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ARTICLE

ORIGINALISM AND THE AFFIRMATIVE ACTION DECISIONS

Douglas G. Smith†

INTRODUCTION

The Supreme Court’s recent affirmative action decisions have generated significant controversy. Already, commentators have criticized the Court’s companion decisions in Grutter v. Bollinger and Gratz v. Bollinger as either unprincipled or incomprehensible. In Grutter, the Court upheld the University of Michigan’s use of race as a factor in law school admissions. In Gratz, the Court at the same time struck down the University of Michigan’s use of race as a factor in undergraduate admissions. Yet, it is difficult to discern a clear principle distinguishing the two cases.

Some commentators, and indeed members of the Court them-
selves, have suggested that the decisions will spawn a new round of litigation to determine myriad questions regarding permissible affirmative action programs that the decisions do not resolve.\textsuperscript{4} Others have concluded that the decisions are far more clear cut, standing forcefully for the proposition that the use of race in college and university admissions can be justified based on the need to obtain the educational benefits of a "diverse" student body.\textsuperscript{5}

What is striking about the Court's decisions, however, and has received little comment is that the opinions in \textit{Grutter} and \textit{Gratz} are almost devoid of any attempt to ascertain the original meaning of the relevant constitutional provisions.\textsuperscript{6} While members of the

\textsuperscript{4} See, e.g., Jennifer C. Braceras, Commentary, \textit{Diversity Rationale Not Compelling}, 26 \textit{LEGAL TIMES} 59 (June 30, 2003) ("By endorsing the diversity rationale, but making each college or university's plan subject to fact-specific inquiry, the Court has essentially created a full employment plan for lawyers."); Steven Lubet, Editorial, \textit{Affirmative Action Battle Has Just Begun}, \textit{BALT. SUN} 15A (June 25, 2003) ("The court's ruling contains a virtual road map for years of continuing litigation in which many affirmative action programs are very likely to lose."); Derrick Bell, \textit{Diversity's Distractions}, 103 \textit{COLUM. L. REV.} 1622, 1628 (2003) (the Court's opinions "will likely encourage affirmative action opponents to mount more litigation challenges as well as exert pressure for the appointment of judges opposed to affirmative action in any form"); cf. Stuart Taylor, Jr., \textit{Getting Serious About Race: The Next 25 Years}, 35 \textit{NAT'L J.} 2085 (2003) (describing the majority opinion in \textit{Grutter} as "a sorry muddle of 'utter logical confusion'").

\textsuperscript{5} See, e.g., Marcia Coyle, \textit{The Fallout Begins: In Its Final Week of the Term, the Supreme Court Hands Down Landmark Rulings that Give Legal Backing to Two Kinds of Diversity}, 25 \textit{NAT'L L.J.} 1, 25 (July 7, 2003) ("It's a total defeat," said U.S. Civil Rights Commissioner Abigail Thernstrom, who has written and spoken against race preferences for 25 years."); Jan Crawford Greenburg, \textit{Supreme Court Narrowly Upholds Affirmative Action}, \textit{CHI. TRIB. C1} (June 24, 2003) ("This is a tremendous victory for the University of Michigan, for all of higher education, and for the hundreds of groups and individuals who supported us," said university President Mary Sue Coleman."); Gail Heriot, Commentary, \textit{Supreme Court Decision Upholds Principle of Racial Preferences, SAN DIEGO UNION-TRIB. G1} (June 29, 2003) ("\textit{Grutter} is a huge loss for those who favor race neutrality."); Tony Mauro, \textit{Court Affirms Continued Need for Preferences}, 229 \textit{N.Y. L.J.} 1 (June 24, 2003) (observing that "[t]he U.S. Supreme Court yesterday gave a surprising and historic embrace to the concept of affirmative action in university admissions").

Court issued multiple opinions in each case, there is little analysis concerning what the ratifiers or drafters of the Fourteenth Amendment understood by its guarantee of "equal protection." Nor is there any analysis of how this historical understanding may be applied to the use of racial preferences in university admissions.

This is quite significant given the purported reliance upon an originalist approach to constitutional interpretation by at least certain members of the Court. Indeed, while there have been numerous instances in which the Court has deviated significantly from the Constitution's original meaning, it has nonetheless periodically emphasized that in interpreting the Constitution, recourse must be made to "[o]ur Nation's history, legal traditions, and practices."\(^7\)

An originalist analysis in \textit{Gratz} and \textit{Grutter} might have provided additional clarity and legitimacy to the Court's decisionmaking. Both the traditional legal understanding and the common understanding of the proper role of judges in deciding cases require courts to ascertain the meaning of constitutional or statutory provisions attributed to them by those with the authority to enact such measures into law.\(^8\) The proper role of judges is to interpret, not create, new law.

This article examines potential originalist analyses of the constitutionality of race-conscious affirmative action programs in university admissions as well as potential reasons why neither the parties nor the Court relied upon such analyses in evaluating the University of Michigan's admissions policies. While one may construct an originalist argument under which affirmative action programs might be validated, as they were by the Court in \textit{Grutter}, such an argument faces significant practical hurdles.

First, it is difficult to construct an originalist analysis under which the law school program at issue in \textit{Grutter} would be upheld while the undergraduate program at issue in \textit{Gratz} would be invalidated. An originalist analysis justifying the use of race in uni-

\(^7\) Washington v. Glucksberg, 521 U.S. 702, 721 (1997); \textit{see also} McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 359 (1995) (Thomas, J., concurring in judgment) (stating that the Court should base its decisions on the "original meaning, for '[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.'" (quoting South Carolina v. United States, 199 U.S. 437, 448 (1905))).

iversity admissions would most likely be based on the limited scope of the amendment. One could argue that the historical record suggests that the amendment's guarantees did not extend to the provision of government benefits. Under this interpretation, university admissions would fall outside the scope of the amendment's guarantee. As a result, such an analysis would undermine the Court's decision in *Gratz*.

Second, an originalist analysis would not provide the degree of flexibility sought by members of the Court in resolving the questions presented to them. Because the originalist analysis focuses on the scope of the amendment, it leads to a bright-line rule concerning whether such programs are subject to judicial review. Under such circumstances, it would be difficult, if not impossible, to adopt a flexible, case-by-case approach.

Finally, an originalist analysis might be inconsistent with other decisions of the Court. Thus, for example, any ruling upholding race-conscious measures is at odds with the Supreme Court's decision in *Brown v. Board of Education*. An originalist analysis that posited that governmental benefits fell outside the scope of the Fourteenth Amendment would entail overruling the Court's decision in *Brown* that "separate but equal" public education systems violated the Fourteenth Amendment's guarantee of equal protection. In contrast, an originalist analysis such as that advanced by Justice Harlan in his dissent in *Plessy v. Ferguson* that concluded that the Fourteenth Amendment embodied the concept of a "color-blind" Constitution would not allow the majority to uphold the discriminatory law school admissions policy at issue in *Grutter*. Accordingly, there are reasons that neither the Court nor the parties would find it either desirable or possible to rely upon an originalist analysis of the Fourteenth Amendment.

Part I of this article discusses the Court's analysis of these constitutional questions in *Grutter* and *Gratz*. The differences in these two decisions are striking. While the Court's decision in *Gratz* appears to adhere closely to its recent precedents evaluating governmental use of race in affirmative action programs, its decision in *Grutter*, while purporting to adhere to Justice Powell's decision in the *Bakke* case, deviates significantly from the Court's more recent decisions. In particular, the Court appeared to announce a new principle of "deference" that would apply to educational institutions' consideration of race, arguably designed to limit the scope

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10 163 U.S. 537 (1896).
of its decision upholding the University of Michigan Law School admissions program to the educational context. Similarly, in a rather cryptic passage, the Court appeared to impose *sua sponte* a durational limitation on the law school's use of race as a factor in admissions, thereby going well beyond mere deference in its review of the law school's admissions program.

Part II presents an originalist analysis of the constitutionality of affirmative action programs. While neither the majority nor dissenting opinions offer much in the way of an examination of the original meaning of the Fourteenth Amendment, such an analysis may be constructed on either side of the question. In particular, an originalist analysis may be used to justify the government's use of race as a factor in university admissions, which may have constituted a more legitimate basis for the Court's decision in the *Grutter* case.

Finally, Part III discusses potential practical problems in applying the originalist analysis, which may have resulted in the utter lack of discussion of the text or history of the Fourteenth Amendment in both of the Court's affirmative action decisions. The originalist analysis consistent with the outcome in *Grutter* suggests that affirmative action programs in the context of university admissions fall outside of the scope of the amendment, therefore contradicting the Court's ruling in *Gratz*. Moreover, adopting such an analysis would mean invalidating the Court's prior decision in *Brown*, a result neither the parties nor the Court would find desirable. Finally, such an analysis may be antithetical to the Court because it would deprive it of flexibility in such cases and would constrain the scope of its own power.

**I. THE AFFIRMATIVE ACTION DECISIONS**

The Supreme Court's recent affirmative action decisions largely maintain the *status quo*. While the Court was presented with an opportunity to clarify its prior rulings in cases concerning the constitutionality of affirmative action programs in college and university admissions, it did not do so. Rather, the Court in its twin decisions in *Gratz* and *Grutter* purported to adhere to Justice Powell's opinion in the *Bakke* case.  

Before these cases were decided, there was much confusion concerning the rules that must be applied in evaluating the constitutionality of programs that use race as a factor in university ad-

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missions. The Court’s decisions in *Gratz* and *Grutter* did nothing to clarify the situation. Indeed, they arguably added to the confusion. The Court did not present a coherent framework for analyzing university programs that consider race in admissions decisions. Most obviously, in *Gratz* the Court ruled that the University of Michigan’s undergraduate admissions program unconstitutionally discriminated on the basis of race, and in *Grutter* it concluded that the university’s law school admissions program passed constitutional muster. The contrast in these two decisions received little explanation.

Not only did the Court’s rulings lack coherence, but they raised new questions regarding potential conflicts with the Court’s own precedents. As certain members of the Court observed in *Grutter*, the Court’s analysis of the law school’s admissions program was arguably at odds with its prior decisions in cases such as *Wygant*,12 *Croson*,13 and *Adarand*.14 Further, the Court’s analysis in *Grutter* raises new issues regarding the constitutionality of affirmative action programs that must be addressed on a case-by-case basis. As a result, there is likely to be continued, and perhaps more active, litigation stemming from the Court’s failure to clarify the law in this area.

### A. Grutter v. Bollinger

In *Grutter*, the Court reviewed the admissions program of the University of Michigan Law School, holding that the program’s use of race as a factor in admissions decisions to achieve a “critical mass” of underrepresented minority students was constitutional. In deciding whether to admit a given student, the law school considered a variety of factors, including the candidate’s race.15 The law school justified its admissions program on the ground that it sought to achieve the educational benefits flowing from a “diverse” student body. The law school did not contend that its admissions policies sought to remedy any past discrimination.16 Nor did it seek to assist members of certain “underrepre-

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15 See *Grutter*, 123 S. Ct. at 2331-32 (“The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.”).
16 Cf. Wygant, 476 U.S. at 274 (noting that the Board’s actions were an attempt to alleviate the effects of societal discrimination); *Croson*, 488 U.S. at 511 (explaining that the city failed to establish that its actions were necessary to remedy past discrimination); *Adarand*, 515
sented" minorities because they were economically disadvantaged. Indeed, the law school specifically disavowed any intent to use race as a proxy to assist disadvantaged applicants. Rather, the program was purely a race-conscious measure.

While the law school admissions policy did not "restrict the types of diversity contributions eligible for 'substantial weight' in the admissions process," the school had a "longstanding commitment to 'one particular type of diversity,' that is, 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans.'" The law school sought to enroll what it called a "critical mass" of such "underrepresented minority students."

Under the theory espoused by the law school, a "critical mass" of "underrepresented" minority students was necessary to prevent such students from feeling "isolated or like spokespersons for their race." The school acknowledged that "a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores." Nonetheless, law school officials claimed that they "did not seek to admit any particular number or percentage of underrepresented minority students."

U.S. at 237 (explaining that the government's actions were taken in response to the persistence of both the practice and the lingering effects of racial discrimination against minority groups). But see Brief for Respondents Kimberly James et al. at 26, Grutter (No. 02-241) ("From at least 1868 forward, the University of Michigan Law School had not practiced de jure segregation. But as described above, in the 1960s, it was a classic example of de facto segregation.").

17 Indeed, the law school admitted that it could not utilize a race-neutral program that admitted more low-income students because there were so many white students that fit into this category that such a program would not achieve the desired racial balance. See Respondent's Brief at 36-37, Grutter (No. 02-241) ("[T]here are still many more poor white students than poor minority students in the pool from which the Law School draws . . . . Boalt Hall recently experimented with admitting more low-income students but abandoned that experiment after one year, concluding that it could not produce racial diversity."); see also Brief of Amici Curiae Columbia University et al. in Support of Respondents at 3-4, Grutter (No. 02-241) & Gratz (No. 02-516) ("Each of the amici curiae, like virtually every university in the nation, has reached the conclusion that completely race-blind admissions practices frustrate or otherwise impede its effort to achieve a sufficient level of diversity in its student body to effectuate its academic mission.").

18 Grutter, 123 S. Ct. at 2332.
19 Id. at 2333; see also id. (noting that the Director of Admissions had testified that "at the height of the admissions season, he would frequently consult the so-called 'daily reports' that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender) to "ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body").

20 Id. at 2333-34.
21 Id. at 2333.
22 Id.
Justice O'Connor's opinion for the Court adopted Justice Powell's approach in the Bakke case, which she described as "the touchstone for constitutional analysis of race-conscious admissions policies." According to Justice O'Connor, Justice Powell in his Bakke decision "approved the university's use of race to further only one interest: 'the attainment of a diverse student body.'" Nonetheless, Justice O'Connor observed that Justice Powell was "careful to emphasize that in his view race 'is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.' " Other aspects of "diversity" were important in university admissions as well. Moreover, Justice O'Connor acknowledged that "'government may treat people differently because of their race only for the most compelling reasons.'"

Accordingly, the Court reaffirmed that in reviewing affirmative action programs in university admissions it would continue to apply strict scrutiny under which racial classifications would be constitutional "only if they are narrowly tailored to further compelling governmental interests." In Grutter, the "compelling interest" was ensuring a "livelier, more spirited" classroom discussion.

In a striking statement, however, Justice O'Connor went even further, indicating that "'[t]he Law School's educational judgment that . . . diversity is essential to its educational mission is one to which we defer.'" The statement is noteworthy because "deferring" to the views of one of the parties in litigation seems at odds with the Court's avowed application of "strict scrutiny" in reviewing the law school's admissions policies. The Court claimed,  

24 Grutter, 123 S. Ct. at 2336; see also id. at 2337 ("[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").
25 Id. at 2336 (quoting Bakke, 438 U.S. at 311). See also id. at 2339 ("[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. . . . Today, we hold that the Law School has a compelling interest in attaining a diverse student body.").
26 Id. at 2337 (quoting Bakke, 438 U.S. at 314).
27 Id. (quoting Adarand, 515 U.S. at 227).
28 Id. at 2337-38; see also id. at 2338 (observing that "'not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context'").
29 Id. at 2340; see also id. ("In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" (quoting Brief of Amicus Curiae American Educational Research Association at 3)).
30 Id. at 2339.
nonetheless, that its "scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." In so stating, the Court appeared to be attempting to constrain its ruling to the context of university admissions. Indeed, it noted that "universities occupy a special niche in our constitutional tradition."

The Court contrasted the goal of achieving classroom diversity with "racial balancing, which is patently unconstitutional." It expressly distinguished the law school's desire to achieve a "critical mass" with such racial balancing. Thus, the Court observed that a college or university could not attempt to "'assure within its student body some specified percentage of a particular group

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31 Id. ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."); see also id. ("[A]taining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" (quoting Bakke, 438 U.S. at 318-19)).

32 In a separate concurring opinion, Justice Ginsburg observed, for example, that the majority decision in Grutter did not "necessitate reconsideration whether interests other than 'student body diversity,' . . . rank as sufficiently important to justify a race-conscious government program." Id. at 2348 n.* (Ginsburg, J., concurring).

33 Id. at 2339; see also id. ("In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy.").

Certain amici also advanced the position that universities should be given deference in crafting their admissions policies. See, e.g., Brief of the Law School Admission Council as Amicus Curiae in Support of Respondents at 7, Grutter (No. 02-241) ("University and law school decisions about how best to pursue student-body diversity reflect educational policy judgments entitled to substantial deference."); Brief of Amicus Curiae Michigan Governor Jennifer M. Granholm et al. at 17-18, Grutter (No. 02-241) & Gratz (No. 02-516) ("Both the First Amendment of the United States Constitution and art. VIII, §5 of Michigan's Constitution confer upon the University of Michigan the right, as a separate autonomous entity, to make academic choices with only limited judicial scrutiny."); Brief of Amici Curiae Columbia University et al. in Support of Respondents at 5, Grutter (No. 02-241) & Gratz (No. 02-516) ("[T]he First Amendment . . . should be understood to limit the power of the government to require all universities—public and private—to adopt completely race-neutral admissions policies."); Brief of Amici Curiae American Council on Education and 52 Other Higher Education Organizations in Support of Respondents at 11, Grutter (No. 02-241) ("Particular deference is owed educators' judgment about education because such matters require evaluation of cumulative information for which those responsible for higher education are best qualified."); Brief of Amici Curiae Judith Areen et al. at 2, Grutter (No. 02-241) ("[T]he Law School Deans believe that universities and law schools should have the freedom to resolve these matters in ways that they believe are most consistent with the academic and social missions of their schools—and not through rigid constitutionalization of the admissions process by federal courts.").

34 Grutter, 123 S. Ct. at 2339. In his separate opinion, Justice Thomas agreed that: the issue of unconstitutional racial discrimination among the groups the Law School prefers is not presented in this case, because petitioner has never argued that the Law School engages in such a practice, and the Law School maintains that it does not. . . . Thus, the Law School may not discriminate in admissions between similarly situated blacks and Hispanics, or between whites and Asians. Id. at 2363 (Thomas, J., concurring in part and dissenting in part).
merely because of its race or ethnic origin.”

Having established that the educational benefits of “diversity” constituted a compelling state interest, the Court then proceeded to analyze whether the University of Michigan program was narrowly tailored to further that end. The Court reiterated that “[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system.” Nonetheless, race could be used as a “plus” factor along with other considerations as long as each applicant was given “individualized consideration”: “As Justice Powell made clear in Bakke, truly individualized consideration demands that race be used in a flexible, nonmechanical way.”

As a result, the Court held that “[w]hen 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.” Indeed, it noted that “[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”

Despite the limited record available to the Court, it concluded that the Michigan admissions program did not “operate as a quota.” In particular, it found that the law school’s goal of “attaining a critical mass of underrepresented minority students” did not “transform its program into a quota.” Rather, the Court observed that the law school admissions program provided the “individualized” treatment of applicants that the Court indicated was necessary to survive judicial scrutiny: “[T]he Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”

The Court specifically observed that there was “no policy, either de jure or de facto, of automatic acceptance or rejection based

35 Id. at 2339 (quoting Bakke, 438 U.S. at 307).
36 Id. at 2342.
37 Id.; see also id. (stating that universities may not “insulate applicants who belong to certain racial or ethnic groups from the competition for admission,” but may “consider race or ethnicity more flexibly as a ‘plus’ factor in the context of individualized consideration of each and every applicant”).
38 Id. at 2343.
39 Id. (emphasis added).
40 Id. at 2342.
41 Id. at 2343; see also id. (observing that “between 1993 and 2000, the numbers of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota”).
42 Id.
on any single ‘soft’ variable,” and that the law school did not rely upon any “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity.”

It also noted that the law school considered other factors related to “diversity”—not merely an applicant’s race—and that it did not “limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity.” In fact, the Court claimed that “the Law School actually gives substantial weight to diversity factors besides race.”

The Court further held that before resorting to race-conscious measures, universities and colleges must examine whether there are race-neutral alternatives that could have been employed by the law school in making its admissions decisions. As the Court ob-

43 Id.

44 Id. at 2344; see also id. (“Like the Harvard plan Justice Powell referenced in Bakke, the Law School’s race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions”).

45 Id.; see also id. (“The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants who are rejected.”).

46 See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (noting that the court might, for example, ask whether there was “any consideration of the use of race-neutral means”) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989)).

A number of amici identified potential race-neutral alternatives that might be employed instead of using racial preferences. See, e.g., Brief of the State of Florida & the Honorable John Ellis “Jeb” Bush at 3, Grutter (No. 02-241) & Gratz (No. 02-516) (“Florida’s experience under Governor Jeb Bush’s One Florida Initiative demonstrates that diversity can be attained through race-neutral means.”); Brief of the Center For New Black Leadership as Amicus Curiae in Support of Petitioners at 12-13, Grutter (No. 02-241) & Gratz (No. 02-516) (observing that “the existence of . . . facially neutral programs establishes, as a matter of law, that less-burdensome alternatives exist to the use of racial preferences, necessarily rendering respondents’ programs unconstitutional”); Brief for the United States as Amicus Curiae Supporting Petitioner at 10, Grutter (No. 02-241) & Gratz (No. 02-516) (“[T]here are a variety of race-neutral alternatives available to achieve the important goals of openness, educational diversity and ensuring that all students of all races have meaningful access to institutions of higher learning.”). But see Brief of Amicus Curiae Michigan Governor Jennifer M. Granholm et al. at 17, Grutter (No. 02-241) & Gratz (No. 02-516) (arguing that “the ‘percent plan’ approach simply does not represent a viable mechanism for assuring diversity in admissions at the University of Michigan”); Brief of the National Urban League et al. in Support of Respondents at 3-4, Grutter (No. 02-241) & Gratz (No. 02-516) (arguing that there are “a battery of . . . transparent flaws in the percentage plans that cast substantial doubt on whether they are efficacious alternatives or even race-neutral to begin with”); Brief for the United Negro College Fund and Kappa Alpha Psi as Amici Curiae in Support of Respondents at 25, Grutter (No. 02-241) & Gratz (No. 02-516) (“Although many race-neutral alternatives have been suggested—and some implemented—none of them have yet proven effective, and all suffer from serious limitations.”); Brief of Harvard University et al. as Amici Curiae Supporting Respondents at 23, Grutter (No. 02-241) & Gratz (No. 02-516) (“Available research suggests that the impact of [alternative] plans on minority admissions is quite limited and due in significant part to lingering racial segregation in secondary schools— itself a deeply problematic state of affairs.”); Brief of the American Educational Research Association et al. in Support of Respondents at 4, Grutter (No. 02-241) (“Evidence introduced in the district court and more recent research studies indicate that race-neutral alternatives are far less
served, in order for a program to be narrowly tailored, there must be a "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."47 However, in the case of the law school admissions program, the Court concluded that all of the race-neutral alternatives such as lotteries or reducing admissions standards would have required "a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."48

That was not the end of the analysis, however. The Court also observed that narrow tailoring required that "a race-conscious admissions program not unduly harm members of any racial group."49 This is because, as the majority observed, "there are serious problems of justice connected with the idea of preference itself."50 Somewhat surprisingly, however, the majority concluded that the law school's admissions program did not impose such an undue burden. In reaching that conclusion, it pointed to the law school's use of non-raced-based diversity factors as well as its individualized consideration of applicants.

Finally, the majority opinion made a somewhat cryptic pronouncement regarding the duration of such programs that has garnered much attention. Observing that "race-conscious admissions policies must be limited in time," Justice O'Connor stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."51 Some have taken this as meaning that the law school's program must be limited to this specific term of years. Others have taken this as an indication of a merely aspirational goal.52

Nonetheless, in so stating, the Court appeared to go beyond mere deference to the law school's decisionmaking. The law school had proffered no durational limitation on its use of race as a factor in admissions decisions.53 Accordingly, under the Court's

effective than race-conscious policies in promoting educational diversity.").

47 Grutter, 123 S. Ct. at 2345.
48 Id.
49 Id.
50 Id. (quoting Bakke, 438 U.S. at 298).
51 Id. at 2346-47.
52 Justice Ginsburg, for example, in a concurring opinion joined by Justice Breyer, viewed such durational limits as purely aspirational: "From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." Id. at 2348 (Ginsburg, J., concurring).
53 See Grutter v. Bollinger, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001) (observing that "there is no time limit on defendants' use of race in the admissions process Vienna), rev'd, 288 F.3d
precedents, its program was constitutionally infirm.\footnote{\textit{Grutter}, 123 S. Ct. at 2346. Justice Ginsburg in a separate concurring opinion inexplicably relied upon principles of international law such as the International Convention on the Elimination of All Forms of Racial Discrimination for the same proposition. \textit{See id.} at 2347 (Ginsburg, J., concurring).} For, as Justice O’Connor observed, racial classifications such as those involved in the law school program were “potentially so dangerous that they may be employed no more broadly than the interest demands,”\footnote{\textit{Grutter}, 123 S. Ct. at 2346. The majority observed that the law school “concedes that all ‘race-conscious programs must have reasonable durational limits.’” \textit{Id.} (quoting Respondent’s Brief at 32, \textit{Grutter} (No. 02-241)). Accordingly, despite its application of strict scrutiny to the law school’s admissions program, the majority stated without explanation that it was willing to “take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.” \textit{Id.} (citation omitted).} and as a result, they “must have a logical end point”\footnote{\textit{Id.} (“The requirement that all race-conscious admissions programs have a termination point ‘assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.’” (quoting \textit{Croson}, 488 U.S. at 510)).} and must be subject to “sunset provisions” and “periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”\footnote{\textit{Grutter}, 123 S. Ct. at 2325 (2003).} Nonetheless, the Court appears to have supplied some form of durational limitation to save the law school’s program where the law school itself had expressed no such intent. This goes well beyond any form of “deference” to the law school’s educational judgments.

Indeed, the deference that the Court was willing to give to the law school was particularly striking in light of the facts found by the district court in the proceedings below. The district court ruled
that the law school’s admissions policies amounted to a *de facto* quota. Nonetheless, the Court apparently concluded that the district court’s factual determinations did not deserve the same deference it gave to the law school’s decisionmaking. Rather, it glossed over or ignored the district court’s factfinding and instead ceded that role to school administrators.

Several members of the Court severely criticized the majority decision on this and other grounds. Justice Scalia, for example, argued that the law school’s “mystical ‘critical mass’ justification for its discrimination by race challenges even the most gullible mind” and that the evidence demonstrated that this rationale was “a sham to cover a scheme of racially proportionate admissions.” He also criticized the majority’s conclusion that Michigan had a “compelling interest in maintaining a ‘prestige’ law school whose normal admissions standards disproportionately exclude blacks and other minorities.”

Most significantly, however, Justice Scalia commented extensively on the vagueness of the Court’s holdings in *Grutter* and *Gratz*, observing that the Court’s “*Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.” According to Justice Scalia, the majority opinions in the two cases left several open questions that would undoubtedly be the subject of “future lawsuits.” Thus, for example, Justice Scalia suggested that litigants might question whether an admissions program contained enough “individual” evaluation of applicants, avoided “separate admissions tracks,” sought to achieve a “critical mass” of minority students rather than a “*de facto* quota system,” and was based on a real commitment to diversity. Similarly, future courts would be called upon to resolve whether the program at issue intentionally discriminated against certain minority groups in order to achieve a “generic minority ‘critical mass,’”

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58 The district court observed:

[B]y using race to ensure the enrollment of a certain minimum percentage of underrepresented minority students, the law school has made the current admissions policy practically indistinguishable from a quota system . . . [T]he law school has an unwritten policy of constituting each entering class so that at least 10-12% are students from underrepresented minority groups . . . . The practical effect of the law school’s policy is indistinguishable from a straight quota system, and such a system is not narrowly tailored under any interpretation of the Equal Protection Clause. *Grutter*, 137 F. Supp. 2d at 851. But see *Grutter*, 288 F.3d at 747-48 (“As a matter of definition, we are satisfied that the Law School’s ‘critical mass’ is not the equivalent of a quota, because . . . the Law School has no fixed goal or target.”).

59 *Grutter*, 123 S. Ct. at 2348 (Scalia, J., concurring in part and dissenting in part).

60 *Id.* at 2349.

61 *Id.*
and whether the racial preferences at issue "have gone below or above the mystical Grutter-approved 'critical mass.'"  

Justice Thomas similarly raised a number of problems in the majority's analysis. Justice Thomas concluded that, on its face, the law school's admissions policy constituted constitutionally-prohibited racial discrimination. As he observed: "No one would argue that a university could set up a lower general admission standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admission standard and grant exemptions to favored races."

Second, he critiqued the majority's "unprecedented deference" to the law school's decisionmaking, which he concluded was "an approach inconsistent with the very concept of 'strict scrutiny.'" According to Justice Thomas, "under strict scrutiny, the Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference, grounded in the First Amendment or anywhere else."

Third, Justice Thomas concluded that the need for "diversity" was not a sufficiently compelling interest to withstand strict scrutiny. In particular, Justice Thomas relied heavily upon the Court's decision in Wygant v. Jackson Board of Education, which held that the desire to have a racially diverse teaching faculty was not a sufficiently compelling state interest to support a collective bargaining agreement for teachers that favored certain minority races. Justice Thomas noted that the Court in Wygant had specifically stated that "'[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy' because a 'court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.'" In his view, the law school's admissions program ap-

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62 Id. at 2349-50.
63 Id. (Thomas, J., concurring in part and dissenting in part).
64 Id. at 2350; see also id. ("The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.").
65 Id.
66 Id. at 2356; see also id. at 2357 ("The majority's broad deference to both the Law School's judgment that racial aesthetics leads to educational benefits and its stubborn refusal to alter the status quo in admissions methods finds no basis in the Constitution or decisions of this Court.").
68 Grutter, 123 S. Ct. at 2351.
69 Id. at 2352 (quoting Wygant, 476 U.S. at 276); see also id. (observing that "'[t]he Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government
peared to be an attempt to compensate for such generalized discrimination.

Justice Thomas further critiqued the majority's analysis of the compelling interest at issue in the case. As Justice Thomas observed, the law school was pursuing "diversity" in admissions based on a desire to attain certain "educational benefits." As had Justice Scalia, Justice Thomas noted that the law school refused to obtain these alleged benefits by dropping its admissions standards so that a greater number of minority candidates would be deemed "qualified." Therefore, in reality the specific interest at issue, according to Justice Thomas, was "the Law School's interest in offering a marginally superior education while maintaining an elite institution."70

Justice Thomas concluded that this interest was even less "compelling" than the interest in remedying societal discrimination through diversity programs that the Court rejected in Wygant. As he observed: "Under the proper standard, there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school."71 Indeed, as Justice Tho-

places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all”).

70 Id. at 2353; see also id. at 2353 n.4 ("If the Law School is correct that the educational benefits of 'diversity' are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law School's reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all.").

Several amici submitted evidence showing that there were no demonstrable benefits flowing from a diverse student body. See, e.g., Brief for Amicus Curiae National Association of Scholars in Support of Petitioners at 6, Grutter (No. 02-241) (concluding that "the premise that faculty view racial preferences as essential to the basic purposes of higher education, or even as desirable, is unfounded"); Brief Amicus Curiae of Reason Foundation in Support of Petitioners at 10, Grutter (No. 02-241) & Gratz (No. 02-516) (concluding that "academic outcomes 'are generally not affected' by racial composition of the peer environments and measures of minority enrollment, and that any effects found 'are very weak and indirect'"). But see Brief Amicus Curiae of the National Education Association et al. at 24, Grutter (No. 02-241) & Gratz (No. 02-516) ("[S]upport for the proposition that integration itself yields educational benefits is found in the voluminous social science literature analyzing the impact of school desegregation on student performance."); Brief of Amici Curiae American Council on Education and 52 Other Higher Education Organizations in Support of Respondents at 27-28, Grutter (No. 02-241) ("Research . . . shows that institutional commitment to diversity is linked with student academic success and relatively low racial tension on campus supports retention of minority students and, overall, has powerful educational impact on white and minority students.") (citations omitted).

71 Grutter, 123 S. Ct. at 2354 (Thomas, J., concurring in part and dissenting in part). Justice Thomas further noted that this interest was even less compelling given that most of the graduates of the law school did not even remain in the State of Michigan. See id. at 2355 (cataloguing evidence demonstrating that "the Law School trains few Michigan residents and overwhelmingly serves students, who, as lawyers, leave the State of Michigan" and concluding that "[t]he Law School's decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan").
mas observed, "[t]he interest in remaining elite and exclusive . . . requires the use of admissions 'standards' that, in turn, create the Law School's 'need' to discriminate on the basis of race."\(^7\)

Chief Justice Rehnquist's dissenting opinion similarly maintained that the law school's admissions policy was not narrowly tailored. Rather, Chief Justice Rehnquist concluded that the law school had engaged in "a naked effort to achieve racial balancing."\(^7\)

Finally, as did Justices Scalia and Thomas, the Chief Justice observed that the Court's application of strict scrutiny was "unprecedented in its deference."\(^7\)

In examining the law school's admissions program, Chief Justice Rehnquist concluded that it "bears little or no relation to its asserted goal of achieving 'critical mass.'"\(^7\)

He cited the large disparities among various underrepresented minority groups in terms of admission to the law school, noting:

In order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African-Americans.\(^7\)

Chief Justice Rehnquist attributed these results to outright racial balancing, noting that "from 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups."\(^7\)

Thus, in Chief Justice Rehnquist's view, the admissions policies constituted "a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups."\(^7\)

As Chief Justice Rehnquist's opinion forcefully demonstrates, the majority's prohibition of "racial balancing" and discriminatory practices within the underrepresented minority and remaining

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\(^7\) Id. at 2356.
\(^7\) Id. at 2365 (Rehnquist, C.J., dissenting).
\(^7\) Id. at 2366.
\(^7\) Id.
\(^7\) Id. at 2367; see also id. (observing that the majority "simply emphasize[s] the importance of achieving 'critical mass,' without any explanation of why that concept is applied differently among the three underrepresented groups").
\(^7\) Id. at 2368.
\(^7\) Id. at 2369.
segments of the applicant population leave such affirmative action programs open to significant collateral attack. For the way in which these programs are implemented, as evidenced in the law school case, shows that there is significant discrimination among different "underrepresented" minority groups as well as among "overrepresented" groups such as white and Asian students. Thus, future lawsuits may seek to undermine these programs by challenging the significant preferences given to African-American students over Hispanic students, or the discriminatory effects of these programs on Asian applicants.

Chief Justice Rehnquist further concluded that the law school's admissions program failed the constitutional test because it was effectively of unlimited duration. He found that the law school's "discussions of a time limit are the vaguest of assurances," and as a result "permit[ted] the Law School's use of racial preferences on a seemingly permanent basis."79 Thus, unlike the majority, he was unwilling to supply the law school with a durational limit that was contrary to its expressed intent.

Finally, Justice Kennedy filed a separate dissent in which he asserted that "[t]he Court . . . does not apply strict scrutiny" and that, "[b]y trying to say otherwise, it undermines both the test and its own controlling precedents."80 According to Justice Kennedy, "[h]aving approved the use of race as a factor in the admissions process, the majority proceeds to nullify the essential safeguard Justice Powell insisted upon [in Bakke] as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard."81

Justice Kennedy indicated that while the Court might give deference to a "university's definition of its educational objective," deference "is not to be given with respect to the methods by which it is pursued."82 Justice Kennedy pointed to Chief Justice Rehnquist's opinion, which he maintained "demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."83

79 Id. at 2370.
80 Id. (Kennedy, J., dissenting).
81 Id.; see also id. (observing that "[t]his Court has reaffirmed, subsequent to Bakke, the absolute necessity of strict scrutiny when the state uses race as an operative category").
82 Id. at 2370-71.
83 Id. at 2371. Several amici made the point that the law school's attempt to create a "critical mass" of underrepresented minority students constituted a de facto or "disguised" quota. See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioner at 9, Grutter (No.
Specifically, Justice Kennedy noted that race was "outcome determinative" in filling fifteen to twenty percent of the available admissions slots. The percentage of minorities enrolled at the law school "fluctuated only by 0.3%, from 13.5% to 13.8%," and the "number of minority students to whom offers were extended varied by just a slightly greater magnitude of 2.2%." Justice Kennedy noted that the district court had concluded based on this evidence that the "Law School's pursuit of critical mass mutated into the equivalent of a quota." As a result, there was a lack of individual review, which the majority deemed necessary for an admissions program to withstand constitutional scrutiny.

02-241) ("[R]espondents' admissions policy uses disguised quotas to ensure that each entering class includes a predetermined 'critical mass' of certain racial minorities."); Brief of Amici Curiae Law Professors Larry Alexander et al. in Support of Petitioner at 9, Grutter (No. 02-241) ("'Diversity' policies must be described as what they are—means of implementing racial quotas."); Brief of Amicus Curiae Center for Individual Freedom in Support of Petitioners at 3, Grutter (No. 02-241) & Gratz (No. 02-516) ("[T]he admitted desire for a 'critical mass' of supposedly under-represented minority students is an open admission of the existence of a quota."); Brief Amici Curiae of the Center for Equal Opportunity et al. at 11, Grutter (No. 02-241) & Gratz (No. 02-516) ("In this case, as found by the district court, the Law School uses racial preferences in its admissions process to achieve a minimum ten-percent minority representation within its student body that is 'practically indistinguishable from a quota system.'") (quoting Grutter, 137 F. Supp. 2d at 851)). But see Respondent's Brief at 38, Grutter (No. 02-241) ("Petitioner and her amici repeatedly charge that the Law School's admissions process employs a 'quota' or 'effectively reserves' a minimum of 10-12% of the class for minority applicants. That accusation may be an error of law or of fact (their arguments are too vague to discern which), but either way the error is a plain one."); Brief of the Law School Admission Council as Amicus Curiae in Support of Respondents at 22, Grutter (No. 02-241) ("It is precisely the flexibility afforded admissions officials that distinguishes most race-sensitive law school admissions policies from the 'quota' system condemned in Bakke."); Brief of Amicus Curiae Michigan Black Law Alumni Society in Support of Respondents at 5, Grutter (No. 02-241) (maintaining that "the Law School admissions policy does not erect a quota, and its central goal is to select students who will become outstanding lawyers").

Id. at 2373. He further noted that "[i]f universities are given the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review." Id. at 2374.

Justice Kennedy noted that there was substantive evidence that individual review was in fact not implemented in the admissions process. For example: [the consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself. The admissions officers could use the reports to recalibrate the plus factor given to race
Justice Kennedy's dissent best illustrates how the majority opinion ignores the record at issue in the case. The actual facts as found by the district court below show that the University of Michigan's efforts to achieve a "critical mass" amounted to a *de facto* quota. Moreover, in the process of achieving a critical mass, the law school was forced to discriminate among members of different underrepresented minority groups. Finally, there was significant evidence that law school administrators had engaged in a purposeful attempt to achieve a prohibited racial balance among admitted students. All of these facts were glossed over by the majority.

The majority's decision in *Grutter* was therefore subject to powerful critiques by the dissenting members of the Court. Its announcement of a rule of "deference" while at the same time applying strict scrutiny was particularly controversial. To a lesser extent, its adoption of Justice Powell's analysis in *Bakke* was also subject to criticism. Finally, the Court appeared to ignore the significant evidence that the law school's goal of a "critical mass" of underrepresented minority students functioned as a *de facto* quota.

**B. Gratz v. Bollinger**

The Court was far more united in its review of the University of Michigan's undergraduate admissions program in *Gratz*. While the University had changed its guidelines "a number of times," it consistently considered race as one of the factors in its admissions decisions. The use of race in admissions was so pervasive that the University admitted "virtually every qualified . . . applicant" who was a member of certain "underrepresented minorities." An applicant's race had additional ramifications, however. Under the University's guidelines, members of certain groups were to be "admitted as soon as possible in light of the University's belief that such applicants were more likely to enroll if promptly no-

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88 See *id.* at 2418-19 (observing that, aside from race, the university also "considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership").
89 *Id.* at 2419; see also *id.* (noting that "underrepresented minorities" include "African-Americans, Hispanics, and Native Americans").
The University also had certain "protected seats" that were available only to specific groups, "including athletes, foreign students, ROTC candidates, and underrepresented minorities." As had the law school, the University sought to justify these measures on the grounds that it had a compelling interest in achieving the educational benefits flowing from a "diverse" student body.

The six-member majority opinion authored by Chief Justice Rehnquist pointed to the Court's decision in Grutter in rejecting the petitioners' attempt to argue that the desire to achieve "diversity" could not be used as a justification for the use of race in university admissions. It then proceeded, however, to consider whether the University of Michigan program was narrowly tailored to achieve such an interest, ultimately concluding that it did not give the "individualized consideration" to applicants that was constitutionally required.

The undergraduate program, unlike the law school admissions program, automatically gave "20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race." The Court determined that this mechanical point system was "not narrowly tailored to achieve the interest in educational diversity."

As did the majority in Grutter, the majority in Gratz applied Justice Powell's analysis in Bakke. The majority noted that Justice Powell's opinion "emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education." The undergraduate admissions program failed this test because it did not give each applicant individualized consideration since it "automatically distribute[d] 20 points to every single applicant from an 'underrepresented minority' group, as defined by the Uni-

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90 Id. at 2420.
91 Id.
92 Id.
93 Id. at 2426-27.
94 Id. at 2427-28.
95 Id. at 2428.
96 Id. at 2427.
97 Id.; see also Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1254-57 (11th Cir. 2001) (striking down "rigid, mechanical approach to considering race," which was "itself incompatible with the need for flexibility in the admissions process").
98 Gratz, 123 S. Ct. at 2428; see also id. ("Under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application.")
Indeed, the applicant's race was weighted so heavily that it was the "decisive" factor for "virtually every minimally qualified underrepresented minority applicant."100

Justice O'Connor wrote a separate concurring opinion in which she agreed that the undergraduate admissions program did not "provide for a meaningful individualized review of applicants."101 In her view, the "mechanized selection index score" used by the undergraduate admissions staff, which "by and large, automatically determines the admissions decision for each applicant," precluded the "type of individualized consideration" that Grutter required.102

In a separate concurring opinion, Justice Thomas reiterated the view he expressed in Grutter that "a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause."103 Justice Thomas noted, however, that the undergraduate admissions program did not discriminate among applicants that were members of different underrepresented minority groups.104 Rather, the program treated all underrepresented minorities equally, giving them all an additional twenty points.105 Nonetheless, the program was still defective in that it did not consider "nonracial distinctions among applicants on both sides of the single permitted racial classification."106

Justice Souter, in contrast, filed a dissenting opinion arguing that the undergraduate admissions policy was similar to the law school admissions policy upheld in Grutter.107 He concluded that

99 Id.
100 Id.
101 Id. at 2431 (O'Connor, J., concurring); see also id. at 2432 ("[T]he selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed.").
102 Id. at 2431. Justice O'Connor observed that the points awarded for underrepresented minority status far outstripped points awarded for other factors:

Michigan residents, for example, receive 10 points, and children of alumni receive 4. Counselors may assign an outstanding essay up to 3 points and may award up to 5 points for an applicant's personal achievement, leadership, or public service . . . . Although the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race.

Id. at 2431-32.
103 Id. at 2433 (Thomas, J., concurring).
104 Id.
105 Id.
106 Id.
107 See id. at 2440 (Souter, J., dissenting) (noting that Gratz is "closer to what Grutter ap-
the undergraduate admissions program did not implement a quota system, such as that invalidated in the *Bakke* case, noting that the program considered a number of factors other than race. In Justice Souter's opinion, the undergraduate program was therefore constitutional because it considered "‘all pertinent elements of diversity in light of the particular qualifications of each applicant’" and placed "each element ‘on the same footing for consideration, although not necessarily according them the same weight.’"

While he acknowledged that there might be a point system where the racial "plus factor" was "so extreme as to guarantee every minority applicant a higher rank than every nonminority applicant in the university's admissions system," he concluded that the undergraduate program at issue in *Gratz* did not pose such a case. Indeed, Justice Souter observed that "[t]he college simply does by a numbered scale what the law school accomplishes in its 'holistic review.'"

Justice Ginsburg also issued a dissenting opinion. She maintained that the government in evaluating race-conscious programs could permissibly "distinguish between policies of exclusion and inclusion." She reasoned that "[a]ctions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated."

Citing the "United Nations-initiated" Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination Against Women, Justice Ginsburg observed that "[c]ontemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality." Accordingly, she determined that the undergraduate admissions program survived judicial scrutiny because it was a policy of "inclusion" that sought to benefit disadvantaged minorities.

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108 See id. (observing that the plan lets all applicants "compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic disadvantage, athletic ability, and quality of a personal essay").

109 Id. at 2440 (quoting *Bakke*, 438 U.S. at 317).

110 Id. at 2441.

111 Id. (quoting *Grutter*, 123 S. Ct. at 2343).

112 Id. at 2444 (Ginsburg, J., dissenting).

113 Id.

114 Id. at 2445.
Finally, in a somewhat unusual line of reasoning, Justice Ginsburg further argued that "colleges and universities will seek to maintain their minority enrollment" despite the Court's invalidation of policies such as that employed by the undergraduate program and that they would resort to "camouflage" in order to achieve this end. According to Justice Ginsburg reasoned that the undergraduate program should be upheld because "[i]f honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."

Despite these dissents, however, the Court was far more unified in its decision in Gratz than it had been in Grutter. Nonetheless, it is difficult to reconcile the two decisions. In Gratz, the Court appeared to be troubled by the mechanistic approach in consideration of race in admissions decisions that resulted in a lack of "individualized consideration." Yet, it is difficult to see why this could be constitutionally significant or outcome determinative. If race may be considered as a "plus factor," whether such consideration is "mechanical" or "individualized" should not seem to matter.

II. An Originalist Approach

The most striking aspect of the opinions in Grutter and Gratz is that none discuss in detail the original meaning of the Fourteenth Amendment. Rather, the Court focused primarily on its own precedents in cases such as Bakke, Croson, and Adarand. In the process, however, a majority of the Court announced new doctrines designed to uphold affirmative action programs in the educational context while at the same time making clear that not all such programs that seek to obtain the "educational benefits" of "diversity" are necessarily constitutional. The result of these various forces shaping the Court's decisionmaking is a pair of decisions that are difficult to reconcile.

An originalist analysis has the potential to provide greater clarity concerning the constitutionality of state-sponsored affirmative action programs. While the framers of the Fourteenth Amendment did not directly address the question, the fundamental principles they sought to embody in the amendment may give some guidance

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115 Id. at 2446.
116 Id. Several members of the Court also concluded that the petitioners lacked standing to seek prospective relief regarding the undergraduate admissions policies given that they were not likely to suffer any injury from those policies in the future. See id. at 2434-38 (Stevens, J., dissenting). However, the majority rejected this conclusion. See id. at 2422-26.
in resolving this modern controversy. Indeed, originalist arguments can be constructed on both sides of this question.

Section One of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Thus, there are three clauses that are potentially applicable in determining whether state-sponsored affirmative action programs are constitutional.

At the outset, the Due Process Clause does not appear to be particularly relevant given that it was most likely intended to guarantee procedural, as opposed to substantive, rights. In contrast, despite the fact that the Supreme Court narrowly construed the clause in *The Slaughter-House Cases*, the Privileges or Immunities Clause of the amendment provides a potential source of substantive rights that may be adversely impacted by state-sponsored affirmative action programs. Finally, and most obviously, the Equal Protection Clause must be considered in determining whether such programs impermissibly discriminate against certain classes of individuals.

A. The Privileges or Immunities Clause

The Privileges or Immunities Clause of Section One of the Fourteenth Amendment provides a potential, albeit judicially ignored, source for a constitutional prohibition of discrimination. That clause provides that "[n]o State shall . . . abridge the privileges or immunities of citizens of the United States." Thus, the clause by its terms applies only to citizens. It does not apply to

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117 U.S. CONST. amend. XIV, § 1.

118 See, e.g., BERGER, supra note 6, at 222 (maintaining that due process did "not comprehend judicial power to override legislation on substantive or policy grounds").

119 83 U.S. (16 Wall.) 36 (1873). See also AMAR, supra note 6, at 213 (observing that the Court's ruling "strangled the privileges-or-immunities clause in its crib"); PERRY, supra note 6, at 89 ("[A]n early misreading by the Court of the privileges or immunities provision yielded a privileges or immunities norm that was largely useless."); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 1 (1996) ("The decision in the Slaughter-House Cases liquidated the Privileges or Immunities Clause of the Fourteenth Amendment."); Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'y 71, 73 (1989) (stating that the Privileges or Immunities Clause was "ruthlessly eviscerated" by the Slaughter-House Court).

120 U.S. CONST. amend. XIV, § 1.

121 This distinction is part of a broader conceptual framework that served as the backdrop for nineteenth-century notions of fundamental law. Indeed, "nineteenth-century American law
all "persons" as do the Equal Protection and Due Process Clauses.

In order to determine the scope of the guarantee under the clause it is necessary to determine the original meaning of the terms "privileges" and "immunities" at the time of ratification. An analysis of the historical record shows that the privileges and immunities of citizens were those fundamental capacities thought to be inherent in citizenship. During the congressional debates over the amendment, Representative Woodbridge stated, for example, that it was intended to "give to a citizen of the United States the natural rights which necessarily pertain to citizenship."

These capacities or powers were conceived of as existing anterior to the establishment of government. Citizens had a fundamental right to exercise certain powers on the basis of their status as citizens as well as fundamental rights available to all persons. They had the power, for example, to own property, to testify, and to enforce their rights in the courts. These were all aspects of citizenship that were specifically guaranteed in the Civil Rights Act, which Congress sought to constitutionalize by enacting

frequently distinguished between the rights of citizens and the rights of noncitizens, principally aliens." Harrison, supra note 6, at 1390.

See, e.g., John Harrison, If the Eye Offend Thee, Turn Off the Color, 91 Mich. L. Rev. 1213, 1230 (1993) ("[T]he privileges and immunities of citizens referred to in the Privileges or Immunities Clause, although they encompass basic rights, like making contracts and owning property, were not generally understood as including all rights someone might have."); Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863, 926 (1986) ("The framers' understanding of citizenship involved an important distinction between fundamental and nonfundamental rights."); Earl M. Maltz, The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction, 45 Ohio St. L.J. 933, 967 (1984) ("While some construed the term civil rights very broadly, all mainstream Republicans agreed that the privileges and immunities encompassed only those interests which are 'fundamental.'").

See, e.g., id. (statement of Rep. Woodbridge) ("What is the object of the proposed amendment? It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship."); id. at 1836 (statement of Rep. Lawrence) (maintaining that "[f]rom the very nature of citizenship, the avowed purpose of the founders of our Government, and the interpretation put upon the Constitution, it must be clear that this bill creates no new right, confers no new privilege, but is declaratory of what is already the constitutional rights of every citizen in every State" and, that "equality of civil rights is the fundamental rule that pervades the Constitution and controls all State authority").

Section One of the Act provided that citizens would have the "same right" to exercise certain fundamental rights:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right . . . to make and enforce
Section One of the Fourteenth Amendment.\textsuperscript{126}

In contrast, the clause did not afford protection for "special privileges," which could only exist after a government was established. Thus, Representative Wilson in discussing the nature of the rights to be guaranteed under the Civil Rights Act indicated that "[c]ivil rights are those which have no relation to the establishment, support, or management of government."\textsuperscript{127} Similarly,

contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, . . . and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.


\textsuperscript{126} Several members of Congress indicated that the amendment was designed to constitutionalize the Civil Rights Act. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2502 (1866) (statement of Rep. Raymond) ("[A]lthough [the Civil Rights Bill] became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it."); id. at 2896 (statement of Sen. Doolittle) (maintaining that "it was because Mr. BINGHAM and others of the House of Representatives and other persons upon the committee had doubts, at least, as to the constitutionality of the civil rights bill that this proposition to amend the Constitution now appears to give it validity and force"); id. at 2511 (statement of Rep. Eliot) ("I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt" as to the bill's constitutionality.).

Moreover, members of Congress described the rights enumerated in the Act as the "rights of citizenship." See, e.g., id. at 1833 (statement of Rep. Lawrence); id. at 1152 (noting that the Act was designed to protect "the fundamental rights of citizenship; those rights which constitute the essence of freedom"); see also BERGER, supra note 6, at 30 ("The ‘privileges or immunities’ clause was the central provision of the Amendment’s § I, and the key to its meaning is furnished by the immediately preceding Civil Rights Act of 1866, which, all are agreed, it was the purpose of the Amendment to embody and protect."); CURTIS, supra note 6, at 86 ("Several congressmen observed that the amendment would eliminate any question about the power of Congress to pass the Civil Rights bill. Others considered the amendment a reiteration of the Civil Rights bill.").

Justice Field in his dissent in the Slaughter-House Cases similarly pointed to the Civil Rights Act as providing an enumeration of the privileges and immunities of citizens:

What, then, are the privileges and immunities which are secured against abridgement by State legislation? In the first section of the Civil Rights Act Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment these terms include; it has there declared that they include the right "to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property."

83 U.S. (16 Wall.) 36, 96-97 (1873) (Field, J., dissenting).

\textsuperscript{127} CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson); see also id. at 1119 (statement of Rep. Lawrence) (maintaining that "[b]efore our Constitution was formed, the great fundamental rights which I have mentioned, belonged to every person who became a member of our great national family" and that the "several departments of Government possess the power to enact, administer, and enforce the laws ‘necessary and proper’ to secure these rights which existed anterior to the ordination of the Constitution"). See generally Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180-81 (1868) (observing that "[s]pecial privileges enjoyed by citizens in their own States are not secured in other States" under the clause).
the framers of the amendment specifically stated that it would not guarantee the right to vote or to hold office. This was part of a broader conceptual framework that viewed such "political" rights as not being inherent in the concept of citizenship. Indeed, the Fifteenth Amendment was soon ratified as a separate constitutional measure to specifically guarantee at least one such "political" right—the right to vote.

As a consequence, the Privileges or Immunities Clause as originally understood does not provide any constitutional guarantee with respect to rights that could only exist after the establishment of government. By implication, therefore, the clause does not provide any constitutional guarantee with respect to benefits conferred by the government. For such benefits may only exist after a government is established.

Under this construction, government educational benefits would not fall within the scope of the Privileges or Immunities Clause of the Fourteenth Amendment. As a result, state govern-

128 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) ("The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law . . . ."); see also NELSON, supra note 6, at 125 ("The statement most frequently made in debates on the Fourteenth Amendment is that it did not, in and of itself, confer upon blacks or anyone else the right to vote.").

Members of Congress similarly distinguished between civil and political rights in debating the Civil Rights Act. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (statement of Sen. Trumbull) ("[T]he granting of civil rights does not, and never did in this country, carry with it rights, or, more properly speaking, political privileges. A man may be a citizen in this country without a right to vote or without a right to hold office."); id. at 1255 (statement of Sen. Wilson) ("I [believe] Congress is clothed with ample authority to secure the emancipated slaves in their civil rights and immunities. But I did not understand then, and I do not believe now, that it gives Congress the power to clothe these men with suffrage or to confer office upon them."); id. at 1117 (statement of Rep. Wilson) (maintaining that the terms "civil rights and immunities" used in the Civil Rights Bill did not "mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal"); id. at 1151 (statement of Rep. Thayer) ("[N]obody can successfully contend that a bill guarantying simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right.").

129 See Harrison, supra note 6, at 1417 ("[N]ineteenth-century usage concerning political participation confirms the close connection between privileges and immunities and civil rights: neither was thought to extend to political rights, such as voting or serving on juries."); Maltz, supra note 122, at 965 (observing that "1860 Americans distinguished two mutually exclusive sets of rights: 'civil rights'—rights which belong to all men as a matter of natural law—and 'political rights'—rights which are granted by the grace of government"); McConnell, supra note 6, at 1024 ("It was generally understood that the nondiscrimination requirement of the Fourteenth Amendment applied only to 'civil rights.' Political and social rights, it was agreed, were not civil rights and were not protected.").

130 See U.S. CONST. amend. XV. See also AMAR, supra note 6, at 273 (observing that "the Fifteenth Amendment, rightly read, affirms blacks' political rights—to vote, serve on juries, and hold office—just as the Fourteenth Amendment had affirmed blacks' civil rights to do virtually everything but").
ments or universities would remain free to adopt whatever educational policies they deemed appropriate, including admissions policies that discriminated on the basis of applicants' race by giving certain racial categories a "plus" factor in making admissions decisions.

This interpretation finds some support in the Court's jurisprudence under the related Privileges and Immunities Clause of Article IV, Section 2. That clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The framers of the Fourteenth Amendment specifically acknowledged that the Privileges and Immunities Clause of Article IV served as the basis for the Privileges or Immunities Clause of Section One. Representative Bingham, the primary draftsman of the amendment, stated, for example, that it would give Congress the power "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State." Similarly, Senator Howard in introducing the proposed amendment, cited the Article IV clause as authority in defining the meaning of the terms "privileges" and "immunities." Finally, other members of Congress referred to the Article IV clause more generally as a potential source of a constitutional guarantee of civil rights that were being abridged in the South.

131 U.S. CONST. Art. IV, § 2.
133 Id. at 2765 (statement of Sen. Howard); see also id. at 2961 (statement of Sen. Poland) (stating that the Privileges or Immunities Clause "secures nothing beyond what was intended by the original provision in the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"); id. at 1088 (statement of Rep. Woodbridge) (observing that the proposed amendment "is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guarantied to him under the Constitution of the United States"); id. at 1089 (statement of Rep. Bingham) (maintaining that the states could not "withhold from any citizen of the United States within its limits, under any pretext whatever, any of the privileges of a citizen of the United States" or impose "any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States").
134 See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence) ("This clause of the Constitution therefore recognizes but one kind of fundamental civil privileges equal for all citizens. No sophistry can change it, no logic destroy its force. There it stands, the palladium of equal fundamental civil rights for all citizens."); id. at 1118 (statement of Rep. Wilson) ("If [the States] would recognize that 'general citizenship' (Story on the Constitution, volume two, page 604) which under this clause entitles every citizen to security and protection of personal rights, (Campbell vs. Morris, 3 Harris & McHenry, 535) we might safely withhold action."); CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865) (statement of Rep. Kasson) ("It is necessary to carry into effect [the Privileges and Immunities Clause] of the Constitution of the United States which has been disobeyed in nearly every slave State of the Union for some
Beginning with Justice Bushrod Washington’s often-cited opinion in *Corfield v. Coryell*,¹³⁵ which pre-dated the Fourteenth Amendment and was expressly cited by its framers, the “privileges” and “immunities” contemplated under the clause were construed to be those “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”¹³⁶

Similarly, despite recent erosion of this interpretation of the Article IV clause, some of the Court’s modern cases have reiterated the limited nature of the provision. Thus, in *Baldwin v. Montana Fish & Game Commission*,¹³⁷ the Court considered whether a state could impose a licensing fee that discriminated against nonresidents who wanted to hunt game in the state. The Court upheld the licensing fee despite the Privileges and Immunities Clause challenge on the ground that the clause protected only those rights that were “fundamental,” noting: “Whatever rights or activities may be ‘fundamental’ under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.”¹³⁸ Thus, precedents such as *Corfield* and its progeny may form a basis for a narrow construction of the Privileges or Immunities Clause that would support the constitu-

²²⁵ or thirty years past.”); *id.* at 237 (statement of Rep. Smith) (“The Constitution declares that every citizen of the United States shall have equal privileges in every other State. That principle was denied to the whole North by the South unless the man adhered to the sentiments of the South.”); CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (statement of Sen. Wilson) (maintaining that “the supporters of slavery enforced this disregard of the supremacy of the Constitution and of the privileges and immunities of the citizen by every power and influence known to the communities cursed by the presence of a slave”).

¹³⁸ *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (arguing that “no fundamental right” was at issue in reviewing affirmative action program in medical school admissions).

¹³⁹ *Baldwin*, 436 U.S. at 388. *But see id.* at 402 (Brennan, J., dissenting) (“An inquiry into whether a given right is ‘fundamental’ has no place in our analysis of whether a State’s discrimination against nonresidents . . . violates the Clause. Rather, our primary concern is the State’s justification for its discrimination.”).
tionality of race-conscious admissions programs.  

There are, however, arguments that might be made to support an interpretation of the Privileges or Immunities Clause under which race-conscious university admissions programs would be unconstitutional. For example, the clause’s guarantee of “immunities” may be argued to include the “immunity” or freedom from unequal burdens imposed by the government. Some of the remarks made by Representative Bingham support this interpretation of the clause. During the congressional debates, Bingham stated, for example: “What does the word immunity in your Constitution mean? Exemption from unequal burdens.”

Subsequent congressional interpretation of the amendment also supports this reading to some extent. Commentators advancing this interpretation have relied heavily on the debates over the 1875 Civil Rights Act, for example, during which congressional leaders maintained that the Fourteenth Amendment had always been intended to guarantee an across-the-board equality of rights. However, such debates, which occurred years after the amendment’s ratification, are an inferior source for determining the original meaning. Moreover, other commentators have argued that

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139 Professor Harrison has argued, in contrast, that government benefits would constitute “privileges or immunities” of citizenship:

In light of . . . Corfield, it is tempting to say that government benefits are more like oyster beds than they are like the right to own property. This is unpersuasive, however, because there are many examples of government services known in the nineteenth century that very probably would have been classified as privileges or immunities of citizenship.

Harrison, supra note 6, at 1456.

140 Representative Wilson described the term “immunity” as used in the Civil Rights Act as follows:

What is an immunity? Simply “freedom or exemption from obligation;” an immunity is “a right of exemption only,” as “an exemption from serving in an office, or performing duties which the law generally requires other citizens to perform.” This is all that is intended by the word “immunities” as used in this bill. It merely secures to citizens of the United States equality in the exemptions of the law. A colored citizen shall not, because he is colored, be subjected to obligations, duties, pains, and penalties from which other citizens are exempted. Whatever exemptions there may be shall apply to all citizens alike.


141 Id. at 1089 (statement of Rep. Bingham); see also MALTZ, supra note 6, at 111-13 (pointing to statements about the segregated education system in Florida by Timothy Howe) (citing CONG GLOBE, 39th Cong., 1st Sess. App. 219-20 (1866)).

142 See, e.g., Harrison, supra note 6, at 1425 (“The debates on the [1875 Civil Rights] Act are a rich source of information about how the Fourteenth Amendment was understood at the time of its adoption, and they show that the equality theory of the Privileges or Immunities Clause was prominent among Republicans.”); McConnell, supra note 6, at 1099 (“[T]he weight of the evidence supports the proposition that segregation was understood in the years prior to the end of Reconstruction to be unconstitutional, especially by those who had supported the Fourteenth Amendment.”).
it is not clear that Congress adopted an interpretation of the amendment as rigidly prohibiting government discrimination in its debates over the 1875 Civil Rights Act.\textsuperscript{143} Nonetheless, this interpretation, if correct, suggests that the Privileges or Immunities Clause may prohibit unequal taxation as well as the use of public funds derived from tax revenues in a discriminatory manner.\textsuperscript{144} If the term "immunity" could be so construed, then to the extent that a race-conscious admissions program imposed unequal burdens on various classes of citizens, it would be unconstitutional.

\textbf{B. The Equal Protection Clause}

Even if one concluded, however, that the Privileges or Immunities Clause did not afford a means of attacking racial preferences, the Equal Protection Clause might provide a basis for such a challenge. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."\textsuperscript{145} On its face, the clause therefore appears to constitute a broad prohibition of racial discrimination by the state governments.\textsuperscript{146} Indeed, the Court's decisions in \textit{Grutter} and \textit{Gratz} were based entirely on an analysis of this provision—the much neglected Privileges or Immunities Clause did not figure in

\textsuperscript{143} See, e.g., Alfred Avins, \textit{De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875}, 38 Miss. L.J. 179, 246 (1967) (noting that Congress did not feel compelled by the Fourteenth Amendment to desegregate schools); BERGER, supra note 6, at 148 ("The persistent acceptance of segregated schools in the North is further evidenced by the history of the Civil Rights Act of 1875. Although the Act prohibited discrimination with respect to inns, public conveyances, and theaters, Congress, despite Sumner's unflagging efforts, rejected a ban against segregated schools."); see also Harrison, supra note 6, at 1427 (observing that during the debates, at least one member of Congress "evidently believed that the choice between integration and separate-but-equal facilities was a policy question left to the states by the Fourteenth Amendment, along with other substantive decisions concerning education"); McConnell, supra note 6, at 992 (observing that members of Congress had "definite views about the limited nature of 'civil rights,' which did not encompass all privileges or benefits").

\textsuperscript{144} See, e.g., MALTZ, supra note 6, at 113 (arguing that the amendment could be interpreted to mean that "whenever blacks were taxed at the same rate as whites, the state governments would be under an obligation to provide equal services"); Harrison, supra note 6, at 1456 ("[M]ost government benefits with which we are familiar will be privileges of citizenship because most of them are supported by general taxation."); id. at 1462-63 ("Schools financed by general taxation are very probably a privilege of citizens. If so, to give individuals of different races different versions of the privilege would constitute an abridgment."); McConnell, supra note 6, at 1042 (observing that, in debates after ratification of the Fourteenth Amendment, members of Congress maintained that "the tax-supported character of . . . schools is a strong additional reason to insist upon equality of treatment within them").

\textsuperscript{145} U.S. CONST. amend. XIV, § 1.

\textsuperscript{146} See Harrison, supra note 6, at 1411 (observing that "[s]tandard equal protection jurisprudence, faced with the inescapably general text of the clause, appeals to a notion of general equality or impartiality in lawmaking").
the Court’s decisions at all.147

Under a straightforward reading of the plain language of the text, the Equal Protection Clause might be invoked to prohibit all types of racial discrimination by state governments, including discrimination in the provision of governmental benefits such as college and university admissions.148 Indeed, the opinions in Gratz and Grutter assume that the Equal Protection Clause applies in such circumstances. The various opinions merely differ in the way in which the clause is applied.

Yet, the possibility remains that the Equal Protection Clause may have a much narrower scope. The most accurate reading of the clause may restrict it to acts of the state government that involve governmental “protection.”149 Such a narrow construction would greatly restrict the reach of the clause and might make it inapplicable to university admissions decisions.

The structure of Section One may provide some support for this interpretation. Each of the three clauses could be construed as relating to a distinct function of the state government. The Privileges or Immunities Clause may determine which substantive rights are constitutionally protected. The Due Process Clause may guarantee individuals the right to certain fundamental legal processes when they are pursuing their rights in court. Finally, the Equal Protection Clause may relate primarily to enforcement of

147 In Grutter, for example, the Court held that “the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.” 123 S. Ct. at 2347. Similarly, in Gratz, the Court held that “because the University’s use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents’ asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.” 123 S. Ct. at 2430.
148 See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 82 (1990) (concluding that “[t]he text itself demonstrates that the equality under law was the primary goal”).
149 See Raoul Berger, Fantasizing About the Fourteenth Amendment: A Review Essay, 1990 WIS. L. REV. 1043, 1063 (“Intense focus on ‘equality’ has obscured the significance of the word ‘protection.’ Yet it is ‘protection’ that is the subject of discourse; ‘equal’ is the modifier.”); Harrison, supra note 122, at 1229 (arguing that “the main antidiscrimination provision of Section 1 is the Privileges or Immunities Clause, not the Equal Protection Clause” and concluding: “[I]t is likely that in 1866 most Republicans thought that the ‘protection of the laws’ constituted a subset of the functions of government. Specifically, the protection of the laws consisted principally of those substantive provisions and government activities that shield people’s rights from invasion.”); Harrison, supra note 6, at 1390 (arguing that the term “protection” used in the clause suggests “either the administration of the laws or, if it is about their content, laws that protect as opposed to laws that do other things” and that “[i]n order for the clause to be a requirement of equality in everything the states do, the word ‘protection’ must simply drop out, so that the text would read ‘equal laws’ rather than the ‘equal protection of the laws’”); see also id. at 1435 (arguing that “protection of the laws” referred to the mechanisms through which the government secured individuals and their rights against invasion by others”).
protective laws.

Under this interpretation, university admissions policies would fall entirely outside the scope of the Fourteenth Amendment. They would fall outside of the scope of the Privileges or Immunities Clause because they do not involve a “fundamental” right of citizenship. They would fall outside the scope of the Due Process Clause because they do not involve rights of legal process. Finally, they would fall outside the scope of the Equal Protection Clause because they do not involve unequal treatment with respect to the government’s role as protector of individuals within its jurisdiction.

Proponents of this interpretation sometimes point to congressional practice at the time of ratification. During Reconstruction, they note, Congress enacted a series of race-conscious measures such as the Freedman’s Bureau Bill designed to assist newly-freed slaves. While many such measures were advanced before the amendment was ratified and there is debate over the extent to which such measures were truly race-conscious, proponents of this interpretation maintain that they evidence a willingness to engage in race-conscious decisionmaking by the individuals responsible for drafting the Fourteenth Amendment. As a result, they claim that such measures support an interpretation of the amendment that would allow government to consider race as a factor at least in certain contexts.

Yet, as in the case of the Privileges or Immunities Clause, a counterargument may be constructed as well. One might assert, for example, that the textual guarantee of equal protection “of the laws” requires equal treatment whenever the state government acts. In other words, the guarantee of equality would extend to any governmental act or law. Under this interpretation, the provision of government benefits would fall under the clause, and any discriminatory admissions procedures might be subject to constitutional attack.

Such an interpretation finds support in Justice Harlan’s dissent in *Plessy v. Ferguson*, a case in which the Supreme Court upheld a Louisiana statute that required “equal but separate accommoda-

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150 *See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 397 (1978) (plurality opinion) (Marshall, J., concurring) (“The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen’s Bureau Act, an Act that provided many of its benefits only to Negroes.”); *id.* at 398 (“Since the Congress that considered and rejected the objections to the 1866 Freedmen’s Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures.”).*
tions” on passenger trains. In his dissent, Justice Harlan focused on the amendment’s guarantee that citizens would enjoy an “immunity” from “legal discriminations.” Quoting the Court’s prior ruling in *Strauder v. West Virginia*, Justice Harlan reiterated that:

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\text{[t]he words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.}
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This determination was reinforced, Justice Harlan noted, in the Court’s subsequent decision in *Gibson v. State*, where it stated that the amendment “‘forbids, so far as civil and political rights are concerned, discrimination by the General Government or the States against any citizen because of his race.’” Thus, while there was not an extensive analysis of the text or history of the amendment in Justice Harlan’s dissent, he appears to have focused on the language of “equality” and “immunity” in holding that the amendment required governmental action to be “colorblind.”

Indeed, even the majority in *Plessy* acknowledged that the “object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law.” The majority merely concluded that the amendment did not enforce “social” equality. Accordingly, the restrictions regarding passenger accommodations fell outside the scope of the amendment. In the words of the majority, “the enforced Separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment.”

On the other hand, Justice Harlan’s dissent contains some lan-

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151 163 U.S. 537, 540 (1896) (discussing the Louisiana statute).
152 *Id.* at 556 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879)) (internal quotes omitted).
153 *Id.* (Quoting *Gibson v. State*, 162 U.S. 565, 567 (1896)).
154 See *id.* at 559 (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”).
155 *Id.* at 544.
156 *Id.* at 548.
guage and analysis indicating that his interpretation may be much more limited. For example, Justice Harlan observed that the amendment's guarantees were intended to "protect all the civil rights that pertain to freedom and citizenship," and reasoned that the passenger restrictions were unconstitutional because they were "inconsistent not only with that equality of rights which pertains to citizenship, national and State, but with the personal liberty enjoyed by every one within the United States."\textsuperscript{157} Indeed, Justice Harlan claimed that the "fundamental objection" to the legislation was the fact that it interfered "with the personal freedom of citizens."\textsuperscript{158} One might therefore conclude that Justice Harlan's dissent is consistent with an interpretation of the amendment that would not encompass governmental benefits, such as university admissions. The restrictions on passengers were restraints on individual liberty—they did not involve governmentally-conferring benefits that could only exist after the establishment of government.

Whatever one concludes regarding the merits of each position, either interpretation would provide a clear rule of decision. Under the narrow interpretation of the Equal Protection Clause, admissions procedures such as those at issue in \textit{Grutter} and \textit{Gratz} would fall outside the scope of the amendment. Under the broad reading of the clause, they would not. In either case, the result of the analysis would be a bright-line rule that would define the scope of judicial power to scrutinize race-conscious admissions programs.

\section*{III. Barriers To the Originalist Approach}

This virtue of the originalist approach may at the same time, however, represent the primary barrier to its adoption. The Court's ambivalence about the constitutionality of such programs and its desire to take a flexible approach in resolving such questions may effectively rule out an originalist analysis.

First, there may be sufficient historical indeterminacy to make the application of the amendment in the context of university admissions programs extremely difficult. As outlined above,\textsuperscript{159}

\textsuperscript{157} Id. at 555.
\textsuperscript{158} Id. at 557 (citing Blackstone's \textit{Commentaries} and noting that "personal liberty" was traditionally understood as the "power of locomotion" free from restraint). Moreover, even Justice Harlan's pronouncement that the Constitution is "color-blind" appears limited to a notion of "civil rights," for in the very next sentence he notes: "\textit{In respect of civil rights, all citizens are equal before the law." Id. at 559 (emphasis added).
\textsuperscript{159} See supra Part II. See also PERRY, THE CONSTITUTION IN THE COURTS, supra note 6, at 117 ("There is room for reasonable disagreement about the original meaning of the second sentence of section 1" of the Fourteenth Amendment.).
originalist arguments can be constructed on both sides of this question. While a full analysis of the relevant historical materials may render a definitive conclusion, in the Court's view these conflicting arguments may undermine the use of the historical record to decide the constitutionality of race-based admissions programs.

Second, even if such application were feasible, it would not allow the Court to act with the flexibility that it sought to embody in its rulings. Either race-conscious admissions programs are subject to constitutional scrutiny or they are not. The originalist approach suggested here would allow very little room for compromise. Indeed, it would dictate that at least one of the Court's decisions in Grutter or Gratz was incorrect.

Finally, and perhaps most significantly, the originalist approach clashes with the Court's precedents. If one concludes that government benefits and other similar state actions fall outside the scope of the clause, then the Court's decisions invalidating race-conscious measures in such situations would be at odds with the originalist interpretation. Foremost among these would be the Court's decision in Brown v. Board of Education. Indeed, a fundamental problem inherent in attempting to justify race-based admissions measures is attempting to reconcile those measures with the prohibition on such race-conscious decisionmaking that was at the heart of the Brown decision.

A. Historical Indeterminacy

As noted above, one can construct arguments based on the historical record that would support either upholding or invalidating race-conscious admissions programs. If one gives these arguments equal credence, they would tend to support the conclusion that the historical record is indeterminate. Indeed, even during the debates over the amendment and associated enactments, certain members of Congress themselves expressed some uncertainty concerning the meaning of the terms they were embodying in the Constitution.
The "indeterminate" nature of the historical record may be one reason that the Court has refrained from engaging in an extensive analysis of the text and history of the amendment in its affirmative action decisions. The Court in *Brown*, for example, explicitly eschewed historical analysis in favor of an analysis of the social science evidence regarding the effects of segregation. Members of the Court may believe that the historical record is too unclear to provide useful guidance.

Moreover, even if one develops a coherent theory of the original meaning of the amendment, application of that meaning in reviewing race-conscious university admissions programs may prove daunting. The framers of the amendment did not address the specific question of affirmative action programs in higher education. Thus, applying their general theories to this particular problem raises additional complications.

Nonetheless, coherent originalist theories can be constructed and applied in determining the constitutionality of affirmative action programs. Accordingly, the alleged indeterminacy of the historical record does not constitute an insurmountable barrier to an originalist analysis. Indeed, the Court in other contexts routinely undertakes such an analysis where the historical record is less than clear. Any purported "indeterminacy" should therefore not impose a significant barrier to an originalist approach.

**B. A Clear Cut Rule of Decision**

A more compelling reason the Court may not have relied upon the text and history of the amendment is that it would not allow the Court to adopt a flexible approach in its affirmative action decisions. In particular, the majority opinion in *Grutter* evidences a desire to review affirmative action programs on an individual ba-

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What are such rights? One writer says civil rights are those which have no relation to the establishment, support, or management of the Government. Another says they are the rights of a citizen; rights due from one citizen to another, the privation of which is a civil injury for which redress may be sought in a civil action. Other authors define all these terms in different ways, and assign to them larger or narrower definitions according to their views. Who shall settle these questions? Who shall define these terms?

*Id.* at 1270-71.

162 See infra notes 175-77 and accompanying text.

163 See, e.g., Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 578 (2003) ("[O]riginalists certainly do not have to abandon their approach simply because it sometimes will identify only a range of 'original meanings.' Indeed, Professor Whittington argues that originalism's capacity to accommodate textual indeterminacy is one of its advantages." (footnote omitted)).
sis, which in that particular case resulted in a unique standard of "deference" to such programs in the educational context and the imposition of a durational limit where none was supplied. An originalist analysis, in contrast, would most likely require a bright-line decision concerning whether affirmative action programs fall within the scope of the constitutional guarantee.\footnote{See supra Part II.}

Indeed, even the dissenter\textemdash{}s in \textit{Grutter} did not take a strictly originalist approach. For example, while Justice Thomas noted that the majority had suggested that "racial discrimination in higher education admissions will be illegal in 25 years" and stated that he dissented from much of the majority's opinion on the ground that the "Constitution means the same thing today as it will in 300 months,"\footnote{\textit{Grutter} v. Bollinger, 123 S. Ct. 2325, 2351 (2003) (Thomas, J., concurring in part and dissenting in part). \textit{See also id. at 2361} (asserting that majority's ruling "grant[s] a 25-year license to violate the Constitution").} his opinion focuses primarily on the non-historical framework crafted by the Court in its prior cases. That approach, which involves the application of different levels of scrutiny to various categories of claims, finds no basis in the text or history of the Fourteenth Amendment. Yet, Justice Thomas went to great lengths to point out how the majority's analysis was flatly inconsistent with the framework it had developed in prior cases. In particular, according to Justice Thomas, the "deference" the majority gave to the University of Michigan Law School admissions program was inconsistent with the "strict scrutiny" the Court sought to apply in that case.\footnote{See supra notes 30-31 and accompanying text.}

Nonetheless, Justice Thomas did cite the standard announced by Justice Harlan in \textit{Plessy v. Ferguson},\footnote{163 U.S. 537 (1896) (Harlan, J., dissenting).} which would prohibit all racial discrimination by enforcing a "color-blind" Constitution.\footnote{\textit{Grutter}, 123 S. Ct. at 2365 (citing \textit{Plessy}, 163 U.S. at 559).} Justice Harlan's opinion, in turn, was at least based on some analysis of the history of the amendment and the meaning that its drafters and ratifiers attributed to it. Moreover, the ultimate outcome reached by Justice Thomas would have applied a rigid rule of nondiscrimination, similar to that which might be dictated under an originalist analysis.

Justice Thomas's opinion, however, is the closest that any of the members of the Court came to examining the text and history of the amendment. The need or desire to adopt a flexible approach in reviewing university admissions programs in the Court's view...
apparently was more significant than strict adherence to the historical understanding of the constitutional text. As for the dissenters in *Grutter*, the historical evidence supporting the constitutionality of affirmative action programs may have resulted in their silence on this question.  

C. Constraining the Scope of the Court's Power

A third reason the Court may have eschewed an originalist approach is that it would largely constrain the scope of the Court's own power. If the Court had concluded that governmental benefits fell outside the scope of the guarantee afforded by the Fourteenth Amendment, it would have effectively eliminated an entire class of cases over which it formerly exercised power. If, in contrast, it adopted the "colorblind" interpretation of Justice Harlan in *Plessy*, it would have been constrained to apply a rigid prohibition on the use of race in all contexts by government actors. In either case, the Court's own power would be significantly curtailed.

This outcome, itself, may have been undesirable in the Court's eyes. In recent decades, the Court has taken upon itself the role of moral arbiter. In cases such as *Roe v. Wade*  and *Brown v. Board of Education* the Court has assumed the task of providing rules governing complex and politically divisive moral and social issues, even in instances where its authority to do so is not clear. The decision in *Lawrence v. Texas* is the most recent example of the Court imposing its own moral judgments in the context of a particularly divisive social issue, determining that the right to privacy extended to consensual sodomy among adults based on, among other things, norms of international law. Given its expansive view of its own role in defining and resolving moral issues, it is unlikely that the Court would step back or constrain its own ability to pass judgment on affirmative action programs.

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169 Cf. Rubenfeld, *supra* note 1, at 427 (observing that "Congress in the 1860s repeatedly enacted statutes allocating special benefits to blacks on the express basis of race" and arguing that "[t]o be true to their principles, two of the five Justices in the prevailing anti-affirmative action majority—Justices Scalia and Thomas, whose commitment to original understandings and practices is also a matter of record—should drop their categorical opposition to race-based affirmative action measures").


172 123 S. Ct. 2472, 2483 (2003) (upholding constitutional right to sodomy on the ground that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries"). *But see id.* at 2497 (Scalia, J., dissenting) ("What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change.").
The result is the fact-bound test adopted in *Grutter* and *Gratz*, which crafts a significant role for the judiciary in passing judgment on race-conscious measures. As noted above, the Court’s decisions raise more questions than they answer, all of which must be subject to judicial resolution. Moreover, the test that the Court appears to have crafted depends so heavily on the individual facts and circumstances of the particular program at issue, that the role of the courts in making such determinations has been dramatically expanded.

**D. The Supreme Court’s Precedents Regarding Race-Conscious Decision-Making**

Finally, and perhaps most significantly, another fundamental obstacle to the implementation of an originalist analysis in the affirmative action context is the Supreme Court’s adherence to its ruling in *Brown v. Board of Education*. The Court in *Brown* held that “separate but equal” public education systems violated the Equal Protection Clause of the Fourteenth Amendment. An originalist analysis that would uphold the affirmative action programs at issue in *Grutter* and *Gratz* on the ground that government benefits such as public education do not fall within the scope of the constitutional guarantee would require the Court to overrule its prior decision in *Brown* in order to uphold the University of Michigan’s racially discriminatory educational policies. Thus, the proponents of affirmative action and the Court would have to confront the obvious inconsistency with *Brown*.

In its decision in *Brown*, the Court acknowledged that the parties had focused on the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868,” including “consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment.” The Court, however, rejected such authorities, succinctly stating that they were “inconclusive” and that the discussion by the parties and the Court’s “own investigation” convinced it that “although these sources cast some light, it is not enough to resolve the problem” with which the Court was

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173 See supra notes 61-62 and accompanying text.
175 *Id.* at 495; see also *id.* ("[W]e hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").
176 *Id.* at 489.
confronted. Instead, the Court chose to "consider public education in the light of its full development and its present place in American life throughout the Nation."

Thus, the Court's decision was not based on an analysis of the historical record. Nonetheless, one can construct originalist arguments on both sides of the question. Under one interpretation, a strict rule of nondiscrimination would apply. Under another, however, government benefits such as public education would fall outside the scope of the Fourteenth Amendment's constitutional guarantee and, as a result, the states would remain free to adopt whatever policies they saw fit with respect to such benefits, even if racially discriminatory.

There is, therefore, a fundamental tension between the Court's ruling in *Grutter* and its decision in *Brown*. The Court in *Brown* held that racial discrimination in public education was prohibited. It did not give any "deference" to the state's decision to maintain a segregated school system. Indeed, it did not give any credence to the state's reasoning in maintaining such a system at all. Rather, the Court engaged in a straightforward application of the Equal Protection guarantee and declared that "separate but equal" school systems were not "equal" and therefore were constitutionally prohibited. This straightforward approach contrasts sharply with the approach taken by the majority in *Grutter*.

Indeed, this point was recognized by Justice Thomas in his separate opinion. Justice Thomas observed that the majority opinion upholding the law school's affirmative action program contained "the seed of a new constitutional justification for . . . racial segregation." For, as Justice Thomas observed, if an educational institution's decisions regarding the value of "diversity" were entitled to deference, then a decision regarding the value of "racial homogeneity" would "similarly be given defer-

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177 Id.
178 Id. at 492-93.

[R]acial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law—an indispensable condition to a free society—under which all men stand equal and alike in the rights and opportunities secured to them by their government.


180 *Grutter*, 123 S. Ct. at 2358 (Thomas, J., concurring in part and dissenting in part).
ence." While Justice Thomas used the example of Historically Black Colleges, which are almost entirely racially homogenous, the same principle might be applied to an all-white institution.

Thus, as Justice Thomas implicitly recognized, the majority's rationale in *Grutter* is inconsistent with the Court's ruling in *Brown*. An originalist analysis that would uphold affirmative action programs such as that sketched above would entail overruling the Court's prior decision in *Brown*, a result that would be untenable for those advocating such programs. Thus, while most of the parties filing briefs with the Court completely ignored the original meaning of the amendment, those who did cite the historical record failed to address the inherent tension with *Brown*. Rather, they merely cited the history of race-conscious measures enacted by Congress designed to benefit newly-freed slaves, such as the Freedman's Bureau Bill, and suggested that congressional practice supported the constitutionality of race-conscious programs.

The irony is that, had the Court not taken its much-criticized

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181 Id.

182 See id.; see also Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioners at 9, *Grutter* (No. 02-241) & *Gratz* (No. 02-516) ("[T]reating 'diversity' as a compelling interest might allow, perhaps even require, states to ban historically black colleges, or the federal government to exclude them from Title VI funding, a proposition that, one might just as easily assume, the four *Bakke* dissenters would have soundly rejected.").

Justice Thomas also observed that the Court in *United States v. Virginia*, 518 U.S. 515 (1996), gave no deference to the Virginia Military Institute in ruling that its exclusion of women was unconstitutional even though the Institute's policies regarding admission of women were subject to only intermediate scrutiny. See *Grutter*, 123 S. Ct. at 2358-59 (Thomas, J., concurring in part and dissenting in part) ("[I]n Virginia, where the standard of review dictated that greater flexibility be granted to VMI's educational policies than the Law School deserves here, this Court gave no deference.").

183 See, e.g., Brief for the NAACP Legal Defense and Educational Fund, Inc. and the American Civil Liberties Union as Amici Curiae in Support of Respondents at 29, *Grutter* (No. 02-241) ("The legislative history of the Fourteenth Amendment establishes that one of its chief objectives was to secure the constitutionality of race-conscious legislation enacted by the Thirty-ninth Congress."); Brief of Amherst et al. Amici Curiae, Supporting Respondents at 29, *Grutter* (No. 02-241) & *Gratz* (No. 02-516) ("Given the repeated enactment of race-conscious legislation by the Congress that adopted the Fourteenth Amendment in order to close the social gap between blacks and whites, the Court could not fairly conclude that the 'original understanding' of the Fourteenth Amendment prohibits what *Bakke* permits."); Brief Amici Curiae of the Coalition for Economic Equity et al. at 8, *Grutter* (No. 02-241) ("Petitioner's view of pure colorblindness contradicts the original purpose of the Equal Protection Clause—to ensure meaningful equality for groups subordinated under law and by social practice."); Brief Amici Curiae of the Hispanic National Bar Association and the Hispanic Association of Colleges and Universities in Support of Respondents at 8, *Grutter* (No. 02-241) ("That the original intent of the Members of Congress who framed the Fourteenth Amendment was to aid discrete minorities ineluctably leads to the conclusion that race-conscious legislation is constitutional."); *id.* at 10 ("Since the drafters of both the Civil Rights Act of 1866 and the Fourteenth Amendment supported the Freedman's Bureau legislation, it follows that the equal protection language of the Fourteenth Amendment was not intended to eliminate the racial restrictions within the Freedman's Acts.").
detour from the original meaning in Brown, its decision in Grutter may have been placed on a more solid footing. Thus, proponents of judicial, rather than political, action to end segregation who might now favor government-sponsored affirmative action programs, find themselves impeded by precedent that precludes an originalist analysis that would support their position.

IV. CONCLUSION

The Court’s recent affirmative action decisions represent an abandonment of the broad principle of non-discrimination the Court established in Brown and reaffirmed in cases such as Croson and Adarand. These decisions therefore are consistent with the views of those commentators who have advanced a narrow interpretation of the constitutional guarantee under the Fourteenth Amendment and have questioned the Court’s adherence to the original meaning in its decision in Brown.

Yet, the basis given for the Court’s decision in Grutter was quite different. The Court did not rely upon the original meaning of the amendment in reaching its decision. Nor did it address the tension between its ruling in Grutter and its ruling in Brown. Rather, it crafted unique standards in the context of affirmative action in higher education in order to justify its deviation from established precedent and to ensure that its ruling in Grutter could not be applied to justify race-conscious measures outside the context of higher education.

Had the Court undertaken an originalist analysis, its decision might have been more coherent. However, it would be difficult, if

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184 See, e.g., Michael J. Klarman, Brown v. Board of Education: Facts and Political Correctness, 80 Va. L. Rev. 185, 185 (1994) (“Brown was not an unambiguously correct decision either for the justices or the American public in 1954, and to formulate constitutional theories on the basis of ahistorical judgments is at the very least unconstructive, and possibly quite insidious.”); McConnell, supra note 6, at 952 (“[T]here is something close to a consensus that Brown was inconsistent with the original understanding of the Fourteenth Amendment, except perhaps at an extremely high and indeterminate level of abstraction.”); Rubenfeld, supra note 1, at 432 (“[N]early no one today is a true equal protection originalist, because true equal protection originalism would repudiate Brown v. Board of Education.”). But see McConnell, supra note 6, at 1140 (“Most commentators have assumed that the ahistorical quality of Brown was unavoidable, because an historical approach to the question would have produced a morally unacceptable answer. This Article shows, to the contrary, that school segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment.”).

185 See, e.g., Berger, supra note 6, at 146-54 (arguing that Brown was wrongly decided); Maltz, supra note 6, at 157 (observing that “conservative Republicans” had opposed measures that “explicitly provided Congress with sweeping authority over matters that had hitherto been the exclusive province of the state governments or that implicitly suggested that the Constitution was an open-ended grant of power to the federal government to deal with matters that might appear to be of national concern”).
not impossible, to construct an originalist interpretation that would at the same time uphold the use of racial preferences in *Grutter* and invalidate them in *Gratz*. Moreover, an originalist approach would not provide the flexibility that the Court apparently sought to embody in its affirmative action decisions. Accordingly, the Court's decisions in *Grutter* and *Gratz* represent a powerful example of the Court’s rejection of its role as interpreter of the laws and an adoption of a plainly policymaking function.