

NOTE

Perpetuating the Exclusion of Asian Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in *Grutter v. Bollinger*

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INTRODUCTION

Lynn, a Southeast Asian female, grew up in San Francisco's Tenderloin district. She immigrated from Cambodia at a young age, when her family settled in the United States as refugees. Her parents held low-paying jobs at restaurants to support their family of six. Her friends consisted of similarly situated Asians. Most of them were underachievers, high school dropouts, and/or gang members.

Lynn stayed in school, studied hard, and graduated from a public university. She then decided to pursue a profession as a public interest attorney. She worked hard and achieved a 3.7 grade point average (GPA) and scored a 159 on the Law School Admission Test (LSAT). She applied to an elite law school, her first choice, outside of California. That school embraces a policy of attaining student body diversity by giving preferential treatment to African Americans, Hispanics, and Native Americans. The school rejected Lynn and, instead, accepted a Hispanic applicant with a similar background, but lower LSAT score and GPA.

The school chose the Hispanic applicant over Lynn because of its categorization of Lynn as "Asian." Asians already comprise 15% of the school's population.¹ The school did not consider her an

¹ See Don W. Joe, *2002 Law School*, available at http://www.asianam.org/2002_law_school.htm (last modified Nov. 9, 2003). This website compiled statistics showing Asian American enrollment in 22 of the country's top law schools in 2002. The two schools with the highest percentage of Asian American enrollment are schools in California, University of California, Los Angeles and University of Southern California, both with 17%

“underrepresented” minority despite the fact that only two Southeast Asians attend the school. Most of the other “Asians” that comprise the 15% are either Chinese or Japanese.²

In June 2003, the United States Supreme Court upheld the constitutionality of a similar race-preference policy at the University of Michigan Law School in *Grutter v. Bollinger*.³ The Court held that the school could constitutionally adhere to its policy of preferential treatment for African Americans, Hispanics, and Native Americans to attain student body diversity.⁴ In doing so, however, the Supreme Court failed to account for the “Lynns” of the Asian American population. The holding perpetuates the exclusion of Asian Americans from the affirmative action debate. If Lynn sues the school, the *Grutter* holding would be inapplicable to her needs.

Although Asian Americans have encountered discrimination like other racial minorities, they do not stand to benefit from affirmative action in the context of higher education.⁵ Opponents of affirmative action argue that Asian Americans do not need affirmative action because of their overrepresentation in universities.⁶ Opponents further

enrollment. *Id.* Outside of California, Asian American enrollment is highest at Cornell, comprising 15% of the law school population. *Id.* The average Asian American enrollment among all of the listed law schools is 10.6%. *Id.*

² This hypothetical, though not based on a specific case, is similar to the facts in *Grutter v. Bollinger*, 539 U.S. 306 (2003). See *infra* Part II.A-C for a discussion of *Grutter*. The hypothetical attempts to show the precarious position of an “underrepresented” Asian American in the affirmative action debate in higher education. See *infra* note 129 for the definition of “underrepresented” Asian Americans in the context of this Note.

³ See *Grutter*, 539 U.S. at 343 (2003) (upholding law school’s race-based admissions policy which provides preferential treatment to African Americans, Hispanics, and Native Americans, but excludes Asian Americans).

⁴ *Id.*

⁵ See *id.* at 319 (noting testimony of University of Michigan Law School official acknowledging that Asians do not receive preferential treatment despite having experienced discrimination); *DeFunis v. Odegaard*, 416 U.S. 312, 339 (1974) (acknowledging that University of Washington Law School excluded Chinese and Japanese from preferential treatment although “no Western State . . . can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner”); *DeRonde v. Regents of the Univ. of Cal.*, 28 Cal. 3d 875, 900-02 (1981) (Mosk, J., dissenting) (arguing that Asian Americans have achieved academic and economic success despite history of legal and extralegal discrimination).

⁶ See Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 ASIAN PAC. AM. L.J. 129, 148 (1996) (noting that politicians suggest success of Asian Americans has either singled them out for mistreatment by affirmative action or demonstrated that affirmative action is unnecessary); William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts about Thernstrom’s Rhetorical Acts*, 7 ASIAN L.J. 29, 34-35 (2000) (discussing Harvard historian Professor Stephan Thernstrom’s scholarship on

assert that the Asian American experience justifies the abolition of affirmative action.⁷ They argue that affirmative action harms non-whites as well as whites, and that racial minorities can succeed without affirmative action.⁸ Ironically, the proponents of affirmative action find that the anomalous success of Asian Americans defeats their arguments for affirmative action.⁹ They find that the Asian American experience supports the proposition that racial minorities do not need preferential treatment to succeed.¹⁰ Thus, the proponents of affirmative action exclude Asian Americans from the affirmative action debate.¹¹

With the *Grutter* decision, the United States Supreme Court took a radical step in the affirmative action debate. In *Grutter*, the Supreme Court held that student body diversity may justify the use of race as a factor in universities' admissions processes.¹² This holding is a success for minorities such as African Americans, Hispanics, and Native Americans in the affirmative action debate. For Asian Americans, however, many questions remain. This landmark decision, which

banning affirmative action, which uses Asian American experience to argue that color-blind society does not necessarily disadvantage racial minorities); Janine Young Kim, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2409 (1999) (stating that "[t]hose who would eliminate affirmative action use the Asian-American population to exemplify how affirmative action disadvantages non-Whites as well as Whites"); Frank Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 225 (1995) (discussing House Speaker Newt Gingrich's use of Asian American overrepresentation at prestigious universities in his attack against affirmative action).

⁷ See sources cited *supra* note 6.

⁸ See sources cited *supra* note 6.

⁹ See Linda Chen Einsiedler & Todd A. DeMitchell, *Affirmative Action and the Model Minority in Higher Education Admissions: A Conundrum for Asian Americans*, 131 EDUC. LAW REP. 877, 891 (1999) (noting that proponent of affirmative action, Walter Feinberg, excluded Asian Americans from his list of protected groups in his case for educational affirmative action); Kidder, *supra* note 6, at 35-36 (discussing Omi and Takagi's discourse on political Left's exclusion of Asian Americans from the affirmative action debate); Wu, *supra* note 6, at 225 (stating that Asian American experience defeats affirmative action).

¹⁰ See Kidder, *supra* note 6, at 34-35 (discussing Harvard historian Professor Stephan Thernstrom's scholarship on banning affirmative action, which uses Asian American experience to argue that color-blind society does not necessarily disadvantage racial minorities).

¹¹ See sources cited *supra* note 9.

¹² *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). On the same day, the Supreme Court rendered a decision in a similar case, *Gratz v. Bollinger*, 539 U.S. 244 (2003). *Gratz* also involved a claim of discrimination in the University of Michigan's admissions program. While *Grutter's* claim arose from her rejection from the University of Michigan's law program, the claim filed in *Gratz* arose from the petitioners' rejections from the University's undergraduate program. Using a similar analysis in both cases, the Supreme Court found the law school's admissions program constitutional, but found the undergraduate admissions program unconstitutional. *Grutter*, 539 U.S. at 334; *Gratz*, 539 U.S. at 275.

ostensibly provides a clear holding on affirmative action in higher education, also raises fundamental questions about what “diversity” entails.

This Note argues that the diversity rationale the *Grutter* Court adopted fails to address the needs of many Asian Americans. The Supreme Court has overlooked issues that do not fall within the traditional racial paradigm of the affirmative action debate. Part I chronicles how courts have addressed the use of race in higher education admissions processes. Part II discusses the facts, holding, and rationale of *Grutter*. Part III argues that the diversity rationale fails to account for the needs of many Asian Americans.

I. STATUS OF THE LAW

President John F. Kennedy first used the term “affirmative action” in 1961 in Executive Order 10925, which created the Equal Employment Opportunity Commission.¹³ The order required federally funded projects to take affirmative action to ensure that employment decisions were not racially discriminatory.¹⁴ Eventually, affirmative action included efforts to expand employment opportunities for minorities through governmental actions.¹⁵

Use of affirmative action also extended to higher education admissions programs.¹⁶ In the context of higher education, courts have offered two justifications for the use of affirmative action: remedying the present effects of past discrimination¹⁷ and attaining student body diversity.¹⁸

¹³ See generally Susan Low Bloch, *Affirmative Action: The Aftermath of the University of Michigan Cases*, 50-OCT FED. LAW. 22 (2003) (discussing history and evolution of affirmative action).

¹⁴ *Id.*

¹⁵ *Id.* For example, in 1965, President Lyndon B. Johnson issued Executive Order 11246 requiring government contractors and subcontractors to take affirmative action to expand job opportunities for minorities before awarding them government contracts. *Id.* The Office of Federal Contract Compliance was established in the Department of Labor to carry out the order. *Id.* In 1970, under President Richard M. Nixon, the Labor Department issued Executive Order No. 4, which required employers in government business to develop goals and timetables to correct the underutilization of minority workers. *Id.*

¹⁶ Corinne E. Anderson, Comment, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 191 (1999).

¹⁷ See *Grutter*, 539 U.S. at 328 (recognizing that remedying past discrimination is permissible justification for race-based governmental action); *Hopwood v. Texas*, 236 F.3d 256, 272 (5th Cir. 2000) (noting Supreme Court precedent that government can constitutionally use racial preferences to remedy present effects of past discrimination); *Hopwood v. Texas*, 861 F. Supp. 551, 554 (W.D. Tex. 1994) (noting that reasoning behind affirmative action is that removal of longstanding discriminatory barriers cannot suddenly

Prior to *Grutter*, the Supreme Court last addressed the use of race in higher education in *Regents of the University of California v. Bakke*.¹⁹ In a plurality opinion, Justice Powell held that the goal of attaining diversity is a compelling interest that may justify the use of race in a university's admissions process.²⁰ Twenty-five years later, in *Grutter*, the Supreme Court confirmed that holding.²¹ This Part of the Note will discuss equal protection jurisprudence in the context of affirmative action, focusing on the evolution of the diversity rationale.

A. *Equal Protection Jurisprudence and Racial Classifications in Higher Education*

The Equal Protection Clause of the Fourteenth Amendment provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."²² Thus, the Fourteenth Amendment prohibits racial discrimination by the States.²³ Any use of racial or ethnic classifications by state actors is inherently suspect and "call[s] for the most exacting judicial examination."²⁴ Under strict scrutiny review, to be

avail minority individuals to equal competition for opportunities); *DeRonde v. Regents of the Univ. of Cal.*, 28 Cal. 3d 875, 896 (1981) (Mosk, J., dissenting) (noting remedying past societal discrimination as alternative theory for preferential treatment).

¹⁸ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (holding that diversity is compelling state interest justifying use of race in university admissions); *DeRonde*, 28 Cal. 3d at 896 (Mosk, J., dissenting) (noting desire for student body diversity as alternative theory for preferential treatment). Although *Bakke's* plurality opinion established that diversity is a compelling interest, federal circuit courts were split on whether the opinion is binding precedent. See *infra* Part I.C.

¹⁹ *Grutter*, 539 U.S. at 322; *Bakke*, 438 U.S. 265. See *infra* Part I.B for discussion of *Bakke*.

²⁰ *Bakke*, 438 U.S. at 311-12.

²¹ *Grutter*, 539 U.S. at 328 (holding that University of Michigan Law School has compelling interest in attaining student body diversity).

²² U.S. CONST. amend. XIV, § 1.

²³ See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (holding that core purpose of Fourteenth Amendment is to eliminate all governmentally imposed racial discrimination); *Loving v. Virginia*, 388 U.S. 1, 6 (1967) (describing central purpose of Fourteenth Amendment as eliminating invidious racial discrimination by states); *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896) (noting that United States Constitution forbids racial discrimination by general government or states against any citizen).

²⁴ *Bakke*, 438 U.S. at 291; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that courts must review all racial classifications, whether by federal, state, or local governmental actors, under strict scrutiny). In *Adarand*, the Supreme Court ruled on the constitutionality of a federal law, which favors small businesses controlled by African Americans, Hispanics, Native Americans, Asian Americans, and other minorities. *Id.* at 204. In determining the appropriate level of review to apply, the Court held that the Fifth and Fourteenth Amendments provide the same level of protection to personal rights. *Id.* at 227. Thus, it held that courts must review all racial classifications under strict

constitutional, a racial classification must meet two requirements.²⁵ It must serve a compelling governmental interest and be narrowly tailored to further that interest.²⁶ Because university affirmative action programs involve race-based classifications, courts must analyze these programs under strict scrutiny review.²⁷

B. *Regents of the University of California v. Bakke*

The Supreme Court last addressed the constitutionality of affirmative action programs in public higher education in 1978.²⁸ In *Regents of the University of California v. Bakke*, the Court examined whether the special admissions program of the medical school ("Medical School") of the University of California, Davis ("UC Davis") violated the Equal Protection Clause of the Constitution.²⁹ The plurality opinion held that it did.³⁰

The Medical School devised a special admissions program to increase the representation of disadvantaged students.³¹ The program established a special admissions committee to review applications of individuals with minority status or disadvantaged backgrounds.³² The Medical School considered African American, Chicano, Asian, or American Indian as minority statuses.³³ Between 1973 and 1974, the Medical School allotted sixteen slots for minority students.³⁴ None of the students

scrutiny. *Id.*

²⁵ See *Adarand*, 515 U.S. at 227 (noting that racial classifications subject to strict scrutiny must meet requirements of furthering compelling governmental interest and being narrowly tailored to achieve that interest).

²⁶ *Id.* (stating that racial classifications subject to strict scrutiny must be narrowly tailored measures that further compelling governmental interest).

²⁷ *Bakke*, 438 U.S. at 291.

²⁸ *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003)

²⁹ *Bakke*, 438 U.S. at 269-70.

³⁰ *Id.* at 320.

³¹ *Id.*

³² *Id.* at 272-73. The special admissions program operated separately from the regular admissions program, with a different committee. *Id.* at 274. Minorities comprised a majority of the special admissions committee. *Id.* In determining which students were from disadvantaged backgrounds, the 1973 application form asked applicants to indicate whether they wished the school to consider them as "economically and/or educationally disadvantaged" applicants. *Id.* The Medical School changed the question in the 1974 application to ask whether applicants wished to be considered as members of minority groups. *Id.*

³³ *Id.*

³⁴ *Id.* at 275. The prescribed number was eight during the years when the class size was 50. *Id.* In 1973 and 1974, when the class size increased to 100, the number rose to 16. *Id.*

chosen to fill the slots were disadvantaged white applicants.³⁵

Allen Bakke, a white male, applied to the Medical School in 1973 under the regular admissions program.³⁶ The Medical School rejected his application even though four special admissions slots remained open.³⁷ Bakke re-applied in 1974, but the Medical School again rejected his application.³⁸

Bakke sued the University, alleging that the special admissions program excluded him from admission based on his race, violating the Equal Protection Clause.³⁹ The Superior Court of California struck down the program and prohibited UC Davis from considering race in its admissions decisions.⁴⁰ The California Supreme Court transferred the case from the superior court "because of the importance of the issues involved."⁴¹ Applying strict scrutiny, it affirmed the superior court's decision enjoining the school's use of race.⁴²

The United States Supreme Court granted certiorari "to consider the important constitutional issue."⁴³ Justice Powell wrote the plurality opinion of the Supreme Court.⁴⁴ To first determine the level of judicial scrutiny to apply, he analyzed the scope of equal protection under the Fourteenth Amendment.⁴⁵ He found that equal protection applies similarly to all individuals, regardless of race.⁴⁶ Otherwise, this

³⁵ *Id.* at 276. In 1973, 73 out of the 297 special admissions program applicants were white. *Id.* at 275 n.5. In 1974, 172 out of 628 were white. *Id.*

³⁶ *Id.* at 276.

³⁷ *Id.* By the time Bakke submitted his application in 1973, the Medical School was unwilling to accept regular admissions applicants with a benchmark score lower than 470. *Id.* Bakke had a score of 468. *Id.*

³⁸ *Id.* at 277.

³⁹ *Id.* Bakke also alleged violations of the California Constitution and title VI of the Civil Rights Act of 1964. *Id.* at 277-78. He demanded injunctive and declaratory relief. *Id.* at 277.

⁴⁰ *Id.* The Superior Court, however, refused to order the Medical School to admit Bakke. *Id.* On appeal, the California Supreme Court ordered the school to admit him. *Id.* at 281.

⁴¹ *Id.* at 279.

⁴² *Id.* at 279-81. In its strict scrutiny analysis, the California Supreme Court recognized that the state had compelling interests in integrating the medical profession and increasing the number of doctors willing to serve minority communities. *Id.* at 279. Nevertheless, the court struck down the program because it was not the least intrusive means to achieving these goals. *Id.*

⁴³ *Id.* at 281.

⁴⁴ *Id.* at 269.

⁴⁵ *Id.* at 289.

⁴⁶ *Id.*

protection would not be equal.⁴⁷ Thus, any racial or ethnic classification is inherently suspect and calls for “the most exacting judicial examination.”⁴⁸ Justice Powell, therefore, analyzed the special admissions program under strict scrutiny.⁴⁹

Under strict scrutiny, to justify the use of any suspect classification, the State must show that its purpose or interest is constitutionally permissible and that its use is necessary to accomplish the purpose or to safeguard the interest.⁵⁰ The Medical School set forth four purposes for the special admissions program.⁵¹ The only purpose Justice Powell upheld was the school’s interest in attaining a diverse student body.⁵² Justice Powell, nonetheless, struck down the program because it was not the least intrusive means to achieve that interest.⁵³ He stated that universities may only use race as a “plus” factor and may not insulate an individual from comparison with all other candidates for available seats.⁵⁴

⁴⁷ *Id.* at 290.

⁴⁸ *Id.* at 291.

⁴⁹ *Id.* at 279.

⁵⁰ *Id.* at 305 (quoting *In re Griffiths*, 413 U.S. 717, 721-22 (1973)).

⁵¹ *Id.* at 306. The four reasons proffered were (i) to reduce the “historic deficit of traditionally disfavored minorities in medical schools and in the medical profession”; (ii) to counter the effects of societal discrimination; (iii) to increase the number of doctors willing to serve underserved communities; and (iv) to obtain “the educational benefits that flow from an ethnically diverse student body.” *Id.*

⁵² *Id.* at 311-12. The Court held that this interest was grounded on academic freedom, which was based on the First Amendment. *Id.* at 312. It also believed that a diverse student body promotes the atmosphere of “speculation, experiment and creation” essential to the quality of higher education. *Id.*

Justice Powell found the first purpose facially invalid, as it provided preferential treatment to a particular group merely because of race or ethnic origin. *Id.* at 307. He rejected the second purpose of ameliorating the effects of societal discrimination because he found an absence of judicial, legislative, and administrative findings of constitutional or statutory violations. *Id.* at 309-10. The Court needs these findings to vindicate the legal rights of the victims and confirm the government’s interest in helping certain groups at the expense of others. *Id.* He rejected the third purpose, to increase the number of doctors willing to help underserved communities, because he found no empirical data demonstrating that one race is more socially oriented and more willing to service these underserved communities. *Id.* at 310-11.

⁵³ *Id.* at 320.

⁵⁴ *Id.* at 316-17. Justice Powell held that diversity encompassed a broader array of qualifications and characteristics than race and ethnicity. *Id.* at 316. Prescribing a set number of spaces for minorities, which would foreclose nonminority applicants from all considerations, was not a necessary means to achieve the end of diversity. *Id.*

C. *The Fractured Court and Its Aftermath: Revisiting the Diversity Rationale and Resolving the Circuit Split*

The *Bakke* decision was inconclusive because there was no true majority opinion.⁵⁵ Four justices, led by Justice Brennan ("the Brennan Group"), would have applied intermediate scrutiny and upheld the special admissions program as a legitimate response to societal discrimination.⁵⁶ Four justices, led by Justice Stevens ("the Stevens Group"), would have struck down the program on statutory grounds.⁵⁷ Justice Powell, in a swing vote, agreed with the Stevens Group in prohibiting the admissions program.⁵⁸ He also agreed with the Brennan Group, however, in allowing universities to consider race in their admissions decisions.⁵⁹

This fractured decision led to much uncertainty over the next two decades. Since *Bakke*, public and private universities across the nation have structured their admissions programs to comply with Justice Powell's opinion.⁶⁰ Many federal courts, however, remained divided over whether Justice Powell's plurality opinion was binding precedent.⁶¹

⁵⁵ Six justices rendered opinions. Justice Powell provided the plurality opinion. *Id.* at 269-320. Justice Brennan concurred and dissented in part. *Id.* at 324-79. Justice White wrote an opinion to express his need to address the question of whether Bakke may file suit under title VI. *Id.* at 380-87. Justice Marshall wrote his own opinion arguing that the special admissions program was constitutional. *Id.* at 387-402. Justice Blackmun wrote an opinion to add some general observations and a few comments on equal protection. *Id.* at 402-08. Justice Stevens concurred and dissented in part. *Id.* at 408-21.

⁵⁶ For intermediate scrutiny rationale, see *id.* at 362-69. For rationale upholding legitimate response to societal discrimination, see *id.* at 369-76. The Brennan Group consisted of Justices Brennan, White, Marshall, and Blackmun. *Id.* at 324 (Brennan, J., concurring in part, dissenting in part).

⁵⁷ *Id.* at 411-21. Justice Stevens concluded that under title VI, the government cannot use race to exclude anyone from participating in a federally funded program. *Id.* at 418. The Stevens Group consisted of Chief Justice Berger and Justices Stevens, Stewart, and Rehnquist. *Id.* at 408 (Stevens, J., concurring in part, dissenting in part).

⁵⁸ *Id.* at 315-20.

⁵⁹ *Id.* at 311-15.

⁶⁰ *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003).

⁶¹ Compare *Encore Videos v. City of San Antonio*, 310 F.3d 812, 819 n.10 (5th Cir. 2002) (stating that "[In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)] we refused to follow Justice Powell's single-Justice opinion in [*Bakke*] because his argument garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case."), and *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (stating that "[T]he *Bakke* Court did not express a majority view and is questionable as binding precedent."), and *Johnson v. Bd. of Regents*, 106 F. Supp. 2d 1362, 1369 (S.D. Ga. 2000) (stating that "Justice Powell's opinion regarding the compelling nature of student body diversity in university admissions is not binding precedent, although of course it carries some persuasive weight."), and *Brewer v. West Irondequoit Cent. Sch. Dist.*, 32 F. Supp. 2d 619, 628 (W.D.N.Y. 1999) (stating that "Justice Powell's lone opinion in *Bakke* is hardly conclusive

1. The Fifth Circuit: *Hopwood v. Texas*

The Fifth Circuit rejected Justice Powell's diversity rationale in *Hopwood v. Texas*.⁶² *Hopwood* involved the review of the admissions process at the University of Texas School of Law ("Law School").⁶³ The Law School afforded African American and Mexican American applicants lower index score ranges for admission.⁶⁴ It assigned an index score to all applicants based on their undergraduate GPA and LSAT score.⁶⁵ It used the scores to filter out applicants during the initial stages of review.⁶⁶ The Law School also reviewed African American and Mexican American applicants through a separate admissions committee.⁶⁷

After the Law School rejected them, four white applicants sued the school, alleging that the admissions process violated the Equal Protection Clause.⁶⁸ The district court accepted two proffered reasons as compelling interests in its strict scrutiny analysis: (1) obtaining student body diversity and (2) overcoming past effects of discrimination.⁶⁹ It struck down the use of the special admissions committee, finding that it was not narrowly tailored to achieve these interests.⁷⁰ However, it upheld the part of the process which treated the index scores differently based on race, finding that it merely gave minorities a "plus."⁷¹

authority to justify the Program.") *aff'd*, 263 F.3d 1234 (11th Cir. 2001) (refusing to address whether Justice Powell's opinion in *Bakke* was binding precedent), *with* *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (holding that district court "correctly decided that Justice Powell's opinion in *Bakke* described the law").

⁶² *Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996) (holding that use of race to achieve diversity can never be compelling enough to meet strict scrutiny standard).

⁶³ *Hopwood*, 78 F.3d at 935.

⁶⁴ *Id.* at 936.

⁶⁵ *Id.* at 935. The school called the index score the Texas Index ("TI") number. *Id.* at 935.

⁶⁶ *Id.* The Law School placed applicants into one of three categories based on their TI numbers: "presumptive admit," "presumptive deny," and "discretionary zone." *Id.* Those in the "discretionary zone" received the most extensive scrutiny. *Id.* at 936. The admissions committee also considered the strength of an applicant's undergraduate education, the difficulty of major, trends in grades, and the qualities the applicant could contribute to the law school. *Id.* at 935.

⁶⁷ *Id.* at 937.

⁶⁸ *Id.* at 938. The applicants were Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers. *Id.* The four applied for the class of 1992. *Id.* at 938.

⁶⁹ *Id.* at 938.

⁷⁰ *Id.*

⁷¹ *Id.*

The Fifth Circuit reversed, holding that attainment of student body diversity was not a compelling interest.⁷² It reasoned that Justice Powell's opinion in *Bakke* was not binding precedent.⁷³ It pointed out that none of the other justices in the *Bakke* court even mentioned the diversity rationale.⁷⁴ Nor had the Supreme Court ever accepted the rationale as a compelling state interest in subsequent relevant cases.⁷⁵ The Fifth Circuit interpreted the Supreme Court cases to permit only remedial measures to justify racial classifications.⁷⁶ It held that diversity would never be sufficiently compelling to meet strict scrutiny.⁷⁷ Consequently, it struck down the admissions program.⁷⁸

2. The Ninth Circuit: *Smith v. University of Washington Law School*

The Ninth Circuit took the opposite view in *Smith v. University of Washington Law School*.⁷⁹ In *Smith*, three Caucasians (collectively "Smith") brought a class action against the University of Washington Law School ("Law School") for racial discrimination in its admissions policies.⁸⁰ Smith moved for partial summary judgment on the claim that the Law School may not use race as a factor in achieving educational diversity.⁸¹ The district court denied the motion, and the Ninth Circuit affirmed, concluding that Justice Powell's *Bakke* opinion set forth the law.⁸² The Ninth Circuit held that the Fourteenth Amendment permits use of race in university admissions programs and that educational diversity is a compelling governmental interest which withstands strict scrutiny.⁸³

⁷² *Id.* at 944.

⁷³ *Id.* See *supra* Part I.B for a discussion of *Bakke*.

⁷⁴ *Hopwood*, 78 F.3d at 944.

⁷⁵ *Id.* The Supreme Court had previously upheld the diversity rationale in *Metropolitan Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990). However, in that case, the Supreme Court applied intermediate scrutiny. *Metro. Broad.*, 497 U.S. at 564-65. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), later overruled *Metropolitan Broadcasting*. *Adarand*, 515 U.S. at 227.

⁷⁶ *Hopwood*, 78 F.3d at 944-45.

⁷⁷ *Id.* at 948.

⁷⁸ *Id.* at 962.

⁷⁹ *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200-01 (9th Cir. 2000) (holding that student body diversity is compelling governmental interest).

⁸⁰ *Id.* at 1191.

⁸¹ *Id.*

⁸² *Id.* at 1191, 1201.

⁸³ *Id.* at 1200-01.

3. The Other Circuit Courts

Other circuit courts also addressed the diversity rationale's validity. The First, Second, Fourth, Seventh, Tenth, and Eleventh Circuits, however, declined to resolve the issue.⁸⁴ The Sixth Circuit agreed with the Ninth Circuit that Justice Powell's opinion is binding precedent.⁸⁵ But the D.C. Circuit agreed with the Fifth Circuit that diversity cannot be a compelling interest.⁸⁶ The resulting discordance among the circuits set the backdrop against which *Grutter* emerged.

II. *GRUTTER V. BOLLINGER*

On June 23, 2003, the United States Supreme Court resolved the circuit split in *Grutter v. Bollinger*.⁸⁷ The Supreme Court declared that diversity is a compelling governmental interest that can justify the use of race in university admissions.⁸⁸ Thus, it formally recognized the validity of the diversity rationale.

A. *Facts*

The University of Michigan Law School ("Law School") created an admissions policy to achieve student body diversity.⁸⁹ The policy required admissions officials to evaluate applicants individually.⁹⁰ The

⁸⁴ See *Johnson v. Univ. of Ga.*, 263 F.3d 1234, 1244 (11th Cir. 2001) (finding it unnecessary to resolve the issue); *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2nd Cir. 2000) (concluding that compelling interest may be found in reducing racial isolation); *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 130 (4th Cir. 1999) (choosing to leave issue unresolved); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) (noting that, aside from remedial rationale, other justifications for affirmative action are "unsettled," and citing *Bakke*); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 499 (10th Cir. 1998) (noting "absence of a clear majority opinion" in *Bakke*, but basing opinion on other grounds); *Wessmann v. Gittens*, 160 F.3d 790, 795, 800 (1st Cir. 1998) (declining to rule on issue because defendant's issue is different from one in *Bakke*).

⁸⁵ *Grutter v. Bollinger*, 288 F.3d 732, 816 (6th Cir. 2002).

⁸⁶ See *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (stating that diversity cannot be elevated to compelling level).

⁸⁷ See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding that attainment of diverse student body in context of public higher education is compelling state interest justifying use of race in admissions). The Supreme Court granted certiorari to resolve the circuit split. *Id.* at 322.

⁸⁸ *Id.* at 328.

⁸⁹ *Id.* at 314. The Law School attempted to design a policy compliant with *Bakke*. *Id.* at 314-15.

⁹⁰ *Id.* at 315. The officials evaluated each applicant based on their undergraduate GPA, LSAT score, personal statement, letters of recommendation, an essay describing their

policy reaffirmed the Law School's commitment to racial and ethnic diversity, specifically targeting the inclusion of African Americans, Hispanics, and Native Americans.⁹¹ The school recognized these minority groups as "underrepresented" and sought to enroll a "critical mass" of them.⁹²

Barbara Grutter, a Caucasian female, applied for admission to the Law School in 1996.⁹³ The school rejected her application.⁹⁴ Consequently, Grutter sued, alleging racial discrimination in violation of the Fourteenth Amendment.⁹⁵

B. Procedural Setting

Applying strict scrutiny, the district court held that the Law School's use of race was unlawful.⁹⁶ It granted declaratory relief and enjoined the school from using race as a factor in its admissions decisions.⁹⁷ It found that *Bakke* did not formally recognize attainment of racial diversity as a compelling state interest.⁹⁸ The court said that even if it was a compelling interest, the Law School's use of race was not narrowly tailored to achieve that interest.⁹⁹

potential to contribute to the school's diversity, and other criteria known as "soft variables." *Id.* Soft variables included factors such as the enthusiasm of recommenders, the quality of the undergraduate institution, the applicant's essay, and the areas and difficulty of undergraduate course selection. *Id.*

⁹¹ *Id.* at 316.

⁹² *Id.* The Director of Admissions and the Dean of the Law School defined "critical mass" as "meaningful numbers" or "meaningful representation" such that underrepresented minorities did not feel isolated. *Id.* at 318-19. The school believed a critical mass of underrepresented minority groups would ensure the minority students' ability to contribute to the Law School's diversity and character. *Id.* at 315. No numbers or percentages constitute a critical mass. *Id.* at 315-16.

⁹³ *Id.* at 316.

⁹⁴ *Id.*

⁹⁵ *Id.* at 317. Grutter later moved for class certification. *See id.* The Court granted the motion and certified the class 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." *Id.*

⁹⁶ *Id.* at 321.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

The Sixth Circuit reversed the judgment and vacated the injunction.¹⁰⁰ It held that Justice Powell's plurality opinion was binding precedent.¹⁰¹ It also held that the Law School's use of race was narrowly tailored to achieve racial diversity because it was only a "plus" factor in the admissions decision rather than part of a quota system.¹⁰² The Supreme Court granted certiorari to review the Sixth Circuit's decision.

C. *Rationale*

The Supreme Court affirmed the Sixth Circuit's reversal.¹⁰³ It endorsed Justice Powell's opinion in *Bakke*.¹⁰⁴ It also reaffirmed that courts must analyze all racial classifications under strict scrutiny.¹⁰⁵

The Law School had asked the Supreme Court to recognize that it had a compelling interest in attaining student body diversity.¹⁰⁶ The Supreme Court held that the school's interest was indeed compelling.¹⁰⁷ Moreover, the Court believed that it should defer to the Law School's judgment that diversity was essential to its educational mission.¹⁰⁸ The Court explained that educational institutions occupy a special niche under the Constitution.¹⁰⁹ Grounded in the First Amendment, educational autonomy afforded educational institutions the right to select students who would contribute most to the "robust exchange of ideas."¹¹⁰

The Supreme Court also held that the Law School's admissions program was narrowly tailored to achieve student body diversity.¹¹¹ The program did not operate as a quota.¹¹² Rather, it afforded all applicants

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* Four justices dissented, finding the use of race unconstitutional. *Id.* Three justices dissented on the grounds that the Law School's interest in diversity was not compelling. *Id.* One justice thought the use of race was not narrowly tailored and did not decide whether diversity was a compelling interest. *Id.* at 321-22.

¹⁰³ *Id.* at 343-44.

¹⁰⁴ *Id.* at 325, 328-30.

¹⁰⁵ *Id.* at 326 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

¹⁰⁶ *Id.* The Law School argued that it used race in its admissions decisions to obtain educational benefits that flow from student body diversity. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 329.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 334.

¹¹² *Id.* at 335. The Supreme Court concluded that the program did not allocate a number of spaces for members of certain groups or insulate individuals from comparison with other applicants for available seats. *Id.*

individualized review and adequately considered all factors, in addition to race and ethnicity, that may contribute to diversity.¹¹³ The Court found that individualized inquiries would preclude harm to nonminority applicants.¹¹⁴ Thus, the policy of enrolling a "critical mass" of minority students to ensure class diversity was constitutional.¹¹⁵

The Court also found that a "critical mass" would provide the educational benefits that stem from diversity.¹¹⁶ The benefits include "cross-racial understanding," breaking down of racial stereotypes, and enabling students to understand others of different races.¹¹⁷ The Court thought that classrooms with students of diverse backgrounds would result in livelier class discussions.¹¹⁸ The Court also believed that diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."¹¹⁹ Further, the benefits from exposure to diverse people, cultures, ideas, and viewpoints will enhance the skills needed in the global marketplace.¹²⁰ Also, even the military officer corps desires service of those highly qualified and racially diverse.¹²¹

Conclusively, the Supreme Court held that attainment of diversity is a compelling interest that can justify the use of race in university admissions.¹²² It upheld the Law School's program, finding it narrowly tailored to achieve that interest.¹²³ Thus, the Law School's admissions policy withstood strict scrutiny.¹²⁴

III. ANALYSIS

In light of the *Grutter* holding, the law stands as follows. First, courts must analyze all racial classifications under strict scrutiny.¹²⁵ Second, in the context of higher education, diversity is a compelling interest in the

¹¹³ *Id.* at 337-39.

¹¹⁴ *Id.* at 341.

¹¹⁵ *Id.* at 330. See *supra* note 92 for a definition of "critical mass."

¹¹⁶ *Grutter*, 539 U.S. at 330.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 331.

¹²² *Id.* at 328.

¹²³ *Id.* at 334.

¹²⁴ *Id.* at 343.

¹²⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that courts must analyze all racial classifications, whether imposed by federal, state, or local governmental actor, under strict scrutiny).

strict scrutiny analysis.¹²⁶

Grutter appears to settle the issue of affirmative action in higher education. The *Grutter* decision, however, fails to address the needs of Asian Americans. This section will highlight the inadequacy of the current state of equal protection jurisprudence with respect to Asian Americans. First, the Supreme Court ignored the unique situation of Asian Americans in establishing this new law.¹²⁷ Second, the diversity rationale becomes problematic when applied to Asian Americans.¹²⁸ In the Asian American context, it becomes amorphous and overlooks the needs of "underrepresented" Asian Americans.¹²⁹ Third, in allowing schools to exclude all Asian Americans from affirmative action programs, the Supreme Court contradicts some of its own justifications for upholding the diversity rationale.¹³⁰

A. *In Upholding the Diversity Rationale, the Supreme Court Ignored the Anomalous Situation of Asian Americans*

In *Bakke* and *Grutter*, the Supreme Court was aware that the status of Asian Americans differed from that of the other minority groups.¹³¹ Yet, where the Court acknowledged Asian Americans, it did so only in brief dicta, offhand remarks, or footnotes.¹³² This failure to consider Asian Americans in establishing equal protection jurisprudence perpetuates their exclusion from the affirmative action debate.

In *Bakke*, the Supreme Court recognized that Asian Americans received preferential treatment despite higher admission rates compared to other minorities.¹³³ According to the facts, from 1971 through 1974, the special

¹²⁶ *Grutter*, 539 U.S. at 328 (holding that attainment of student body diversity is compelling interest which may justify use of race in public higher education admissions).

¹²⁷ See *infra* Part III.A.

¹²⁸ See *infra* Part III.B.

¹²⁹ In this context, by "underrepresented" Asian Americans, I refer to disadvantaged Asian ethnic groups who are not as apparent in higher education, such as Filipinos, Pacific Islanders, and Southeast Asians (e.g., Vietnamese, Hmong, Laotians, and Cambodians). I place emphasis on Southeast Asians because members of these groups are typically disadvantaged. Harvey Gee, *Why Did Asian Americans Vote Against the 1996 California Civil Rights Initiative?*, 2 LOY. J. PUB. INT. L. 1, 49 n.190 (2001). They are also less educated than other Asian immigrants, live at or below the poverty line, and rely greatly on public assistance for their livelihood. *Id.*

¹³⁰ See *infra* Part III.C.

¹³¹ See *infra* Part III.A for a discussion of references to Asian Americans in *Bakke* and *Grutter*.

¹³² See *infra* Part III.A; see also Wu, *supra* note 6, at 250 (noting that courts in affirmative action cases relegate Asian Americans to status of footnotes).

¹³³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 274-76 (1978).

admissions program admitted twelve Asians out of sixty-three minority students.¹³⁴ The regular admissions program, however, admitted thirty-seven Asians out of forty-four minority students.¹³⁵ The facts also stated that the first matriculating class in 1968 consisted of three Asians in an otherwise all white student body.¹³⁶ These statistics indicate that Asian Americans, compared to other minority racial groups, were more likely to gain admission without affirmative action.¹³⁷

Though aware of these facts, the Supreme Court barely questioned the preferential treatment given to Asian American applicants.¹³⁸ Justice Powell was the only justice who did so. In light of the substantial numbers of Asian Americans admitted through the regular admissions program, Justice Powell questioned the Medical School's choice of Asian Americans as a preferred group.¹³⁹ However, he only noted this in a brief footnote.¹⁴⁰ Justice Powell also noted, in another footnote, that "nothing is said about Asians" in Justice Brennan's opinion (which argued that remedying societal discrimination was a compelling interest).¹⁴¹ Despite being aware of the higher admission rates of Asian Americans, the Supreme Court did not make any effort to address this aberration.¹⁴²

¹³⁴ *Id.* at 275. The Medical School considered "Blacks," "Chicanos," "American Indians," and "Asians" as minority groups. *Id.* at 274. The school forwarded applications of applicants who indicated membership in these groups to the special admissions committee. *Id.* The special admissions program admitted 21 African Americans and 30 Mexican Americans. *Id.* at 275.

¹³⁵ *Id.* at 276. The regular admissions program admitted one African American and six Mexican Americans. *Id.*

¹³⁶ *Id.* at 272.

¹³⁷ The statistics show that Asian Americans constitute 84% of the minorities admitted through the regular admissions program while only comprising 12% of minorities admitted through the special admissions program. *See id.* at 275-76.

¹³⁸ Only Justice Powell mentioned the status of Asian Americans, albeit in a short footnote and in an inquiry rather than a conclusion. *Id.* at 309 n.45. The other opinions do not mention Asian Americans. Even where the Court analyzed statistics of minorities, the Court only mentioned African Americans and Chicanos. *Id.* at 324-75 (Brennan, J., concurring in part, dissenting in part).

¹³⁹ *Id.* at 309 n.45 ("The inclusion of [Asians in the program] is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process.").

¹⁴⁰ *See id.*

¹⁴¹ *Id.* at 296 n.36. Although Justice Brennan consistently gave statistical information on how discrimination affected the opportunities of minorities, he failed to make any references to Asian Americans. *See id.* at 324-78 (Brennan, J., concurring in part, dissenting in part).

¹⁴² Granted, the status of Asian Americans was not a specific controversy before the Court. The Supreme Court does not render advisory opinions on issues which the parties do not present before it. *E.g.*, *United States Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 446 (1993).

References to Asian Americans in *Grutter* were even more trivial. The only allusion to Asian Americans was the testimony of the chair of the Law School's admissions policy drafting committee.¹⁴³ The chair admitted that the school did not include Asian Americans in its policy to promote racial and ethnic diversity because it already admitted Asian Americans in significant numbers.¹⁴⁴ The Supreme Court incorporated this testimony in the facts, but it neither addressed nor questioned the statement.¹⁴⁵

Thus, in establishing new law in equal protection jurisprudence, the Supreme Court was aware that the Asian American situation differed from that of other minority racial groups.¹⁴⁶ Yet, when given the opportunity to inquire further for clarification, the Court either acknowledged it only in offhand remarks or chose to ignore it altogether.¹⁴⁷ This indifference perpetuates the exclusion of Asian Americans from the affirmative action debate.

B. Applying the Diversity Rationale to Asian Americans Will Be Problematic

The Supreme Court's failure to inquire into the Asian American situation while establishing new law leads to potential problems. This section presents two problems in applying the diversity rationale to Asian Americans. First, the rationale would allow schools to be inconsistent in determining whether Asian Americans contribute to diversity.¹⁴⁸ Second, the Supreme Court excludes "underrepresented" Asian Americans from its view of "diversity."¹⁴⁹

¹⁴³ *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003).

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See id.* (noting testimony stating that although Asian Americans experienced discrimination, they do not stand to gain preferential treatment); *Bakke*, 438 U.S. at 272, 274-76 (noting statistics on Asian American admissions rate compared to that of other minority racial groups).

¹⁴⁷ *See Grutter*, 539 U.S. at 319 (failing to address testimony that school did not give Asian Americans preferential treatment despite past discrimination); *Bakke*, 438 U.S. at 309 n.45 (questioning inclusion of Asian Americans in special admissions program briefly in footnote).

¹⁴⁸ *See infra* Part III.B.1.

¹⁴⁹ *See infra* Part III.B.2.

1. "Diversity" Becomes an Amorphous Concept with Respect to Asian Americans

In prior affirmative action cases, schools were not unanimous in deciding whether Asian Americans contribute to diversity.¹⁵⁰ In 1978, the Medical School in *Bakke* entitled Asian Americans to preferential treatment.¹⁵¹ Conversely, in 2003, the law school in *Grutter* excluded Asian Americans from its view of racial and ethnic diversity.¹⁵² The *Grutter* Court did not address this distinction. Thus, diversity may have had a different meaning in 1978 than it did in 2003. One school may encompass Asian Americans in "diversity," but another school may exclude them.

However, the Supreme Court authorizes schools to determine the definition of "diversity" they choose to adopt.¹⁵³ In *Grutter*, Justice O'Connor recognized the tradition of deferring to a university's academic decisions.¹⁵⁴ She acknowledged that educational institutions occupy a special niche under the Constitution.¹⁵⁵ *Id.* She explained that educational autonomy, grounded in the First Amendment, affords

¹⁵⁰ See *DeFunis v. Odegaard*, 416 U.S. 312, 323 (1974) (noting that admissions program favors Filipinos, but not other Asian Americans). Compare *Bakke*, 438 U.S. at 274 (noting that UC Davis Medical School considers Asian Americans minority group), and *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1241 (11th Cir. 2001) (noting that University of Georgia gives Asian Americans preferential treatment), and *DeRonde v. Regents of the Univ. of Cal.*, 625 P.2d 220, 222-23 (Cal. 1981) (noting that UC Davis Law School considers Asian ethnic minority status), with *Grutter*, 539 U.S. at 316 (noting that University of Michigan Law School excludes Asians from policy of promoting diversity), and *Gratz v. Bollinger*, 539 U.S. 244, 253-54 (2003) (noting that University of Michigan undergraduate program does not consider Asian Americans underrepresented minorities), and *Farmer v. Ramsay*, 159 F. Supp. 2d 873, 882 n.30 (D. Md. 2001) (noting that school considers Asians "non-preferred" minorities), and *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tx. 1994) (noting that University of Texas Law School excludes Asians from affirmative action program), and *DiLeo v. Bd. of Regents of the Univ. of Colo.*, 590 P.2d 486, 490 (Colo. 1978) (noting that law school excludes Asian Americans from Special Academic Assistance Program).

¹⁵¹ *Bakke*, 438 U.S. at 274.

¹⁵² *Grutter*, 539 U.S. at 316. The University of Michigan Law School actually has excluded Asian Americans from its affirmative action program since 1975. Symposium, *Rethinking Racial Divides-Panel on Affirmative Action*, 4 MICH. J. RACE & L. 195, 202-03 (1998) [hereinafter Symposium]. The UC Davis Medical School included Asian Americans in its program in 1978. This difference reinforces the argument that schools have long been inconsistent in determining whether Asian Americans contribute to student body diversity.

¹⁵³ See *Grutter*, 539 U.S. at 328 (acknowledging that courts should defer to schools' judgments with respect to choosing student body).

¹⁵⁴ *Id.* ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutional limits.")

¹⁵⁵ *Id.*

schools the right to select students who will contribute most to the "robust exchange of ideas."¹⁵⁶ She also supported Justice Powell's acknowledgment that a university's educational autonomy includes the freedom to select its own student body.¹⁵⁷

Examples demonstrate, however, a lack of objective, constitutional standards that admissions committee members use in determining the beneficiaries of affirmative action.¹⁵⁸ In his dissent in *Grutter*, Justice Kennedy expressed his concern that deference to schools' judgments may result in unfair and unconstitutional consequences.¹⁵⁹ He also noted the testimony of a dean who stated that faculty members were "breathhtakingly cynical" in deciding who qualifies as an underrepresented ethnic minority.¹⁶⁰ Furthermore, one scholar noted that the University of Michigan Law School has excluded Asian Americans from its affirmative action program since 1975.¹⁶¹ The justification for this exclusion was that there were enough Asian American students attending the school and enough Asian American lawyers in the community.¹⁶² Deference to schools' judgments, therefore, will allow school officials to employ almost any criteria in excluding Asian Americans from preferential treatment. Thus, the *Grutter* Court basically entrusts schools to decide who benefits from their affirmative action programs. The Court does not monitor whether schools include or exclude Asian Americans as beneficiaries.¹⁶³ It detrimentally subjects preferential treatment of Asian Americans to the whim of school admissions officials.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* ("The freedom of a university to make its own judgments as to education includes the selection of its student body.") (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)). See also *supra* note 52 for Justice Powell's reasoning in *Bakke*.

¹⁵⁸ See *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (noting testimony acknowledging that school officials were "breathhtakingly cynical" in determining which groups should receive preferential treatment); see also Symposium, *supra* note 152, at 202-03 (noting that University of Michigan Law School excluded Asian Americans from affirmative action program because school officials deemed that there were enough Asian Americans attending school and that there were enough Asian American lawyers in community).

¹⁵⁹ *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting).

¹⁶⁰ *Id.*

¹⁶¹ Symposium, *supra* note 152, at 202-03.

¹⁶² *Id.*

¹⁶³ See *Grutter*, 539 U.S. at 328-30 (reaffirming notion that courts are to defer to school judgments in selection of student body).

2. The Diversity Rationale Overlooks "Underrepresented" Asian Americans

The Supreme Court's deference to schools' judgments will further lead to detrimental consequences for Asian Americans. It sanctions the notion that Asian Americans are a homogenous group.¹⁶⁴ Many higher education affirmative action cases involve programs where Asian Americans are not a preferred group.¹⁶⁵ Some programs exclude Asian Americans from preferential treatment because their respective schools already admit Asian Americans in significant numbers.¹⁶⁶ Other programs exclude Asian Americans because the schools deem Asian Americans to have possessed the educational and cultural opportunities to qualify for admission without assistance.¹⁶⁷ These justifications reinforce the fallacy that members of all Asian American ethnic groups are capable of gaining admission into universities without the assistance of affirmative action programs. In essence, these schools perpetuate the stereotypes of the "model minority" myth.¹⁶⁸

¹⁶⁴ See Grace W. Tsuang, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659, 678 n.3 (1989) (noting that despite diverse cultural, historic, and ethnic backgrounds of Asian Americans, most universities collect data on "Asian Americans" as single group); see also *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 832 (E.D. Mich. 2001) (noting that Law School collects information on Asian Americans as single group).

¹⁶⁵ See *Grutter*, 539 U.S. at 315-17 (noting that program does not favor Asian Americans); *Gratz v. Bollinger*, 539 U.S. 244, 244 (2003) (noting that program does not favor Asian Americans); *Farmer v. Ramsay*, 159 F. Supp. 2d 873, 882 (D. Md. 2001) (noting that school considers Asians "non-preferred" minorities); *Hopwood v. Texas*, 861 F. Supp. 551, 561-62 (W.D. Tex. 1994) (noting that program only favors African Americans and Mexican Americans); *DiLeo v. Bd. of Regents of the Univ. of Colo.*, 590 P.2d 486, 490 (Colo. 1978) (noting that school excludes Asian Americans from Special Academic Assistance Program); see also Symposium, *supra* note 152, at 202-03 (noting that University of Michigan Law School encouraged only African Americans, Mexican Americans, Native Americans, and Puerto Ricans to apply). *But see DeFunis v. Odegaard*, 416 U.S. 312, 323 (1974) (noting that program favors Filipinos, although not other Asian Americans); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1241 (11th Cir. 2001) (noting that admissions policy gives Asian Americans preferential treatment); *DeRonde v. Regents of the Univ. of Cal.*, 625 P.2d 220, 222-23 (Cal. 1981) (noting that school includes Asian Americans in affirmative action program).

¹⁶⁶ See *Grutter*, 539 U.S. at 319-21 (noting testimony that Asians do not receive preferential treatment because they have already been admitted in significant numbers); *DeFunis v. Odegaard*, 507 P.2d 1169, 1174 n.3 (Wash. 1973) (noting testimony that Asian Americans, except Filipino Americans, do not receive preferential treatment because school can admit significant number of them without favorable treatment).

¹⁶⁷ See *DiLeo*, 590 P.2d at 490 (noting that law school declared Asian Americans ineligible for program because they do not meet criteria of being underrepresented in legal field and being educationally or culturally disadvantaged).

¹⁶⁸ The "model minority" myth is a stereotype that emanated in the 1960s portraying

Grutter reflects the Supreme Court's adoption of the notion that all Asian Americans fall under the stereotype.¹⁶⁹ The *Grutter* court assumed that it could determine whether Asian Americans may receive favored treatment merely by examining the numbers already attending higher education institutions.¹⁷⁰ In *Bakke*, Justice Powell did not think the school should favor Asian Americans because the school already admitted "substantial numbers" of them.¹⁷¹ In *Grutter*, however, where the Law School excluded Asian Americans from preferential treatment, the Court refrained from questioning the school's judgment.¹⁷² It did not question the school's reason for the exclusion — that the school already admitted Asian Americans in "significant numbers."¹⁷³ Implicit in these responses is that the Supreme Court views Asian Americans as a monolithic group. It did not necessarily further inquire about the composition of these "substantial" or "significant" numbers or whether the numbers consisted of "underrepresented" Asian Americans.

The Supreme Court cannot assume that the experiences and achievements of all Asian American ethnic groups are uniform for equal protection purposes. By doing so, it ignores the ethnic groups which have just as much to gain from affirmative action as African Americans and Hispanics. As one scholar has noted, the socioeconomic positions of Southeast Asians are similar to that of African Americans rather than that of whites.¹⁷⁴ Furthermore, Southeast Asians and Filipinos are underrepresented in higher education institutions.¹⁷⁵ Grouping

Asian Americans as super-minorities. Chin et al., *supra* note 6, at 148-51. The myth emphasizes the success of Asian Americans and depicts them as racial minorities that have succeeded through school and hard work. *Id.* The myth, however, is misleading because it is based on statistics showing that Asian American household incomes are equal to or are higher than that of whites. *Id.* Many reasons, such as extended family living arrangements, the concentration in states with higher costs of living, and the census's inclusion of Hispanics as whites, contribute to the higher household income of Asian Americans. *Id.* The myth is also dangerous because it portrays all Asian ethnic groups as being uniformly successful, ignoring the disadvantaged ethnic groups' need for help. *Id.*

¹⁶⁹ See *Grutter*, 539 U.S. at 319-21 (acknowledging that Asians do not receive preferential treatment because school already admits them in significant numbers).

¹⁷⁰ See *Grutter*, 539 U.S. at 319, 321 (failing to question school's judgment that Asian Americans do not need preferential treatment merely because significant numbers of them already attend school).

¹⁷¹ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 297 n.39 (1978) (questioning school's decision to admit Asians through special admissions program).

¹⁷² See *Grutter*, 539 U.S. at 319, 321 (noting testimony of school official that Asians were not included in program due to substantial numbers already attending school).

¹⁷³ *Id.*

¹⁷⁴ Wu, *supra* note 6, at 245-46.

¹⁷⁵ See Kidder, *supra* note 6, at 42 (noting that although Filipinos represent one of largest

Southeast Asians and Filipinos with more “accomplished” ethnic groups, such as the Chinese, Japanese, and Koreans, deprives them of the benefits of affirmative action.¹⁷⁶

Granted, however, under *Grutter*, an admissions program may only use race as a “plus” factor and must afford all applicants individualized review.¹⁷⁷ Justice O’Connor noted that schools must consider all elements of diversity in light of the qualifications of each applicant.¹⁷⁸ The Supreme Court upheld the admissions policy in *Grutter* because it provided a holistic review of each individual’s application and considered the myriad ways an applicant can contribute to diversity.¹⁷⁹ The policy included the experience of having been a Vietnamese boat person as one of the bases for diversity.¹⁸⁰ The California Supreme Court had also mentioned how an “oriental refugee from Asian communism” can benefit as a “victim of deprivation.”¹⁸¹ Thus, one may contend that individualized review will potentially distinguish these “underrepresented” Asian Americans from the others.

There is no guarantee, however, that individualized review can really accomplish this goal. Courts, including the United States Supreme Court itself, have never set a proper example. In his part-concurrence, part-dissent in *Grutter*, Justice Scalia agreed that discrimination among preferred groups is unconstitutional.¹⁸² He acknowledged that the only

Asian American subgroups, few attend college, graduate, or professional school); Symposium, *supra* note 152, at 211-12 (noting Vietnamese, Pacific Islander, and Filipinos (groups categorized under “Asian Subgroups”) comprise only 2% of 16% of minorities at Boalt Hall under the post-Proposition 209 policy). These “Asian Subgroups” — Vietnamese, Pacific Islanders, Samoans, Tongans, Cambodians, Laotians, and Hmong — also lag behind in educational levels. *Id.* at 215; see also *DeFunis v. Odegaard*, 416 U.S. 312, 338 (1974) (recognizing that University of Washington considered Filipinos favored group, but excluded Chinese and Japanese).

¹⁷⁶ *Ho v. S.F. Unified Sch. Dist.*, 965 F. Supp. 1316, 1319 (N.D. Cal. 1997) (noting that public “alternative” high school requires Chinese Americans to achieve higher index scores for admission than applicants of other racial/ethnic minority groups); Symposium, *supra* note 152, at 211-12 (noting Chinese, Koreans, and Japanese make up 11% of the 16% of minorities at Boalt Hall under post-209 policy).

¹⁷⁷ *Grutter*, 539 U.S. at 334-36.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 335-37. The court gave the following examples of individuals who may contribute to diversity: one who lived abroad, one who is fluent in several languages, one who has overcome adversity, one who has an extensive community service background, or one who is successful in other career fields. *Id.* at 337-39.

¹⁸⁰ *Grutter v. Bollinger*, 288 F.3d 732, 736 (6th Cir. 2002).

¹⁸¹ *DeRonde v. Regents of the Univ. of Cal.*, 625 P.2d 220, 233 (Cal. 1981) (Mosk, J., dissenting).

¹⁸² *Grutter*, 539 U.S. at 372-73 (Scalia, J., concurring in part, dissenting in part). Justice Scalia recognized that this type of discrimination balances race within the preferred groups

appropriate use of race was to distinguish between “underrepresented minority applicants and those of other races.”¹⁸³ In light of these conclusions, he stated that the Law School may not discriminate between “similarly situated” African Americans and Hispanics, or between Asians and whites.¹⁸⁴ This statement demonstrates Scalia’s view of Asian Americans as a monolithic group. Thus, even courts adopt the stereotype that all Asian American ethnic groups are similar. This adoption undermines the view that “underrepresented” Asian Americans can distinguish themselves through individualized review.

The view of Justice Mosk, formerly of the California Supreme Court, is another example of how courts may not discern this need of “underrepresented” Asian Americans.¹⁸⁵ Arguing against the constitutionality of an educational affirmative action scheme, Justice Mosk questioned the scheme’s inclusion of Asian Americans.¹⁸⁶ He strongly believed that Asian Americans do not need preferential treatment in public universities.¹⁸⁷ He asserted that “no ethnic group in our society is better adjusted, completely accepted and more successful academically and economically than Asian Americans.”¹⁸⁸ However, his reference to Asian Americans as an “ethnic” group demonstrates his ignorance that many different ethnicities comprise the broader Asian race. His statement reinforces the notion that Asian Americans are viewed as a homogenous group.

Thus, courts, including the United States Supreme Court, erroneously view Asian Americans as a uniform, successful group. If judges and courts do not distinguish between the “overrepresented” and “underrepresented” Asian Americans, they may continue overlooking the needs of Asian Americans in equal protection jurisprudence. What

rather than ensure enrollment of more underrepresented students. *Id.* at n.12.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 372-73.

¹⁸⁵ See *DeRonde*, 625 P.2d at 235 (Mosk, J., dissenting) (asserting that Asian Americans do not deserve preferential treatment).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (stating that “[n]one of the foregoing [statistics] would suggest to any objective observer that Asian Americans require preferential treatment in publicly financed schools of higher learning”). Justice Mosk credited “extensive lobbying efforts” for maintaining their inclusion in the program. *Id.*

¹⁸⁸ *Id.* For support, Justice Mosk provided statistics from 1970 on the academic and economic status of Chinese, Japanese, Filipino, Korean Americans, and “new arrivals from Vietnam.” See *id.* (citing statistics from U.S. COMM’N ON CIVIL RIGHTS, SUCCESS OF ASIAN AMERICANS: FACT OR FICTION? 3-4 (1980)). Although Justice Mosk seemed to be aware of some of the different ethnicities of the broader Asian race, he still referred to the broader “Asian American” category as an “ethnic” group. See *id.*

the “underrepresented” Asian Americans need is the law’s formal recognition that the current state of equal protection jurisprudence does not fully address their needs.

C. *In Allowing Schools to Exclude All Asian Americans from Affirmative Action Programs, the Supreme Court Undermines Some of Its Own Justifications for Upholding the Diversity Rationale*

The Supreme Court believes that the substantial benefits of student body diversity include promotion of cross-racial understanding and breaking down of racial stereotypes.¹⁸⁹ The Court also believes that a student body with the “greatest possible variety of backgrounds” offers the benefit of promoting different viewpoints.¹⁹⁰ The Court, nonetheless, contradicts these justifications by failing to recognize the heterogeneity of Asian Americans.¹⁹¹

By not recognizing the diversity among Asian Americans, the Court perpetuates, rather than breaks down, entrenched Asian American stereotypes.¹⁹² One scholar observed that most universities currently collect data on “Asian Americans” or “Oriental Americans,” treating Asians as a single, uniform group.¹⁹³ Furthermore, a California Supreme Court justice had erroneously referred to Asian Americans as an ethnic group, rather than as a racial group consisting of many ethnicities.¹⁹⁴ Failure to recognize the ethnic diversity of Asian Americans will further the misconceptions of the Asian race. Failure to acknowledge the “underrepresented” Asian Americans will also perpetuate their invisibility and prevent others from recognizing their existence. If the Court allows schools to treat them accordingly, it hinders non-Asian students and society from understanding the myriad cultures and experiences within the Asian race. Thus, the Supreme Court undermines some of its own purposes in championing the diversity rationale.

¹⁸⁹ *Grutter*, 539 U.S. at 328-32.

¹⁹⁰ *Id.* at 330-34.

¹⁹¹ See *supra* Part III.B.2.

¹⁹² See *supra* note 168 for a description of the model minority stereotype.

¹⁹³ Tsuang, *supra* note 164, at 678 n.3.

¹⁹⁴ See *DeRonde v. Regents of Univ. of Cal.*, 625 P.2d 220, 235 (Cal. 1981) (Mosk, J., dissenting) (stating that “no ethnic group in our society is better adjusted, completely accepted and more successful academically and economically than Asian Americans”).

CONCLUSION

The *Grutter* decision supposedly settled the issue of the use of affirmative action in higher education. This is only true to some extent. It may establish favorable precedent for African Americans, Hispanics, and Native Americans, but does not fully address the needs of Asian Americans. The danger of the *Grutter* decision is that it allows universities to perpetuate a careless and uninformed view of Asian Americans.

The holding, however, is not fatal to all Asian Americans. It is beneficial for Asian Americans so long as courts can understand their unique situation in the affirmative action debate. However, if Lynn sues the law school for violating her equal protection right, it is doubtful that *Grutter*, without modification, would vindicate her rights.
