

this term. But things are not always as they seem in this most troubling area of our history and law. In fact, in the two so-called affirmative action cases before it this term, the Court split. While upholding the Law School's admissions scheme in *Grutter v. Bollinger*,⁵ the Court in *Gratz v. Bollinger*⁶ threw out the scheme employed by the University of Michigan's College of Literature, Science, and the Arts, ruling 6–3 that it was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

Plainly, in this “split double header,” as Justice Antonin Scalia put it,⁷ the devil is in the details. But once those details emerge, does the Court's reasoning explain, much less justify, this outcome? And is that reasoning consistent with the Constitution? Let's start with the first principles of the matter. Against that background we'll then examine the reasoning in the two cases.

First Principles

The history of race relations in America is not pretty. From slavery through segregation to the more subtle forms of racism we see today, we've had to struggle to realize the American dream, and we're not there yet. Discrimination on other grounds has plagued us too—all the more reason to be clear about the principles at issue.⁸

We start, as in America we must, with the “higher law” of the Declaration of Independence, to which early abolitionists, Abraham Lincoln, Justice Harlan the elder, and Dr. Martin Luther King Jr., to name a few, all repaired for insight and inspiration. As that law found its way over time into the positive law of the Constitution, the Bill of Rights, and the Civil War Amendments, it spoke to a single idea—freedom. Not the “positive freedom” of the modern welfare state, but the simple, uncomplicated freedom to pursue happiness as one wishes, by one's own lights, restrained only by

⁵*Grutter*, 123 S. Ct. at 2347.

⁶*Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

⁷*Grutter*, 123 S. Ct. at 2349.

⁸I have discussed the issues that follow more fully in Roger Pilon, *Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues*, 45 AM. U. L. REV. 775 (1996).

the equal rights of others to do the same. That is the freedom that animated the civil rights movement from its inception.⁹

But a close look at that freedom yields conclusions that ring uncomfortably in the modern ear. For thus free, we may associate with anyone willing to associate with us—which means, of course, that we have a right *not* to associate, for any reason, good or bad, or no reason at all. As private individuals and organizations, that is, we have a right to discriminate, for any reason, which means there is no natural right against discrimination. And that right to discriminate—like the right to be free generally, from which it is derived—is grounded in the idea of sovereignty. Each of us is sovereign over himself and his actions, over what is his—in a word, over his property. Of course, we are also free to criticize those who exercise their freedom, including their right to discriminate, wrongly. But that’s altogether different from denying them that right. There is all the difference in the world between defending the right to discriminate and defending the discrimination that flows from the exercise of that right. With perfect consistency we can defend the right while condemning its exercise. When warranted, decent people do that.¹⁰

Those fundamental principles concerning sovereignty apply in the public sector as well, but there they cut in the opposite direction when it comes to discrimination. For the public sector and the institutions that constitute it—public agencies, parks, universities, and so on—belong to all of us, or at least to the citizens of the jurisdiction at issue. Thus, just as we are sovereign, individually, over what is ours in the private sector, so too we are sovereign, collectively, over what is ours in the public sector.

But that raises immediately the problems of collective action and the competing principles that govern it. Since public institutions

⁹In the words of Dr. Martin Luther King Jr.:

When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.

This note was a promise that all men would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.

Martin Luther King Jr., “I Have a Dream” Speech at Lincoln Memorial (Aug. 23, 1963), reprinted in *LEND ME YOUR EARS* 497 (William Safire ed., 1992).

¹⁰See *FLAG-BURNING, DISCRIMINATION, AND THE RIGHT TO DO WRONG: TWO DEBATES* (Roger Pilon ed., 1990).

spring from constitutions, state and federal, disagreements over running them should be settled in the first instance under constitutional provisions. But constitutions often speak very generally to such issues, if they speak at all, relegating them mostly to the political process—to the legislative arena. Yet the decisions that flow from that process must still respect the equal rights of each of us over what are, after all, our institutions—a matter to be policed in the judicial arena. In particular, equal protection means that government, because it belongs to all of us, cannot discriminate among us except as constitutionally authorized or, if a constitution is silent, on grounds that are narrowly tailored to serve the function of the institution.¹¹

Unfortunately, there is no easy accommodation of the democratic and the equal-protection principles. On one hand, too great a deference to the democratic principle gives berth to majoritarian tyranny or, worse, to the capture of public institutions by skilled or well-placed minorities, as public-choice economists have amply shown.¹² On the other hand, a judiciary overly solicitous of equal protection, insisting on the right of each of us to control what is ours, invites the stalemate of the monopoly holdout. Neither result is acceptable. Both could be avoided from the start by leaving as much as possible, including education, in the private sector, where it can be carried out under the principles of private property and contract. But if the people in their public capacity are determined to conduct the many activities that today are conducted through public institutions, there must be some resolution of the inherent conflict, even if it can never be more than a second-best solution. That resolution must be mindful, however, of the nondiscrimination principle that informs equal protection: in particular, insofar as it is not constitutionally narrowed, collective ownership must be presumed to be for the benefit of all, equally. And neutral principles, generated behind a “veil of ignorance” about particular qualities, must ensure that.¹³

¹¹Thus, to take an easy case, a public fire department may discriminate against wheelchair-bound firefighter applicants, but not if they are applying for office jobs. Unfortunately, many cases are not that easy, nor is the rule of reason relevant to such cases easy to state or apply.

¹²See, e.g., Jean-Jacques Laffont and Jean Tirole, *The Politics of Government Decision Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089 (1991).

¹³On the veil of ignorance, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

The modern welfare state has raised havoc with those equal-protection principles, of course, for its countless programs distribute burdens and benefits unequally in endless ways, as the Michigan cases clearly show. First, public higher education in general is not for the benefit of all: as the demographics reveal, its dirty little secret is that it constitutes a massive wealth transfer from the lower to the upper classes of society. For although upper-income taxpayers tend to pay more in taxes, their children tend to use public higher education in far greater numbers than the children of lower-income taxpayers, who often never even go to college. The exceptions, which are invariably cited by proponents of public higher education, simply prove the rule.¹⁴ Second, that wealth transfer is especially true of elite institutions like the University of Michigan Law School; the vast taxpaying public of Michigan is underwriting the education of a tiny group of people who, as a result of that education, will in most cases then join the highest income earners in the nation. But it's even worse than that in Michigan because, third, as Justice Clarence Thomas noted in his dissent in *Grutter*, "the Law School trains few Michigan residents and overwhelmingly serves students who, as lawyers, leave the State of Michigan."¹⁵ One wonders why the citizens of Michigan allow themselves to be so fleeced, assuming they know the facts. Be that as it may, we have here a textbook example from public-choice economics of a skilled and well-placed minority (those with a direct interest in the Law School) having captured the political process for their own benefit.

¹⁴Milton and Rose Friedman stated the matter succinctly:

We know of no government program that seems to us so inequitable in its effects, so clear an example of Director's Law, as the financing of higher education. In this area those of us who are in the middle- and upper-income classes have conned the poor into subsidizing us on the grand scale—yet we not only have no decent shame, we boast to the treetops of our selflessness and public-spiritedness.

MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 183 (1979). See, e.g., Jenny B. Wahl, *A Bigger Bang for the Public Buck: Achieving Efficiency and Equity in Higher Education*, Jan. 14, 2002, at http://www.aicup.org/resources/Higher_Ed_Paper.pdf (last visited Aug. 22, 2003); Lee Hansen and B. A. Weisbrod (1969), *The Distribution of the Costs and Benefits of Public Higher Education: The Case of California*, 4 J. HUM. RESOURCES 176 (1969).

¹⁵*Grutter*, 123 S. Ct. at 2355. As Thomas notes, only 27 percent of the Law School's 2002 entering class are from Michigan, and less than 16 percent of the Law School's graduating class elects to stay in Michigan after law school. *Id.*

Those are the most searching equal-protection concerns in the Michigan cases, but they were not the concerns directly before the Court. Rather, they arose only obliquely, largely in the Thomas dissent in connection with the more immediate question of whether having a racially diverse student body is a compelling state interest, as the school argued. Thomas answered that Michigan had no compelling interest even in having a public law school (not all states do), much less an elite law school, still less a marginally better law school because of racial discrimination, as Michigan contended.¹⁶

Although those more searching concerns were not before the Court, they are central to true equal protection, and they bring out how far we have strayed from that ideal. But in other ways too our anti-discrimination law today—federal, state, and local—is often far removed from the first principles just outlined. Private discrimination, for example, has been outlawed in a vast and bewildering array of contexts, with forced association effectively replacing free association.¹⁷ And in the public sector, discrimination is not simply permitted but required for “remedial” purposes, although the burdens and benefits of such remedies rarely fall on those who did wrong or were wronged.¹⁸ With *Gratz* and *Grutter*, however, nonremedial public-sector discrimination is now permitted as well. Let’s see how the Court justified that.

Gratz and Grutter

When an act is presumed to be wrong, we justify doing it by giving reasons that are sufficient to overcome the presumption. Because it seeks to be objective, law looks for sufficient reasons in principles, for the most part, not in subjective values. Thus, unequal treatment by the government can be justified for remedial purposes if it remedies a prior wrong, matching wrongdoers with wronged, thereby restoring the status quo of equality the prior wrong disturbed. Unequal treatment is justified, that is, because it remedies prior unequal treatment that, left unremedied, constitutes a continuing

¹⁶*Id.* at 2353–54.

¹⁷See, e.g., Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. § 50.14 (1978); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 n.9 (1971) (quoting text of EEOC guidelines on Employment Testing Procedures).

¹⁸See generally, SAMUEL LEITER AND WILLIAM M. LEITER, *AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY* (2002).

wrong. The backward-looking aim is to restore the status quo of equality—unequal treatment to rectify unequal treatment that itself disturbed equality. Looked at in that fundamental way, public-sector discrimination for remedial purposes, if it matches wrongdoers with those wronged, is grounded in ordinary tort principles.

But the methods of the modern Court are often not that analytical, objective, or deductive. Rather than look for a benchmark of equality as a starting point, then apply backward-looking principles of natural right to the facts of the case, the post-*Carolene Products* Court allows government to treat people unequally—to do what would otherwise be wrong, constitutionally—if the government has a good reason.¹⁹ And the characteristics of a good reason—quite apart from what constitutes a good reason—vary by the character of the government wrong. If the wrong is racial discrimination, for example, the Court employs “strict strictly,” which means that the government must have a “compelling interest” (or reason) to do the wrong, and the means it employs must be “narrowly tailored” to serve that interest.²⁰ But if the wrong is gender discrimination, the Court relaxes its scrutiny, demanding only that the government have an “important” interest and that the means be “substantially related” to it—although recently the Court said that the justification in gender discrimination cases must be “exceedingly persuasive.”²¹

Plainly, that methodology is replete with subjective value judgments nowhere to be found in the Constitution. The difference between a “compelling” and an “important” governmental interest is a matter of degree, not kind, as is the difference between means that are “narrowly tailored” and those that are “substantially related” to an interest. As a practical matter, the Court’s methodology has immersed its members in endless disputes over those judgments,

¹⁹Famous footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), was the great watershed in American constitutional law, completing the New Deal constitutional revolution and introducing modern “scrutiny theory.” Professor Owen M. Fiss has called it “[t]he great and modern charter for ordering the relations between judges and other agencies of government.” Owen M. Fiss, *The Supreme Court: 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979). For a fuller, critical discussion, see Randy Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2002–2003 CATO SUPREME COURT REVIEW 21.

²⁰*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

²¹*United States v. Va. Military Acad.*, 518 U.S. 515, 531–34 (1996).

to no one's surprise. As a matter of principle, however, there is no constitutional basis whatever for different levels of judicial scrutiny. If the Constitution restricts government from discriminating, then every governmental action brought before the Court that ignores that restriction should be strictly scrutinized. In the parlance of the modern practice, all classes are "suspect."²²

Interestingly, three days after the Michigan cases were handed down, the Court gave us its decision in *Lawrence v. Texas*.²³ There it seemed to abandon its post-*Carolene Products* methodology, as discussed elsewhere in this volume.²⁴ Without ever saying it was engaged in "strict scrutiny," or searching for some "compelling state interest," the Court simply insisted that Texas justify its restriction of Lawrence's liberty. The state failed to offer the kind of reason that would overcome the presumption of liberty, and that was the end of it. To be sure, *Lawrence* was not an equal-protection case, but that should matter not at all. It was a case about the government's doing something it was presumptively forbidden to do, just as in *Gratz* and *Grutter*.

The problem in the Michigan cases, however, is rather less with the Court's invocation than with its application of strict scrutiny. There are two aspects to that. First, not only did the Court fail to give us a rigorous, constitutional standard for discerning "compelling interests," but its abject deference to the university's account of its interests amounts to abandoning the very scrutiny the Court invokes. Second, in *Grutter* even if the Law School did have a compelling interest in discriminating on the basis of race, the means it employed were not narrowly tailored to overcome the presumption against doing so. Let's take those two points in order, starting with *Grutter*, which is where the Court discusses the "compelling state interest" prong of strict scrutiny, concluding that the Law School has satisfied it.

²²I discuss scrutiny theory more fully in Roger Pilon, *A Modest Proposal on "Must-Carry," the 1992 Cable Act, and Regulation Generally: Go Back to Basics*, 17 HASTINGS COMM. & ENT. L.J. 41 (1994).

²³123 S. Ct. at 2472.

²⁴See Barnett, *supra* note 19.

“Compelling State Interest”

The very idea of “compelling-interest” analysis is problematic within the theory of legitimacy that underpins American governments, federal and state. That theory begins with individuals and their rights. As individuals, we come together to form governments, delegating *powers* to them, not “interests.” Delegated powers are thus “authorized” and hence legitimate, as are powers entailed by the delegated powers—means that, under the federal Constitution, must be “necessary and proper” toward achieving the purposes or ends enumerated in the Constitution. The execution of federal and state powers must also respect retained rights, of course, both enumerated and unenumerated. As thus conceived, therefore, the theory is deductive, with legitimacy following from whether a power does or does not conform to that chain of reasoning. A legitimate power is thus exercised by right. An unauthorized power or a power that violates rights is *ultra vires*.²⁵

To say that a government has “interests,” however, is not the same as saying it has powers. Nor is the word used here as it is used when we say, for example, that someone has an “interest” in a property. Rather, the term connotes something we’d like to see done or brought about. We all have interests: some are pursued by right, others not. So too with governments. With governments, however, one of two things is true. Either an interest is entailed by one of its powers as necessary and proper for realizing the end for which the power was authorized, or it is not, in which case pursuing that interest takes the government beyond its authority. Regrettably, the latter is what much of modern interest analysis amounts to, with “interest” having about it the ring of a policy sought, not a principle followed. One imagines a government in the Progressive Era or New Deal mold, pursuing policies that reflect interests that have been distilled in the legislative caldron unrestrained by any charter of authorized and hence limited purposes. Today, of course, that pretty much describes government in America, imbued as it is with all but plenary power to address all manner of public and private problems, constitutional limits notwithstanding.

²⁵I have discussed those issues more fully in Roger Pilon, *On the First Principles of Constitutionalism: Liberty. Then Democracy*, 8 AM. U. J. INT’L L. & POL’Y 531 (1992–93).

Yet as just noted, government that pursues interests beyond its authorized powers or contrary to retained rights is to that extent illegitimate. In the early stages of his searing dissent in *Grutter*, we see Thomas struggling with that issue. He begins where the majority did not, with a look at the Court's prior treatment of "compelling state interest" in the equal-protection, racial-classifications context. A majority of the Court, he says, "has validated only two circumstances where 'pressing public necessity' or a 'compelling state interest' can possibly justify racial discrimination by state actors:"²⁶ ensuring national security (*Korematsu v. United States*²⁷); and remedying past discrimination by the state (*Richmond v. J.A. Croson Co.*²⁸). He also cites Justice Hugo Black, concurring in *Lee v. Washington*,²⁹ who suggested that protecting prisoners from violence might justify narrowly tailored racial discrimination. And in the same vein he quotes Justice Scalia, concurring in the judgment in *Croson*: "At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify [racial discrimination]."³⁰

Notice that in each of those cases the "pressing public necessity" or "compelling state interest" is not a separate policy concern but rather an integral component of a basic power authorized to the government. The justification for overriding the presumption against racial discrimination is thus entailed, given the facts, in the underlying power to protect life and limb or rectify wrongs. The departure from principle, that is, is itself principled—indeed, it is a departure grounded in the same principle. In fact, were the government to refrain from thus departing, it would be charged, rightly, with denying the equal protection of the laws.

Thomas does not bring that point out explicitly, but it is implicit in his sampling of rationales for racial discrimination that have failed. Thus, he cites *Wygant v. Jackson Bd. of Ed.*³¹ in which the Court threw out a discriminatory collective-bargaining agreement the school

²⁶ *Grutter*, 123 S. Ct. at 2351.

²⁷ 323 U.S. 214 (1944).

²⁸ 488 U.S. 469, 504 (1989).

²⁹ 390 U.S. 333, 334 (1968) (*per curiam*) (Black, J., concurring).

³⁰ *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment).

³¹ 476 U.S. 267 (1986).

board had defended on policy grounds: minority teachers provided role models for minority students; and a racially “diverse” faculty would improve the education of all students. The Court deemed both asserted interests “insufficiently compelling,” Thomas notes.³² Unfortunately, that reduces the Court’s rationale to a value judgment, no better in principle, or worse, than the school board’s value judgment. A more principled rationale would hold the board’s policy interests as not necessarily entailed by its power to run a school: the board could perform its functions perfectly well without discriminating, that is—or claiming, by implication, that its ends justified those means. Equally important, a principled rationale would hold that the board’s policies violated rather than secured rights of equal protection, unlike in the previous examples. Two other examples Thomas cites of failed rationales exhibit similar problems. Thus, in child custody determinations, the state’s concern for the best interests of a child does not constitute a compelling state interest that justifies racial discrimination. Nor, more broadly, can remedying general societal discrimination, presumably by private parties, justify racial discrimination by the state.³³ In both cases, governmental discrimination would not secure equal protection of the law but would violate it—in the name of policies about which reasonable people may reasonably disagree.

As we will now see, Justice Sandra Day O’Connor’s arguments for the Court in *Grutter* are similar in all respects to the failed rationales cited by Thomas. From the start, they are policy arguments, not arguments from principle. And the Law School’s policy interests are served by denying the equal protection of the law. In fact, we should be clear at the outset that there is no ambiguity about what the Court upheld. For the Court itself acknowledges that it is sanctioning “a race-conscious admissions program”³⁴ and “racial preferences,”³⁵ even though “there are serious problems of justice connected with the idea of preference itself.”³⁶ The only questions, therefore, are whether the racial discrimination serves a compelling state

³²*Grutter v. Bollinger*, 123 S. Ct. 2325, 2351 (2003). As Thomas notes, “The [*Grutter*] Court’s refusal to address *Wygant*’s rejection of a state interest virtually indistinguishable from that presented by the Law School is perplexing.” *Id.* at n.2.

³³*Id.* at 2351–52.

³⁴*Id.* at 2345.

³⁵*Id.* at 2347.

³⁶*Id.* at 2345 (citing *Bakke*, 438 U.S. at 298) (opinion of Powell, J.).

interest, understood as a matter of principle, and whether it is narrowly tailored to do so.

As noted earlier, the Court gives us no account of the concept “compelling state interest.” Instead, it dives straightaway into the question of whether, in the context of higher education, racial “diversity” among students is such an interest, as the Law School contended. The last time the Court addressed the use of race in public higher education admissions policies, 25 years ago in *Bakke*, it split 4–4, with Justice Lewis Powell casting the deciding vote against California’s set-aside program, which reserved a fixed number of seats in the medical school class for members of certain minority groups. Writing for himself in dicta, however, Powell concluded, after rejecting several other rationales, that “the attainment of a diverse student body”³⁷ would be a compelling governmental interest justifying racial discrimination. O’Connor points out that Powell “grounded his analysis in the academic freedom that ‘long has been viewed as a special concern of the First Amendment,’”³⁸ noting how he emphasized that the nation’s future depended on leaders exposed to a wide variety of views.

When she herself takes up the argument left by Powell, O’Connor continues in that same policy vein. From the start, however, she is less than clear about just what the state’s interest is, as she conflates two “compelling interests.” The Law School, she says, asserts “only one justification for [its] use of race in the admissions process: obtaining ‘the educational benefits that flow from a diverse student body.’ . . . In other words, the Law School asks us to recognize . . . a compelling state interest in student body diversity.”³⁹ That implies, Thomas says, “that both ‘diversity’ and ‘educational benefits’ are components of the Law School’s compelling state interest.”⁴⁰ In fact, the Court speaks of both, he notes, as “compelling interests.”⁴¹ Yet the reason the Law School cannot realize those interests without discriminating, he continues, is because it refuses to change its admissions standards and status, which indicates that its real interest is broader. In his

³⁷*Id.* at 2336 (citing *Bakke*, 438 U.S. at 311) (opinion of Powell, J.).

³⁸*Id.* (citing *Bakke*, 438 U.S. at 312, 314).

³⁹*Id.* at 2338 (citing Respondents’ Brief at i).

⁴⁰*Id.* at 2352.

⁴¹*Id.* at 2353.

separate dissent, joined by Thomas, Scalia succinctly states what he takes that broader interest to be: “maintaining a ‘prestige’ law school whose normal admissions standards disproportionately exclude blacks and other minorities.”⁴² Given the clear constitutional prohibition on racial discrimination, Thomas concludes that “the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways.”⁴³

One way to read O’Connor’s contention is this: the Law School has a compelling interest in achieving student diversity; its reason or justification is to secure the educational benefits that purportedly follow; but it can achieve that diversity, and hence those benefits, only by discriminating on the basis of race; therefore it has a compelling interest in discriminating. If that indeed is a correct construction of O’Connor’s point, the Thomas-Scalia rejoinders still stand. Here’s why.

“Context matters when reviewing race-based governmental action under the Equal Protection Clause,”⁴⁴ O’Connor says. Then let’s look at the context. Like several other states, Michigan has a public higher education system composed of many units, each with its own admissions standards. The “flagship” Law School at the Ann Arbor campus has very high standards—reflecting, presumably, the wishes or interests of the citizens of Michigan in having such a school. But if the function of the school is to train the “best and brightest,” as is evidenced by those standards, then certain other interests are not simply not entailed by that function but are outright excluded by it. Achieving student diversity is one such inconsistent interest, for it would require either lowering admissions standards or employing a discriminatory, race-conscious admissions plan. In fact, as the Law School’s own expert testified, “a race-blind admissions system would have a ‘very dramatic,’ negative effect on underrepresented minority admissions.”⁴⁵ But the Law School does not want to lower its admissions standards. It’s only option, therefore, is to employ a two-tiered admissions system—to discriminate on the basis of race.

⁴²*Id.* at 2349.

⁴³*Id.* at 2356.

⁴⁴*Id.* at 2338.

⁴⁵*Id.* at 2334.

Thus, Thomas is right: the school cannot have both diversity and an exclusionary admissions system without engaging in constitutionally prohibited discrimination.

The “compelling interest” that purports here to justify racial discrimination is thus nothing like the interests discussed previously that the Court has validated. It is not entailed of necessity in a state power. Nor is it grounded in principle, much less required to secure a principle. In fact, its pursuit violates principle—the principle of equal protection. There may indeed be educational benefits from diversity, ranging from promoting “cross-racial understanding” to “breaking down racial stereotypes” to “better prepar[ing] students for an increasingly diverse workforce and society,”⁴⁶ concerning which the Court defers unreservedly to the Law School’s educational judgment. Those policy interests may be rational, or important, or even “compelling”—depending on one’s values. But the policy arguments the Court invokes are just that—arguments from policy, appropriate for the legislative arena, if constitutionally authorized, not the judiciary. However “compelling” they may be from some evaluative perspective, they cannot be pursued by the state in violation of a citizen’s constitutional rights. For once you allow that, you soon find that there is no end to “good reasons” for violating rights, and every reason starts to look “compelling.” At that point, interests trump rights, policy trumps principle, and that is the end of principle. Nor does the First Amendment save the Law School, for it hardly authorizes a public university to do what the Fourteenth Amendment forbids. In effect, the Court has allowed narrow, special-interest politics, the politics of the Law School, to trump law. Thomas sums it up perfectly: “the Court holds . . . that the Law School has a compelling state interest in doing what it wants to do.”⁴⁷

“Narrow Tailoring”

Assume, however, that the Court got it right, that diversity is a compelling state interest that justifies racial discrimination. The university would still have to satisfy the narrow-tailoring prong of strict scrutiny: the means it employs to secure a diverse student body, that is, would have to be “narrowly tailored” to that end. In

⁴⁶*Id.* at 2339–40.

⁴⁷*Id.* at 2356.

Gratz, the University of Michigan's College of Literature, Science, and the Arts (LSA) failed that test. There the Court simply incorporated the diversity-as-compelling-state-interest argument from *Grutter* and proceeded to examine whether the LSA's means were narrowly tailored. The Court held they were not. Let's look first at those arguments, then return to *Grutter*, where the means the Law School employed did pass the test.

We should start, however, by asking what "narrow tailoring" means, because the idea is hardly intuitive. Once it has a compelling interest to do so, we know the university can discriminate on the basis of race, provided its means are narrowly tailored to serve that interest. It doesn't help, of course, that the *Grutter* majority was unclear about just what the compelling interest is. Set that problem aside, however, assume that diversity is that interest, and focus on the essence of the matter. To secure a diverse student body, the university can do what would otherwise be wrong—discriminate on the basis of race. But its discrimination must be narrowly tailored. Why? The answer is not obvious. Perhaps it is so that no more damage or wrong than is necessary be done. The university may discriminate—bad enough. It just has to do it carefully so as not to make things worse.

As with "compelling state interest," one struggles to make sense of this idea of "narrow tailoring." Take the validated examples Thomas cites, as discussed previously. In those, ensuring national security and remedying past discrimination by the state were compelling interests that justified racial discrimination. The government's compelling interest was inherent in its power, not a policy standing apart from it, and the government violated equal protection as a means of securing equal protection. If national security is the compelling interest, presumably narrow tailoring means that one wants to impinge on all and only those rights of all and only those people as may be necessary to secure that interest. Likewise, if equal protection is denied for remedial reasons, narrow tailoring means one wants to burden all and only those who benefited from wrongful prior discrimination and benefit all and only those who were previously burdened.

But how does that understanding of "narrow tailoring" operate in the cases at hand? How do we do little damage beyond the damage racial discrimination is already doing? Why, for example,

do the racial set-asides in *Bakke*, or the point system in *Gratz*, which looks to race to award 20 of the 100 points needed for admission, do more damage than the approach of *Grutter*, which seeks a “critical mass” (10 to 17 percent of the class) of “underrepresented minorities”? Could the answer be as simple as this: the first two means bring the discrimination closer to the surface, making it obvious for all to see, whereas the means the Law School uses are more subtle, disguising what is going on? Is that what “narrow tailoring” is all about? Let’s see.

Chief Justice William Rehnquist, who dissented forcefully in *Grutter*, wrote for the Court in *Gratz*, finding that the admissions policy the LSA employed was not narrowly tailored because it “automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race.”⁴⁸ In *Bakke*, Rehnquist notes, Powell thought “it would be permissible for a university to employ an admissions program in which ‘race or ethnic background may be deemed a “plus” in a particular applicant’s file.’”⁴⁹ A system that looked at each applicant individually “might allow for [t]he file of a particular black applicant [to] be examined for his potential contribution to diversity without the factor of race being decisive”⁵⁰ in comparison with other applicants. Such a system would be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant,”⁵¹ unlike the LSA’s policy, which “has the effect of making ‘the factor of race . . . decisive’ for virtually every minimally qualified underrepresented minority applicant.”⁵²

It would seem, in brief, that a narrowly tailored policy must be individualized, flexible, and not automatic in the sense of assuring admission on the basis of race. The LSA policy failed on those counts. But surely those “weaknesses” are strengths insofar as they assure diversity, for which they are the means. They get the job done, so to speak, which an outright quota would do too. What is it that

⁴⁸ *Gratz*, 123 S. Ct. at 2427.

⁴⁹ *Id.* at 2428 (citing *Bakke*, 438 U.S. at 317) (opinion of Powell, J.).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

makes those straightforward, above-board policies impermissible, whereas “narrow tailoring” succeeds? What is the virtue that narrow tailoring secures? Let’s see if we can find it in *Grutter*, which does exhibit narrow tailoring, the Court says.

Not surprisingly, the same narrow-tailoring terms arise in *Grutter* as did in *Gratz*, but here the terms are satisfied. Writing for the Court, O’Connor makes it clear that “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 other applicants,’”⁵³ as happened in *Bakke*. Again, race may be considered only as a “plus” factor in an applicant’s file. There must be an “individualized” consideration that is “flexible” and “nonmechanical.” The Law School’s program meets those requirements, the Court holds. It “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.”⁵⁴ Its goal of attaining a “critical mass” of minority students does not transform the program into a quota in which “a certain fixed number or proportion of opportunities” are reserved for minorities.⁵⁵

In his incisive dissent, Rehnquist takes particular aim at the Law School’s goal of attaining a “critical mass” of *each* underrepresented minority—justified because only so will there be a sufficient number of each group to ensure against isolation, to provide opportunities for interaction, and so forth. Yet the school’s actual program, Rehnquist says, “bears little or no relation to its asserted goal,” because the admissions practices with respect to the different groups differ dramatically.⁵⁶ If a critical mass of each group is needed, how can one explain that Hispanics are admitted at only one-half the rate of blacks, and Native Americans at only one-sixth the rate of blacks? As Rehnquist concludes, “the Law School’s disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of ‘critical mass’ is simply a sham.”⁵⁷ Indeed, “the

⁵³*Grutter*, 123 S. Ct. at 2342 (citing *Bakke*, 438 U.S. at 315) (opinion of Powell, J.).

⁵⁴*Id.* at 2343.

⁵⁵*Id.* at 2342.

⁵⁶*Id.* at 2366.

⁵⁷*Id.* at 2367.

ostensibly flexible nature of the Law School's admissions program that the Court finds appealing appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups."⁵⁸

Still, how is any of this "narrow tailoring"? And how does it in any way reduce or minimize the harm done by the underlying racial discrimination? The Law School is not discriminating any less than the LSA; it's just doing it more subtly—but affecting, proportionally, just as many people. The Court tells us that narrow tailoring requires that a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial or ethnic groups."⁵⁹ What does "unduly burden" mean in this context? Surely, those individuals whose applications are rejected because they "are not members of the favored racial or ethnic groups" are duly burdened. And on that, how do the two programs at issue here differ in the least?

In her concurring opinion in *Gratz*, Justice Ruth Bader Ginsburg put it well: "If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."⁶⁰ But that needs to be tempered by Rehnquist's observation on the narrow tailoring of *Grutter*: "Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing."⁶¹

Conclusion

It is noteworthy, at least, that toward the end of its opinion in *Grutter*, the Court returns to the first principles of the matter: "'[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.' Accordingly, race-conscious admissions policies must be limited in time."⁶² That is a non sequitur. The Fourteenth Amendment was no more

⁵⁸*Id.* at 2369.

⁵⁹*Id.* at 2345 (citing *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990)) (O'Connor, J., dissenting).

⁶⁰*Gratz*, 123 S. Ct. at 2446.

⁶¹*Grutter*, 123 S. Ct. at 2365.

⁶²*Id.* at 2346 (citing *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984)).

written to “do away” with governmental discrimination over time than the Thirteenth Amendment was written to do away with slavery over time. They were both written to end the respective evils they addressed immediately. The Court concludes its reflections on duration by saying, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”⁶³ Whether that is an expectation or just a hope, it rings hollow. For if diversity is indeed such a compelling state interest, then discrimination to achieve it should be legitimate for as long as it is needed. One imagines that the Court broached this issue of duration because it senses, deep down, that there is something fundamentally wrong in its opinion, something wrong in denigrating principle for mere policy.

But as a consequential matter, even more is wrong with these decisions. For not only do they encourage further denigration of principle when we think we have “good reasons,” but they shield us from having to face the real issues. The underlying problem, of course, is that too many minorities cannot gain admission to higher education on neutral admissions standards, which tells us that the roots of the problem are far broader and much deeper. Regrettably, as Thomas points out, the Court’s decisions in these cases will only postpone the day when we face that hard truth. They buy a small gain for a few today at the cost of a huge gain for many tomorrow.

⁶³*Id.* at 2347.

