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12-12-2005

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### Recommended Citation

82 U. DET. MERCY L. REV. 432 (2005)

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# Compelling Interest, Forbidden Aim: the Antinomy of *Grutter* and *Gratz*

PATRICK S. SHIN\*

## INTRODUCTION

If racial diversity is a compelling state interest in the context of university admissions policies, why is it constitutionally impermissible for a policy to establish such diversity by giving an automatic, uniform preference to every applicant who belongs to an underrepresented minority group?

Anyone familiar with the Supreme Court's opinions in *Grutter v. Bollinger*<sup>1</sup> and *Gratz v. Bollinger*<sup>2</sup> will likely have a ready answer: an admissions policy of this kind does not guarantee "individualized consideration" to every applicant and so fails to satisfy the narrow-tailoring requirement of strict scrutiny. That is, after all, exactly what the Court said.<sup>3</sup> But, on reflection, this doctrinally pat answer is conceptually puzzling.<sup>4</sup> What *Grutter* purports to hold is that an admissions policy can permissibly grant preferences to some applicants on the basis of their race, so long as those preferences are based on individualized consideration. This sounds simple enough. But the difficulty is articulating how the requirement of individualized consideration is supposed to square with the permissibility of race-based preference. What could it mean to evaluate an applicant "as an individual" and yet, at the same time, grant her preferential consideration on the basis of her membership in a racial group? It hardly helps matters to appeal to the general governing principle that is supposed to be in play here — namely, a principle of *equal treatment*. For if the

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1. 539 U.S. 306 (2003).

2. 539 U.S. 244 (2003).

3. *Grutter*, 539 U.S. at 334; *Gratz*, 539 U.S. at 271.

4. Cf. Robert Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 72 (2003) (characterizing as "genuinely puzzling" the question of how to reconcile the requirement of individualized consideration with the permissible pursuit of racial diversity).

interest in achieving racial diversity is sufficient under the Equal Protection Clause to justify granting a race-based admissions preference to some number of underrepresented minority applicants on a case-by-case basis in order to alleviate their underrepresentation, why should it be impermissible, as a matter of equal treatment, automatically to distribute that preference proportionally to *all* applicants so as to produce the same result?

I argue that there is no satisfactory answer to this question — or, to be more precise, that there is no coherent principle of equal treatment that provides one. What we should say about the question I opened with, then, is that it makes a counterfactual assumption. My claim is that the *Grutter* decision, when read as of a piece with *Gratz*, cannot logically be interpreted to hold what almost everyone assumes it does. I propose a reading of the cases on which the cases jointly support the opposite conclusion: that racial diversity is *not* a compelling state interest.

This claim will undoubtedly seem implausible to some. It does, to be sure, run against the grain of key portions of Justice O'Connor's opinion in *Grutter*. I will argue, however, that despite Justice O'Connor's expansive comments in that opinion concerning the value of racial diversity, an important conceptual instability in her reasoning opens up an interpretation under which the *Grutter* decision cannot be accommodated to the companion holding of *Gratz* except on a much narrower understanding of the constitutionally cognizable interest in diversity. More specifically, I argue that the Court's decisions in the two cases can be read jointly to imply that affirmative action policies are constitutionally permissible only on a model according to which the race of an applicant is regarded as a *predictor* of an applicant's expected contribution to the diversity of a given population, rather than as a characteristic that is itself a *constituent* of such diversity. On this interpretation, the interest in diversity that justifies race-based preference under *Grutter* and *Gratz* is an interest not in racial diversity as such, but diversity in some color-blind modality to which race is at most only contingently related.

In Section I, I open my investigation with a comparison of the two different accounts of the value of diversity in the educational context that emerge from Justice Powell's opinion in *Regents of University of California v. Bakke*<sup>5</sup> and Justice O'Connor's opinion in *Grutter*. In Section II, I undertake an extended analysis of the conceptual puzzle set up by the juxtaposition of the capacious account of diversity's value that Justice O'Connor develops in the first part of her *Grutter* opinion and the doctrinal requirement of "individualized consideration" she endorses in the second part, which the Court applies with dispositive effect in *Gratz*. In Section III, I discuss how Justice O'Connor's response to an objection asserted by Chief Justice Rehnquist in *Gratz* — which I refer to as the "Monet objection" — suggests an interpretation of the cases that directly conflicts

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5. 438 U.S. 265 (1978).

with the idea that racial diversity constitutes a compelling interest. Finally, in Section IV, I offer some diagnostic observations reinforcing the suggestion that Justice O'Connor's insistence on the requirement of individualized consideration either involved a conceptual mistake or was rooted in pragmatic considerations rather than in genuine concerns of equal treatment.

### I. FROM *BAKKE* TO *GRUTTER*

The legal prologue to *Grutter* and *Gratz* is by now familiar to everyone, but I revisit briefly the central case in the standard chronicle in order to set the stage for my examination of the relation between the compelling interest in diversity and the constraining requirement of "individualized consideration."

The diversity rationale of course received its first significant<sup>6</sup> Supreme Court treatment in Justice Powell's opinion in *Bakke*.<sup>7</sup> That case involved a challenge to an affirmative action policy that had been implemented by the medical school of the University of California at Davis.<sup>8</sup> In an array of separate opinions, the Court in *Bakke* overturned a decision of the California Supreme Court that had held that it was constitutionally impermissible for the medical school to take *any* consideration of the race of applicants in making admissions decisions.<sup>9</sup> In the famous opinion in which he staked out his then-solitary position,<sup>10</sup> Justice Powell argued that policies that use racial classifications for "benign" purposes (such as affirmative action programs) are nevertheless subject to strict scrutiny

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6. Even before *Bakke* or even *Brown*, the Court had recognized the possibility that racial diversity might be pedagogically beneficial. See Goodwin Liu, *Affirmative Action in Higher Education: the Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 386-87 (1998) (citing *Sweatt v. Painter*, 339 U.S. 629 (1950) and *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950)).

7. *Bakke*, 438 U.S. at 269-324.

8. Under that policy, sixteen of 100 seats in each incoming class were filled under a "special admissions" program for which only certain minority groups were eligible. Some of the minority students who were admitted to fill those sixteen places had GPA and MCAT scores that were "significantly lower" than those of some non-minority students competing for the remaining eighty-four seats who were rejected under the general admissions program. See *Bakke*, 438 U.S. at 277-78.

9. *Bakke*, 438 U.S. at 320.

10. The only other Justice who joined in any part of Justice Powell's opinion (other than the sections reciting the facts and announcing the disposition) was Justice White, who joined in the section in which Justice Powell rejected the University's argument that strict scrutiny should apply only to policies utilizing racial classifications that disadvantage "discrete and insular minorities." *Bakke*, 438 U.S. at 287-88 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)). The so-called "Brennan Four" would have held the medical school's policy to be constitutional. See *Bakke*, 438 U.S. at 324 (Brennan, J., concurring in part and dissenting in part). The other Justices argued for avoidance of the constitutional issue. See *id.* at 408 (Stevens, J., concurring in part and dissenting in part).

under the Fourteenth Amendment.<sup>11</sup> He then went on to say that the "attainment of a diverse student body" was a compelling state interest for purposes of the strict scrutiny test.<sup>12</sup>

Justice Powell, however, qualified his view in two important ways. First, he made explicit that the interest in diversity that could justify the use of racial preferences in university admissions was not an interest in "simple ethnic diversity," but a type of diversity "of which racial or ethnic origin is a single though important element."<sup>13</sup> The value of this type of diversity is rooted in the educational benefits — the "discourse benefits," to borrow a helpful characterization<sup>14</sup> — that flow from the "atmosphere of 'speculation, experiment and creation'"<sup>15</sup> most conducive to the "robust exchange of ideas" that is promoted by a diverse student body.<sup>16</sup> Second, Justice Powell argued that in seeking to populate an incoming class characterized by this kind of diversity, it was impermissible for an admissions policy to employ set-asides, quotas, or other procedures that deny "individualized consideration" to every applicant.<sup>17</sup>

Thus, for Justice Powell, since the value of diversity was entirely derivative of the discourse benefits that flow from a racially and otherwise heterogeneous student body,<sup>18</sup> a university could permissibly target racial or ethnic diversity for the sake of obtaining those benefits by considering race as a "plus" in an applicant's favor,<sup>19</sup> but it could not adopt a policy that focused *solely* on racial diversity,<sup>20</sup> to the exclusion of other types of diversity that might also facilitate educationally beneficial discourse.<sup>21</sup> The insistence on "individualized consideration," therefore, served primarily to reinforce the notion that since the rationale of discourse benefits did not justify an exclusive focus on racial diversity, that rationale could not justify a policy that effectively gave applicants who were members of racial minority groups an *exclusive* claim on a certain number of seats (set aside or reserved by quota) in an incoming class. The "right to individualized consideration"<sup>22</sup> invoked by Justice Powell was thus meant to ensure that

11. *Bakke*, 438 U.S. at 294-99. This view was eventually vindicated by a majority of the Court in *Richmond v. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

12. *Bakke*, 438 U.S. at 311-14.

13. *Id.* at 315.

14. Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 *FORDHAM L. REV.* 2301, 2305-06 (2004).

15. *Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

16. *Id.* at 312-13 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

17. *Id.* at 318 & n.52.

18. See PETER H. SCHUCK, *DIVERSITY IN AMERICA* 164-65 (2003).

19. *Bakke*, 438 U.S. at 318.

20. *Id.* at 315.

21. See SCHUCK, *supra* note 18, at 165.

22. *Bakke*, 438 U.S. at 318 n.52.

no individual would be entirely foreclosed from competing for any given seat in a class on the basis of her race,<sup>23</sup> as would happen under a program of rigid set-asides.<sup>24</sup>

Justice Powell did not suggest, however, that individualized consideration required that all potential contributions to discourse-enhancing diversity, whether racial or nonracial, be treated as fungible and hence given equal weight in an admissions procedure. On the contrary, he explicitly noted that although a constitutionally permissible policy would place value on nonracial as well as racial forms of diversity, it would "not necessarily accord[] them the same weight."<sup>25</sup> Thus, in Justice Powell's view, the requirement of individualized consideration did not necessarily preclude the possibility of assigning greater value to racial diversity than to nonracial diversity, even though the value of both kinds of diversity was derivative of the discourse benefits they could be expected to yield.

Justice Powell's view that student body diversity could provide a compelling state interest for purposes of strict scrutiny was of course vindicated in Justice O'Connor's majority opinion in *Grutter*.<sup>26</sup> Justice O'Connor's account of the reasons for bringing about diversity in a student body, however, is significantly broader than Justice Powell's.<sup>27</sup> She begins her discussion on common ground with Justice Powell, characterizing the interest in a diverse student body as tied to its "educational benefits."<sup>28</sup> Echoing Justice Powell's appeal to discourse benefits, Justice O'Connor acknowledges that part of the value of a diverse student body lies in the increased awareness of different viewpoints and the felicitous consequences for classroom discussion that result "when students have 'the greatest possible variety of backgrounds.'"<sup>29</sup>

Going beyond the benefits that accrue to the academic enterprise itself, Justice O'Connor describes a broader range of reasons that we might have for valuing a diverse student body. First, she argues that such diversity will lead to better preparation of students for a diverse workforce and society, including, in particular, enabling the military to fulfill its mission of providing national security in racially diverse settings.<sup>30</sup> Second,

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23. See *id.* at 319-20.

24. See Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1751 (1996).

25. *Bakke*, 438 U.S. at 317.

26. *Grutter*, 539 U.S. at 325 ("[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.").

27. See Post, *supra* note 4, at 59-60.

28. *Grutter*, 539 U.S. at 343. In fact, the only justificatory rationale for affirmative action that had been argued to the Court was that there was a compelling interest in obtaining "the educational benefits that flow from a diverse student body." *Id.* at 317.

29. *Id.* at 330 (quoting App. to Pet. for Cert. at 246a, 244).

30. See *id.* at 330-31.

Justice O'Connor also identifies various important social goals and ideals that are served by the attainment of diversity in educational institutions (especially law schools): "effective participation by members of all racial and ethnic groups in the civic life of our nation;"<sup>31</sup> the opening of a visible "path to leadership . . . [for] talented and qualified individuals of every race and ethnicity"<sup>32</sup> in order to "cultivate a set of leaders with legitimacy in the eyes of the citizenry,"<sup>33</sup> and the realization of the possibility that "all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."<sup>34</sup>

While it may still make sense to group these kinds of goods that flow from diversity as "educational benefits," it is clear that these are benefits realized not within the confines of the academic institution, but in the form of social goods that characterize a well-functioning democracy.<sup>35</sup> These are not easily subsumable under the general category of discourse benefits. They are, rather, benefits tied to broader goals of democratic inclusion<sup>36</sup> and the realization of an integrated society founded on equal citizenship.<sup>37</sup> What is significant for my analysis is that the kind of diversity that is called for by a commitment to these benefits and social ideals — which are pitched explicitly in terms of ethnic and racial integration — is not just a general diversity of outlook and experience, but racial diversity in particular. For if the reason we have for promoting diversity in the university setting is to lay a foundation for the "effective participation by members of all racial and ethnic groups in the civic life of our Nation,"<sup>38</sup> the type of diversity that seems particularly relevant is racial diversity. As Robert Post has argued, the "account of diversity embraced by *Grutter* does not conceive of race as simply one element in a potentially infinite universe of differences. It instead points to the particular and unique value of racial diversity."<sup>39</sup>

Justice O'Connor's discussion of the distinct value of racial diversity naturally invites a more permissive attitude toward policies of racial preference. Assuming that the achievement of *racial* diversity as such —

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31. *Id.* at 332.

32. *Id.*

33. *Id.*

34. *Grutter*, 539 U.S. at 333.

35. *Cf.* Post, *supra* note 4, at 60 (distinguishing value intrinsic to the educational process from "extrinsic social goods like professionalism, citizenship, or leadership"); *cf.* also Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gate of Our Democratic Ideals*, 117 HARV. L. REV. 113, 206 (2003).

36. See Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 72-73 (2004); Elizabeth Anderson, *Integration, Affirmative Action and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1222-27 (2002).

37. See Karst, *supra* note 36, at 72.

38. *Grutter*, 539 U.S. at 332.

39. Post, *supra* note 4, at 70.

as opposed to whatever diversity best serves vigorous discourse — is a constitutionally permissible goal, one might suppose that admissions officers should have some latitude in constructing policies that unapologetically take direct account of applicants' racial membership in trying to achieve it.<sup>40</sup> But this is not the turn that Justice O'Connor's reasoning seems to take. Even as she moves away from Justice Powell's account of the indirect relevance of race to diversity, she still adopts his requirement that the pursuit of diversity be constrained by "individualized consideration." Indeed, she argues that the critical difference between the affirmative action policy of the University of Michigan Law School — which the Court upheld in *Grutter* — and the policy of the University of Michigan's College of Literature, Science and the Arts — which the Court invalidated in *Gratz* — was precisely that the former policy treated each applicant "as an individual"<sup>41</sup> and therefore satisfied the requirement of individualized consideration, whereas the latter, with its policy of automatic preferences for all minority applicants, did not.<sup>42</sup>

The negative holding of *Gratz* thus signals the Court's intention to take the requirement of individualized consideration seriously. The important theoretical question is whether, given Justice O'Connor's discussion in *Grutter* concerning the value of racial diversity, we can identify a distinction between a policy of individualized consideration and one of "automatic" preference that makes sense under some norm that we would recognize as having moral and constitutional significance. Of course, one might conclude either that the distinction just does *not* make any sense<sup>43</sup> or that it is grounded in primarily pragmatic considerations.<sup>44</sup> But since both *Grutter* and *Gratz* purport to be decisions that interpret the idea of equal treatment embedded in the Equal Protection Clause, we should at least make an attempt to see whether their contrasting outcomes can be reconciled under some principle that we would recognize as sounding in genuine concerns of equal treatment. It is to this inquiry — which is at least as much a project of rational reconstruction as it is one of textual interpretation — that I now turn.

## II. THE PUZZLE OF INDIVIDUALIZED CONSIDERATION

Let us provisionally assume, per Justice O'Connor's discussion in *Grutter*, that the diversity of student body that constitutes a compelling

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40. See *id.* at 69-70.

41. *Grutter*, 539 U.S. at 337-38.

42. *Gratz*, 539 U.S. at 280 (O'Connor, J., concurring).

43. See Robert George, *Gratz and Grutter: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1634 (2003) (suggesting that there is probably no good way to make sense of the distinction).

44. See Post, *supra* note 4, at 73-74 (suggesting that the real concern motivating the Court's position in *Gratz* is the fear of endorsing a kind of policy that might engender racial "balkanization").



state interest consists at least partly in racial diversity. From this assumption it follows, at a minimum, that assembling a student body characterized by racial diversity is a permissible aim of a university admissions policy.<sup>45</sup> With these provisional premises in place, I now want to examine the reasoning by which the Court attempted to rationalize its split decisions in *Grutter* and *Gratz*. My aim here is to understand why, from the vantage point of a principle of equal treatment, there should be an objection to an admissions body's pursuing the permissible goal of racial diversity by means of a policy that grants automatic preferences to applicants who belong to underrepresented minority groups. If we cannot ultimately make principled sense of any such objection, then we will have to revisit our provisional assumption.

### A. Background

It will be helpful to review some facts concerning the two admissions policies that were at issue. The *Grutter* case involved a challenge to the admissions policy of the University of Michigan Law School ("the Law School"). Under that policy, the Law School on average accepted about 34% of the 3,500 applications it received each year<sup>46</sup> to populate an incoming class of about 350 students.<sup>47</sup> In making their decisions about whether to admit each applicant, admissions officials considered a number of factors deemed relevant to assessing the applicant's "likely contributions to the intellectual and social life of the institution"<sup>48</sup> and making sure that no applicant would be admitted who could not be expected to graduate from the Law School without serious academic difficulty.<sup>49</sup> These factors included: the applicant's undergraduate GPA, LSAT score, quality of undergraduate institution, letters of recommendation, quality of applicant's written personal statements,<sup>50</sup> and applicant's undergraduate course selection.

The Law School's admissions policy aimed, furthermore, "to achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."<sup>51</sup> To this

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45. Notice that this is not the same as saying that racial diversity is intrinsically valuable. On our provisional understanding of Justice O'Connor's view, achieving racial diversity in a student body is a permissible goal that is valued because of its service to the broader goals of social integration and democratic equality.

46. For the years 1955-2000. See *Grutter*, 539 U.S. at 381 (Rehnquist, C.J., dissenting).

47. *Id.* at 313.

48. *Id.*

49. *Id.*

50. Each applicant is required to write a personal statement and an "essay describing the ways in which the applicant will contribute to the life and diversity of the Law School." *Id.* at 338.

51. *Id.*

end, admissions officers were permitted to give "substantial weight" to an applicant's potential "diversity contributions."<sup>52</sup> One "type of diversity" to which the policy was expressly committed was "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the Law School's] student body in meaningful numbers."<sup>53</sup> The Law School sought to enroll a "critical mass" of underrepresented minority students, *i.e.*, a sufficient number to allow such students to participate in the classroom without feeling isolated or like "spokespersons for their race,"<sup>54</sup> and to allow for intra-minority diversity, counteracting any tendency of non-minorities to assume the existence of a single "minority viewpoint."<sup>55</sup>

At trial, the Law School never disputed that it gave active, positive consideration to the race of applicants in making admissions decisions. Although the Director of Admissions disavowed the use of any explicit "quotas" or target enrollment percentages for minority students, he explained that he frequently consulted "daily reports" that tracked the racial and ethnic composition of the incoming class as it was being populated, to "ensure that a critical mass of underrepresented minority students would be reached."<sup>56</sup> According to Law School officials, there was no specific formula used to determine the weight to be given to an applicant's race relative to other relevant factors in any given case; indeed, the fact that an applicant was of a particular race might play "no role" in one case and yet be "determinative" in another.<sup>57</sup> The Law School asserted that it needed to factor the race of applicants into its admissions decisions, because a "critical mass" of underrepresented minorities could not have been enrolled if the only factors considered were "hard" variables such as GPA and LSAT score.<sup>58</sup> This assertion was confirmed by the Law School's statistical expert, who testified that in the year 2000, only 10% of all minority applicants who were given offers of admission would have been admitted if their race had not been considered as a positive factor in the decision-making process.<sup>59</sup>

The *Gratz* case involved a dispute over the constitutionality of the admissions policy used by the University of Michigan's College of Literature, Science and the Arts ("the College"). The College's procedures for reviewing applications (during the relevant time period) were more

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52. See *Grutter*, 539 U.S. at 338.

53. *Id.*

54. *Id.* at 319.

55. *Id.* at 320, 333 (quoting App. to Pet. for Cert. at 215a).

56. *Id.* at 318.

57. *Id.* at 319.

58. *Grutter*, 539 U.S. at 318.

59. *Id.* at 320.

formulaic than the Law School's. In deciding whether to admit or reject an applicant, the College's policy took into account the following factors:<sup>60</sup> high school GPA, standardized test scores, quality of the applicant's high school, strength of the applicant's high school curriculum, whether the applicant was an in-state resident, the applicant's alumni relationships, strength of the applicant's personal essay, the applicant's personal achievement or leadership, and various "miscellaneous" factors.<sup>61</sup> Each application was rated for these variables and awarded a certain number of "points" in each category, with a maximum possible score of 150. Of those 150 points, a total of 110 points were possible in the academic categories and forty in the non-academic ones.<sup>62</sup> The disposition of each application was determined by reference to a "selection index," consisting of a division of score ranges into several recommended outcomes. According to this index, scores of 100 and higher called for immediate admission; scores from ninety to ninety-nine allowed for admission or "postponement" of decision until a later time (the College used a "rolling" admissions process); and scores of eighty-nine or lower generally called for other types of delayed decisions less likely to end with admission, or outright rejection.<sup>63</sup>

As in the *Grutter* case, there was no genuine dispute in *Gratz* that the College took active and significant account of an applicant's race in determining whether to admit or reject her. The College's method of doing so was more formula-driven than the Law School's case-by-case approach. Under the College's policy, every applicant who qualified as an underrepresented minority was automatically awarded twenty points under the "miscellaneous" category of decision factors.<sup>64</sup> The only other nonacademic factors for which an applicant could receive a comparable number of points were socioeconomic disadvantage (twenty points),<sup>65</sup> "attendance at a predominantly minority or disadvantaged high school" (twenty points), and athletic recruitment (twenty points).<sup>66</sup> Smaller point awards were available for other nonacademic factors such as in-state residence (ten points), alumni relationships (four points), and outstanding personal achievement, leadership, or public service (five points).<sup>67</sup>

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60. There were numerous variations in the specifics of the College's policy over the period 1995-2000. See *id.* at 253.

61. *Id.* at 253-54.

62. *Id.* at 277-78 (O'Connor, J., concurring).

63. *Id.* at 254.

64. *Gratz*, 539 U.S. at 254-55.

65. This factor was only mentioned in Justice Souter's dissenting opinion. Justice Souter also noted that 20 points could be awarded to an applicant at the Provost's discretion. See *id.* at 295 (Souter, J., dissenting).

66. *Id.* at 278 (O'Connor, J., concurring).

67. *Id.* (O'Connor, J., concurring).

The Supreme Court's contrasting conclusions in the two cases are familiar enough that they do not require extended rehearsal here. Briefly: the Court decided in *Grutter* that the Law School's policy was constitutionally permissible under the Equal Protection Clause but ruled in *Gratz* that the College's policy was impermissible. I have already discussed the main rationale for the positive holding of *Grutter* — viz., Justice O'Connor's argument for assigning the status of compelling state interest to the value of diversity, including racial diversity in particular. Following this rationale, the Court held that it was permissible for the Law School to try to achieve a "critical mass" of underrepresented minorities<sup>68</sup> and, furthermore, that its "individualized" procedure for taking account of race in the admissions process was narrowly tailored to serve that goal.<sup>69</sup> In *Gratz*, however, a five-Justice majority announced that the College's policy of "automatically distribut[ing] 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race" could not be regarded as narrowly tailored to achieve "educational diversity"<sup>70</sup> and therefore failed to pass constitutional muster under strict scrutiny.

#### B. *What's Wrong with Automatic Racial Preferences?*

The Court's opinions clearly indicate that a minority applicant's race may be considered a reason in favor of admission, but the amount of preferential advantage attached to race cannot be assigned a fixed, quantified value that is insensitive to the particular facts presented by each individual application. This principle suggests that there is something objectionable about granting all minority applicants a uniform amount of preference, just in virtue of their racial membership. But this seems, on the face of it, a rather surprising restriction on policies of race-based preference. If it is permissible, as a matter of equal treatment, to consider race as a factor in admissions decisions and to weigh that factor to the advantage of *some* minority applicants, on what basis could we say that it should be impermissible to weigh that same factor to the *uniform* advantage of *all* minority applicants? Why should the Court have thought that a policy that would (presumably) lead to a less uniform distribution of race-based preference be required as a matter of equal treatment?

Perhaps it will help to remind ourselves of a key passage from Justice O'Connor's *Grutter* opinion: "When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual

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68. See *Grutter*, 539 U.S. at 316.

69. *Id.* at 334.

70. *Gratz*, 539 U. S. at 270.

and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."<sup>71</sup>

Since the constraining principle here is supposed to be the Equal Protection Clause, we must understand the Court to be stating that an admissions policy that grants preferences to minority applicants without considering each of those applicants "as an individual" is offensive to the idea of equal treatment. On this view, equal treatment demands that every applicant be considered on facts specific to her own case, rather than in such a way that the applicant's racial status becomes the predominant or decisive consideration in deciding whether to admit or deny her.

An immediate difficulty is that the notions of treating each applicant "as an individual" and of race not being made to be the "defining" or "decisive" feature of an individual's application are themselves far from self-interpreting and even farther from having any obvious normative force. Furthermore, when we try to unpack these ideas in the most obvious ways, they become even more suspect as candidates for genuine requirements of equal treatment and hence only tend to obscure rather than clarify the purported distinction between the policies at issue in the two cases.

Let us first consider the second idea — the proscription against allowing race to become the "defining" or "decisive" feature of an individual's application. What might it be for an individual's race to be the defining or decisive aspect of her application? One possible interpretation is that race becomes the defining feature of an application when the magnitude of the effect given to consideration of race reaches a certain maximum level relative to the other aspects of that application. If we accepted this reading, we could say that the reason that the Court found the Law School's program to be permissible while it found the College's impermissible is that the Law School's policy allowed consideration of race to have an effect that stayed below the maximum level, while the magnitude of that effect under the College's policy exceeded it. Putting it roughly, one might say that the crucial problem for the College's policy was that it made race matter too much.

Whether we ought to accept this view depends, of course, upon a more precise articulation of what it would be for a policy to make race "matter too much." We certainly cannot restate the idea in terms of keeping the absolute or relative number of minority admissions below a certain level. As the Court says in characterizing the impermissibility of a system that implements racial quotas: "that would amount to outright racial balancing, which is patently unconstitutional."<sup>72</sup> A more promising approach might

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71. *Grutter*, 539 U.S. at 336-37. Justice O'Connor is here borrowing directly, of course, from Justice Powell's opinion in *Bakke*. See *Bakke*, 438 U.S. at 318 n.52 (arguing that a policy of racial preference, to be permissible, must "treat[] each applicant as an individual" and that "[t]he denial . . . of this right to individualized consideration" is the principal constitutional infirmity of a quota- or set-aside-based program).

72. *Grutter*, 539 U.S. at 329 (citing *Bakke*, 438 U.S. at 307).

be to try to specify what it means for race to matter too much as a function of how likely it is that the consideration of race under a given policy will have affected the outcome of any given decision to admit or deny a minority applicant. We can imagine two limiting cases. In the limiting case where consideration of race matters for naught, every minority applicant who is admitted under the policy in question would also have been admitted absent consideration of race. In the opposite limiting case where race matters maximally, every minority applicant who would have been rejected absent consideration of race is admitted under the policy in question. The closer a given admissions policy is to the maximal case in its treatment of race, the more it can be thought to treat race as the predominant, "defining," or "decisive" feature of applications filed by minorities.

Given this proposed clarification, is it plausible to conjecture that the basis for the Court's decisions was that it believed that race mattered too much under the College's policy and, by contrast, mattered sufficiently little under the Law School's policy? There is very little in the Court's opinions that would support any such claim. The Law School's own expert witness testified that giving positive consideration to applicants' minority status had a "very dramatic" effect on the numbers of minority students admitted, estimating that only ten percent of such students who actually were admitted would still have been admitted had their minority status not been taken into account.<sup>73</sup> This seems a far cry from the limiting case where consideration of race matters for naught. It might nevertheless be true, of course, that race mattered *less* under the Law School's policy than under the College's (though the Court's opinions themselves do not provide sufficient information to determine this);<sup>74</sup> but even if this were so, a marginal difference of this sort could not provide the basis for any principled distinction between their policies. Given how substantial a role the consideration of race appears to have played in the admission of minorities under the Law School's policy, it is implausible to interpret the proscription against allowing race to be the defining feature of an individual's application as a curb on the likelihood that consideration of an applicant's race will determine the outcome of the decision whether to admit or deny her.

Perhaps it should have been obvious from the start that trying to come up with a sensible specification of what it means in this context for race to matter too much would be an unfruitful endeavor. If we presume that

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73. *Id.* at 320. The expert's analysis was based on admissions figures for the year 2000.

74. The College asserted in its briefs, however, that without consideration of race or ethnicity, the number of minority students admitted would "drop precipitously, leaving most of [the College's] learning contexts with very few minority students, or none at all." Respondents' Brief in Conditional Opposition to *Certiorari* Before Judgment at 9, *Gratz* (No. 02-516).

institutions adopt policies of race-based preference only when race-blind selection procedures result in inadequate diversity yields, it should hardly be surprising that when we examine admissions outcomes under affirmative action programs, we find that racial preference is having a considerable impact on who is being admitted. If we did not find this — that is, if consideration of race under an affirmative action program were not having “decisive” effects for a substantial number of minority applicants — then we should conclude that either the program was ineffectual or must not have been necessary in the first place.<sup>75</sup> It seems to me difficult, therefore, to take seriously the claim that a policy of race-based preference is permissible only if it stops short of making race a defining or decisive factor for minority admissions.

This leads me to think that the significance of the admonition that race not be made a defining feature of minority applications must ultimately devolve upon what originally may have looked to be a separate prescription: the requirement — pedigreed by Justice Powell’s *Bakke* opinion — that a policy of race-based preference evaluate every minority applicant “as an individual.” So let us see what can be made of this notion.

The basic question, to repeat, concerns how it could make sense to think that a problem of equal treatment arises when a uniform advantage is granted to *all* individuals who are minority applicants, and why the Court should have thought that this problem could be remedied by adopting a policy of “individualized consideration” that “demands that race be used in a flexible, nonmechanical way,”<sup>76</sup> given that such a policy could be expected to make the distribution of race-based preference less uniform over the class of minority applicants.

One response may seem ready at hand: the question is misleading because the fact that a policy provides for the uniform distribution of advantage within a given group is no reason to recommend it as a matter of equal treatment. To the contrary, one might argue, the constitutional norm of equal treatment is *violated* when all members of a group are treated the same just in virtue of their membership in that group. One might say that this is because making determinations on the basis of group classifications is bound to result in treating equals unequally, since such classifications inevitably mask relevant differences among members of the class; and this unfairness can be avoided only if every individual is evaluated on his or her own merits. Thus, according to this argument, what equal treatment requires of an admissions policy is that it evaluate the admissibility of

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75. Justice Souter, responding to Chief Justice Rehnquist’s suggestion that an admissions policy cannot permissibly make race a “decisive” factor in minority admissions, makes a related point in his dissenting opinion: “The very nature of a college’s permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants’ chances for admission.” *Gratz*, 539 U.S. at 295 (Souter, J., dissenting).

76. *Grutter*, 539 U.S. at 334.

every student on the specific facts presented by her application, rather than on the basis of generalizations about certain groups into which she may happen to fall.

This line of argument, however, surely proves too much. It is hard to see how any particular fact presented by an individual application could have any significance apart from its suitability as the basis of some judgment generalizable to other applicants who present that same fact.<sup>77</sup> Thus, for example, the decisional relevance of the fact that an applicant was the president of her high school student council depends on the availability of some general judgment regarding the qualities of individuals who are presidents of their high school student councils. To consider an item on an individual's application as a positive qualification for admission seems to imply some general positive judgment regarding the class of individuals whose applications present that same item (other things equal, of course). It follows that whatever evaluating an applicant "as an individual" could mean, its prescriptive force cannot derive from the impermissibility of drawing inferences about the applicant's admissibility based on general judgments about the various groups within which she might be classifiable.

The obvious rejoinder is that *racial* classifications are different, insofar as there *are* no inferences about an applicant's admissibility that can be drawn from her membership in a particular racial group. This point surely can be granted — it is reflected as a matter of law in the established doctrine of racial classifications as automatically "suspect" and necessitating "strict scrutiny" — but we have already crossed that bridge. Indeed, this is what makes the Court's contrasting holdings in *Grutter* and *Gratz* so puzzling. The question we have been addressing is, *given* the Court's conclusion in *Grutter* that it *is* constitutionally permissible for an admissions policy to give positive consideration to an applicant's classifiability as a racial minority, why should it be impermissible to give such consideration a uniform beneficial effect to all applicants who are so classifiable? To put it another way, we might agree (*arguendo*) that the idea of equal treatment embodies some form of a requirement of individualized consideration (e.g., related to the idea of treating equals equally<sup>78</sup>), but once we have decided that consideration of race is permissible in the context of university admissions — thus having presumably *overcome* the standing assumption that one's classifiability as a member of a particular race has no proper bearing on how one should be treated — it seems like illogical backtracking to then continue to insist that consideration of race must be individualized because of the inherent suspectness or irrelevance of racial classifications.

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77. Cf. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 125-26 (1999) (arguing that equal treatment does not preclude the use of classificatory judgments, and "almost all classifications involve 'groups'").

78. I discuss this idea further *infra*, Section III.B.



### C. *What Does Individualized Consideration Require?*

But the difficulties do not end here. Even waiving any objection to the premise that individualized consideration is a requirement of equal treatment, there is still the further problem of trying to specify just what an admissions procedure must do in order to satisfy that requirement. The *Gratz* Court's suggestion that in order for an admissions policy to be regarded as making use of race in the "nonmechanical," "flexible" way that individualized consideration requires, the policy must take into consideration "each characteristic of a particular applicant."<sup>79</sup> But this is hardly a workable proposition. The Court could not plausibly have intended that every applicant be treated as though she presents a fixed or determinate number of "characteristics" in addition to her race, each of which must somehow be factored into the decision-making process. In the context of an admissions policy, it makes sense only to speak of the characteristics of an applicant that are relevant to a decision; and these characteristics are simply given by whatever (legally permissible) desiderata the institution sets for its individual students or for the composition of its student body as a whole.

Nor could the Court have meant to say that there are certain identifiable characteristics of applicants that an admissions policy *must* take into account as a matter of equal treatment. Presumably, it would be constitutionally permissible for a university to make its admissions decisions solely on the basis of some index determined exclusively by an applicant's GPA and her standardized test scores.<sup>80</sup> One might question the social value, justness, or the fairness of such a policy, but it seems doubtful that the *Grutter* Court should have intended that individuals would have a claim under the Equal Protection Clause that the policy take other characteristics into account. But if we assume that the idea of taking "each characteristic of an applicant" into account is not supposed to rule out the permissibility of an admissions policy limited solely to consideration of grades and test scores, it is hard to see what content we could ascribe to the idea at all.

Another way that one might try to interpret the idea of racial preference based on individualized consideration is in terms of some concept of "suitability" (for lack of a better term), under which positive effect would be given to a minority applicant's race only in "suitable" cases — *i.e.*, only where the *other* features of the individual's application made consideration of her race appropriate. This proposal may have some surface appeal. But, for one thing, it does not appear to be what the Court had in mind. What the proposed interpretation suggests is that the permissibility of using race as a positive consideration is *conditional* upon

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79. *Gratz*, 539 U. S. at 271.

80. So long, of course, as this was not done for the purpose of racial discrimination. See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

the presence of certain other qualifying characteristics in an individual's application. But the Court's statements about the permissibility of race-based preference simply are not couched in these conditional terms. Indeed, what the Court explicitly says is that an admissions policy may consider "race or ethnicity . . . as a 'plus' factor in the context of individualized consideration of *each and every applicant*."<sup>81</sup> The most natural reading of this language seems contrary to the proposed conditional reading. Moreover, Justice O'Connor's broad discussion in *Grutter* of the value of diversity contains no hint that only individuals meeting certain non-racially defined criteria should be thought capable of contributing to a community's racial diversity. One might argue that a good admissions policy should *also* consider those other criteria, such that any applicant who satisfied them would be regarded as preferable to one who did not, *ceteris paribus*. But even if we accepted this argument (although it is difficult to see any constitutional reason to do so), it simply would not follow that there is something objectionable about using a formula that assigns a uniform weighting to race across all applicants. Thus, although we can undoubtedly read the Court's decision as holding that the granting of race-based preference must be conditioned upon individualized consideration, it does not seem to me plausible to interpret the notion of individualized consideration as requiring that race-based preference be conditioned on the presence of other factors.

Ultimately, it seems to me that if we assume that racial diversity is a constitutionally permissible aim, it is going to be difficult to draw any normatively meaningful distinction between a policy that takes consideration of race in an "automatic" way versus one that does so by means of a case-by-case determination. As I have already argued, every efficacious affirmative action program will make race a decisive, but-for cause of the favorable disposition of *some* group of minority applicants. The choice between a policy of automatic preference and one of case-by-case evaluation merely represents a choice as to whether the selection of that group should be made on an *ex ante* basis or on the basis of contemporaneous evaluation. A policy of automatic preference will make that determination *ex ante*, based on predictive judgments about the expected quality of the applicant pool and the magnitude of preference necessary to achieve the desired racial diversity, *i.e.*, a "critical mass"<sup>82</sup> of minority students who might otherwise be underrepresented. A policy of case-by-case evaluation will make the determination on a rolling basis, perhaps contemporaneously with the actual review of individual applications. But even under such a policy, the decision as to when an admissions officer should take consideration of an applicant's race so as to tip the disposition of her application toward acceptance is surely not left to

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81. *Grutter*, 539 U. S. at 334 (emphasis added).

82. *Id.* at 333.

unbridled discretion. There will have to be some set of working standards or guidelines that govern that decision, particularly if the applicant pool is very large and not every application gets reviewed by every admissions officer. Any such working guidelines, no less than a formal policy that automates the process, must be based on predictions about how aggressively applicants' minority status should be weighted in order for the incoming class to be populated with the desired "critical mass" of otherwise underrepresented groups. It is difficult to see how the operation of any such guidelines could be thought to differ materially from the application of a policy that simply makes these same sorts of predictive judgment *ex ante*. If the goal is racial diversity, then unless matters are to be left to chance, individualized consideration must at some point give way to regularizing bird's-eye determinations of how much aggregate preferential treatment will be necessary, as a matter of logistics, to achieve the desired goal.

It will help at this juncture to take a step or two back and remind ourselves of the basic question which we are supposing that *Gratz* and *Grutter* addressed. Doctrinal complexities aside, one might have thought that the central question was about the constitutional permissibility of an admissions policy under which an applicant's being a member of an underrepresented racial minority group counts as a relevant reason, at least *pro tanto*, for admitting that applicant. It seems reasonable to believe this question was given an affirmative answer in *Grutter*: if racial diversity is a compelling state interest, then surely an individual's race can be a relevant reason for admitting her. The Court did hold, after all, that it was permissible for the Law School to take the race of its minority applicants into account as a positive consideration in deciding whether to admit or reject them.

But if a minority applicant's race can be counted as a relevant reason (*pro tanto*) for admitting her, this means that given two applicants, *A* and *B*, who are identical except for the fact that *A* belongs to a racial minority group and *B* does not, it must at least be permissible for a university to adopt a policy under which *A* is admitted due to consideration of her race, while *B* is rejected.<sup>83</sup> This is implicit in the idea of some consideration being a relevant reason for admitting or rejecting an applicant.

Having stated the upshot of *Grutter* in this way, we can see more clearly the source of our puzzlement about the Court's hand-wringing over the need for individualized consideration. For if we assume that the Court

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83. This "tie-breaking" model represents one of the weakest forms of affirmative action. See STEVEN CAHN, *Introduction to THE AFFIRMATIVE ACTION DEBATE* xiii (2d ed. 2002). Stronger forms of preference are of course possible (e.g., in which minority status counts as a reason to admit one individual over another individual who is otherwise better qualified), but if my arguments below are correct in what they conclude about the implications of *Grutter* and *Gratz* for the weaker form, then they should (*a fortiori*) also go through for the stronger forms.

held in *Grutter* that the race of an applicant can be counted as a relevant reason for giving preference to her admission over the admission of an otherwise identical non-minority applicant, it seems incongruous to insist that a policy's granting of such a preference not be keyed predominantly to the race of applicants: giving decisive effect to consideration of race is precisely what *constitutes* the preference. Relatedly, if an applicant's being a minority can be a relevant reason for admitting her, it seems inapt to object to a policy on the grounds that it makes race too "decisive" or makes it matter too much. If race can be regarded as a relevant reason for preferring one applicant over another, one might think that the question of how much weight that factor can be given should no more raise a question of equal treatment than the question of how much weight can be assigned to other considerations that are less controversially regarded as decisionally relevant, such as grades, test scores, special talents, and so forth. And even less should it raise a question of equal treatment that a policy assigns a fixed value to the positive effect of race based on *ex ante* determinations of what will be necessary to achieve the desired levels of racial diversity. As Justice Souter writes:

Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. . . . The college simply does by a numbered scale what the law school accomplishes in its "holistic review."<sup>84</sup>

### III. THE "MONET OBJECTION"

At this point, I think we are forced to ask whether there is something wrong with the provisional assumption with which we began Section II — namely, that racial diversity is a compelling state interest and so a permissible aim of university admissions policies. Perhaps this assumption is less secure than we may originally have thought.

Indeed, there is a strand of reasoning in *Grutter* and *Gratz* involving the requirement of individualized consideration that stands in direct conflict with the notion that an applicant's race, as such, can be a relevant reason to favor her admission. This strand of reasoning opens up the possibility of reading the cases in a way that is far less accommodating to the value of racial diversity than my discussion to this point has been assuming. In order to understand this reading, we must examine an objection to policies involving automatic race-based preferences that I will call the "Monet objection."

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84. *Gratz*, 539 U. S. at 295 (Souter, J., dissenting).

### A. *Monet and the Minority*

Chief Justice Rehnquist, writing for the Court in *Gratz*, sets up the objection by drawing on an hypothetical example originating from Justice Powell's opinion in *Bakke*:

[Suppose that] the Admissions Committee, with only a few places left to fill, [found] itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership . . . [and] C, a white student with extraordinary artistic talent.<sup>85</sup>

The Chief Justice then describes the "problematic nature" of the College's affirmative action policy by discussing how each of these hypothetical students would fare under it:

[E]ven if student C's "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the [College's] system. . . . At the same time, every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application. Clearly, the [College's] system does not offer applicants [an] individualized selection process . . . . Instead of considering how the differing backgrounds, experiences and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing [College] applications would simply award both A and B 20 points because their applications indicate that they are African-American, and student C would receive up to 5 points for his "extraordinary talent."<sup>86</sup>

The point of this objection presumably is not meant to depend merely on an outright substantive judgment that Monet-caliber artistic talents ought to be valued on a par with racial diversity. No such judgment could, in any event, plausibly be considered a constitutional requirement of equal treatment.

The point, rather, is supposed to be that the College's policy is internally inconsistent: it automatically grants a substantial number of "points" to minority applicants based on their race, ostensibly on the assumption that these individuals will make contributions to student body diversity. Yet, at the same time, the policy awards a much smaller, relatively insignificant number of points to *non-minority* applicants who (*ex hypothesi*) possess characteristics embodying comparable or even greater

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85. *Id.* at 272-73 (quoting *Bakke*, 438 U.S. at 324 (Powell, J.)).

86. *Gratz*, 539 U.S. at 273.

"diversity contributions," simply on the basis of their status as non-minorities. Thus, according to this objection, the College's policy fails to give commensurate consideration to the diversity contributions of minorities and non-minorities alike. And since the relevance of race is supposed to be *derivative* of the value of diversity, the significance of an applicant's diversity contribution cannot be made to depend on her minority racial status. Or so the argument goes.

It should be clear that the Monet objection depends upon a conception of diversity similar to the one described by Justice Powell in *Bakke*<sup>87</sup> — a conception under which the value of a diverse student body derives wholly from its enlivening effect on intra-institutional discourse and other benefits realized within the context of the academic enterprise.<sup>88</sup> It is remarkable, then, that Justice O'Connor in her *Grutter* opinion simply seems to accept the Monet objection on the Chief Justice's terms. Given how significantly Justice O'Connor's account of the value of diversity<sup>89</sup> departs from Justice Powell's view, one might have expected her to resist the objection, perhaps criticizing it for presupposing the wrong definition of diversity. Or she might have pointed out that, even on Justice Powell's view, the requirement of individualized consideration did *not* imply that all diversity contributions had to be regarded as fungible and hence weighted equally.<sup>90</sup>

But Justice O'Connor does neither of these things. Instead, she takes the Monet objection seriously. In fact, it seems that it is precisely because she assumes that the Monet objection is well-taken on the facts of *Gratz* that she emphasizes the "flexible" and "highly individualized" nature of the Law School's policy, taking pains to assert that it, unlike the College's policy, allowed for the individualized consideration of all applicants and gave "substantial weight to diversity factors besides race."<sup>91</sup> The following assertion by Justice O'Connor, for example, seems almost a complete and explicit concession to the validity of the Chief Justice's objection: "[b]ecause the Law School considers 'all pertinent elements of diversity,' it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants."<sup>92</sup> This rationalization of the Law School's policy suggests that, in fact, the diversity contributions of non-minority applicants — which, presumably, would primarily fall under the category of *Bakke*-style discourse benefits — are fungible with the diversity contributions of minority applicants, implying that the value of the diversity contributions of each group inheres in some common benefit that they produce. But this would mean that the relevance of an applicant's race is not founded in the

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87. See *Bakke*, 438 U.S. at 315.

88. See *Lee*, *supra* note 14, at 2305-06; *Post*, *supra* note 4, at 59-60.

89. See *Grutter*, 539 U.S. at 328-34.

90. See *supra* text accompanying note 7.

91. *Grutter*, 539 U.S. at 336-39.

92. *Id.* at 341.

distinct value of racial diversity, but in the value of some more general form of diversity, a kind of diversity to which minority and non-minority applicants can make commensurable contributions. I believe that it is largely this view of diversity engendered by the Monet objection that drives the Court's insistence on the doctrinal requirement of individualized consideration. Once we drop the assumption that *racial* diversity is a permissible constitutional aim, it becomes clear why a policy of automatic preference keyed to applicants' race should be thought problematic as a matter of equal treatment: individualized consideration is needed to ensure the similar treatment of minority and non-minority applicants with similar potential to make a diversity contribution.

#### B. The Implications of Objections from Formal Inequality

To understand more fully the implications of Justice O'Connor's acceptance of the Monet objection, I want to take a closer look at its analytical and logical structure. By doing so, I believe we can better appreciate precisely what it entails.

The Monet objection is, at bottom, a complaint of formal inequality. Its argument takes the general structure of asserting that some action  $x$  ought to be done to  $Q$  because  $x$  was done to  $P$ , and  $Q$  is similar in relevant respects to  $P$ . Or, alternatively: other things equal,  $x$  ought to be done to  $Q$  because  $x$  was done to  $P$  on the basis of some consideration  $c$ , and this same consideration is present in the case of  $Q$ . The complaint that an action violates a norm of formal inequality can be powerful because its force seems to depend only on some requirement of logical consistency rather than on a substantive justification of the action in question. Insofar as the Monet objection fits this form, it gets its grip on us by suggesting that, whatever our substantive political or moral commitments, we should agree that the policy invalidated in *Gratz* was objectionable as a matter of logic: if a policy grants preferential treatment to minority applicants on the basis of their potential diversity contributions, consistency demands that it should also provide for comparable treatment with respect to non-minority applicants who present similar potential.

But, like any other claim of formal inequality, the normative plausibility of the Monet objection depends on prior substantive premises. It is often argued that assertions of formal equality that depend on some precept in the nature of "like cases ought to be treated alike" are empty or tautologous.<sup>93</sup> Whether this strong claim about the emptiness of the precept can be defended is open to further inquiry,<sup>94</sup> but we can agree, at least, that

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93. See, e.g., PETER WESTEN, *SPEAKING OF EQUALITY* 186-94 (1990); Craig Carr, *The Concept of Formal Justice*, 39 *PHIL. STUD.* 211, 212 (1981); J.R. Lucas, *Against Equality*, in *JUSTICE AND EQUALITY* 139-41 (Hugo Bedau ed., 1971); cf. Christopher J. Peters, *Equality Revisited*, 110 *HARV. L. REV.* 1210 (1997).

94. For the view that the formal precept does have independent content, see, for example, Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 *COLUM. L. REV.* 1167, 1170-78 (1983); see also Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*,

claims about actions that are required as a matter of formal equality always depend for their normative purchase on further principles that determine and constrain the sorts of considerations that can count as reasons, and these further principles will involve substantive moral or political judgments.<sup>95</sup> Thus, the mandate that like individuals ought not be treated differently is vacuous absent substantive principles that specify what count as relevant similarities in respect of individuals and of treatments. This idea is, to be sure, a familiar one.<sup>96</sup> We can say, generally, that the claim that doing  $x$  to  $P$  but not  $Q$  is objectionable because it violates formal equality of treatment presupposes the substantive premise that for every consideration relating to  $P$  that provides a reason for doing  $x$  to  $P$ , there is a similar consideration relating to  $Q$  that provides equal reason for doing  $x$  to  $Q$ .<sup>97</sup> So, for example, suppose Smith is given a job promotion but Jones is denied one. A complaint by Jones that this differential action is objectionable because it constitutes formally unequal treatment presupposes that every consideration that can be cited in favor of promoting Smith applies equally in favor of promoting Jones: *i.e.*, the two are similar in all respects relevant to being promoted.

But whether a given similarity or difference between two individuals counts as relevant in a given context can only be determined by reference to principles that have legitimate institutional authority in that context. Thus, in addition to presupposing positive claims about the relevant similarity of affected individuals, assertions of formal inequality of treatment also necessarily imply negative claims about substantive institutional principles. Specifically, such assertions imply that there is *no*

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110 HARV. L. REV. 1265 (1997). Kenneth W. Simons also provides a number of illuminating insights into the content and structure of equality-based norms in his article, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000).

95. Cf. R.M. Hare, *Relevance*, in VALUES AND MORALS: ESSAYS IN HONOR OF WILLIAM FRANKENA, CHARLES STEVENSON, & RICHARD BRANDT 75 (Alvin Goldman & Jaegwon Kim eds., 1978).

96. See, e.g., Bernard Williams, *The Idea of Equality*, in EQUALITY: SELECTED READINGS 91-92 (Louis Pojman & Robert Westmoreland eds., 1997); JOHN RAWLS, A THEORY OF JUSTICE 208-09 (rev ed. 1999); William Frankena, *The Concept of Social Justice*, in SOCIAL JUSTICE 8-11 (Richard Brandt ed., 1962); H.L.A. HART, THE CONCEPT OF LAW 155 (1961).

97. Notice that the claim of formal inequality of treatment does not necessarily imply that there actually is some consideration that provides reason for doing  $x$ ; it implies only the conditional claim that if there is reason for doing  $x$  to  $P$ , then there is also reason for doing  $x$  to  $Q$ . This makes it possible to assert that doing  $x$  to  $P$  but not  $Q$  constitutes formal inequality of treatment, without necessarily implying that there is good independent reason for doing  $x$  to  $P$ . Thus, for example, Chief Justice Rehnquist can assert that it constitutes formal inequality to credit the diversity contributions of minority applicants while not crediting the diversity contributions of non-minority applicants, without necessarily accepting the premise that we have good independent reason to credit the diversity contributions of minority applicants.



*legitimate institutional principle* that could justify treating the individuals differently in respect of the action at issue.

For example, the assertion that giving a promotion to Smith but not to Jones is objectionable on grounds of formal inequality implies not just that Smith and Jones are relevantly similar in some abstract pre-institutional sense, but that there is no legitimate institutional principle under which there could be reason for promoting Smith but not Jones.<sup>98</sup> Notice that it follows from this that Jones's complaint of formal inequality would be obviated if it could be established that there *is* some such legitimate principle. We might imagine the employer responding to Jones, for example, by explaining that he only had the resources to promote one employee at the time he promoted Smith. Such a response would meet Jones's claim of formal inequality of treatment insofar as it posits a principle — namely, some principle that insufficiency of resources is a reason for granting a promotion to one employee but denying it to another equally qualified one — under which the employer could have been justified in promoting Smith but not Jones, despite their similarity qualifications-wise.

Of course, in any given factual scenario, it will usually be trivial to rig an *ad hoc* principle under which there is sufficient reason for doing *x* to *P* but not *Q*,<sup>99</sup> so all of the critical weight must be borne by the concept of "legitimacy." The legitimacy of a proposed principle that would reconcile the possibility of treating *P* and *Q* differently in respect of doing *x* (even though they share some or many characteristics relevant to *x*-ing) is ultimately a matter of identifying the values that are embedded in the institutional contexts in which a dispute arises. In the affirmative action debate, the relevant institutional context is set by an overlapping mix of different social structures: universities acting to determine the composition of their own student bodies, the institution of higher education generally, the various practices by which desirable career opportunities are distributed and professional status attained in our society, and the legal framework given by anti-discrimination law and the Constitution.

In the arena of constitutional argument, we can think of the task of identifying "legitimate" principles as corresponding with the "compelling interest" part of the strict scrutiny test as standardly understood. The point of the compelling interest inquiry is to ensure that the principles that determine the kinds of considerations that count as reasons for treating certain individuals differently from others are derived from values consistent with the Constitution that are genuinely embodied in our various social institutions and to which we assign the highest order of priority.

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98. Since the example involves an employment matter, the relevant institutional principles here would presumably be the principles governing employer-employee relations and the laws governing employment discrimination.

99. For example, in the case of Smith and Jones, one could rig this principle: having a name starting with the letter "j" is a consideration that counts against receiving a promotion.

To say, therefore, that a certain challenged classification of individuals serves a compelling state interest is to say that there *is* some legitimate principle under which certain considerations could provide reasons for doing something with respect to individuals of one class while not doing it with respect to individuals of another class. And — importantly for my discussion below — if there is some legitimate principle that justifies the differential treatment of two classes, this *obviates* any complaints of formal inequality based on claims that individuals of the two classes are relevantly similar or that there is some overriding reason for treating them the same. For to insist on these latter claims is just to deny that any legitimate principle justifying the differential treatment at issue can be identified.

The Monet objection, as I have construed it, is a complaint of formal inequality. It asserts that the College's policy in *Gratz* treated applicants unequally insofar as it conferred an advantage on minority applicants on the basis of their potential to make diversity contributions yet withheld any comparable advantage from non-minority applicants who also demonstrated such potential. But if what I have said about claims of formal inequality is right, then the Monet objection presupposes the substantive claim that there is *no legitimate principle* under which an admissions body could be justified in conferring an advantage upon a minority applicant based on her expected diversity contribution over a non-minority applicant who shows the potential to make a comparable contribution. If there is no such legitimate principle, then *a fortiori* there is no principle under which the distinct value of *racial* diversity might provide justification for the differential treatment of minority and non-minority applicants. It follows, moreover, that achieving *racial* diversity cannot be a compelling interest for constitutional purposes. For if it were, then there *would* be a legitimate principle under which such differential treatment could be justified.

Justice O'Connor's apparent acceptance of the Monet objection, therefore, stands in direct conflict with her account of the value of diversity.<sup>100</sup> On the one hand, her *Grutter* opinion suggests that the form of diversity in which there is a constitutionally compelling state interest consists in, or at least includes, racial diversity. On the other hand, her insistence on the doctrinal requirement of individualized consideration in order to accommodate (and even embrace) the Monet objection suggests that racial diversity is *not* itself a compelling interest, and that only some form of discourse-enhancing diversity is constitutionally cognizable. To the extent that the latter position seems to carry the day in *Gratz*, and insofar as Justice O'Connor's account of the value of *racial* diversity is not actually *necessary* to the outcome of *Grutter*, it quickly becomes unclear whether the cases ought to be read to support the conclusion that racial diversity is a compelling state interest. Indeed, even if one wants to say

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100. See *Grutter*, 539 U.S. at 328-34.

that *Grutter* calls for agnosticism on the matter, *Gratz* does seem most amenable to precisely the opposite conclusion: racial diversity is *not* a compelling interest.

An alternative interpretation is to read *Grutter* as holding that there is indeed a compelling state interest in achieving racial diversity in student populations, but that because of the *Monet* objection and the holding of *Gratz*, it is nevertheless impermissible to *aim directly* at it by using devices like automatic preferences keyed to race.<sup>101</sup> I do not think that such an interpretation is altogether implausible, at least if what we are concerned about is figuring out what the Court actually had in mind. But whatever its merits as an explanation of what the Court subjectively intended, the point I emphasize is that it is difficult to see how any such alternative holding could be justified on the basis of a principle of equal treatment. Pragmatic considerations aside (such as fear of propagating racially divisive policies<sup>102</sup>), if there truly is a compelling interest in achieving racial diversity in our institutions of higher education, I do not think that it makes much sense, and certainly no sense as a matter of equal treatment, to require that we approach the pursuit of diversity as though race was "simply one element in a potentially infinite universe of differences."<sup>103</sup>

#### IV. BACK TO *BAKKE*

In this last section, I offer a bit of summary and a few diagnostic thoughts on Justice O'Connor's seemingly contradictory stances in *Grutter* and *Gratz*. In her *Grutter* discussion of the value of diversity, the Justice pointed out two categories of benefits: (1) benefits realized in the form of enhanced discourse within the educational institution,<sup>104</sup> and (2) benefits that are realized in the form of social goods that characterize a well-functioning democracy, such as racial integration at all levels of society and equal participation by all citizens in the various aspects of our shared civic life.<sup>105</sup> If the good of diversity is located in the first category of benefits, then there is no obvious reason to think that the diversity we have reason to establish in the educational context should be defined as having

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101. An additional pressure in this direction might be the general proscription against "racial balancing," which is invoked by the Court in *Grutter*. See *Grutter*, 539 U.S. at 329-34 (citing *Bakke*, 438 U.S. at 307). On the other hand, given the Court's explicit holding that it was permissible for the Law School to aim at populating its incoming class with a "critical mass" of underrepresented minority students, see *Grutter*, 539 U.S. at 318, it is unclear how much force that proscription could be thought to have as against the legitimate pursuit of racial diversity (if it were a compelling interest).

102. See Post, *supra* note 4, at 73-74.

103. *Id.* at 70.

104. See *Grutter*, 539 U.S. at 329-30 (pointing to the benefits of "livelier" "classroom discussion" and better "learning outcomes" (citations omitted)).

105. *Id.* at 330-31 ("Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.").

race as an essential component. On this model of the value of diversity, an applicant's race might still be relevant to determining the "diversity contribution" she could be expected to make, but only as an indirect *predictor*, as a contingent or statistical correlate of the incremental benefit that she could bring to the community of discourse.<sup>106</sup> Once we think of the relevance of race in this way — as an indirect proxy for discourse-enhancing potential<sup>107</sup> — the insistence upon the importance of individualized inquiry becomes somewhat easier to understand. For if race is only indirectly predictive of diversity in the sense of being contingently correlated to it,<sup>108</sup> one might expect that in some cases, the presence of other known factors might make race less predictive or non-predictive, or that race might have predictive value with respect to an applicant's diversity contribution only in conjunction with the consideration of other variables.<sup>109</sup>

But if the good of diversity consists in or at least includes the second category of benefits, it would then make sense to think of the diversity we have reason to establish in the educational context as being at least partly *constituted* by racial heterogeneity. On this account, an applicant's race would be relevant not just as a *predictor* of her "diversity contribution," but

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106. It is interesting to consider, for whatever it may be worth, the wording that Justice's O'Connor uses in one of the passages where she contrasts the Law School's policy with the College's. The Law School's policy, she argues, takes race into consideration in a way that allows for "nuanced judgments with respect to the contributions each applicant is *likely to make* to the diversity of the incoming class." *Gratz*, 539 U.S. at 279 (O'Connor, J., concurring (emphasis added)). The idea that a nuanced judgment would be necessary to determine the "likely" contribution of a minority applicant to an incoming class is strongly suggestive that the applicant's race is at best a contingent correlate or predictor of her expected diversity contribution.

107. For an argument that the diversity rationale of *Bakke* has precisely this implication, see Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 U.C.L.A. L. REV. 2059, 2062 (1996) (claiming that the diversity rationale for affirmative action "openly embraces" the use of race as a proxy). Cf. also Richard H. Fallon, Jr., *To Each According to His Ability, from None According to His Race: the Concept of Merit in the Law of Antidiscrimination*, 60 B.U. L. REV. 815, 873-74 (1980) (suggesting that the relevance of race under Justice Powell's *Bakke* opinion depends on the assumption that "race — a factor of no general social worth — contingently but legitimately evidences a superior capacity to further compelling interests [namely, the enhancement of discourse] in a particular institutional context").

108. This discussion may raise, for some, questions about how race ought to be conceptualized in the first place. See generally Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1769-77 (2003) (canvassing some of the possibilities). I offer no view of the matter here.

109. On this kind of view, the connection between race and expected diversity contribution might be analogous to something like the connection between standardized test scores and expected academic performance: test scores might generally be predictive of academic performance, but that correlation might be very weak in cases, say, where the applicant's test scores are low but her GPA is very high. For example, one might imagine that an applicant's race might fail as a predictor of discourse-enhancing character in cases where the applicant is known to be extremely shy. (I owe this example to Tim Scanlon.)

as a direct constituent of it. If we think of race and diversity as being constitutively related in this way, then the doctrinal requirement of individualized consideration seems to lose any normative grip it might have had on us (at least as a matter of equal treatment). No "nuanced judgment,"<sup>110</sup> after all, is required to determine whether an individual of a particular race will contribute to the racial diversity of the incoming class. All that is needed is some prediction of how the numbers would work out absent the use of racial preferences.

The Monet objection, as I have described it, depends on the first model of the value of diversity. It says that if the point of establishing diversity is to enhance the quality of discourse in the classroom, then it makes no sense to key preferences, in the name of diversity, rigidly to the race of applicants. But from the perspective of Justice O'Connor's account of the value of diversity, the response to the Monet objection should have been easy. On that account, the point of establishing diversity in a student body is *not* just internal to the academic enterprise, but is linked to broader goals of social integration and democratic equality.<sup>111</sup> These broader goals call for the recognition of a compelling interest in the achievement of *racial* diversity within the academy.<sup>112</sup> And, plainly, giving preference to the applications of underrepresented minorities serves *that* interest in a way that crediting the race-independent diversity contributions of non-minority applicants could not. The Monet objection — which asserts that automatic race-based preferences constitute unequal treatment because they do not treat like cases alike — fails for the simplest of reasons: Monet and the minority are not "like" cases in respect of the contributions to diversity they each represent.

Yet, as we saw, Justice O'Connor did not even hint at this kind of deflective response. Instead, she embraced the Monet objection, effectively incorporating it into the doctrine of individualized consideration. By doing so, she directly undermined her discussion in *Grutter* of the value of racial diversity. Still, despite her unhesitant acceptance of the Monet objection, it may strike some readers as doubtful that Justice O'Connor really could have meant to endorse the various logical implications of the objection that I have been describing. For

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110. *Gratz*, 539 U.S. at 279 (O'Connor, J., concurring).

111. *Cf. Guinier, supra* note 35, at 206

(If institutions examine closely the relationship between their own educational objectives and their public mission, a larger set of democratic principles may begin to animate the process for making allocative choices, . . . [principles] which emphasize[] the importance of linking an institution's admissions policy for all applicants to its educational and public missions, combining a commitment to construe educational opportunity broadly with an obligation to educate individuals who then serve their communities and the larger society.).

112. This is, at bottom, an empirical claim. If it turned out that the achievement of racial diversity within the academy was not achieving the broader goals of democratic equality emphasized by Justice O'Connor, then we would presumably have cause to revisit the rationale for supposing that there is a compelling interest in that kind of diversity.

example, I have claimed that, by her emphasis on the requirement of individualized consideration as a constraint on the pursuit of (racial) diversity, she opened up an interpretation of *Grutter* and *Gratz* under which race becomes just an information-bearing proxy for other characteristics (e.g., the capacity to enhance educational discourse) to which it happens to be correlated. That view is independently worrisome for perhaps obvious reasons,<sup>113</sup> but it also comes very close to a perspective on the significance of race that Justice O'Connor herself vigorously contested in her dissent in *Metro Broadcasting v. FCC*.<sup>114</sup> Thus, it seems unlikely that she knowingly would have affirmed an interpretation of the individualized consideration requirement on the terms I have been suggesting, and I do not mean to suggest otherwise.

But, while speculation about what Justice O'Connor might subjectively have intended or what she might now be willing to endorse may be interesting as a matter of diagnosis, biography, or even prognosis, it is not important to my argument. Indeed, I do not deny that, as Professor Post has suggested, the best (etiological) explanation of Justice O'Connor's insistence on the requirement of individualized consideration may be a purely pragmatic one.<sup>115</sup> That conclusion is not inconsistent with the primary thesis I have been trying to advance.

What I have tried to show is that the doctrinal requirement of individualized consideration cannot be squared with the assumption that racial diversity is a compelling interest. I have also suggested that insofar as the requirement of individualized consideration was necessary to the outcome of *Gratz*, whereas Justice O'Connor's account of the distinct value of racial diversity was not strictly necessary to the outcome of *Grutter*, the cases may be construed to have jointly *rejected* the proposition that racial diversity is a compelling state interest. But what seems most clear is that there is no conceptually neat principle, rooted in genuine concerns of equal treatment, that can reconcile the conflicting elements of the unstable view with which Justice O'Connor's *Grutter* opinion and the *Gratz* decision have left us — a view on which racial diversity, even if a compelling interest, is a forbidden aim.

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113. See SCHUCK, *supra* note 18, at 165 (arguing that if race is seen as a proxy for expected diversity contribution, then "[o]n a parity of reasoning, legitimating the use of this proxy might equally justify racial profiling by police if it were intended to fight crime and were sufficiently accurate").

114. 497 U.S. 547, 621 (1990) (O'Connor, J., dissenting) (arguing that the use of "race as a proxy" for underrepresented viewpoints is "the hallmark of an unconstitutional policy"). But cf. Amar & Katyal, *supra* note 24, at 1761-63 (arguing that Justice O'Connor's remarks in *Metro Broadcasting* should be understood as specific to the particular context of that case and not necessarily applicable to her understanding of the meaning of educational diversity under *Bakke*).

115. See Post, *supra* note 4, at 73-74.

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