSAC Official Guide to ABA-Approved Law Schools (W. Margolis, B. Gordon, J. Puskarz, & D. Rosenlieb, eds.2004) (hereinafter ABA-LSAC Guide), provides further evidence that Michigan's maintenance of the Law School does not constitute a compelling state interest.

2

As the foregoing makes clear, Michigan has no compelling interest in having a law school at all, much less an *elite* one. Still, even assuming that a State may, under appropriate circumstances, demonstrate a cognizable interest in having an elite law school, Michigan has failed to do so here.

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The Law School today, however, does precious little training of those attorneys who will serve the citizens of Michigan. In 2002, graduates of the University of Michigan Law School made up less than 6% of applicants to the Michigan bar, Michigan Lawyers Weekly, available at http://www.michiganlawyersweekly.com/barpassers0202.cfm,barpassers0702.cfm (all Internet materials as visited June 13, 2003, and available in Clerk of Court's case file), even though the Law School's graduates constitute nearly 30% of all law students graduating in Michigan. *Ibid.* Less than 16% of the Law School's graduating class elects to stay in Michigan after law school. ABA- LSAC Guide 427. Thus, while a mere 27% of the Law School's 2002 entering class are from Michigan, see University of Michigan Law School Website, available at http://www.law.umich.edu/prospectivestudents/Admissions/index.htm, only half of these, it appears, will stay in Michigan.

In sum, the Law School trains few Michigan residents and overwhelmingly serves students, who, as lawyers, leave the State of Michigan. By contrast, Michigan's other public law school, Wayne State University Law School, sends 88% of its graduates on to serve the people of Michigan. ABA-LSAC Guide 775. It does not take a social scientist to conclude that it is precisely the Law School's status as an elite institution that causes it to be a way station for the rest of the country's lawyers, rather than a training ground for those who will remain in Michigan. The Law School's decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan.

Again, the fact that few States choose to maintain elite law schools raises a strong inference that there is nothing compelling about elite status. Arguably, only the public law schools of the University of Texas, the University of California, Berkeley (Boalt Hall), and the University of Virginia maintain the same reputation for excellence as the Law School. Two of these States,

Texas and California, are so large that they could reasonably be expected to provide elite legal training at a separate law school to students who will, in fact, stay in the State and provide legal services to its citizens. And these two schools far outshine the Law School in producing in-state lawyers. The University of Texas, for example, sends over three- fourths of its graduates on to work in the State of Texas, vindicating the State's interest (compelling or not) in training Texas' lawyers. *Id.*, at 691.

3

Finally, even if the Law School's racial tinkering produces tangible educational benefits, a marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest in either its existence or in its current educational and admissions policies.

4

The interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions "standards" that, in turn, create the Law School's "need" to discriminate on the basis of race. The Court validates these admissions standards by concluding that alternatives that would require "a dramatic sacrifice of ... the academic quality of all admitted students," *ante*, at 2345, need not be considered before racial discrimination can be employed. In the majority's view, such methods are not required by the "narrow tailoring" prong of strict scrutiny because that inquiry demands, in this context, that any race-neutral alternative work " 'about as well.' " *Ante*, at 2344 (quoting *Wygant*, 476 U.S., at 280, n. 6, 106 S.Ct. 1842). The majority errs, however, because race-neutral alternatives must only be "workable," *ante*, at 2345, and do "about as well" *in vindicating the compelling state interest.* The Court never explicitly holds that the Law School's desire to retain the status quo in "academic selectivity" is itself a compelling state interest, and, as I have demonstrated, it is not. See Part III-B, *supra.* Therefore, the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system--it cannot have it both ways.

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A

The Court bases its unprecedented deference to the Law School--a deference antithetical to strict scrutiny--on an idea of "educational autonomy" grounded in the First Amendment. *Ante*, at 2339. In my view, there is no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause.

The constitutionalization of "academic freedom" began with the concurring opinion of Justice Frankfurter in *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957). Sweezy, a Marxist economist, was investigated by the Attorney General of New Hampshire on suspicion of being a subversive. The prosecution sought, *inter alia*, the contents of a lecture Sweezy had given at the University of New Hampshire. The Court held that the investigation violated due process. *Id.*, at 254, 77 S.Ct. 1203.

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In my view, "[i]t is the business" of this Court to explain itself when it cites provisions of the Constitution to invent new doctrines--including the idea that the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause. The majority fails in its summary effort to prove this point. The only source for the Court's conclusion that public universities are entitled to deference even within the confines of strict scrutiny is Justice Powell's opinion in *Bakke.* Justice Powell, for his part, relied only on Justice Frankfurter's opinion in *Sweezy* and the Court's decision in *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), to support his view that the First Amendment somehow protected a public university's use of race in admissions. …

I doubt that when Justice Frankfurter spoke of governmental intrusions into the independence of universities, he was thinking of the Constitution's ban on racial discrimination. The majority's broad deference to both the Law School's judgment that racial aesthetics leads to educational benefits and its stubborn refusal to alter the status quo in admissions methods finds no basis in the Constitution or decisions of this Court.

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Virginia is also notable for the fact that the Court relied on the "experience" of formerly single-sex institutions, such as the service academies, to conclude that admission of women to VMI would be "manageable." 518 U.S., at 544-545, 116 S.Ct. 2264. Today, however, the majority ignores the "experience" of those institutions that have been forced to abandon explicit racial discrimination in admissions.

…In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics. University of California Law and Medical School Enrollments, available at http://www.ucop.edu/acadadv/datamgmt/lawmed/law- enrolls-eth2.html. Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels. Apparently the Law School cannot be counted on to be as resourceful. The Court is willfully blind to the very real experience in California and elsewhere, which raises the inference that institutions with "reputation[s] for excellence," *ante*, at 2339, 2344, rivaling the Law School's have satisfied their sense of

mission without resorting to prohibited racial discrimination.

V

Putting aside the absence of any legal support for the majority's reflexive deference, there is much to be said for the view that the use of tests and other measures to "predict" academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law. The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a "true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities. The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the basis of race. So while legacy preferences can stand under the Constitution, racial discrimination cannot. I will not twist the Constitution to invalidate legacy preferences or otherwise impose my vision of higher education admissions on the Nation. The majority should similarly stay its impulse to validate faddish racial discrimination the Constitution clearly forbids.

In any event, there is nothing ancient, honorable, or constitutionally protected about "selective" admissions. The University of Michigan should be well aware that alternative methods have historically been used for the admission of students, for it brought to this country the German certificate system in the late-19th century. See H. Wechsler, The Qualified Student 16-39 (1977) (hereinafter Qualified Student). Under this system, a secondary school was certified by a university so that any graduate who completed the course offered by the school was offered admission to the university. The certification regime supplemented, and later virtually replaced (at least in the Midwest), the prior regime of rigorous subject-matter entrance examinations. *Id.*, at 57-58. The facially race-neutral "percent plans" now used in Texas, California, and Florida, see *ante*, at 2345, are in many ways the descendents of the certificate system.

Certification was replaced by selective admissions in the beginning of the 20th century, as universities sought to exercise more control over the composition of their student bodies. Since its inception, selective admissions has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators. The initial driving force for the relocation of the selective function from the high school to the universities was the same desire to select racial winners and losers that the Law School exhibits today. Columbia, Harvard, and others infamously determined that they had "too many" Jews, just as today the Law School argues it would have "too many" whites if it could not discriminate in its admissions process. See Qualified Student 155-168 (Columbia); H. Broun & G. Britt, Christians Only: A Study in Prejudice 53-54 (1931) (Harvard).

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Similarly no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admissions Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to "correct" for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court. See Part IV, *supra*. The Law School itself admits that the test is imperfect, as it must, given that it regularly admits students who score at or below 150 (the national median) on the test. See App. 156-203 (showing that, between 1995 and 2000, the Law School admitted 37 students--27 of whom were black; 31 of whom were "underrepresented minorities"--with LSAT scores of 150 or lower). And the Law School's *amici* cannot seem to agree on the fundamental question whether the test itself is useful. Compare Brief for Law School Admission Council as *Amicus Curiae* 12 ("LSAT scores ... are an effective predictor of students' performance in law school") with Brief for Harvard Black Law Students Association et al. as *Amici Curiae* 27 ("Whether [the LSAT] measure[s] objective merit ... is certainly questionable").

Having decided to use the LSAT, the Law School must accept the constitutional burdens that come with this decision. The Law School may freely continue to employ the LSAT and other allegedly merit-based standards in whatever fashion it likes. What the Equal Protection Clause forbids, but the Court today allows, is the use of these standards hand-in-hand with racial discrimination. An infinite variety of admissions methods are available to the Law School. Considering all of the radical thinking that has historically occurred at this country's universities, the Law School's intractable approach toward admissions is striking.

The Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution. And the same Court that had the courage to order the desegregation of all public schools in the South now fears, on the basis of platitudes rather than principle, to force the Law School to abandon a decidedly imperfect

admissions regime that provides the basis for racial discrimination.

VI

The absence of any articulated legal principle supporting the majority's principal holding suggests another rationale. I believe what lies beneath the Court's decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, see *Adarand*, 515 U.S., at 239, 115 S.Ct. 2097 (SCALIA, J., concurring in part and concurring in judgment), and that racial discrimination is necessary to remedy general societal ills. This Court's precedents supposedly settled both issues, but clearly the majority still cannot commit to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications.

***

Finally, the Court's disturbing reference to the importance of the country's law schools as training grounds meant to cultivate "a set of leaders with legitimacy in the eyes of the citizenry," *ibid.*, through the use of racial discrimination deserves discussion. As noted earlier, the Court has soundly rejected the remedying of societal discrimination as a justification for governmental use of race. *Wygant*, 476 U.S., at 276, 106 S.Ct. 1842 (plurality opinion); *Croson*, 488 U.S., at 497, 109 S.Ct. 706 (plurality opinion); *id.*, at 520-521, 109 S.Ct. 706 (SCALIA, J., concurring in judgment). For those who believe that every racial disproportionality in our society is caused by some kind of racial discrimination, there can be no distinction between remedying societal discrimination and erasing racial disproportionalities in the country's leadership caste. And if the lack of proportional racial representation among our leaders is not caused by societal discrimination, then "fixing" it is even less of a pressing public necessity.

The Court's civics lesson presents yet another example of judicial selection of a theory of political representation based on skin color--an endeavor I have previously rejected. See *Holder v. Hall*, 512 U.S. 874, 899, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment). The majority appears to believe that broader utopian goals justify the Law School's use of race, but "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis*, 416 U.S., at 342, 94 S.Ct. 1704 (Douglas, J., dissenting).

VII

As the foregoing makes clear, I believe the Court's opinion to be, in most respects, erroneous. I do, however, find two points on which I agree.

A

First, I note that the issue of unconstitutional racial discrimination among the groups the Law School prefers is not presented in this case, because petitioner has never argued that the Law School engages in such a practice, and the Law School maintains that it does not. See Brief for Respondents Bollinger et al. 32, n. 50, and 6-7, n. 7. I join the Court's opinion insofar as it confirms that this type of racial discrimination remains unlawful. *Ante*, at 2337-2338. Under today's decision, it is still the case that racial discrimination that does not help a university to enroll an unspecified number, or "critical mass," of underrepresented minority students is unconstitutional. Thus, the Law School may not discriminate in admissions between similarly situated blacks and Hispanics, or between whites and Asians. …

B

The Court also holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest. *Ante*, at 2346. While I agree that in 25 years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now. The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that timeframe. In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black. In 1993 blacks constituted 1.1% of law school applicants in that score range, though they represented 11.1% of all applicants. Law School Admission Council, National Statistical Report (1994) (hereinafter LSAC Statistical Report). In 2000 the comparable numbers were 1.0% and 11.3%. LSAC Statistical Report (2001). No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years. Nor is the Court's holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time.

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I therefore can understand the imposition of a 25-year time limit only as a holding that the deference the Court pays to the Law School's educational judgments and refusal to change its admissions policies will itself expire. At that point these policies will clearly have failed to " 'eliminat[e] the [perceived] need for any racial or ethnic' " discrimination because the academic credentials gap will still be there. *Ante*, at 2346 (quoting Nathanson & Bartnika, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chicago Bar Rec. 282, 293 (May- June 1977)). The Court defines this time limit in terms of narrow tailoring, see *ante*, at 2346, but I believe this arises from its refusal to define rigorously

the broad state interest vindicated today. Cf. Part II, *supra.* With these observations, I join the last sentence of Part III of the opinion of the Court.

* * *

For the immediate future, however, the majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting). It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court's opinion and the judgment.