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I. INTRODUCTION

The Supreme Court has accepted diversity as a compelling governmental interest justifying the use of race-conscious affirmative action plans (“AAP”) in the educational context. Therefore, an admissions program that takes race into account to obtain a diverse student body may be constitutional under the Court’s strict scrutiny analysis. Recognizing diversity’s impact in the educational setting, the Court has found the benefits of diversity to be real and substantial. Yet these benefits are not limited solely to the formal educational setting. On the contrary, the benefits from exposure to diversity continue through one’s life and spill into society as well. Numerous scholars, social and

1. As used, “diversity” retains its general definition: “1. a. The fact or quality of being diverse; difference. b. A point or respect in which things differ. 2. Variety or multiformity.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 527 (4th ed. 2000). It should be noted that this paper emphasizes the consideration of race and ethnicity as available indicators of the fact or quality of being a diverse person. See Grutter v. Bollinger, 539 U.S. 306 (2003).

The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking... Strict scrutiny does not “treat dissimilar race-based decisions as though they were equally objectionable[.]” [T]o the contrary, it evaluates carefully all governmental race-based decisions in order to decide which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which “so seldom provide[s] a relevant basis for disparate treatment,” is legitimate, before permitting unequal treatment based on race to proceed).
6. Grutter, 539 U.S. at 331 (citing to numerous Amici attesting to the benefits of diversity outside the educational context and their continued benefits to society).
psychological researchers, military officials, businesses, and professional entities agree that the benefits from diversity are essential for growth and success. But for some anomalous reason, diversity, as a compelling governmental interest, has only been constitutionally approved for a relatively brief period of an individual’s life—during his or her formal education—and then only through preferential race-based classifications.

Outside of education and preferential race-based admissions policies, the federal government has sought to remedy harm caused by past governmental discrimination through AAPs. Previously, any federal AAP that used racial classifications had to pass constitutional review under an intermediate scrutiny standard, whereas a state AAP was subject to the highest level of review—strict scrutiny. In reviewing federal AAPs, the Court formerly gave deference to Congress pursuant to the Fourteenth Amendment’s provision that Congress has the power to enforce the Equal Protection clause in relation to the states. But recently, the Court has limited this deference to Congress, overruling a line of cases to the contrary, and has begun applying strict scrutiny.


8. Grutter, 539 U.S. 306. These AAPs are sometimes referred to as preferential AAPs because preference is given to an applicant’s race or ethnicity.


10. Intermediate scrutiny requires satisfaction of a two-prong test: (1) a significant governmental interest, and (2) a narrowly tailored plan to further that interest. Likewise, strict scrutiny requires satisfaction of a two-prong test that is the strictest standard of review: 1) a compelling governmental interest, and (2) a narrowly tailored plan to further that interest. Adarand, 515 U.S. at 235, 237.


12. Fullilove, 448 U.S. 448 (granting deference to Congress in the Court’s review of its legislation); Metro Broad., 497 U.S. 547.

13. See Metro Broad., 497 U.S. 547 (upholding a federally-mandated AAP awarding new radio and television licenses to minority-controlled firms while applying intermediate scrutiny and
across the board for all federal and state race-based classifications. This has placed substantial burdens on federal AAPs and their ability to pass constitutional review. As a result, the overarching goal of AAPs—societal progress in achieving racial and ethnic equality—has been impaired substantially and may even be regressing.

Whether seeking to remedy past governmental discrimination or seeking to obtain a diverse student body, AAPs have the same purpose: to cure societal ills of prejudice, discrimination, and other forms of racial and ethnic inequality. A superficial review of constitutional challenges to remedial and preferential AAPs leads to a noteworthy hypothesis with regard to remedial programs: AAPs justified, and subsequently defended, on remedial grounds are failing. This may be attributable to the Court’s substantial evidentiary requirement that the government prove past governmental discrimination to employ race-conscious, remedial AAPs, as well as the Court’s heightened review of them. As a result, the remedial argument is losing its efficacy. Furthermore, the changing make-up of the Court has left the continuance of the Court’s previous trend in question.

Legal scholars have detailed the Court’s amorphous positions on AAPs and some have argued to extend diversity as a compelling governmental interest to other specific contexts. However, legal distinguishing between constitutional review of a state and federal AAP; Fullilove, 448 U.S. 448 (upholding the constitutionality of a federal AAP requiring at least 10 percent of federal funds for local public works be used to procure services or supplies from minority business enterprises).

14. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (overruling Fullilove and Metro Brod. as far as each applies a lower standard of review to governmental racial classifications without considering the question of how much deference Congress is entitled to in enforcing the Fourteenth Amendment).

15. See Brief of American Sociological Ass’n, et al. as Amici Curiae Supporting Respondents, at 3–4, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) (noting that Blacks in major U.S. cities are presently almost as segregated as Blacks were living under apartheid in South Africa while presenting other alarming statistical data on the previous condition versus the present condition).


18. See id.


20. Adarand Constructors, 515 U.S. at 239 (Scalia, J., concurring) (commenting that “it is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand”).

21. See Orrin Finch, Minority and Disadvantaged Business Enterprise Requirements in Public Contracting, Transportation Research Board, RRD No. 146 (1985) and supplement, LRD No.
scholars have yet to explore the use of a compelling governmental interest in seeking the societal benefits from racial and ethnic diversity, widely recognized in the educational context, as a justification for broader-reaching affirmative action programs.

Because the benefits that flow from diversity outside the educational context have been established as equally extensive and desirable as those that flow from within the educational context, the government has a compelling interest in seeking diversity outside the educational context as well. These benefits outside the educational context are likely to be greater than those in the educational context. If so, this makes diversity an even more compelling governmental interest. As addressed in Parts II and III, the similar purposes of preferential and remedial AAPs are better served by designing plans that use race-based classifications to obtain the benefits of diversity. If faced with a constitutional challenge, the government would be better served to defend the constitutionality on preferential grounds, arguing that the benefits from diversity justify the preferential AAP, rather than on remedial grounds.

II. THE INS AND THE OUTS OF REMEDIAL AND PREFERENTIAL AFFIRMATIVE ACTION: CHANGES IN THE SUPREME COURT JURISPRUDENCE IN AND OUT OF THE EDUCATIONAL CONTEXT

The Fourteenth Amendment’s Equal Protection Clause guarantees ‘equal protection’ to all citizens and forbids the states from encroaching on this right. Challenges to AAPs in the educational and federal context have generally been litigated by invoking this clause. Section five of the Fourteenth Amendment states that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

22. See infra Part III.
23. See id.
Historically, the Supreme Court applied intermediate scrutiny when faced with constitutional challenges to federal AAPs, arguably interpreting the grant of power to Congress broadly. However, the Supreme Court in a recent case applied strict scrutiny to all race-based classifications by the government without addressing the degree of deference the legislative branch is entitled to by the courts when interpreting the Equal Protection Clause.

Since 1978, when the first AAP case appeared before the Supreme Court, only three cases on educational AAPs and three cases on federal employment AAPs have been argued before the Justices. But three decades later, the Court has yet to articulate clear, applicable standards for federal AAPs designed to remedy past governmental discrimination. In the federal employment context, the Court upheld the two early federal AAPs in Fullilove v. Klutznick and Metro Broadcasting, Inc. v. Federal Communications Commission, and remanded the third, in Adarand Constructors, Inc. v. Pena, for further proceedings. In the educational context, the Court found two of the three AAPs—in University of California v. Bakke and Gratz v. Bollinger—unconstitutional, leaving for future cases an uncertain precedent. In all AAP cases, decisions have been delivered by a divided and contentious Court.

Interestingly, Metro Broadcasting was upheld not only on the ground that it sought to remedy past discrimination, but also because it sought to promote broadcast diversity, which the Court held to be an important governmental objective passing intermediate constitutional review. Because no federal AAP case has been brought before the Court asserting diversity as the sole justification for racial preferences, one may wonder to what extent diversity impacted the Court’s decisions in Metro

27. See Fullilove, 448 U.S. 448; Metro Broad., 497 U.S. 547.
28. See Adarand Constructors, 515 U.S. at 231.
30. See Adarand Constructors, Inc. v. Pena, 515 U.S. 290 (1995) (overruling a line of cases applying intermediate scrutiny to federal AAPs and remanding the case accordingly); compare Adarand Constructors, Inc., v. Mineta, 532 U.S. 967 (2001) (accepting a second petition for writ of certiorari and limiting the petition to (1) whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination and (2) whether the United States Department of Transportation’s current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling government interest) with Adarand Constructors, Inc., v. Mineta, 534 U.S. 103 (2001) (dismissing certiorari as improvidently granted). Unfortunately, the Court dismissed the case, leaving the issue in arguably more of a mess than before it decided Adarand Constructors, Inc., v. Pena.
31. 497 U.S. at 566 (noting the limited nature of broadcast frequencies and finding that broadcast diversity was an important governmental interest).
Broadcasting and whether diversity presents a sufficient basis to satisfy constitutional demands before an arguably more conservative judiciary applying strict scrutiny review. According to the majority in Adarand, it does not seem likely. However, considering Grutter v. Bollinger and its amici, a preferential AAP justified on only the benefits of diversity gains vitality and may prevail under strict scrutiny review.

The reasoning of the Metro Broadcasting decision is distinguishable from the argument presented here in a significant way: Metro Broadcasting dealt with remedial measures along with preferential race treatment justified by an important governmental interest. The argument advanced here, however, considers only the use of preferential treatment without any remedial measures. As illustrated below, the Court’s jurisprudence has become less amenable to remedial AAPs and, as a result, the remedial argument’s vitality has been diminished. In contrast, the argument for the use of preferential, race-conscious AAPs to obtain the benefits of diversity has now emerged as a potentially viable constitutional justification in light of recent cases.

In Bakke, the Court dismissed all arguments advanced by the University of California, Davis to justify race-conscious AAPs in remedying past racial discrimination; instead, the Court only accepted the justification of diversity. As a result, the Court did not require the state to prove past governmental discrimination before it accepted the University’s interest in seeking diversity by using race-conscious classifications. This illustrates a key difference between remedial and preferential AAPs: the first remedies a past constitutional violation by inflicting another constitutional violation on “innocent wrongdoers,” while the other simply seeks the benefits of diversity by using preferential race treatment. In the latter, the value of all races is equated and preferential race treatment is used for the benefit of all races.

The following section analyzes the remedial federal affirmative action cases. It begins with the most recently decided case in light of the previous two cases it overruled, detailing the Court’s deteriorating acceptance of AAPs that seek to remedy past governmental discrimination. From there, the classroom-setting cases are analyzed chronologically, examining the Court’s increasing acceptance of AAPs that seek diversity in education.

32. 515 U.S. at 225–27.
33. 539 U.S. 306.
34. See supra note 31.
36. See infra note 89.

In Adarand, the Central Federal Lands Highway Division, a part of the United States Department of Transportation (“DOT”), awarded a prime contract for a highway construction project to the Colorado Mountain Gravel & Construction company (“CMGC”). After being awarded the contract, CMGC solicited bids for a guardrail portion of the contract to subcontractors, awarding the bid to Gonzales Construction Company. Gonzales Construction was certified as a Small Business controlled by socially and economically disadvantaged individuals under the Small Business Act (“SBA”). CMGC awarded the subcontract to Gonzales over the lowest bidder, Adarand.

Pursuant to a complex federal scheme based on the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), a DOT appropriations measure, and the SBA, the prime contract’s terms provided that CMGC would receive additional monetary compensation if it hired subcontractors certified as small businesses controlled by socially and economically disadvantaged owners. The record indicates that this incentive controlled why CMGC hired Gonzales over the lowest bidder, Adarand.

37. 515 U.S. at 205.
38. Id.
39. Id.
40. Id.; see Surface Transportation and Uniform Relocation Assistance Act, Pub. L. No. 100-17, 101 Stat. 132, 145 (1982) (stating not less than ten percent of the appropriated funds shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals, adopting the Small Business Act’s definitions of socially and economically disadvantaged individuals); see also Surface Transportation and Uniform Relocation Assistance Act § 106(c)(2)(B) (adding the presumption that women, along with certain racial groups, shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection).
42. Adarand, 515 U.S. at 205.
43. Id.
Because of this requirement, Adarand asserted his Fifth Amendment Equal Protection rights, claiming that this presumption discriminated on the basis of race and violated his constitutional guarantee.45 The question of what standard of review to apply to the race-conscious federal AAP confronted the Court here for only the third time.

Fullilove v. Klutznick came before the Supreme Court in 1980 and challenged a federal AAP for the first time.46 The Court upheld a federally mandated 10-percent set-aside program for minority owned businesses under the Public Works Employment Act of 1977.47 Chief Justice Burger’s plurality opinion stated that “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees,”48 and rejected the standards of review articulated in the University of California Regents v. Bakke.49 However, Justice Powell stated in his opinion in Fullilove that the AAP would have passed judicial review under any of the several tests articulated in Bakke and that the plurality opinion had essentially applied strict scrutiny correctly as described in Bakke.50 In Adarand, the majority made explicit “what Justice Powell thought implicit in the Fullilove lead opinion” – that strict scrutiny applies to federal racial classifications.51 Because the plurality opinion in Fullilove did not state the standard of review applied, the Court in Adarand acknowledged that Fullilove would be overruled insofar as it supports a lower standard of review, contrary to the Court’s
Five years before *Adarand* and ten years after *Fullilove*, the Court dealt with another Fifth Amendment challenge to a federal AAP in *Metro Broadcasting, Inc. v. FCC*. The Court faced benign race-conscious measures mandated by Congress and held that

[B]enign race-conscious measures mandated by Congress—even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

The Court also noted “[the standard of review articulated] in *Richmond v. J.A. Croson Co.* concerning a minority set-aside program adopted by a municipality, does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress.” The Court acknowledged a distinction between municipality and congressionally mandated remedial AAPs and the appropriate standard of review for each. The AAP in *Metro Broadcasting* awarded licenses and benefits to minority owners and served not only as a remedy for past discrimination, but also served an important governmental interest in promoting broadcast diversity. The Court found that the AAP passed constitutional review under intermediate scrutiny because it served an important governmental objective and its policies were substantially related to achieving the interest.

The Court in *Adarand* found two problems with applying intermediate scrutiny to congressionally mandated benign racial classifications such as those in *Metro Broadcasting*. First, the Court claimed it contradicted the Court’s reasoning in *Croson*. There the Court had asserted that strict scrutiny of all governmental racial classifications is essential, stating:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in

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52. Id. The Court did not decide whether *Fullilove* had applied a lower standard of review or, if so, whether the federal AAP would have past strict scrutiny review.
54. Id. at 564–565.
55. Id. (emphasis supplied).
56. Id. at 566–569.
fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. 57

Second, the Court found that Metro Broadcasting rejected three general propositions established from prior equal protection cases: 1) congruence with the standards applicable to the federal and state race-based classifications, 2) skepticism of all race-based classifications, and 3) consistency of treatment irrespective of the race benefited or burdened. 58 Yet, the Adarand Court did not distinguish between federal and state affirmative action cases even though each invoked a separate constitutional amendment. Instead, the majority opinion found a general congruence between the standards applied to federal and state race-based classifications despite the different textual requirements set out by the Constitution. 59 The Court justified the proposition of skepticism of all race-based classifications by citing its previous jurisprudence, which detailed the ills and dangers of racial classifications. 60 Under any analysis, Metro Broadcasting’s application of intermediate scrutiny to a federally-mandated AAP could not stand according to the majority in Adarand. 61 Thus, the Court overruled Metro Broadcasting in its entirety. 62

Metro Broadcasting provided little guidance for the Court in Adarand. And Fullilove’s soundness remains questionable as it is no longer controlling insofar as it suggests a lower standard of review than strict scrutiny in cases involving federal racial-based classifications. 63 As

58. See id. at 226–27 (additionally noting that those propositions derive from the basic principles of the Fifth and Fourteenth Amendment to protect persons, not groups). But see id. at 247 (pointing out the fact that the court employs two different standards for gender discrimination and racial discrimination).
59. Id. at 226–29.
60. Id. at 231–32.
61. Id. at 225–27.
62. Id. As noted by Justice Stevens in Metro Broadcasting, the Court seemingly blurred the differences between state and federal government race-based initiatives. See id. at 229–30 (Justice Stevens alleged that the Court did not distinguish between the federal and State legislatures). Justice Stevens, who once aligned himself with the conservative Justices, highlighted the difference between the Fifth and Fourteenth Amendments and the power granted to Congress by the Constitution to enforce the Equal Protection Clause against the states. Id. at 228–29.
63. Id. at 235.
pointed out, Justice Burger’s opinion did not articulate a standard of review as the Court had in subsequent cases;\textsuperscript{64} nonetheless, Justice Powell acknowledged that the same result would follow regardless of which standard of review from \textit{Bakke} was applied.\textsuperscript{65} As a result, the court found it unnecessary to decide whether \textit{Fullilove} would survive strict scrutiny as set out under \textit{Adarand}, leaving its holding dangling by a legal thread.\textsuperscript{66}

After articulating the correct standard of review to be applied in all federal, race-conscious AAPs, the Court in \textit{Adarand} vacated and remanded the case, leaving for the lower court the question of whether there was a compelling governmental interest and whether the means were narrowly tailored to achieve that interest.\textsuperscript{67} On remand, it became apparent that the Court’s clarification was anything but clear. \textit{Adarand} has worked its way back up to the Supreme Court, now spanning the twentieth and twenty-first centuries.\textsuperscript{68}

In his concurrence, Justice Scalia stated:

\begin{quote}
In my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual, and its rejection of dispositions based on race, or based on blood. To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American. It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.\textsuperscript{69}
\end{quote}

This view effectively denies any deference to Congress in cases where

\begin{itemize}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.} (citing \textit{Fullilove v. Klutznick}, 448 U.S. 448, 492 (1980)).
\item \textsuperscript{66} \textit{Id.} at 235.
\item \textsuperscript{67} \textit{Id.} at 237–38.
\item \textsuperscript{68} See \textit{Adarand Constructors, Inc. v. Mineta}, 532 U.S. 967 (2001).
\item \textsuperscript{69} \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200, 239 (1995) (arguably a much broader position than need be—a slippery slope argument). Justice O’Connor “announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in Justice Scalia’s concurrence, and an opinion with respect to Part III-C in which Justice Kennedy joins.” \textit{Id.} at 204.
\end{itemize}
enforcing the Equal Protection Clause of the Fourteenth Amendment serves to inflict an additional injury on another race. But neither Justice Scalia nor Justice O’Connor addressed whether Congress was entitled to deference under the constitutional amendment, leaving much confusion and ambiguity as to what are permissible race-based classifications and what are not.

The Court rejected the government’s argument that the subcontracting compensation clause program was based on disadvantage and not race, but agreed with the government’s statement of law—race neutral regulations and statutes require only an intermediate level of scrutiny. However, this case involved explicit race-based classifications without facially race-neutral laws that result in a racially disproportionate impact. This added comment might operate as a backdoor escape for invalidating race-neutral laws that disproportionately impact one group over another.

Adarand changed the landscape of federal AAPs. It heightened the standard of review for all race-based AAPs while leaving open the question of what amount of deference owed to Congress. If Congress is entitled to deference, then the Court may decrease some of the evidentiary burden of finding past governmental discrimination before sanctioning remedial AAPs. But as Justice Scalia averred, it may be impossible for AAPs to pass strict scrutiny where they seek to impose another constitutional violation on those not involved in the prior discrimination. However, it may be possible to pass strict scrutiny where the AAPs seek to equate the races and actualize the benefits of diversity for the benefit of all, regardless of race.

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70. U.S. CONST. amend. XIV.
71. Adarand, 515 U.S. at 231.
72. Id. at 212–13.
74. See supra note 20.

In *Regents of the University of California v. Bakke*, the University claimed its AAP was justified on several different grounds. However, the Court only found one of its arguments valid, which paved the way for the future AAPs and arguments. Bakke has served as the touchstone case supporting both a state’s assertion that diversity is a compelling governmental interest, which would permit consideration of a person’s race and ethnicity in admissions decisions, and the claim that this use may be narrowly tailored to pass constitutional scrutiny. Because no opinion in Bakke garnered a majority, courts have since struggled with the authoritative weight of Justice Powell’s finding that diversity may use race or ethnicity to serve a compelling governmental interest in a narrowly tailored way. Twenty-five years later and in the wake of a split in the circuits, the Court heard two factually similar cases where the state attempted to emulate the admissions program described in Justice Powell’s opinion. Although the Court came to two different conclusions, it became clear that Justice Powell’s opinion in Bakke could serve as a constitutionally permissible guide for allowing the consideration of race and ethnicity as a “plus factor” in order to serve the compelling governmental interest of diversity in the educational context. In all three cases, the Court recognized the benefits of a diverse education, including robust commerce, democracy, and the

76. See id. at 289–315 (considering the arguments that whites are not a discrete and insular minority entitled to a higher standard of review; that the discrimination is permissible because it is benign; that a lower scrutiny should apply as it did in school desegregation, employment discrimination, and sex discrimination; that discrimination favoring racial or ethnic minorities has received judicial approval without an exacting inquiry; and that the state has an interest in ameliorating or eliminating the effects of past discrimination, helping those whom the school finds to be victims of societal discrimination, improving the medical care to underserved communities, or attaining a diverse student body).
77. Id. at 320.
79. See Grutter, 539 U.S. 306; Gratz, 539 U.S. 244.
80. See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996). But see Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000).
81. Compare Grutter, 539 U.S. 306, with Gratz, 539 U.S. 244.
82. See Grutter, 539 U.S. at 325.
83. See id. at 330 (quoting Brief of General Motors Corp. as Amicus Curiae Supporting Respondents, at 5, Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (No. 01-1447)).
84. Id. at 331 (stating that education has long been held to be pivotal to our political system (quoting Plyler v. Doe, 457 U.S. 202, 221, (1982)); id. at 332 (acknowledging that law schools breed future leaders and the importance of diversity in those institutions (quoting Sweatt v. Painter,
From 1969 to 1970, the University of California at Davis (hereinafter “UC Davis”) began to implement an admissions program which included the consideration of race and ethnicity. In 1974, Bakke challenged the constitutionality of this program. In response to Bakke’s suit, UC Davis asserted diversity as a justification for its use of race and ethnicity in its admissions program. When the case arrived at the Supreme Court of the United States, it presented a case of first impression, which may explain the six separate opinions, none of which served as the majority opinion of the Court. The only holding for the Court in Bakke was that a “State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of [a person’s] race and ethnic origin.” Justice Powell’s opinion elaborated on the parameters of such a program.

The admissions program at UC Davis set aside a number of spots in each year’s class for members of certain minority groups. More specifically, UC Davis created a separate admissions program altogether for disadvantaged students who belonged to certain minority groups with the goal of increasing their numbers in each year’s class. UC Davis defined disadvantaged students from “economically and/or educationally disadvantaged backgrounds,” and permitted applicants to identify themselves as a member of these categories. Applicants could also elect

339 U.S. 629, 634 (1950)).
85. Id. at 331 (stating education provides the basis of good citizenry (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954))).
86. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 272–73 (1978). Bakke challenged the program on three grounds: the California Constitution, Title VI of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment. Id. at 270; see CAL. CONST. art. I, § 7 (stating “[n]o special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens”); 42 U.S.C. § 2000(d) (stating “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”); U.S. CONST. amend. XIV.
88. Id. at 279.
89. See id. at 320; see also Grutter v. Bollinger, 539 U.S. 306, 322–23 (2003).
91. Id. at 269–70.
92. Id. at 272–73.
93. Id. at 273, n. 1.
to be considered as members of certain minority groups, which were limited to Blacks, Chicanos, Asians, or American Indians. Both the general and disadvantaged admissions programs were administered by UC Davis in the same way except that the GPA requirements were not in effect for the minority students.

The Court found the use of race by UC Davis permissible insofar as it sought the attainment of a diverse student body. With this argument asserted, Justice Powell’s opinion addressed the benefits that arise from diversity, stating that “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’” Further substantiating this point, a President of Princeton University stated that diversity leads to “[a] great deal of learning occur[ring] informally” and to the understanding that “[p]eople do not learn very much when they are surrounded only by the likes of themselves.”

Justice Powell’s opinion framed the goal of seeking a diverse student body as relating to the First Amendment and of “paramount importance in the fulfillment” of universities’ missions. While briefly acknowledging the possibility that the goal of diversity may have “greater force” at the undergraduate level, the Court cited Sweatt v. Painter and discussed how critical diversity was at the graduate level, particularly in the legal and medical fields. Ethnicity, however, was only one of many factors Justice Powell cited in describing a model program. As will be seen in the following two cases, twenty-five years after Bakke, the consideration of race and ethnic origin may not be a predominant factor in admissions so as to operate as a quota.

94. Id. at 274 (citation omitted).
95. Id. at 275. The Court noted that in 1973, the total number of special applicants was 297, of whom 73 were white; in 1974, 629 applied, of whom 172 were white. Id. at 275, n. 5.
96. Id. at 311–12.
99. Id. at 313.
102. Id. at 314.
2. Justice Souter’s dissent: Gratz v. Bollinger

Gratz v. Bollinger dealt with a University of Michigan (hereinafter “UM”) admissions program that sought to emulate a program similar to the one Justice Powell described in Bakke. The precise issue in this case centered on what constituted an unconstitutional quota system under the second prong of strict scrutiny, the requirement that the AAP be narrowly tailored. The Supreme Court in Bakke found that the admissions program operated as a constitutionally impermissible quota system where the program reserved a certain number of seats for minority applicants. As that case concluded, the compelling interest of diversity could not justify an admissions program that relied on a racial or ethnic quota system. Unlike Bakke where the school reserved seats for minority students, UM’s admissions program in Gratz provided applicants an allotted number of points for certain admissions criteria, including race and ethnicity. Because the majority of the Court found that this type of admissions program operated as a quota-like system insulating minorities from competition, UM’s admissions program failed to pass constitutional muster.

As noted in Justice Souter’s dissent, the Court contemporaneously held in Grutter v. Bollinger that an individualized consideration of race is permissible in achieving diversity “where race is not assigned a preordained value in all cases.” While Grutter provides a floor in the use of race, Justice Souter noted the ceiling established in Bakke, ruling out the use of racial quotas or set-asides, “in which race is the sole fact of eligibility for certain places in a class.” Thus, Justice Souter averred

104. Id. at 257 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).
105. Id. at 249–50.
106. See Bakke, 438 U.S. at 272-73, 320.
109. Gratz, 539 U.S. at 294–96. The Court noted that Justice Powell’s model program did not use race as a “decisive” factor. Instead, the program would rather operate in a flexible manner, considering “all pertinent elements of diversity in light of the particular qualifications of each applicant,” emphasizing an individualized analysis of various qualities and experiences that make up an individual. Id. (quoting Bakke, 438 U.S. at 307). For example, the admissions program may allot a talented artist only five points whereas a minority applicant could be awarded an automatic twenty points. This had the potential to isolate minority individuals from competition in admissions solely based on his or her ethnicity or race similarly to a quota system. Id. at 293.
110. Id. at 251.
111. Grutter, 539 U.S. at 293 (Souter, J., dissenting).
112. Id. (citing Bakke, 438 U.S. 265).
that UM’s AAP resembled the Court-approved AAP in *Grutter*, not the type condemned in *Bakke*, because it did not isolate minority applicants from competition with other non-minority applicants.\(^{113}\)

Contrasting the AAP in *Gratz* with supposedly race neutral admissions programs, Justice Souter pointed out that certain states guarantee admission to a fixed percentage of the top students at state high schools in an arguably failed attempt to achieve diversity.\(^{114}\) The theory underlying these other admissions programs stems from the fact that certain schools within a state often have higher percentages of minorities than others. However, this type of program would not have achieved desirable results in Michigan because its minority populations are much smaller.\(^{115}\) Justice Souter argued that this amounted to a “percentage plan” similar to UM’s, although those “race neutral” admissions programs did not explicitly state their goal to gain minority representation through an ostensibly race neutral admissions program.\(^{116}\) He expressed his dismay at this constitutional paradox by stating that “[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball.”\(^{117}\)

Justice Souter’s dissent in *Gratz* highlights the importance of a meaningful review of an applicant.\(^{118}\) Justice Powell’s opinion in *Bakke* pointed out the fact that in considering diversity factors or qualities applicants must be placed on the same footing, but this does not mean according them the same weight.\(^{119}\) The Court failed to explain the implications of this distinction, but one may speculate that diversity as a compelling governmental interest permits a type of holistic review where “plus” factors may be granted to those with attributes that contribute to diversity, such as membership in a minority race.\(^{120}\)

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\(^{113}\) *Id.* (noting that the record in *Gratz* did not unconstitutionally insulate all non-minority applicants from competition for certain seats (citing *Bakke*, 438 U.S. at 317)).

\(^{114}\) See *Gratz*, 539 U.S. at 297–98 (citing Brief Lt. Gen. Julius W. Bector, Jr., et al. as Amici Curiae Supporting Respondents, at 13–17, 48–49, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)) (noting that a similar program would not work in Michigan because minority populations are much smaller than in those states with such plans); *cf.* Brief of Social Scientists Glenn C. Loury, et al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (comparing these percentage plans to race-conscious AAPs and finding that the latter are more narrowly tailored than the former in higher education).

\(^{115}\) See supra note 114.

\(^{116}\) *Gratz*, 539 U.S. at 298.

\(^{117}\) *Id.*

\(^{118}\) *Id.* at 293, 297-298.

\(^{119}\) See *id.* at 279, 294 (quoting Regents of Univ. of Cal. v. *Bakke*, 438 U.S. 265, 317 (1978)).

\(^{120}\) See *id.* at 297–98; *cf.* *Grutter*, 539 U.S. 306 (2003).

Without discussing its authoritative weight, the Court in *Grutter v. Bollinger*\(^{121}\) endorsed Justice Powell’s twenty-five year old opinion in *Bakke* and accepted the University of Michigan law school (“UM Law”) and amici’s assertions that diversity may serve a compelling governmental interest, and an admissions program which takes into account race or ethnicity may be narrowly tailored to serve this interest.\(^{122}\) Like *Bakke*, the Justices in this case also filed six separate opinions.\(^{123}\) The Court had to decide whether the use of race as a factor in admissions by UM Law was unconstitutional pursuant to the Fourteenth Amendment.\(^{124}\) With diversity meeting the first prong of strict scrutiny requiring a compelling governmental interest, a key portion of the majority’s opinion focused on dispensing with the contention that UM Law’s admissions program operated as an unconstitutional quota-like system. After applying the second prong of strict scrutiny, the Court found the law school’s admissions program narrowly tailored because of its compliance with two notable judicial requirements: time restrictions on the AAP and absent an undue burden on innocent individuals.\(^{125}\)

UM Law’s policy sought individuals with “a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others” and “a mix of students with varying backgrounds and experiences who will respect and learn from each other.”\(^{126}\) The policy focused on academic ability and a flexible assessment of an applicant’s talents, experiences, and “potential to contribute to the learning of those around [him or her].”\(^{127}\)

Under this policy, admissions officials could look at an applicant’s grade point average (“GPA”) and Law School Admissions Test (“LSAT”) score, but they also could consider indicia of academic ability including the enthusiasm of recommenders, the quality of the applicant’s undergraduate institution, the level of difficulty of the applicant’s undergraduate course selection, and the quality of the applicant’s

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\(^{121}\) 539 U.S. 306.

\(^{122}\) *Id.* at 325, 328–29, 334.

\(^{123}\) Justice O’Connor filed the opinion for the Court. Justices Ginsburg, Scalia, and Thomas each filed separate concurring opinions, while Justice Kennedy and Chief Justice Rehnquist filed separate dissenting opinions.

\(^{124}\) *Grutter*, 539 U.S. 306.

\(^{125}\) *Id.* at 324–25, 328–29, 334, 341–43.

\(^{126}\) *Id.* at 313–14 (internal quotation marks and citations omitted).

\(^{127}\) *Id.* at 315 (internal quotation marks and citation omitted).
essay. An applicant with the highest possible GPA and LSAT score was not guaranteed admissions nor was an applicant with a low GPA or LSAT score automatically disqualified. Admissions officials were not restricted in the types of diversity contributions eligible for substantial weight in the admissions process, recognizing that valuable diversity is not confined simply to students of different races or ethnic groups. But still, the policy acknowledged that diversity included “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.” While affirming the unique ability of a “critical mass” of underrepresented minority students to contribute to the law school, UM Law pointed out that its admissions policy acted solely as a guide.

The Dean of Vanderbilt’s law school testified at trial that such a “critical mass” negated racial stereotypes because students learn that minorities have a multitude of viewpoints, not a single minority perspective. Explaining the focus on the stated minorities, the committee chair who drafted UM Law’s policy testified that the policy did not seek to remedy past discrimination. Rather, the policy sought minorities that had not been admitted to UM Law in significant numbers.

The Court endorsed Justice Powell’s view in Bakke that “student body diversity is a compelling state interest that can justify the use of race in university admissions.” Identifying several amici who substantiated the benefits that flow from diversity, the Court found real benefits, not just hypothetical ones. Recognizing the demand from the marketplace for the benefits of diversity, the Court noted that

[t]hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through

128. Id. (internal quotation marks and citation omitted).
129. Id. at 316 (citations omitted).
130. Id. (internal quotation marks and citation omitted).
131. Id. (internal quotation marks and citation omitted).
132. But see id. at 378, 381–83 (Rehnquist, C.J., dissenting) (averring that a critical mass was a simple guise for racial balancing, which he found distinct from diversity). The Court noted that “[UM Law’s] concept . . . is defined by reference to the educational benefits that diversity is designed to produce.” Id. at 329.
133. Id. at 319–20.
134. Id. at 319.
135. Id. at 325.
136. Id. at 330–31.
exposure to widely diverse people, cultures, ideas, and viewpoints.\textsuperscript{137}

Acknowledging the importance of the benefits of diversity in another context, the Court turned to our nation’s security and said the following:

What is more, high-ranking retired officers and civilian leaders of the United States military assert that, ‘[b]ased on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’\textsuperscript{138}

Notably, the Court deferred to UM Law’s conclusion that the program served a compelling interest by seeking to obtain a diverse student body.\textsuperscript{139}

Applying the second requirement of strict scrutiny, the Court determined that the admissions program bore the “hallmarks of a narrowly tailored plan.”\textsuperscript{140} This finding was supported by the individualized and flexible nature of the program and the way race and ethnicity did not insulate minorities, but operated solely as a plus factor.\textsuperscript{141} The Court stated the following:

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a ‘plus’ factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.\textsuperscript{142}

After noting that the burden on other non-member individuals favored by the admissions plan was not unduly burdensome, the Court

\begin{itemize}
\item\textsuperscript{137} Id.
\item\textsuperscript{138} Id.
\item\textsuperscript{139} Id. at 328–29 (citations omitted). The Court’s deference to UM Law raises an important question: When should the Court defer to Congress’s judgment, and to how much deference is Congress entitled, under the Equal Protection Clause? Currently, the Court has deferred from answering these questions. Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 228-29 (1995).
\item\textsuperscript{140} Id. at 334.
\item\textsuperscript{141} Id.
\item\textsuperscript{142} Id. at 336–37 (citation omitted).
\end{itemize}
turned to the constitutional time limitations on such programs. In *Palmore v. Sidoti*, the Court identified one of the Fourteenth Amendment’s core purposes as eliminating all governmentally imposed race discrimination and stressed that UM Law’s admissions program included periodic review to both assess the need for race-conscious consideration and determine when sunset provisions may apply. It is not surprising, then, that the Court in *Grutter* noted that it did not foresee the use of race-conscious admissions programs in twenty-five years. With these limitations, the Court sanctioned the first preferential AAP justified on the basis of diversity in the educational context, and possibly set the framework for other AAPs justified on the basis of diversity outside the educational context.

### III. Benefits of Diversity Outside Education Justify Using Racial Preferences in Other Contexts

As social science continues to expand its understanding of human relationships, the evidence becomes stronger that diversity “profoundly affect[s] both the life experiences of individuals and the way individuals are treated within society.” The breadth of diversity’s benefits is startling, as gathered by empirical, objective, quantitative, qualitative, and scientific studies. Some of these benefits described and recognized by the Court are unquantifiable. For example, Justice Powell noted in *Bakke* that diversity is imperative to our future leaders. Never is it explained how exposure to diverse races and ethnicities impacts future leaders or why it is imperative. One could hypothesize that exposure to diverse races and ethnicities facilitates positive interactions between racially and ethnically different individuals. Since *Bakke*, evidence has been proffered to support this hypothesis, as noted by *amici in Grutter*

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143. *Id.* at 341–42.
146. *See Id.* at 342–43; cf. Brief of United States as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (arguing that racial diversity is an unobjectionable compelling governmental interest in all public institutions, citing to the benefits of diversity as support).
149. *See supra* note 6.
and as evidenced by the Justices’ acceptance of the asserted claim.\textsuperscript{153} Yet, the Court in \textit{Grutter} did not find it necessary to explain the bases for some of the claimed benefits, accepting instead UM Law’s arguments, the Court’s own evaluation of the evidence, and \textit{amici’s} testaments.\textsuperscript{154}

Diversity has been established as a compelling governmental interest in the educational context.\textsuperscript{155} Independent of this, the benefits from diversity are sought by many important entities and viewed by some as essential to many aspects of society.\textsuperscript{156} As discussed below, the Court has recognized the benefits of diversity as extensive and not solely limited to the educational context.\textsuperscript{157} This Section begins by briefly analyzing different sources and their conclusions on why the benefits of diversity are substantial and compelling. As a result, the second part of this section discusses the use of racial preferences, shifting from remedial to preferential AAPs and defending affirmative action on preferential rather than remedial grounds.

\textbf{A. Diversity Outside Education Yields Specific and Important Benefits}

Racism is still present in society today.\textsuperscript{158} Furthermore, studies by the American Psychological Association have found that many individuals who claim to be open-minded when it comes to race issues are in fact racist on an unconscious, but demonstrable, level.\textsuperscript{159} Evidence suggests that exposure to other races ameliorates these unconscious attitudes.\textsuperscript{160}

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\textsuperscript{153} See sources cited supra note 5.

\textsuperscript{154} See sources cited supra note 7.

\textsuperscript{155} See Grutter, 539 U.S. at 342-343.

\textsuperscript{156} See id. at 330-331 (discussing how the US military and major US businesses seek the benefits from diversity, including the importance of diversity in national security).

\textsuperscript{157} See supra note 4.


\textsuperscript{160} See \textit{APA}, supra note 158, at 3 (citing FAYE J. CROSBY, \textit{AFFIRMATIVE ACTION IS DEAD:}}
Nonetheless, the Court has noted on several occasions that societal discrimination alone—assuming that it is not the effect of past governmental discrimination, or if it is, that the government is unable to meet its evidentiary burden under strict scrutiny—cannot justify racial classifications. If this is the case, then how can a justification for racial preferences exist in this context? Justification exists in seeking the vast benefits of diversity, with its ameliorating effects on the societal discrimination that becomes less and less bearable as our increasingly borderless world forces interaction between cultures. It seems natural that one must be culturally educated if one is to interact with those with differing cultural values or perspectives. In this regard, seeking diversity outside the classroom setting is simply a continuation or extension of the educational experience—it seeks to expose and educate us on our changing world.

When value arguments fail to sway the Court and the public, one issue carries great weight and rarely ever fails: money. Diversity is “the critical new human resource requirement for corporations that have espoused a global business strategy” and “is the most important new attribute for future effective performance in a global marketplace.” Several major international corporations submitted an amicus brief attesting to the need for businesses to seek diversity, and also noted the benefits that workplace diversity provides a community.

LONG LIVE AFFIRMATIVE ACTION 225–28 (Yale Univ. Press 2004); see also ASA, supra note 158, at 14 (acknowledging the duty of society and educational institutions to produce leaders and the essential need for leaders to be exposed to diversity).

161. See source cited supra note 76; see also ASA, supra note 158, at 18–19 (noting that a prestigious California institution’s mean grade point average was unavailable to minority-attended schools because those schools did not have AP courses necessary to obtain such GPAs); id. at 5 (pointing out that a consensus exists with social scientists that a majority of our social identity is defined by our race and ethnicity because of its profound impact in our daily lives).

162. APA, supra note 158, at 3.

163. See id. at 30 (citing T.K. BIKSON & S.A. LAW, GLOBAL PREPAREDNESS AND HUMAN RESOURCES: COLLEGE AND CORPORATE PERSPECTIVES 24 (Rand Institute on Education and Training 1994); see also ASA, supra note 158, at 25 (noting that a University of Michigan study found that LSAT and undergraduate grades bore no relationship to post-grad earnings, community involvement, or career satisfaction) (citation omitted).

164. See Brief of 3M, et al. as Amici Curiae Supporting Respondents, at 5–28, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 01-1447) (emphasizing a theme that appears within the Court in and out of the educational setting that diversity is a pursuit in life not limited to formal educational institutions, as many of these companies require or provide diversity training to their employees and provide substantial financial assistance to minority employees in order for them to attain a formal education); see also Brief of BP America Inc. as Amicus Curiae Supporting Neither Party, at 1–7, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (recognizing that the necessary innovation and creativity to be successful depends on the number of diverse perspectives, of which race and ethnicity play a factor); Brief of General Motors Corp. as Amici Curiae Supporting Respondents, at 1–32, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 01-1447) (averring that success in the new business world demands race conscious AAPs); Brief of Exxon Mobil Corp. as Amici Curiae Supporting Neither Party, at 2, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-
And where money fails to sway the public, safety and security often does. Retired military officials submitted amici briefs attesting to the absolute need for racial diversity to provide a sufficient level of national security, acknowledging that no other governmental interest takes priority.\textsuperscript{165} These individuals stated that “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.”\textsuperscript{166}

Even outside of capitalism in a global marketplace and national security concerns the need for diversity is apparent. For instance, the racial and ethnic makeup of our own country is changing rapidly. The Minority Business Development Agency estimates that by 2050, 47 percent of all Americans will be African American, Latino, Asian, or Native American.\textsuperscript{167} This necessitates immediate attention to minority issues, which will soon be in the majority.\textsuperscript{168} If minority numbers keep rising, that does not necessarily mean that non-minority interactions will increase. According to the American Psychological Association, “[a] campus could be full of minority students yet still have a segregated environment without meaningful interactions between different racial and ethnic groups.”\textsuperscript{169} When, then, should the Equal Protection Clause

\begin{itemize}
\item \textsuperscript{166} \textit{Grutter}, 539 U.S. at 306 (internal quotations and citations omitted).
\item \textsuperscript{167} \textit{APA, supra} note 158, at 23 (quoting Minority Business Development Agency, U.S. Dep’t of Commerce, Dynamic Diversity: Projected Changes in U.S. Race and Ethnic Composition 1995 to 2050 (1999), at 8) (noting that diversity is a compelling interest not only for formal educational institutions but also for the nation itself).
\item \textsuperscript{168} Minorities suffer from inadequate health coverage and utilization. \textit{See APA, supra} note 158, at 23–24 (citing U.S. Dep’t of Health & Human Services, \textit{Mental Health: Culture, Race, and Ethnicity—A Supplement to Mental Health: A Report of the Surgeon General} (2001) at 3; Stanley Sue, In Search of Cultural Competence in Psychotherapy and Counseling, 53 AM. PSYCHOL. 440 (1998); INSTITUTE OF MEDICINE, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Smedley et al. eds., 2002); 14 HEALTH PSYCHOL. 7 (Dec. 1995).
\item \textsuperscript{169} \textit{ASA, supra} note 158, at 18; \textit{cf.} Brief of Center for the Advancement of Capitalism as Amici Curiae Supporting Petitioners, at 7–8, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (stating that the only way to combat the problem of racism is individualism, denouncing diversity as a compelling governmental interest).
be absolutely blind to race or ethnicity?\textsuperscript{170}

\textbf{B. Shifting From Remedial to Preferential Affirmative Action Plans}

Both remedial and preferential AAPs have been, and arguably remain, a divisive judicial and societal issue. A brief look at past and present Supreme Court justices’ commentary may illustrate this while at the same time forming the basis for the argument for shifting from remedial to preferential AAPs.

In \textit{Regents of the University of California v. Bakke}, Justice Powell stated, “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”\textsuperscript{171}

As this required a higher level of scrutiny and placed a greater burden on the University than a lower standard of review, Justice Marshall responded to Justice Powell’s comment above in his separate opinion, stating:

\begin{quote}
For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.\textsuperscript{172}
\end{quote}

Yet the \textit{Grutter} Court noted that it did not foresee the continued use of race-conscious AAPs in twenty-five years\textsuperscript{173} And under current Supreme Court Equal Protection Clause jurisprudence, race-based classification is viewed as temporary insofar as it is required to remedy past discrimination or achieve a compelling governmental interest. One may find it amazing that after two-hundred years of invidious discrimination, creating a large disparity between the races, the Court could possibly foresee the end of preferential AAPs in as little as twenty-five years. In the 1927 case of \textit{Buck v. Bell}, Justice Holmes remarked that he could sum up the importance of the Fourteenth Amendment as the “last resort of Constitutional arguments.”\textsuperscript{174} Now it is the first resort for

\begin{footnotes}
\item[170] \textit{ASA}, supra note 158, at 29-30.
\item[172] \textit{Id.} at 387.
\item[173] \textit{See supra} note 146.
\item[174] \textit{Bakke}, 438 U.S. at 326 (Brennan, J., concurring in part and dissenting in part) (quoting
\end{footnotes}
challenging race-conscious AAPs.

Addressing Justice Marshall’s response, Justice Powell distinguished between the preferential classification occurring in *Bakke* and remedial measures approved by the Court or Congress in other cases, e.g., school desegregation cases. In *Bakke*, no legislature or administrative agency determined that the University had engaged in past discrimination requiring remedial measures.\(^{175}\) A “[s]tate certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.”\(^{176}\) Instead of seeking to remedy a previous constitutional violation, Justice Powell’s opinion in *Bakke* viewed diversity as a compelling governmental interest that might be served by employing race-conscious admissions programs to achieve a diverse student body.

The *Bakke* opinion noted that the first class at the University of California had only three Asians, no Blacks, no Mexican-Americans, and no American Indians prior to the special admissions program.\(^{177}\) A large gap in scholastic achievement existed between the minority and general groups’ credentials.\(^{178}\) At most, Justice Powell highlighted a key issue in remedial AAPs when he opined that this was “societal discrimination, [. . .] an amorphous concept of injury that may be ageless in its reach into the past.”\(^{179}\) He then asserted that justification for racial classification requires an evidentiary showing “that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is ‘necessary . . . to the accomplishment’ of its purposes or the safeguarding of its interest.”\(^{180}\) Remedial AAPs, therefore, may be more akin to societal discrimination than the latter standard.

In the absence of judicial, legislative, or administrative findings of constitutional or statutory violations, the Court has “never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals.”\(^{181}\) If such findings have been made, then “the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated.”\(^{182}\)

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175. Id. at 305.
176. Id. at 307.
177. Id. at 272.
178. Id. at 277.
179. Id. at 307.
182. Id.
Within this scenario, the individual Constitutional protections override the rights of innocent individuals in order to remedy an earlier Constitutional violation against a specific group. The Court justified this result because in such cases the degree of the injury and its prescribed remedy have been determined by the legislature, judiciary, or administrative agency and will be continually scrutinized in order to ensure “the least harm possible to other innocent persons competing for the benefit.”\textsuperscript{183} Without this, the government cannot have a compelling justification for inflicting such harm on innocent parties as well as wrongdoers,\textsuperscript{184} which may be comparable to the retributive justice principle of an eye for an eye. With preferential treatment, all races have equal value and the use of race-conscious factors or qualities in seeking diversity aims to benefit all races rather than one race alone. Emphasis is placed on the individual and his or her contributions as a diverse human being, including race as a factor. This arguably reaffirms the person’s identity and esteems the value of embracing one’s identity. It is with this perspective that diversity, employing race-conscious considerations, has been asserted as a compelling governmental interest and used to justify affirmative action.\textsuperscript{185}

IV. CONCLUSION

Justice Holmes stated, “[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”\textsuperscript{186} Like a word, an argument is susceptible to fluidity of meaning and application. This has been shown to be true in two examples presented here: 1) the argument for judicial deference to Congress in the wake of a heightened standard of review for all race-conscious AAPs, and 2) the argument for expanding diversity as a compelling governmental interest outside the classroom. The former emphasizes the importance of thinking creatively about affirmative action and how to effectuate equality where our Court has raised the constitutional standard of review for federal employment AAPs. The latter seeks to shift from supporting and defending AAPs on a remedial to a preferential basis.

Judicial recognition of diversity as a compelling governmental

\textsuperscript{183} Id. at 308.

\textsuperscript{184} Id. at 309.

\textsuperscript{185} Is it possible to persuade a conservative judge to a more liberal perspective? One notable shift is that of Justice Stevens. See Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 236, 242 (quoting Fullilove v. Klutznick, 448 U.S. 448 (1980) (Stevens, J., dissenting)).

\textsuperscript{186} Towne v. Eisner, 245 U.S. 418, 425 (1918).
interest has become more concrete since the 1978 decision of *Bakke v. Regents of the University of California*.\(^\text{187}\) In *Grutter v. Bollinger*, for example, the Court affirmed Justice Powell’s non-precedential opinion in Bakke, which argued for diversity as a compelling governmental interest in educational admissions programs.\(^\text{188}\) In *Grutter*, the Court recognized the many benefits of diversity in the educational context, which less than coincidentally results in a spillover effect into society.\(^\text{189}\) The Court not only recognized these benefits but also acknowledged the need for them in several critical sectors outside of the classroom.\(^\text{190}\)

As a result of seeking to further the compelling governmental interest of diversity, a beneficial by-product occurs: a progressive trend in alleviating certain societal ills, particularly prejudice, discrimination, and others.\(^\text{191}\) While arguments for remedying past governmental discrimination address the effects of past discrimination, seeking the benefits of diversity may address these effects to a greater and more substantial degree. This may be so because genuinely seeking diversity uses race and ethnicity as one factor, valuing all components of a diverse people by equating the races and their potential contribution to one another, and emphasizing the individual above all. Preference for this type of affirmative action is a preference for equality.

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\(^\text{189}\) Id.; *cf.* Gratz v. Bollinger, 539 U.S. 244, 294 (Souter, J., dissenting).

\(^\text{190}\) *Grutter*, 539 U.S. at 331.

\(^\text{191}\) See supra note 160.