Back to the Future: Should Grutter's Diversity Rationale Apply to Faculty Hiring - Is Title VII Implicated

L. Darnell Weeden

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https://doi.org/10.15779/Z38834K

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**Back to the Future: Should Grutter's Diversity Rationale Apply to Faculty Hiring? Is Title VII Implicated?**

L. Darnell Weeden†

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I.

INTRODUCTION

I remain puzzled by the decision of the Association of American Law Schools (AALS) Sections on Employment Discrimination Law, Labor Relations and Employment Law, and Minority Groups, at its 2004 annual meeting, to limit its panel’s goal to considering “the application of the University of Michigan cases to employment law rather than education law in both the public and private sector.”

When one considers the underlying rationale of the Grutter case for race-based diversity in an academic setting, I think a strong argument can be made that the Grutter case is both an education law and employment law case; and, as a result, that academic employers committed to classroom diversity must consider the terms and conditions of employment of its teaching faculty in light of Grutter.

In 2003, the Supreme Court in Grutter v. Bollinger approved the use of race as a factor under certain circumstances in making law school admission decisions at the University of Michigan Law School (Law School). In Grutter the Supreme Court articulated its belief that “the race factor” may be utilized in the admission process to promote academic diversity among law students without violating the Equal Protection Clause of the United States Constitution. As an intentional governmental race-based policy, Grutter’s diversity analysis under the Equal Protection Clause is certainly beyond conventional Supreme Court precedent. Grutter’s prospective educational benefit justification for racial diversity in an academic setting is said to promote both pedagogical and dialogical values in a democracy.

A reasonable argument can be made that Grutter’s race-based diversity logic applies to employment situations in general. I think a much more convincing line of reasoning demonstrates that Grutter also applies to

We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. Id. at 343 (citations omitted).
3. Id. at 347. “The Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.” Id.
decisions about the employment of those teaching at an institution of higher education. I contend that under Grutter's intellectual diversity in the classroom rationale, when academic employers consider race as a factor in making decisions about the terms and conditions of employment of an academic teaching faculty, Grutter is a much stronger educational law and policy decision than it is a sterilized employment law case. Supporters of race-based intellectual diversity in the classroom may be very disappointed by the AALS panel's decision not to discuss how one can use the Grutter diversity rationale to develop model plans for law schools and colleges committed to promoting diversity in the classroom by using race as a factor in making decisions about terms and condition of employment.

It took me some time to determine why a group of law professors committed to racial diversity in the law school admissions process might have some reservations about expanding the Grutter theory that race is a compelling interest and that diversity in the classroom is considered a plus to the employment of law faculty. After continuing to focus on the AALS panel's failure to focus on the Grutter diversity concept as applying to faculty employment, I thought back to the interest convergence theory of Professor Derrick Bell. For a quarter of a century Professor Bell's interest convergence theory warned thoughtful Americans that blacks "could not obtain meaningful relief until policy makers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern." Under the interest convergence theory, I think it is quite plausible that nonminority law professors are less inclined to promote the use of race as a potential plus factor for a minority candidate being hired for a faculty position even as part of a strategy to reach the goal of intellectual diversity set out in Grutter—because professorial diversity goals often conflict with the economic interests of employees of privilege and prestige.

Whether the convergence theory or another theory explains the lack of diversity in faculty at institutions of higher education, the fact remains that an elite element of the academy has not made overall improvement in hiring of a diverse faculty in ten years. A new report reveals that racial minorities as well as women have made very modest progress in joining the faculty ranks of the Ivy League. "In 2003, Ivy League campuses hired 433 new professors into tenure-track jobs, but only 14 were black and 8 were Hispanic. Women received 150 of the jobs." The figures, which were collected from a federal database by graduate students at Yale, demonstrate

6. Id. (citing Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980)).
8. Id.
that highly visible universities, including Harvard, Yale, and Princeton, are not very successful in diversifying their faculties.\footnote{9} During the ten-year period from 1993 to 2003, the percentage of tenured black professors teaching at Ivy League Schools remained at two percent.\footnote{10} "Hispanic professors accounted for 1 percent of tenured professors in the Ivies in both 1993 and 2003, a period in which tenured positions grew by 9 percent, to nearly 6,000 jobs."\footnote{11}

After making an allowance for the implication of Professor Bell’s interest convergence theory for law faculty terms and conditions of employment, I raise the following question: Is it possible that the majority of nonminority law professors who created the race-based diversity concept for admissions could not reasonably foresee that the \textit{Grutter} rationale of creating a more racially diverse academic learning environment logically applies to those qualified professors teaching in the classroom with credentials that are inferior to those of their elite peers? Professor Bell would probably not be surprised by the AALS law professors’ panel’s less than enthusiastic approach to applying the race-based diversity theory to themselves in the academic workplace. Professor Bell suggests that racial diversity in \textit{Grutter} represents interest convergence because it is designed to protect the privileges of the nonminority elite class to jobs and education while serving as a distraction from economic issues impacting African Americans and Hispanics.\footnote{12}

My support for academic diversity in the university or college setting is based on the holistic value of a reasonably-qualified candidate’s contribution to an institution’s discussions about public policy. A university has a right to promote intellectual diversity based on any reasonable theory that is free of traditionally suspect classifications like race. Pristine elite credentials are absolutely impressive in the university community. However, the vigorous pursuit of truth and intellectual inspiration is a reality check on the over-reliance on elite credentials in making hiring or admission decision for university academic positions. I support academic diversity as an intellectual enterprise because of my respect for the robust exchange of ideas. In my opinion, true intellectual diversity is a color blind educational benefit and it should never be confused with the race-based intellectual diversity theory approved in \textit{Grutter}.

Part I of this Article will examine earlier race-based education and employment law decisions under the constitution and Title VII in light of \textit{Grutter}. Part II addresses the applicability of the \textit{Grutter} decision to

\footnotesize{\bibliography{references}}

\footnotesize{\begin{itemize}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item Bell, 'note 5, at 1624-1627.
\end{itemize}}
academic hiring. Part III involves a criticism of the Grutter theory and race-based criteria in general as well as a rejection of the suggestion that Title VII be amended to allow race to be used as a bona fide occupational qualification (BFOQ).

II.
EARLIER RACE-BASED EDUCATION AND EMPLOYMENT LAW DECISIONS UNDER THE CONSTITUTION AND TITLE VII IN LIGHT OF GRUTTER

A. Pre-Grutter Precedent Cases

A constitutional assessment of racial diversity in the academic faculty workplace is discussed in a two-fold analysis: (1) constitutional principles that could allow race to be used as a plus-factor in faculty hiring and (2) recent Title VII precedent in the Seventh Circuit suggesting that race can be used in hiring when role modeling is the underlying rationale. This Article engages in a discussion about some of the touchstone issues that should be analyzed by academic employers in the academic workplace when making race-based decisions about terms and conditions of employment of faculty members in order to promote an intellectually diverse faculty.

I. Swan

Professors Rotunda and Nowak put forth a theory that dicta in a 1971 Supreme Court case suggests that the use of race may be permissible when making student assignments when no de jure or de facto constitutional violation exists. Specifically, they suggest that dicta in Swan v. Charlotte-Mecklenburg v. Board of Education (hereinafter Swan) supports a theory that public school officials have an historic power, in the absence of a constitutional violation or de jure segregation, to use race as a factor when making decisions about assigning students to public schools in order to establish a racially mixed group of students that mirrors the society in which they live. Because Swan involved the issue of busing children for
remedial purposes to achieve racial desegregation in a city where de jure segregation of schools existed, the Supreme Court suspended the traditional deferential power of school officials to voluntarily use race as a factor to promote racial segregation. *Swan* is representative of the lack of deference given in those public school situations where the state has engaged in intentional invidious discrimination prior to *Grutter*.

It is clear that *Swan* allowed courts to use their power to deny deference to school officials and to require school districts to use race as a factor in providing a remedy for de jure segregation. The *Swan* opinion discussion about the normal deference given to school officials in making decisions about educational policy and the assignment of students suggests that the Supreme Court would approve a voluntary plan to promote racial integration of public schools in a state where either de jure or de facto segregation exists.

In the post-Grutter era, I believe *Swan* can now be expanded to permit public elementary and secondary school officials to adopt a racial diversity policy in the hiring of faculty where there is either de facto or de jure segregation and when the faculty fails to mirror the society in which the students live, so long as there is no constitutional violation. The historical significance of *Swan* in today’s racial diversity battles concerns the amount of deference school officials are given when making race-based decisions that are constitutionally permissible. Although *Swan* is generally understood as providing a remedial justification for the school integration plan in a de jure segregation state, there is no doubt that the Supreme Court would have approved a voluntary school plan designed to promote integration where de facto segregation exists. If diversity is truly a compelling state interest and there is a manifest imbalance between the presence of minority faculty members at school and the number of minorities in society, *Swan* and *Grutter* read together might allow school officials in a de facto situation to use race as a factor in their decision to hire an available candidate because of the cases’ discussion of the value of desegregation and racial diversity. I believe the danger of the *Grutter* Court’s racial diversity rationale is that it allows African Americans and other minorities to accept diversity admissions or employment only if they are willing to assume the risk of being presumed as substantially less qualified than others.

2. Bakke

In the 25-year period from 1978 to 2003, the Supreme Court decided only four cases that use race as a factor in creating diversity in an
educational setting. First, in the 1978 case of *Regents of the University of California v. Bakke*, the Supreme Court held the UC Davis Medical School admission program violated the Equal Protection Clause of the Fourteenth Amendment. However, the Supreme Court in *Bakke* acknowledged that under certain limited circumstances, race could be used as a factor to support racial diversity in the college admission process. Second, in 1986, the Supreme Court revisited the race-based educational diversity issue in an employment dispute involving laying off high school teachers based on race in *Wygant v. Jackson Board of Education*. Third, *Gratz v. Bollinger* involved diversity admission to the undergraduate program at the University of Michigan, and was decided on the same days as *Grutter*, the last of the four cases using race as a factor in creating diversity.

The first case, *Bakke* failed to resolve several significant issues concerning racial diversity. Some commentators suggest that the ruling in *Bakke* did not affect the constitutionality of any race-based diversity plan except those involving admission processes in higher education. In *Bakke*, the Court did not have before it the question of the impact that its race-factoring diversity rationale may have on federal civil rights laws other than Title VI. The most glaring failure of the Court in *Bakke* was its failure to

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23. Id. at 316-18.
27. Id., §18.10 at 428.
28. Id. at 417 n.122.

Indeed, the Court did not decide whether Title VI creates a private cause of action that would allow persons, other than Mr. Bakke, to bring suit for either monetary or injunctive relief from educational institutions that employ programs similar to that used at the Davis Medical School. Four members of the Court—Justices Powell, Brennan, Marshall and Blackmun—appeared to assume a private cause of action under Title VI in order to find Title VI protection equivalent to that of the Fourteenth Amendment, and ultimately to address the constitutional issue. Four members of the Court apparently found the existence of such a private cause of action under Title VI. In a separate opinion, Justice White expressly found no private cause of action under Title VI.

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), on remand 605 F.2d 560 (7th Cir. 1979), the Supreme Court held that an implied cause of action existed under Title IX, which would allow a woman allegedly discriminated against by sex in the admission process of a medical school receiving federal funds to seek a remedy against the school in federal court. The Court reasoned in part that Title IX, which forbids discrimination on the basis of sex by educational programs that are federally funded, was patterned on Title VI and that Congress was aware when it passed Title IX that several federal courts had found an implied private cause of action under Title VI. Although the Court in *Cannon* technically did not resolve the question of whether there would be a similar implied cause of action under Title VI, the majority opinion strongly indicates that a majority of the Justices agree that Title VI, as well as Title IX, give rise to an individual cause of action.

*Id.* (citations omitted).
establish the proper level of review for race-based diversity plans involving either college admissions or other contexts.\textsuperscript{29} While Justice Powell in \textit{Bakke} contended that all racial classifications must meet the strict scrutiny standard, Rotunda and Nowak assert that one of the exceptions for not applying strict scrutiny included “the employment discrimination cases decided under Title VII of the Civil Rights Acts.”\textsuperscript{30} It is important to note that a Title VII issue was not before the Supreme Court in \textit{Bakke}.\textsuperscript{31} The exception existed because Title VII affirmative action remedies implicate cases where there has been a judicial or administrative determination of racial discrimination against a minority group by a specific company or trade.\textsuperscript{32} In the twenty-five years from \textit{Bakke} to \textit{Grutter}, implementing the concept of racial diversity in the absence of a specific finding of racial discrimination by appropriate governmental officials was an uphill battle for the proponents of race-based affirmative action. I contend that the racial diversity campaign on the employment law battleground is a fight that was generally a loser for the supporters of race-based affirmative action who relied on Justice Powell’s rationale in \textit{Bakke}.\textsuperscript{33}

3. Wygant

The Supreme Court in \textit{Wygant v. Jackson Board of Education} in a plurality opinion held unconstitutional under the equal protection clause a scheme in which public school teachers were laid off based on their race


The issue of which level of judicial scrutiny to apply to racial diversity under \textit{Bakke} is a vitally important question upon which “reasonable jurists can and likely will differ on an issue of such magnitude, depth, and importance.” Although Dean Aldave asserts that \textit{Bakke} is the law of the land, reasonable jurists can disagree on that conclusion. It is my position that \textit{Bakke} is distinguishable from \textit{Hopwood} on the basis of judicial scrutiny. . . . The Supreme Court stated in \textit{Adarand} that \textit{Bakke} did not express a majority view and is questionable as mandatory precedent. Accordingly, no decision of the United States Supreme Court has accepted racial diversity as a compelling state interest under a strict scrutiny analysis.

\textsuperscript{30} Id. (citations omitted).

\textsuperscript{31} See \textit{id.} at 421.


\textsuperscript{33} See \textit{United States v. Chicago}, 663 F.2d 1354, 1364 (7th Cir. 1983) (approving the use of racial diversity in making decisions about promotions within a police department with a history of racial discrimination as a means of improving the effectiveness of the police force in fighting crime).

In general, we deplore the need to intrude into the affairs of the Chicago Police Department through the use of mandatory quotas, which may obstruct to some degree the praiseworthy process of recognizing individual merit by suitable promotion. But we deplore even more the history of racial discrimination, the results of which Judge Marshall and others have done much to rectify during recent years. A police force stained by discrimination-past or present-cannot be effective if discrimination renders it in any sense and to any degree an alien body, not fairly representative of the body politic.

\textit{Id.}
rather than based on their seniority.\textsuperscript{34} The local school board devised a scheme under its collective bargaining agreement with the union to lay off white teachers prior to laying off black teachers in order to promote racial diversity in its faculty ranks.\textsuperscript{35} Justice O’Connor, the author of the \textit{Grutter} opinion, stated in her concurring opinion in \textit{Wygant} that the Supreme Court may approve a school board’s plan to use race as a factor in the hiring of teachers in order to construct a racially diverse faculty.\textsuperscript{36}

In \textit{Wygant}, and in \textit{Bakke}, the Supreme Court fail to decide the appropriate standard to apply when a state or local governmental program benefiting racial minorities is challenged as a breach of the equal protection clause.\textsuperscript{37} In her concurring opinion in \textit{Wygant}, Justice O’Connor alleged that the strict scrutiny standard of judicial review “reflects the belief apparently held by all Members of this Court, that racial classifications of any sort must be subjected to ‘strict scrutiny,’ however defined.”\textsuperscript{38}

I think Justice O’Connor’s concurring opinion clearly demonstrates that a majority of the court could not agree on the use of strict scrutiny in the context of considering race as a factor for the alleged benefit of disadvantaged racial minorities.\textsuperscript{39} I believe a strong argument can be made that Justice O’Connor’s concurring opinion in \textit{Wygant} creates the conceptual basis for expanding Justice Powell’s college admission diversity rationale to include the faculty hiring process.\textsuperscript{40} Specifically, Justice O’Connor reasoned that the Court’s opinion in \textit{Wygant} did not necessarily foreclose the possibility that the Court will find other governmental interests other than hiring to be sufficiently “important” or “compelling” to sustain the use of race-based affirmative action policies.\textsuperscript{41} However, Justice

\begin{thebibliography}{99}
\item[34.] \textit{Wygant} v. \textit{Jackson Bd. Of Educ.}, 476 U.S. 267, 284 (1986). \textit{See also} \textit{3 RonTUNDA & NOWAK, supra} note 15.
\item[35.] \textit{Wygant}, 476 U.S. at 270.
\item[36.] \textit{Id.} at 285 (O’Connor, J., concurring in part and concurring in the judgment).
\item[37.] \textit{3 RonTUNDA & NOWAK, supra} note 15, §18.10, at 402.
\item[38.] \textit{Wygant}, 476 U.S. at 285. \textit{See also} \textit{3 RonTUNDA & NOWAK, supra} note 15, §18.10, at 434-35.
\item[39.] \textit{See Wygant}, 476 U.S. at 285-86.
\item[40.] \textit{Id.}
\item[41.] \textit{Id.}
\end{thebibliography}

... And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently “important” or “compelling” to sustain the use of affirmative action policies.

\textit{Id.} (citations omitted).

\textit{Id.}
O'Connor’s concurring opinion does not suggest how race may be used in making employment decisions other than hiring decisions. In Wygant, the racial diversity preference was granted, but not because the African American teachers’ qualifications were perceived to be less than those of the nonminority teachers. The school board in Wygant believed that African Americans were entitled to a race-based layoff preference because those teachers were needed as role models. Because there was no issue about the inferior qualifications of the African-American teachers in Wygant, that case avoided my basic stigmatic harm objection to racial diversity policies that are designed to accommodate the inferior objective qualifications of African-Americans as a group in the workplace or in college admissions.

4. Taxman

In a 1996 opinion, Taxman v. Board of Education, a federal appeals court held that a public school board violated Title VII by using race as a deciding factor to determine whether a black or white school teacher with equal seniority and equal qualifications should be laid off. The school board made a decision to lay off the white teacher and retain the black teacher because the black teacher added racial diversity to the school. The Taxman case is loaded with emotional appeal and sympathy for an innocent white female plaintiff who is about to be laid off from her job because of her race under a race-based affirmative action plan. The facts of the case reveal that diversity-inspired, race-based discrimination against middle class whites like Ms. Taxman helps to give race-based discrimination in the name of affirmative action the bad reputation it deserves.

Professor McGinley, a supporter of race-based diversity in education, describes the events surrounding the Taxman case as demonstrating how politically important the case was considered to be at the time. Oral argument in the Taxman case was planned for January, 1998, but the parties settled the case on November 21, 1997. At first glance, one might think

42. Id.
44. Id.
45. Id.
47. Tony Mauro, Marking High Court Milestones, LEGAL TIMES, Nov. 24, 1997, at 8. After considering the facts and legal analysis of the Third Circuit in the Taxman case, those who claim to be firm believers in race-based diversity helped organize a settlement of the case so as to preclude the Supreme Court from hearing the case, according to Tony Mauro. Id. ("The sudden settlement late last week of the affirmative action case Board of Education of the Township of Piscataway v. Taxman, No. 96-679, takes the biggest case of the term out of the hands of the justices. . . . As it turned out, the Black
that the issue of race-based inferiority would not appear in the Taxman case because the African-American teacher receiving the alleged racial preference possessed objective qualifications equal to those of her white counterpart. However, racial inferiority shows up in the Taxman case because the message sent to the white teacher is one of inferior status on an individual basis because of her racial group status. The message to the white school teacher in Taxman is that members of the white group are not needed in our school to support our goal of racial diversity. As a result, they will be laid off from their jobs because their racial identity in this diversity battle is less desirable than that of their black counterparts with equal qualifications and seniority.

In Adarand Constructors, Inc. v. Pena, the Supreme Court stated that every person of every race has a constitutional right to require governmental actors to justify every racial classification exposing that person to unequal treatment of the law to meet the strictest judicial scrutiny. In 1998, prior to the Supreme Court’s ruling in Grutter that racial diversity was a compelling state interest in the context of educational admissions, it is very likely that the school board would not have met its burden of showing that its diversity race-based classification could meet the strict scrutiny test required under the equal protection clause.

B. Extending Precedent Cases to Academic Hiring

After Grutter made racial diversity for educational purposes a compelling state interest under the equal protection clause, the suggestion made in 1999 by Jonathan Alger, counsel to the American Association of University Professors (AAUP), that an academic employer in hiring a
diverse teaching faculty may be able to use race under Bakke as a factor without violating Title VII may become a legal reality. Alger asserted that the Supreme Court had never construed either Title VII or the Constitution to outlaw race-based affirmative action to uphold faculty diversity. The Supreme Court has suggested that Title VII authorizes nonremedial, race-based affirmative action plans. Alger further contended that in the Wygant decision concerning high school faculty layoffs, most of the members of the Court implicitly or explicitly approved the constitutionality of using race as a factor in achieving a faculty diversity goal. Additionally, Alger implied that Executive Order 11246 mandated colleges and universities with federal contracts to use race as one of the factors in making employment decisions. Based on the contextual analysis put forth by Alger, colleges and universities looking to implement “race-conscious affirmative action programs for faculty recruitment, retention or promotion” must answer the challenges presented in the Bakke decision. Race-based affirmative action plans devised to advance diversity should show “how faculty diversity contributes to the ‘robust exchange of ideas’ (the key to the educational component of the legal argument) and how any such programs are narrowly tailored to serve this educational purpose.”

Considering the state of the law in 1999 on the issue of race-based affirmative action programs in employment that use diversity for nonremedial purposes as their justification, Alger makes a strong case for race-based decisions about the terms and conditions of faculty members under Justice Powell’s Bakke rationale. Although I am impressed with Alger’s analysis for its intellectual insights, I am opposed to the government’s use of race-based diversity in employment because, in the spirit of Justice Harlan’s dissent in Plessy v. Ferguson, it is my belief that the government should never be allowed to benefit or burden an individual using race as a factor. After reading both the Bakke and Grutter opinions, I am more convinced than ever that Justice Scalia is correct in concluding that race-based entitlements, whether they are motivated by separate-but-

50. Id. at 193 (citation omitted).
51. Id. (citing Bd. of Educ. of the Township of Piscataway v. Taxman, 91 F.3d 1547 (3rd Cir. 1996)). In Taxman, the Third Circuit concluded that racial diversity in employment does not constitute a compelling interest. The Supreme Court granted certiorari to evaluate the Third Circuit’s holding, but the settlement of the case before oral argument allowed the Third Circuit opinion to escape judicial review by the Supreme Court. Id. at n.45.
52. Id. 193-94.
53. Id.
54. Id. at 194 (citing Exec. Order No. 11,246, 3 C.F.R. 339 (1965)).
55. Id.
56. Id.
57. Id. at 191-92.
equal segregation or together-but-unequal racial diversity, shall at the end of the day "reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." 59  Although I disagree with Alger's article on the pragmatic philosophical ground that race-based classifications in America should be prohibited, 60 I must concede that Alger's article provides strong logical support, based on Justice Powell's opinion in Bakke, for the relationship between racial diversity in education and faculty employment issues. 61

However, where race is a factor in making decisions about faculty employment or other entitlements, Justice Scalia appropriately suggests that an undesirable invitation to racial hostility and racial privilege is offered to all those preoccupied with race-based status. 62 It is my contention that race-neutral diversity based on either life experience and/or potential intellectual contribution is a true expansive approach to diversity among citizens that extends an invitation of equality to all persons similarly situated without increasing the opportunity for racial hatred.

Although intellectual diversity is compelling, in my opinion, it is not compelling enough to justify racial discrimination when race-neutral options in faculty hiring are available. Race-neutral factors to increase intellectual diversity may include life experience, noteworthy intellectual contribution, and social economic status.

C. Alternative to Using Race as Factor in Academic Hiring

I argue that when a public or private racial diversity plan is designed to accommodate the inferior qualifications of African Americans as a group in the workplace, such a diversity plan sends a message of group inferiority for African Americans. 63

If an academic employer desires to accommodate the inferior objective qualifications of any otherwise qualified person, regardless of his or her


60. See Joseph Tussman & Jacobus Tenbroek, The Equal Protection of the Laws, 37 CAL. L. REV. 341, 354 (1949) (indicating that race be one of those “traits which can never be made the basis of a constitutional classification”).

61. Alger, supra note 49, at 191.  "A college's academic freedom interest in the 'robust exchange of ideas' includes an interest in the existence of a diverse faculty and, more generally, in diversity of professors nationally, since scholars engage in the interchange of ideas with others in their field, and not merely with faculty at their particular school. A university could contribute to this interest by enrolling graduate students who are committed to becoming professors and who will promote the overall diversity of scholars in their fields of study, regardless of the diversity of the students who are admitted to the university's own graduate program." Id. at 195.


63. Brown v. Board of Educ., 347 U.S. 483 (1954). Brown is a school segregation case. In Brown, the Supreme Court held that it was an unconstitutional violation of the Equal Protection Clause for school officials to send a message denoting the inferiority of African Americans as a group.
racial status, because of other noteworthy qualities free of racial
discrimination, I believe this is permissible because it measures the whole
person as an individual without racial considerations. I believe a
university must make a good faith effort to communicate to all qualified
individuals on a race-neutral basis in its hiring process that although they
meet the threshold qualifications for faculty positions that there are other
individuals that have better paper credentials or more elite credentials and
that the college or university has a preference for hiring individuals with the
best elite credentials. All qualified candidates should be informed that the
university will continue to follow its preference for the best available
individual with elite credentials unless those qualified individuals without
similar credentials to its present faculty demonstrate noteworthy social or
economic experiences that either equal or exceed elite credentials. All
qualified individuals seeking a true race-neutral intellectual diversity
preference in the hiring process should be required to demonstrate how
hiring them is rationally related to increasing intellectual diversity on the
faculty. A true diversity approach, based on either noteworthy experiences
or noteworthy intellectual contributions, shall expressly be prohibited from
considering race in the selection process in order to assure reasonable
individuals that diversity based on either an individual’s historical
experience or prospective intellectual contribution is not a pretext for
promoting racial diversity.

The basic goal of the 2002 federal No Child Left Behind Law was to
address the problem of the many schools that shamelessly were letting poor
children fall behind in academic achievement. Very similar to minority
children, poor children of any race are at risk of having low-test scores.
One commentator, Ruby K. Payne, asserts that a person carries with her the
concealed rules of the social/economic class to which she was exposed as a
child. “Even though the income of the individual may raise significantly,
many of the patterns of thought, social interaction, cognitive strategies, etc.,
remain with the individual.” Poverty is not to be used as a proxy for race

64. See Griggs v. Duke Power Co., 401 U.S.424 (1971). Although Griggs is a Title VII disparate
impact case, I am asserting that Griggs stands for the basic proposition that the employer is to measure
the individual job applicant rather than that individual group status. Id.
65. Amanda Ripley & Sonja Steptoe, Inside the Revolt Over Bush’s School Rules, TIME, May 9,
2005, at 30, 32.
66. See id. “[C]urrently 6,000 schools (13% of those receiving federal money) have been deemed
‘in need of improvement’ under No Child [Left Behind]. But that was the reason for the law in the first
place: too many schools were shamelessly letting poor and minority kids fall behind. . . . ‘Some of these
schools haven’t been performing for 15 or 20 years, but it was one of the best-kept secrets in most
communities,’ says House Democrat George Miller of California, who helped write No Child. ‘The
smartest thing the law does is to require schools to separate out the scores of at-risk children instead of
lumping all kids together for a sunnier average.’” Id.
1998).
68. Id.
in expanding diversity in education because poverty exists in every race in every nation.69 A faculty candidate who has experienced substantial childhood poverty who is qualified to teach at an elite school but fails to possess elite credentials because of childhood poverty and the lack of available money to attend an elite college may be given a race-neutral preference in hiring at an elite law school. For example, a qualified faculty candidate may produce evidence to a hiring committee that upon graduating from high school he was offered admission at Harvard but that she could not accept the offer because of a lack of money and that she elected to attend a not so elite flagship university in her home state because the flagship school provided her enough scholarship and grant money to cover all of her expenses. This is because her noteworthy experience of not accepting an offer to go to Harvard because of a lack of money represents to faculty, students, and the larger community at a law school committed to economic justice that it is not totally blind to those exposed to a legacy of poverty and lack of economic opportunity at the personal individual level.

If Grutter is the law of the land, it should be applied to faculty hiring as well as student admissions; but instead of using Grutter's race plus factors, I think law schools should adopt race-neutral factors to diversify both faculty and the student body.

III.
THE APPLICABILITY OF THE GRUTTER DECISION TO ACADEMIC HIRING

Law schools interested in adopting race-based diversity polices when making employment decisions about their faculty should treat Grutter's racial diversity rationale as predominately concerning deference to the decisions of public college officials, allowing the limited use of race as a potential plus in adopting educational policy. One commentator, Professor Hylton, observes that in Grutter, Justice O'Connor "focused a large portion of the opinion on extolling the virtues and necessity of diversity in higher education."70 Unlike Professor Hylton, I take the position that Justice O'Connor's Grutter analysis skillfully champions the virtues of race-based diversity in higher education to the virtual exclusion of all other factors, even when a qualified student fails to meet the University of Michigan Law School's (the "Law School") traditional elite criteria for admission. If honesty is the best policy, then it is clear that race is the predominant factor driving Justice O'Connor's concept of academic diversity. While I reject Grutter's race-based diversity rationale I am a strong supporter of intellectual/viewpoint diversity in higher education. I decline to accept

69. See id. at 10, 11-12.
Grutter’s contention that race is a relevant factor in making decisions about viewpoint diversity.

"Today scholars in many fields argue that race as it is understood in the United States of America was a social mechanism invented during the 18th century." Since the dominant theme of Grutter is the value of racial diversity in higher education, it is my position that in the narrow context of addressing the issue of terms and conditions of employment for the academic faculty in higher education, Grutter is best understood as a case about law, race, and educational policy. However, Professor Hylton also asserts “because employment is the other arena of American life in which affirmative action operates, the University of Michigan cases will have an important impact in labor and employment law. . . . The cases may signal the court’s willingness to uphold workplace affirmative action programs." Professor Hylton believes that after Grutter and Gratz, race-based affirmative action plans will play a leading role in the development of hiring processes for those employers looking to acquire the benefits of a diverse workforce.

Professor Estlund concedes that as a formal matter, Grutter might only marginally impact the constitutional validity of race-based affirmative action in public employment. Professor Estlund fittingly informs doctrinal purists “to assume whatever greater tolerance Grutter portends for affirmative action in employment under the Constitution is likely to spill over into Title VII and the private sector as well.” In my opinion, when the Grutter race-based diversity rationale of “together but unequal qualifications” spills over to the employment arena it will force African Americans to reexamine the “burden of racial status diversity.” I believe the burden of racial status diversity exists when an African American is presumed to wear the badge of racial inferiority in the workforce because his nonminority colleagues believes that he got his job because race was a predominant factor rather than the ability to do the job.

Using race-neutral diversity factors in making employment decisions regarding faculty members would promote true individual consideration of diversity based on either a diversity of one’s background and/or the diversity suggested by one’s intellectual/viewpoint. It is necessary to reject Grutter’s theory because the contention that racial diversity is a compelling interest signals an endorsement of “stereotypical generalizations about individuals and imposing expectations about their contribution to the

72. Hylton, supra note 70.
73. Id. at 278.
75. Id.
classroom" as faculty members because of their lack of elite qualifications and their racial group status. Professor Estlund appropriately concedes that 

Grutter's "diversity-as-difference" outlook fails to adequately explain either the basis for selecting the beneficiaries of racial preferences or the scope of the programs that may implement the nonremedial, race-based diversity concept.  

Professor Estlund raises two basic questions that I believe expose the inherent flaw in adopting the stereotypical view that somehow racial diversity equals intellectual diversity in an academic environment. The first question asks, "Did African Americans and Latinos contribute greater diversity of views than for example, fundamentalists Christians?" The second question raises this debate: "how exactly did diversity of view and experiences contribute to education in physics or mathematics?" It is clear in my vision that Grutter's race-based diversity theory creates a very strong inference that race is the predominant factor in the robust exchange of ideas. The Grutter Court's suggestion that it does not believe that an individual's race is a substantial factor in his or her perspectives on life is not very convincing because the Court strongly suggests that the unique experience of being a racial minority in America is likely to be a substantial factor in impacting one's point of view. I believe one can reasonably argue that every person in America has a unique race-neutral experience that has substantially affected his or her point of view.

Professor Guinier argues that Grutter's race-based diversity rationale "helps challenge stereotypes." However, under Grutter, qualified minority students with lesser academic credentials receiving a racial preference are likely to be viewed as inferior students in the academic community. The Grutter opinion is a dangerous precedent because its rationale for admitting qualified students with lesser academic credentials based on their racial group status perpetuates a stereotypical group status view that those students received the racial preference, and are thus not

76. See id. at 217.
77. Id.
78. Id.
79. Id.
80. Id.
82. But see id. at 372 (Thomas, J. dissenting) ("It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the 'beneficiaries' of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.") (citation omitted).
qualified on their own merit to be at the law school. The Plessy separate-but-unequal doctrine came to be understood as sending a message that African Americans were inferior. Unfortunately the Grutter Court’s notion of “qualified with unequal race-based diversity credentials” may also be sending an unintended message that African Americans as a group are inferior.

After reading the Grutter opinion, in which the Supreme Court approved race-based affirmative action on a theory of expanding the intellectual diversity of nonminority students at the nation’s elite law schools, I question whether Grutter’s intellectual-diversity, critical-mass theory can and should be expanded to apply to faculty hiring and other terms and conditions of employment. Justice Scalia characterized the “educational benefit” of the University of Michigan’s law school race-factor admission plan as including the promotion of cross-racial understanding and preparing nonminority students for a more diverse workforce and society. My intellectual curiosity about the potential impact of the Supreme Court’s educational benefit rationale for race-factor diversity was stimulated in part by Justice Scalia’s statement concerning the potentially expansive scope of the critical mass rationale as a compelling justification for race-based diversity.

This Article maintains that the fatal flaw of the Supreme Court’s rationale in Grutter is that it accommodates the educational benefits of racial diversity for the elite majority group by stamping the minority individual with a badge of inferiority based on her group status, regardless of her individual credentials. It is my position that the group status of racial minorities suffers tremendously when they are hired under standards that are perceived to be inferior to that of their peers because of their race. A true race-neutral hiring policy which considers either intellectual viewpoint or experience diversity as positive, and is not a proxy for minority race hiring, will not be tainted with racial stigma when individuals without elite credentials are valued because of their intellectual difference rather than because they happen to have a different skin color. I contend that when African Americans and other racial minorities are connected to the

83. See id.
84. Id. at 347-48 (Scalia, J. dissenting).
85. Justice Scalia said:
If properly considered an “educational benefit” at all, it is surely not one that is either uniquely relevant to law school or uniquely “teachable” in a formal educational setting. And therefore:
If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a critical mass that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, particularly appropriate—for the civil service system of the State of Michigan to do so. . . . The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.

Id.
academic environment or the workplace on unequal diversity terms because of their racial group status, they are often viewed as inferior individuals representing an inferior racial group, regardless of the actual quality of their individual credentials. 86

The Supreme Court’s creative approval of racial diversity in the context of law school admissions in Grutter 87 has divided courts 88 and commentators on the issue of whether the race-based diversity factor applies to employment decisions. 89 While analyzing the rationale of the Grutter decision, one commentator, Eric Tilles, explored whether its rationale applied to employment law jurisprudence based on Bakke. 90 Tilles argued that Grutter may be the conceptual basis for more extensive use of affirmative action in employment in the future but that the present paradigm used to analyze affirmative action might prevent Grutter from greatly affecting affirmative action in private employment in the near future. 91 It is Tilles’ position that Grutter’s race-based affirmative action diversity approach has its greatest potential for expansion in public sector employment. 92

More than forty years ago, Congress enacted Title VII of the Civil Rights Act of 1964 to prohibit racial discrimination in employment. 93 I believe a critical goal of Title VII’s prohibition against racial discrimination was to destroy notions of racial inferiority and racial superiority among citizens in the workplace. On its face, Title VII appears to exclude the use of race as a factor in making faculty workplace decisions. 94 Fifteen years after the passage of Title VII, the Supreme Court concluded that race could be a factor in making employment decisions under a noncompulsory affirmative action plan without violating Title VII’s anti-discrimination principle. 95

86. See id. at 373 (Thomas, J., dissenting).
87. See id. at 331-33.
88. See, e.g., Petit v. Chicago, 352 F.3d 1111 (7th Cir. 2003) (rejecting an equal protection challenge alleging racial discrimination in sergeant promotional process because the city had a compelling need in a racially diverse workforce in its police department).
90. Id. at 451-52.
91. Id. at 452.
92. Id.
93. 42 U.S.C. § 2000e-2 (1964). (making it an “unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).
94. Id.
One legal scholar, Professor McGowan, has asserted that the Court’s opinion in *Grutter* does not “have a lot to say about Title VII law” and it does not develop any new rights under Title VII. It is my belief that reasonable commentators and courts may convincingly disagree with Professor McGowan’s assertion that *Grutter* does not have much to say about Title VII’s statutory framework. Under *Grutter*’s race-based diversity rationale, the Fourteenth Amendment’s Equal Protection Clause and Title VII “now provide contradictory responses to occupational need defenses raised by certain professions.” I join Professor Leach’s conclusion that *Grutter*’s race-based affirmative action diversity rationale implicitly speaks to Title VII’s antidiscrimination principle.

Distrustful of a latent opportunity for the occupational need defense to be invoked to protect racially discriminatory practices in a never-ending range of professions, the dissent in *Grutter* concluded that the drafters of Title VII never intended for race to be used as a bona fide occupational qualification defense to a charge of reverse racial discrimination in employment, according to Leach. I agree with the contention that the *Grutter* race-factor diversity rationale as articulated by the Court cannot

96. Lillard et al., *supra* note 1, at 137 (“My sense is that *Grutter* really doesn’t have a lot to say about Title VII because it’s really focused, not on the remedial aspects of affirmative action or on the remedial purpose of affirmative action, but rather on the diversity context.”).

97. See Leach, *supra* note 13, at 1093.

Logically, those professions citing an occupational interest in the continued use of affirmative action at universities should be doubly justified in granting preferences to racial minorities who have actually graduated and entered the labor market. Rather than consider the tensions that this reasoning would generate with current Title VII law, however, the Court simply reiterated that its holding reaches only educational—rather than hiring—decisions.

98. See Biondo v. Chicago, 382 F.3d 680 (7th Cir. 2004). White applicants for promotions within the Chicago Fire Department whose promotions were delayed or denied because of the department’s use of a racially segregated list were able to successfully establish that the City violated both 42 U.S.C. § 1983 and Title VII of the Civil Rights of 1964. However there is a reasonable inference in the Seventh Circuit opinion that it may not have found a violation of Title VII and Section 1983 under these facts if Chicago had argued that it used the list to either promote diversity or remedy past discrimination. Chicago “did not argue [ ] either past discrimination or a quest for diversity.” *Id.* at 683 (citing *Grutter* v. Bolinger, 539 U.S. 306 (2003) and Petit v. Chicago, 352 F. 3d. 1111 (7th Cir. 2003)).

99. Lillard et al., *supra* note 1, at 137.

100. U.S. CONST. Amend. XIV.


102. See *id.* at 1095.

103. *Id.* at 1096.
confidently be limited to law school admission decisions, undergraduate admission determinations, or academic hiring decisions.\textsuperscript{104} I agree with Professor White's conclusion that the \textit{Grutter} "decision does not directly apply to the affirmative use of race"\textsuperscript{105} in the workplace but that the decision will take center stage in future discussion about affirmative action in the workplace.\textsuperscript{106} For example, the Seventh Circuit has held that race may be used as a compelling nonremedial diversity factor in making hiring decisions involving individuals involved in law enforcement.\textsuperscript{107}

The Supreme Court has implicitly endorsed racial diversity as a remedial justification for an employer's decision to use race as a factor in order to remedy past discrimination or racial imbalance in hiring its workforce.\textsuperscript{108} In \textit{Weber}, the Court gave its approval to an affirmative action plan designed to remedy discrimination by either a specific employer or to correct imbalances based on a finding of past discrimination.\textsuperscript{109} Unlike \textit{Weber}, the Supreme Court's diversity rationale in \textit{Grutter} is not premised on racial discrimination by either a specific college or societal discrimination. "However, the \textit{Grutter} Court's acceptance of diversity as a compelling state interest in the educational context suggests it may be receptive to that argument in the workplace as well,"\textsuperscript{110} according to Professor White. In my opinion, the Supreme Court's acceptance of racial diversity as a compelling interest in the classroom strongly indicates that the Supreme Court has not articulated a consistent legal theory under \textit{Grutter} for excluding the diversity rationale from decisions regarding the academic workforce. It is my hypothesis that Justice Scalia's dissenting

\begin{itemize}
\item \textsuperscript{104} See \textit{Leach}, supra note 13, at 1096. The \textit{Grutter} Court expanded the boundaries of the constitutional occupational need defense. First, \textit{Grutter} put forward the theory that a profession's dependence on racially diversity may justify the use of race-conscious admissions standards at the entry stage of professional education. \textit{Id.} Second, the \textit{Grutter} Court recognized occupational needs for diversity in fields which differ substantially from the public-safety-oriented employment that effectively raised an occupational need justification in an earlier period. \textit{Id.} "By grouping together professions such as business and law with the military, whose unique features have entitled it to a special exemption under Title VII, the Court proceeded on the questionable assumption that these professions are equally dependent on racially diverse leadership." \textit{Id.}
\item \textsuperscript{105} Rebecca Hanner White, \textit{Affirmative Action In The Work Place: The Significance of Grutter}, 92 KY. L.J. 263, 265 (2003). White also notes that "[t]he statute, as originally enacted, reached only private employers but was amended in 1972 to reach public employers as well. Thus, public employers must conform their conduct not only to the Constitution but to Title VII as well." \textit{Id.} at n.8. (citing 42 U.S.C. § 2000e(b)).
\item \textsuperscript{106} \textit{Id.} at 264.
\item \textsuperscript{107} Biondo v. Chicago, 382 F.3d at 692 (Williams, J., concurring) ("A nonremedial reason may also constitute a compelling interest supporting the use of race and ethnicity in employment decisions. For example, this court found that the Chicago Police Department had a compelling interest in having a diverse population at the rank of sergeant. We similarly recognized an operational need for persons of different races in the corrections environment. In this case, however, the City did not argue that the pursuit of diversity constituted a compelling interest. Based on the arguments presented to us, I concur in the result on the merits.") (citation omitted).
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Tilles}, supra note 89.
\item \textsuperscript{110} \textit{White}, supra note 105, at 264.
\end{itemize}
opinion in *Grutter* correctly assumes that the Supreme Court’s flawed diversity model, in the absence of past discrimination, cannot logically be limited to educational admissions decisions.\footnote{111. Grutter v. Bollinger, 539 U.S. 306, 347 (2003) (Scalia, J. dissenting).}

I believe the *Grutter* Court’s expansive racial diversity rationale creates a very plausible argument for allowing an academic faculty to implement a race-factoring diversity plan. Professor Tanya Washington has suggested that the *Grutter* court came to the right answer with flawed reasoning.\footnote{112. Tanya Washington, *The Diversity Dichotomy: The Supreme Court’s Reticence To Give Race A Capital “R”*, 72 U. CIN. L. REV. 977, 978 (2004).} I agree with Professor Washington’s conclusion that the majority’s reasoning in *Grutter* was flawed, but I do not accept her position that *Grutter* reached the right answer. Like Professor Washington, I conclude that *Grutter*’s line of reasoning on the issue of racial diversity in higher education takes away from its credibility.\footnote{113. Id. at 983.}

It is unlikely that many law school faculties will adopt such a plan because I believe that the pretextual educational benefit of the racial diversity rationale in the law school admissions context articulated in *Grutter* was not actually designed to promote intellectual diversity among the races. The goal of *Grutter*’s diversity is to provide, in the words of Justice Scalia in dissent, “undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants.”\footnote{114. Id. at 1631-32.} I agree with Professor Bell’s suggestion that recognizing the value of racial diversity as an alleged educational benefit in the classroom at the student admission level diverts attention from the more serious issues of employment, poverty, and economic justice.\footnote{115. See id. at 1626.} If a law school were to adopt a race-based diversity hiring policy under the *Grutter* rationale for hiring its faculty members, Professor Bell implies that the Supreme Court would probably invalidate the plan because it would trammel on the economic interest of whites seeking employment as faculty members.\footnote{116. Justice O’Connor generally votes with the Court’s four conservative Justices to defeat race-sensitive policies intended to remedy the continuing effects of past discrimination. Justice O’Connor’s affirmative action jurisprudence illustrates her negative attitude towards racial preferences and racial classifications. She has repeatedly pronounced her concern for the effect affirmative action plans may have on whites. She is worried about “trammel[ling] on the interests of nonminority employees.” Given these concerns, it is less surprising that she supported the Law School’s diversity-oriented admissions policy. She evidently viewed it as a benefit and not a burden to nonminorities. In addition, it was a boost to a wide range of corporate and institutional entities with which she identifies. Id. at 1623, 1626 (citation omitted).}
IV.
A CRITICISM OF THE GRUTTER THEORY AND RACE-BASED CRITERIA IN GENERAL AND A REJECTION OF THE SUGGESTION THAT TITLE VII BE AMENDED TO ALLOW RACE TO BE USED AS A BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ)

A. Rejection of Grutter Theory and Race-Based Criteria Generally

Professor Estlund warns that using race as “a proxy for distinct experiences or views triggers . . . stereotypes, biases, and divisions.”\textsuperscript{117} Under a rational basis level of scrutiny, it is fair to suggest that there is no reasonable connection between racial diversity and the academic perspective one might bring to education in physics and mathematics because these subjects are race-neutral. If an African-American is perceived by his peers and students as teaching mathematics and physics at an elite university because of his race rather than his or her ability, then the racial stereotype of African-Americans not being able to teach mathematics or physics without a racial preference is reinforced.\textsuperscript{118} If teaching mathematics or physics is viewed by nonminority students as a traditionally white professor’s job, the race-based stereotyping of job classification is best destroyed by recruiting qualified African American mathematics and physics professors using race-neutral factors. When members of the academic community believe that an African American professor of mathematics or physics has been hired without any consideration of his racial group status, all other things being equitable, that professor enjoys a presumption of academic authenticity in the academic community.

Law schools that are willing to implement the wrongly decided Grutter opinion in its student admission process are philosophically obligated to impose the Grutter wrong on themselves in making faculty hiring decisions. I am satisfied that the flawed diversity rationale of the Grutter opinion allows a public or private law school to voluntarily adopt a race-based

\textsuperscript{117} Estlund, supra note 74, at 218.


Most importantly, Instrumental affirmative action may limit opportunities for minorities in ways that remedial affirmative action does not. If blacks or any group are said to be best at a certain task, there is a good possibility that employers will see the group as good at only that task, in effect trapping them in a racial script role. Moreover, if the logic of instrumental affirmative action carries over to the dominant group—if employers believe whites are best at certain jobs, or dealing with white clients—opportunities for racial minorities may be even more limited.

\textit{Id.} Today race-based affirmative action is not justified as a remedy for historical discrimination, “but as an instrumentally rational strategy to achieve the positive effects of racial diversity modern society.”\textit{ Id.} at 677. “Affirmative action in the United States has been cut loose from its moorings in the nation’s tragic history of racial oppression and the law that developed to remedy that oppression. Increasingly, it is rooted in strategies to maximize the performance of institutions.” \textit{Id.} at 721.
policy for faculty hiring in the name of educational diversity. However, I am persuaded that very few, if any, elite law schools will adopt a formal, Grutter-approved diversity plan for its faculty hiring because of expediency considerations. The major consideration that will preclude law faculties from seeking the educational benefits of the race-based diversity rationale is their belief that enhancing the super academic elite status of their law school faculty is considerably more compelling than having a racially diverse, qualified faculty with less than traditional elite credentials. When it comes to race and diversity, elite law schools will only act in a politically correct posture when it does not conflict with their interest in achieving the highest possible ranking in the formal polls conducted by the news media or the informal poll of peer faculty members. It should not come as a surprise that the race factor is a tactical political consideration in higher education like it is in the rest of American society. "Race has been the political issue in this since it was founded. And we may regret that is a political reality, but it is a reality."

Professor Bloom asserts that in the context of law school race-based diversity admissions, a law school is required to consider whether race-neutral alternatives will produce similar results, but that the Grutter opinion does not require a law school to sacrifice its academic reputation to achieve diversity on a race-neutral basis. It is my contention that elite law schools are very reluctant to apply the Grutter rationale to a formal faculty employment policy encouraging qualified African American or Hispanic individuals with inferior elite qualifications to apply because such a document is likely to be perceived as having adverse impact on the faculty’s academic prestige among peers in the elite law school community. The Grutter rationale of racial diversity as an educational benefit is not likely to be implemented at the faculty employment level. Among law schools, rankings and prestige are likely to be viewed as greater positive educational benefits than racial diversity among qualified academic colleagues who fail to possess standard elite qualifications. I believe that an educational institution with a formal or de facto race-factoring diversity plan for admission of students which does not operate a similar plan in making employment decisions for its academic faculty is not being internally consistent with any espoused views championing the alleged benefits of racial diversity as an educational benefit in the robust intellectual exchange of ideas.


120. Lackland H. Bloom, Jr., Grutter and Gratz: A Critical Analysis, 41 HOUS. L. REV. 459, 495 (2004) ("The institution is under an obligation to consider race-neutral alternatives that serve its overall mission almost as well as the use of racial preferences. However, it need not significantly sacrifice its academic reputation by lowering admission requirements or instituting a lottery.") (citations omitted).
Under the Supreme Court’s Grutter rationale, I think it is bad public policy to reward private employers and public employers for “teaching” good citizenship to their adult employees or law students “through a patriotic, all-American system of racial discrimination in hiring” in the name of separate-and-unequal racial diversity. I believe that Grutter’s unacknowledged implicit “together-but-unequal diversity” rationale could be expanded to apply to decisions about the terms and conditions of faculty employment as a means of promoting either critical mass or intellectual diversity. I think Grutter’s race-based educational benefit or critical mass diversity rationale in the context of employment decisions is constitutionally flawed because the Court’s “together but unequal” reasoning falls short of making a compelling justification for racial discrimination. I contend that the Grutter opinion was wrongly decided and its race-based rationale should be rejected. Nevertheless, with Grutter as the law of the land, I believe that those elite schools that are intellectually honest about diversity should extend Grutter to faculty hiring decisions. It is my belief that the Grutter race-based rationale hurts African Americans and those institutions of higher education should replace race-based affirmative action with race-neutral criteria in both the admission and employment context.

I contend that accepting race-based employment opportunities where one is qualified but has lower objective test scores and grades runs the significant risk of creating a sense of psychological racial inferiority for the recipient because of the historical significance of using racial registers in America. However, I do not believe accepting race-neutral employment opportunities where one is qualified but has lower objective test scores and grades runs the significant risk of creating a sense of psychological racial inferiority because a recipient receives a preference due to prior military experience or prior experience as a poor person in America without being assigned to a racial registry. Under my race-neutral criteria proposal, the objective criteria of grades and test scores may remain as significant factors in faculty hiring decisions, but those persons selected because they bring a diversity of intellectual/viewpoint or life experience to campus are entitled to have those experiences and/or viewpoints be considered as a positive factor that reduces the focus on their grades and/or test scores. My race-neutral diversity approach has the effect of promoting viewpoint diversity on college campuses without demeaning the Constitution, by making race

122. “The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demean us all.” Id. at 353 (2003) (Thomas, J., with whom Scalia, J., joins as to Parts I-VII, concurring in part and dissenting in part).
123. See id.
irrelevant to providing an employment preference. The race-neutral factors used by colleges or universities in making hiring decisions should not be slanted toward any racial minority group. Race-neutral factors in hiring decisions should be aimed toward selecting qualified individuals with a demonstrated history of childhood poverty or a strong potential to promote an institution’s publicly declared commitment to either economic or social diversity in our society. I believe that diversity based on an individual’s life experience in a social economic status that is underrepresented at a given institution is a better indication of the diversity contribution one is likely to make as either a student or employee at a college or university than race because one generally understands the hidden rules of the class of which she is a successful member.

One reason to use race-neutral affirmative action is that a member of the underrepresented class, in a discussion about diversity, may be equipped to share her views on the hidden rules based on different life experiences, with the non-diverse student or faculty who may not be familiar with hidden rules based on social economic status rather than race. Hidden rules are present for the poor and the middle class as well as the wealthy. According to Payne, “[h]idden rules are about the salient, unspoken understandings that cue the members of the group that this individual does or does not fit.” It is conceded that one could also argue that hidden rules also exist for racial minorities and that hiring a racial minority faculty member because she is presumed to know the hidden rules of survival for the majority members of his race is a dangerous form of race stereotyping because racial minorities who are qualified to teach at elite colleges in spite of their lack of competitive elite credentials are more likely to understand the hidden rules of the middle and upper class than the hidden rules of African American poor.

Although an elite university or law school may be able to meet its entire faculty hiring needs with individuals possessing traditional elite credentials, it could hire qualified individuals with lesser credentials who it believes in good faith will contribute to a robust exchange of ideas or experiences, regardless of race. Assuming that there are a greater number of whites with elite credentials than other racial minorities, historical racial minorities and other qualified individuals with non-elite credentials should be given a formal structure to demonstrate from a holistic individual perspective that they advance the school’s asserted interest in exchanging ideas and experiences on specific issues of interest to a particular college.

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124. Id.
125. See PAYNE, supra note 67, at 18.
126. Id.
127. Id.
128. Id.
My race-neutral criteria for faculty hiring would have a positive race-neutral impact for all qualified candidates seeking a faculty appointment without elite credentials but with special skills and insights that will promote a law school's understanding of relevant issues.

Creating race-neutral diversity employment criteria has the benefit of giving qualified individuals a chance to perform without the stereotypical, race-based affirmative action baggage of inferiority issues. I will concede that using pretextual, race-neutral, diversity credentials as a proxy for race for otherwise qualified faculty candidates may promote historical racial diversity, but it truly undermines a university’s commitment to a race-neutral discussion about the quality of one’s ideas rather than the color of one’s skin. In making either a law school hiring or admission decision, race cannot be used as a proxy for race-neutral ideas and non-elite credentials, which actually show a positive potential to add to the intellectual diversity of the law school. When a law school uses race-neutral credentials in the faculty hiring process as a thinly disguised proxy for race it does the community of ideas a disservice by playing the race card. A good faith race-neutral diversity plan must following the reasoning of Washington v. Davis and not have any intent or purpose to consider social economic status as a proxy for race in making employment decisions about faculty members. A true race-neutral faculty will not use race as a potential plus in application of a person seeking a faculty position even if it is permissible to do so under Grutter. A school seeking diversity in its faculty using race-neutral criteria may wish to encourage all qualified applicants who believe that they can bring intellectual/viewpoint diversity to an identified mission of the law school to include a statement of their diversity vision with their application.

Professor Laycock contends that racial diversity in higher education cannot be achieved through race-neutral means. Professor Sanders reports that the AALS brief in Bakke concluded that adopting race-neutral admission criteria based on LSAT Scores and undergraduate grade point average in law school admission would mean the virtual end of minorities in the legal profession. I think that a school can create academic diversity

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130. See Douglas Laycock, The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership, 78 TUL. L. REV. 1767, 1768-69 (2004) (“Affirmative action has been the most effective method, and generally the only effective method, of desegregating schools with highly selective admission standards. Perhaps least understood of all the reasons for affirmative action, directly considering race preserves selective admission standards and thus protects academic excellence . . . And no race-neutral means work nearly as well, either at increasing diversity or protecting academic standards.”).

The [AALS] brief argued that LSAT score and undergraduate GPA were the best predictors of success in law school, and that they were not biased (so that no alternative indicators would do a better job of assessing minority candidates), but that the number of minority applicants
in its faculty and student body by adopting polices designed to share the diverse mix of human experience without any reference to the controversial concept of race. A hypothetical law school motivated by the concept of economic justice in society should be able to implement "class-based" diversity as a positive plus factor in making either a hiring or admission decision for an otherwise qualified applicant. Law schools committed to economic justice in our society may want to "consider 'diversity' or 'hardship' legal essays," in which qualified faculty candidates "describe challenging life experiences such as poverty, English as a second language, or growing up with a parent in a gang or in prison."

Law professors are not likely to impose the Grutter diversity rationale at the faculty employment level because as one commentator candidly admits, "[e]very established order tends to produce the naturalization of its own arbitrariness." If elite law schools were less strict in applying the traditional standards of law school grades, law review position, and reputation of the law school from which an otherwise qualified candidate graduated, they could use a flexible, race-neutral, holistic approach to meet their institutionally civic needs while evaluating a candidate without using race as a factor. The holistic race-neutral approach may as an incidental matter unavoidably increase the racial diversity of specific groups while engaging in intentional state action to obtain a diversity based on either viewpoints or life experiences for educational purposes. An elite law school in making faculty employment decisions under a holistic approach should consider those factors that allowed the individuals to become

with academic numbers comparable to the best whites was insignificant. "This has led to the creation of 'special admissions programs' designed to produce decisions different from those that would be produced if the process were conducted in a racially neutral way." These special admissions tracks had two characteristics: they compared academic strengths among candidates within each racial group, thus insulating them from direct competition with whites; and they looked a little harder at nonnumerical indicia of academic promise. To place all applicants in direct competition with one another, the brief contended, would "exclude virtually all minorities from the legal profession."


133. Id.

134. Id. Forde-Mazrui argued in his pre-Grutter analysis that race-neutral affirmative action would only be valid if it is not motivated by impermissible racial purposes.


In this Article, the author applies social closure theory to help explain why more than a dozen states have recently enacted more stringent bar exam passing standards and why others are considering similar changes. While higher standards are usually advocated as a way to protect the public from lower student 'quality,' the author applies social closure theory and argues that changes in passing standards are a response to a perceived oversupply of lawyers, especially among solo practitioners. . . . The Article's conclusion is that the psychometric research sponsored by the National Conference of Bar Examiners consistently minimizes and obscures the disparate impact and unfairness of the bar exam for people of color.

Id.
qualified to be a law professor in spite of the tremendous social baggage of family poverty or any other tremendous social economic status barrier.\textsuperscript{136} Elite law schools endorsing race-based diversity should remember that people of color seeking to enter the teaching profession will be disproportionately harmed by any gap between requiring race-neutral, elite credentials and the actual skills needed to be a productive law professor at their specific school. Requiring elite credentials for those deemed capable of doing a good job in the law school community creates social barriers that unnecessarily promote racial and ethnic stratification.

The law school in \textit{Grutter} might have avoided sending an unintended message of racial inferiority to its minority students by articulating an objective list of factors which indicated that those students were likely to succeed in law school in spite of their lower LSAT scores and grade point averages. Justice Thomas asserts, "[t]he Law School is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law. The Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right."\textsuperscript{137} I believe the \textit{Grutter} decision can be interpreted as a message that African Americans as a group are inferior and this message will be expanded into any workplace adopting race-based diversity policies. I think employers using race as a factor in hiring decisions have a duty to neutralize the message of racial inferiority in their diversity plan by articulating reasonable race-neutral factors why any employee white or minority will succeed in spite of lower test scores or other lesser credentials.

If one accepts the argument that the exposure of elite students to varying and diverse intellectual insights and legal analysis would be sharpened and inspired through the exposure to a diverse student body, in order for a law school to remain principled, it must seek a diverse student body and also a critical mass of underrepresented minority law professors. In my opinion, if a hypothetical law school's faculty adopts a race-factor faculty hiring policy very similar to its race-factor admission policy, its educational-benefit justification for race-based decision making is much more credible because faculty members also, and even more directly, impact learning outcomes.\textsuperscript{138} If a law school truly believes that the racial

\textsuperscript{136} See id. at 582 ("While racial and ethnic stratification may be an unintended byproduct of social closure, people of color seeking entry into the legal profession are disproportionately harmed by the gap between the bar exam and legal practice. Professor Lani Guinier, in responding to the University of Michigan Law School alumni study, is correct in arguing that test scores and 'comparable measure of either 'legal aptitude' or general intelligence may correlate modestly with law school grades. But they do not predict or correlate with anything else that we claim to value") (citation omitted).


\textsuperscript{138} See id. at 330.
diversity of students positively impacts “learning outcomes,” it should be eager to apply the Grutter rationale to faculty hiring. In my view, an argument can be made that a hypothetical elite law school may not want to adopt a formal, race-based, faculty diversity plan because it does not want to create the public impression that it is hiring minority faculty members with less than elite credentials. It is my contention that the faculty at a hypothetical elite law school knows that one may be a successful law professor with less than elite credentials. I believe the hypothetical law school faculty may avoid adopting a formal, race-based faculty hiring policy because it does not want to be identified as an elite law school with minority faculty members with credentials that are inferior to the elite qualifications of their peers at similar elite schools. The hypothetical law school faculty knows that image matters. A law school faculty may protect its elite image by not formally adopting a racial diversity hiring plan announcing that it seeks qualified racial minority law professors with inferior credentials because it does not value race-based intellectual diversity more than its superior elite image among law schools. I do not believe the hypothetical law school faculty is prepared to risk its elite group status image among its peers to accommodate racial diversity regardless of its educational benefits.

139. See Id.; see also Alger, supra note 49, at 191-92.

This Article provides analytical and evidentiary support for the relationship between diversity and education. It sets forth a theory of diversity grounded in Justice Powell’s Bakke opinion: that the educational benefits of diversity apply to all racial and ethnic groups in the academy, as well as to both students and faculty members. These benefits result from face-to-face interaction among students and faculty of different racial and ethnic backgrounds. They inure to the entire academic community, rather than to only individuals of particular racial or ethnic groups. Recognition of these benefits requires a college or university to define its educational mission in part by considering the institution as a holistic learning environment, rather than simply as a collection of isolated individuals who can somehow be evaluated (e.g., for purposes of admissions or hiring) without reference to this larger community. While this theory of communal benefits is not the sole justification for a racially diverse faculty, it provides a good starting point for colleges and universities in their quest to enrich students’ educational experiences by exposing them to teachers of different races and ethnicities.

Id.; Jon C. Dubin, Faculty Diversity as a Clinical Legal Education Imperative, 51 HASTINGS L.J. 445 (2000).

Indeed, “the arguments for diversity among faculty in higher education are as compelling as [those for] student body diversity [recognized in Justice Powell’s decisive opinion in Bakke] and rely upon the same theoretical framework.” They are premised upon the creation of a holistic learning environment as part of the institution’s educational mission which promotes a sense of community of students and teachers who learn from their interactions and ‘robust exchange of ideas’ with one another in and outside of the classroom. Moreover, the benefits of faculty diversity accrue to students and faculty alike and to faculty at other institutions “across the country and around the world.”

Id. at 455.
B. Why Title VII Should Not Be Amended to Allow Race to Be Used as a Bona Fide Occupational Qualification (BFOQ)

I will very briefly explain why Title VII should not be amended to allow race to be used as a BFOQ. As Professor Frymer and Professor Skrentny correctly maintain, “Congress explicitly excluded race from the statutory definition of a BFOQ.” During the Title VII debates white southern congressmen made the statement that they wanted to make race a BFOQ in order to protect business interests of their African-American constituents. A majority in Congress appropriately took the position that white southerners wanted to create race-based BFOQ loopholes to allow white employers to prefer white employees. The objections to using race as a BFOQ in the workplace have been very obvious from the time Title VII was enacted as a measure to prohibit race discrimination in the terms and conditions of employment. It was generally believed that allowing race to be used as a BFOQ would allow white employers to refuse to hire black employees based on perceived marketplace preferences or other business justifications. The purpose for not using race as a BFOQ was to protect African Americans, the historical victims of workplace discrimination from the racist Jim Crow practices of many employers. I believe the original logical basis for rejecting a race-based BFOQ was to dismantle the racial homogeneity that existed in the workplace in favor of whites-only racial segregation of jobs.

140. Frymer, supra note 118, at 686.
Emmanuel Celler (D-NY) said, “We did not include the word ‘race’ because we felt that race or color would not be a bona fide qualification, as would be ‘national origin.’ That was left out. It should be left out.” Another senator said, “20 million Negroes are willing to take their chances on this bill.” Defenders of the bill, in a letter addressing Senate minority leader Everett Dirksen’s (R-IL) presented questions about the Harlem Globetrotters or film makers doing a movie about Africa, explained that film makers should not demand a black person but only someone that looked black. And the Harlem Globetrotters, the defenders argued, had too few employees to be covered by the bill.

141. Id.
142. Id.
143. Id.
144. Leach, supra note 13, at 1095.
145. See id.

In the legal context, occupational need arguments have most often arisen as defenses against allegations of racially biased hiring practices. Accordingly, both Congress and the courts have grappled with the question of how to strike the proper balance between catering to important occupational needs and upholding the law’s broader prohibition against racial discrimination. During the legislative debate over Title VII of the Civil Rights Act of 1964, Congress resolved this dilemma by unambiguously rejecting the concept that a person’s race could ever constitute a ‘bona fide occupational qualification’ (BFOQ). Underpinning this decision was the overriding fear that employers might otherwise hire only whites, claiming that this was essential to the smooth functioning of their businesses.

1d. (citations omitted).
After the *Grutter* opinion stated that race may be considered as a positive plus factor in law school admissions in order to promote racial workplace diversity in a multicultural society one commentator unfortunately has now concluded that race should now constitute a BFOQ.¹⁴⁶ In my opinion race should not be used as BFOQ because any official approval of a racial preference in the workplace will lead to resentment by reasonable non-racist whites and the race-based BFOQ will probably serve as a battle cry for white supremacist groups. If race is ever made a BFOQ under Title VII, there will not be any logical reason for whites not to claim a need for a reverse BFOQ in order to promote a cross racial understanding in specific professions such as sports or professors at certain historically segregated minority colleges. It is foreseeable that a white athlete may contend that he will increase multiculturalism by starting in the lineup of a National Basketball Association (NBA) team even if his number of rebounds and points scored per game are inferior to those of minority basketball players. If Congress makes race a BFOQ under *Grutter*’s racial diversity in education rationale, it is very plausible for a white person seeking a faculty position at a Historically Black University to use the reverse BFOQ rationale to ask for a racial preference because he will bring a diversity of viewpoint to the university because of his unique experience of being white and privileged in America.

VI.
CONCLUSION

In my opinion educational institutions with a formal race-based diversity plan for students admission plan based on *Grutter*’s flawed educational benefits of racial diversity theory that have not adopted a similarly flawed race-based diversity plan when considering the employment of its teaching faculty send a mixed message about their level of commitment to the proposition that using race as a factor to promote academic diversity is an educational benefit at all levels.

I am opposed to all forms of race-based discrimination because when it comes to racial discrimination, whether it is in the name of diversity or segregation, the state actors typically follow whatever happens to be politically popular or correct at the moment. I do not oppose race-based diversity or race-based affirmative action because I believe these unwise race-based policies are the proximate cause of racism. Rather, I attack race-

¹⁴⁶. *Id.* at 1098. Leach “proposes that Congress amend the language of Title VII to remove the statutory barrier against race-based bona fide occupational qualification defenses. Courts should then permit occupational need defenses only in those narrow circumstances where a profession establishes that racial discrimination is vital to the essence of its business. Where state actors differentiate on the basis of race, courts should impose the additional requirement that a profession demonstrate how its disruption would compromise public safety.” *Id.*
based affirmative action because I believe America is a presumptive racist society and not because America is presumptively not racist. A presumptive racist society normally takes for granted that a racial stereotype about an individual is true because of his assigned racial group status. I believe that stereotypes in a presumptive racist society are best rebutted by competitive performances in the classroom and the workplace in an environment free of racial discrimination.

When race-based diversity in higher education under Grutter is understood by someone as accommodating the inferiority of African Americans because African Americans inherently lack academic ability, I am offended by both the presumption and the approach. I oppose any and all forms of state-sponsored racial discrimination whether segregation or affirmative action because I do not want my government to ever again discriminate against any people based on race. I am a strong supporter of intellectual and academic diversity among students and faculty members at America’s elite colleges and universities. Thoughtful Americans should simply reject the contention that America’s elite colleges and universities cannot expand intellectual/viewpoint or life experience diversity without using race as a factor.

Contrary to that view, I maintain that any qualified student, regardless of race, who has experienced substantial childhood poverty should be placed in a preference pool when decisions are made about whom to admit to an entering class at an elite school. Grutter’s preoccupation with racial diversity at elite colleges has undermined the issue of wealth and class-based discrimination as a real barrier to academic diversity at elite schools where a predominantly multicultural and multiracial privileged class either teaches as professors or attends as students. Unfortunately, race still matters in America. But I believe class and money have left race behind when it comes to deciding who has the greatest opportunity to either attend or teach at one of America’s elite colleges.