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Constitutional Law: Lowering the Standard of Strict Scrutiny

Marisa Lopez

CONSTITUTIONAL LAW: LOWERING THE STANDARD OF STRICT SCRUTINY

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

Marisa Lopez[*]

Respondents[1] adopted a law school admissions policy that considered, among other factors, applicants' race and ethnicity.[2] The admissions policy was designed to achieve the educational benefits of a diverse student body.[3] As part of this policy, admissions officers often considered daily reports that tracked the number of accepted minorities.[4] The admissions policy consistently resulted in a correlation between the percentage of minority applicants and the percentage of minority acceptances.[5] Under this policy, Respondents rejected Petitioner's[6] application for admission.[7] Petitioner challenged the admissions policy, alleging that it violated her Fourteenth Amendment right to equal protection.[8] The District Court held that Respondents' policy was unconstitutional.[9] The Court of Appeals reversed.[10] The Supreme Court granted certiorari[11] and, in upholding the

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* For my parents, Jane Foye and Thomas Lopez, for their constant love and encouragement and for Michael McDonald in gratitude for his support in law school and in life.

1. Respondents were the University of Michigan Law School, the Regents of the University of Michigan, the past Dean of the Law School, the past President of the University of Michigan, the present Dean of the Law School, and the past Director of Admissions at the Law School. Grutter v. Bollinger, 539 U.S. 306, 316-17 (2003).

2. *Id.* at 316. Respondents' admissions policy required consideration of many factors, including a personal statement, letters of recommendation, a diversity essay, LSAT score, grade point average, undergraduate school, undergraduate course selection, race, and ethnicity. *Id.* at 315. All factors were considered to determine an applicant's potential contribution to the diversity of the university. *Id.*

3. *Id.* Respondents specifically sought to achieve a "critical mass" of underrepresented minority students. *Id.* at 316. "[T]he Law School's concept of critical mass [was] defined by reference to the educational benefits that diversity is designed to produce." *Id.* at 330.

4. *Id.* at 318.

5. *Id.* at 383 (Rehnquist, C.J., dissenting).

6. Petitioner was Barbara Grutter, a white Michigan resident, with a 3.8 grade point average and a 161 LSAT score. *Id.* at 316.

7. *Id.*

8. *Id.* at 316-17. Petitioner also brought her claim under Title VI of the Civil Rights Act of 1964. *Id.* at 317. The instant Court did not consider this claim because Title VI proscribes only racial classifications that violate equal protection. *Id.* at 343 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (plurality opinion)).

9. Grutter v. Bollinger, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

10. *Grutter*, 288 F.3d at 752, *aff'd*, 539 U.S. 306 (2003).

11. Grutter v. Bollinger, 537 U.S. 1043 (2002). The question presented was "[w]hether

decision of the court of appeals, HELD that although the admissions policy was facially discriminatory, it satisfied strict scrutiny because good faith is presumed.[12]

The Fourteenth Amendment provides in relevant part that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[13] Courts have interpreted this to mean that a racial classification that infringes on an individual's rights is subject to strict scrutiny.[14] Strict scrutiny requires that the racial classification be justified by a compelling state interest achieved by narrowly tailored means.[15] Where the classification is facially neutral, however, good faith will be presumed absent a showing of discriminatory intent.[16]

Writing for the plurality in *Regents of the University of California v. Bakke*,[17] Justice Powell found that the University of California's admissions policy was facially discriminatory, and thus applied strict scrutiny.[18] In that case, respondent[19] challenged petitioner's[20] medical

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diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." *Grutter*, 539 U.S. at 322.

12. *Grutter*, 539 U.S. at 329, 343-44.

13. U.S. CONST. amend. XIV, § 1.

14. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that an exclusion order for those of Japanese descent was constitutional). Without specifically naming its test "strict scrutiny," the Court in *Korematsu* reasoned that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Id.* The Court in *Bakke* recognized this statement as one of the first expressions of the strict scrutiny test. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978) (plurality opinion); *see also* E. John Gregory, *Diversity is a Value in American Higher Education, but it Is Not a Legal Justification for Affirmative Action*, 52 FLA. L. REV. 929, 931 (2000).

15. *Grutter*, 539 U.S. at 326. Since *Korematsu*, the Supreme Court has defined the strict scrutiny test more specifically, requiring both a "compelling governmental interest" and "narrowly tailored means." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995); *see Bakke*, 438 U.S. at 305 (plurality opinion) (requiring a constitutionally permissible and substantial interest and means that are necessary to the accomplishment of the interest).

16. *Bakke*, 438 U.S. at 289 n.27, 318-19 (plurality opinion). Where a policy is neutral on its face, good faith will be presumed. *Id.* at 318-19 (plurality opinion). The Court will not apply strict scrutiny under such circumstances absent a showing of intent to discriminate and a discriminatory effect. *Id.* at 289 n.27 (plurality opinion). "Standing alone, [disproportionate impact] does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." Washington v. Davis, 426 U.S. 229, 242 (1976) (citation omitted) (holding that a police officer qualifying test was not unconstitutional despite a disparate impact on admissions of black police officers because there was no intent to discriminate); *see also* Sharon E. Rush, *Beyond Admissions: Racial Equality in Law Schools*, 48 FLA. L. REV. 373, 394 (1996).

17. 438 U.S. 265 (1978) (plurality opinion).

18. *Id.* at 314-15, 318 (plurality opinion).

19. Respondent was Allan Bakke. *Id.* at 276 (plurality opinion). Bakke applied to the medical school twice. *Id.* (plurality opinion). The first time he applied he had a good interview score, a 3.46

school admissions policy, which reserved a specified number of seats for minority applicants.[21] Petitioner offered several justifications for its use of race in the admissions process, including the goal of student body diversity.[22]

The plurality first established that this quota was a facially discriminatory racial classification.[23] Accordingly, the plurality applied strict scrutiny.[24] Under this analysis, the plurality recognized petitioner's asserted interest in student body diversity as part of its academic freedom under the First Amendment.[25] The plurality insisted, however, that a university could not exercise this academic freedom at the expense of individual rights.[26] The plurality argued that a quota was not the only or even the most effective means of meeting the goal of student body diversity.[27] Reasoning that individual review of an applicant would provide

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grade point average, and a relatively high MCAT score. *Id.* at 276, 277 n.7 (plurality opinion). Despite his performance, Bakke was rejected by the medical school. *Id.* at 276 (plurality opinion). Bakke complained to Dr. George H. Lowrey, the Associate Dean and Chairman of the Admissions Committee, regarding the nature of the admissions policy. *Id.* (plurality opinion). The next year Bakke applied again. *Id.* at 277 (plurality opinion). This time the Associate Dean interviewed Bakke and gave him a low score. *Id.* (plurality opinion). Bakke was rejected again. *Id.* (plurality opinion).

20. Petitioner was the Medical School of the University of California at Davis. *Id.* at 269 (plurality opinion).

21. *Id.* at 275 (plurality opinion). The reserved seats were for selections by the special admissions committee. *Id.* at 274 (plurality opinion). The admissions policy was two-tracked and included both a general admissions committee and a special admissions committee. *Id.* at 275 (plurality opinion). The special admissions committee was created to ensure representation of economically disadvantaged students within the entering class. *Id.* at 272 (plurality opinion). Despite this purpose, in practice, the committee only admitted minority applicants (often without regard to their economic status). *Id.* at 276 (plurality opinion).

22. *Id.* at 305-06 (plurality opinion). Petitioner offered several other interests as justification for the special admissions committee, including: "(i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession'; (ii) countering the effects of societal discrimination; [and] (iii) increasing the number of physicians who will practice in communities currently underserved." *Id.* at 306 (plurality opinion) (citation omitted) (footnote omitted). The plurality recognized only petitioner's interest in student body diversity as compelling. *Id.* at 314-15 (plurality opinion).

23. *Id.* at 289 (plurality opinion).

24. *Id.* at 290 (plurality opinion); *see supra* notes 14-15.

25. *Id.* at 313 (plurality opinion) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

26. *Id.* at 314 (plurality opinoin). The *Bakke* plurality stated: "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment." *Id.* at 320 (plurality opinion).

27. *Id.* at 315 (plurality opinion). The plurality stated: "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment

a race-neutral alternative to a quota,[28] the plurality concluded that the admissions policy was not narrowly tailored.[29] The plurality noted that where such individual review was maintained, courts should presume good faith on the part of the university.[30] In *Bakke*, however, the Court did not presume good faith and concluded that the university's admissions policy was unconstitutional.[31]

Despite the uncertainty caused by the split Court in *Bakke*, *Adarand Constructors, Inc. v. Pena*[32] again emphasized that all racial classifications must be subject to strict scrutiny.[33] In *Adarand*, a government contract provided additional compensation to a prime contractor who hired an economically and socially disadvantaged subcontractor.[34] Federal statutory law further provided that certain racial and ethnic minorities should be presumed to be economically and socially disadvantaged.[35] Petitioner challenged this presumption.[36]

The Court first established that the policy of awarding additional compensation based on the disadvantage presumption was racially discriminatory on its face.[37] The Court emphasized that good motives were not enough to justify even a benign racial classification.[38] The Court based

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of genuine diversity." *Id.* (plurality opinion).

28. *See id.* at 318 n.52 (plurality opinion). As an example of individual consideration, the plurality described Harvard College's admissions program. *Id.* at 316-17 (plurality opinion). The Harvard program does not set a quota, but rather considers race or ethnic background as a "plus." *Id.* (plurality opinion). The plurality noted specifically that this policy does not insulate any applicant from competition with other applicants. *Id.* at 317 (plurality opinion). Under a program like the one at Harvard, the plurality reasoned, an applicant who is not accepted for the last available seat was at least considered for admission. *Id.* at 318 (plurality opinion). As such, that applicant "would have no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.* (plurality opinion).

29. *Id.* at 315-16 (plurality opinion).

30. *Id.* at 318-19 (plurality opinion).

31. *Id.* at 320 (plurality opinion).

32. 515 U.S. 200 (1995).

33. *Id.* at 226.

34. *Id.* at 205. Under this contract, the prime contractor awarded the subcontract to a small business certified as economically and socially disadvantaged, although petitioner submitted the lower bid. *Id.*

35. *Id.*

36. *Id.* at 205-06.

37. *Id.* at 213. The Court stated: "(We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose.)." *Id.* (citations omitted).

38. *Id.* at 226. "'More than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.'" *Id.* (quoting Drew S. Days, III, *Fullilove*, 96 YALE L.J. 453, 485 (1987)).

this on the highly suspect nature of all racial classifications.[39] The Court concluded that strict scrutiny should apply even in this case and, as such, remanded the case so that the lower courts could consider whether the interests served by the use of the subcontractor compensation clauses were compelling and whether the means were narrowly tailored to further these interests.[40]

Applying intermediate scrutiny,[41] the Court in *United States v. Virginia*[42] echoed *Bakke* and *Adarand* and held that deference was inappropriate under any heightened standard of review.[43] In *Virginia*, the United States challenged the Commonwealth's policy of not admitting women to its military institute.[44] As a justification for this policy, the Commonwealth asserted an interest in diversity in education through single-sex institutions.[45]

The Court first found that the Commonwealth's total exclusion of women from the military institute was a gender-based classification.[46] Therefore, under intermediate scrutiny, the Court required the Commonwealth to show an exceedingly persuasive justification for its policy.[47] The Court in *Virginia* implicitly accepted diversity as a legitimate goal in higher education.[48] The Court found, however, that the Commonwealth's policy had not actually been motivated by that goal.[49]

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39. *See id.* at 236. Referencing the Japanese exclusion order upheld in *Korematsu*, the Court reasoned that even "'the most rigid scrutiny'" can fail. *Id.* (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)). Therefore, the Court insisted that all racial classifications be subject to strict scrutiny. *Id.* The Court stated: "Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." *Id.*

40. *Id.* at 237-39.

41. Under this standard, the state must show an "exceedingly persuasive" justification. United States v. Virginia, 518 U.S. 515, 533 (1996). Although the Court in *Virginia* does not refer to its test as "intermediate scrutiny," the Court has recognized its analysis as such in other cases. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 366 (2003) (Thomas, J., concurring in part and dissenting in part).

42. 518 U.S. 515 (1996).

43. *Id.* at 555.

44. *Id.* at 523. The suit was prompted by a complaint to the Attorney General by a female high school student who had applied to the military institute. *Id.*

45. *Id.* at 535. The Commonwealth also tried to justify its policy by asserting its interest in providing an adversative training model. *Id.* at 535, 540. The Court dismissed this justification because the adversative training model was not inconsistent with the admission of women. *Id.* at 550. The Court rejected generalizations and stereotypes offered by the Commonwealth that would indicate that women are not suitable for adversative training. *Id.*

46. *Id.* at 530.

47. *Id.* at 532-33.

48. *See id.* at 535.

49. *Id.* The Court reasoned that the Commonwealth's justification of diversity was created after the fact. *Id.* at 535-36. The Court based this on the fact that all other colleges and universities in Virginia are coeducational. *Id.* at 539-40.

Reasoning that mere recitation of a benign purpose, such as diversity, does not satisfy intermediate scrutiny,[50] the Court concluded that deferential review was inappropriate and therefore the policy was invalid.[51]

Although the instant Court purported to apply strict scrutiny, it employed a high level of deference.[52] In determining whether the university had a compelling state interest, the instant Court gave deference to Respondents' stated goal of student body diversity.[53] The instant Court also presumed that Respondents were acting in good faith.[54] Despite claims by the dissent that Respondents' actual purpose was racial balancing, the instant Court accepted Respondents' interest in diversity at face value.[55] The instant Court thus found that Respondents' interest was compelling under strict scrutiny.[56]

Without explicitly referring to deference or good faith, the instant Court applied a lenient standard in examining Respondents' means.[57] Accordingly, the instant Court found that narrow tailoring did not require the university to exhaust all race-neutral alternatives where doing so would risk the quality of education.[58] Further, the Court rejected arguments by the dissent that Respondents' use of daily reports eliminated individual review.[59] The Court also rejected arguments that the number of minorities admitted reflected an underlying quota.[60] Instead, the Court relied substantially on testimony by admissions officials that individual review

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50. *Id.* at 535-36.

51. *Id.* at 555-56.

52. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

53. *Id.*

54. *Id.* at 329. The instant Court stated its presumption of good faith:

> Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."

Id. (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318-19 (1978) (plurality opinion)).

55. *See id.* at 335-37. The majority focused on the fact that the number of minorities admitted varies significantly from year to year. *Id.* at 336. The dissent, however, focused on the fact that the percentage of minorities admitted always correlates to the percentage of minorities who apply. *Id.* at 283 (Rehnquist, C.J., dissenting). The dissent accused the majority of obscuring this point. *Id.* (Rehnquist, C.J., dissenting).

56. *Id.* at 333, 343.

57. *See id.* at 333-43.

58. *Id.* at 339. The Court found that alternative means would require Respondents to sacrifice diversity. *Id.* at 340. The Court specifically rejected arguments that Respondents could have used either percentage plans, which guarantee admission to the top students at in-state public high schools, or a lottery system. *Id.*

59. *See id.* at 336; *infra* note 74 and accompanying text.

60. *See Grutter*, 539 U.S. at 335-36; *infra* note 70 and accompanying text.

was always maintained.[61] Thus, the instant Court held that Respondents' admissions policy was narrowly tailored under strict scrutiny.[62]

Justice Thomas, concurring in part and dissenting in part, criticized the Court's deference to Respondents' admissions policy.[63] Justice Thomas specifically pointed to the apparent contradiction between the Court's analysis in the instant case and the Court's analysis in *Virginia*.[64] He noted that in *Virginia* the Court applied intermediate scrutiny, a lower standard than strict scrutiny.[65] Even under this lower standard, the Court in *Virginia* did not defer to the Commonwealth's judgment.[66]

In his dissent, Chief Justice Rehnquist agreed with the majority's position that racial classifications may be permissible where they are narrowly tailored to serve a compelling state interest.[67] He reasoned, however, that this case did not satisfy that exacting standard.[68] The Chief Justice first attacked Respondents' purported goal of student body diversity as a sham intended to cover up its real goal of racial balancing.[69] He supported this theory with evidence that the percentage of minority applicants admitted correlated to the percentage of minority applications received.[70] The Chief Justice concluded that the policy did not satisfy strict scrutiny.[71]

In yet another dissent, Justice Kennedy also criticized the majority's analysis, questioning whether the Court, in fact, applied strict scrutiny.[72] Justice Kennedy argued that the majority confused deference to Respondents' educational goals with deference to Respondents' chosen means.[73] Justice Kennedy specifically noted that the use of daily reports was a strong indication that individual review was not maintained.[74]

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61. *Grutter*, 539 U.S. at 336. Responding to Justice Kennedy's argument that the daily reports suggest non-individual review, the instant Court stated, "[T]he Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports." *Id.*

62. *Id.* at 343.

63. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part).

64. *Id.* at 366 (Thomas, J., concurring in part and dissenting in part).

65. *Id.* (Thomas, J., concurring in part and dissenting in part).

66. *Id.* (Thomas, J., concurring in part and dissenting in part).

67. *Id.* at 378 (Rehnquist, C.J., dissenting).

68. *Id.* at 380-81 (Rehnquist, C.J., dissenting).

69. *Id.* at 383-85 (Rehnquist, C.J., dissenting).

70. *Id.* at 383-84 (Rehnquist, C.J., dissenting). The Chief Justice's dissent included tables supporting his theory. *Id.* (Rehnquist, C.J., dissenting). The tables showed, for example, that in 1995 the percentage of African-American applicants was 9.7% and the percentage of admitted applicants who were African-American was 9.4%. *Id.* (Rehnquist, C.J., dissenting).

71. *Id.* at 387 (Rehnquist, C.J., dissenting).

72. *Id.* at 388 (Kennedy, J., dissenting).

73. *Id.* (Kennedy, J., dissenting).

74. *Id.* at 392 (Kennedy, J., dissenting).

Justice Kennedy further rejected the majority's presumption of good faith.[75] He reasoned that strict scrutiny requires the proponent of the racial classification to carry the burden of proving compliance with the Fourteenth Amendment.[76] Justice Kennedy concluded that Respondents in the instant case had not satisfied this burden and thus the admissions policy was unconstitutional.[77]

The instant Court changed the application of strict scrutiny analysis by introducing the idea that deference should be given to a university's educational goals.[78] The fact that the instant Court even used the word "deference" is striking in light of its recent decision in *Virginia*.[79] In *Virginia*, the Court was applying a less exacting standard, but still found that deferential review was in error.[80] Despite this holding, the instant Court relied on *Bakke* and gave deference to Respondents without ever acknowledging *Virginia*.[81] *Bakke* acknowledged the academic freedom of the university to define its educational goals and decide which students to admit.[82] The plurality insisted, however, that this academic freedom not come at the expense of individual rights.[83] *Bakke* never referred specifically to deference.[84]

It is not clear that the instant Court's deference is synonymous with the academic freedom recognized in *Bakke*.[85] Rather, this deference extends beyond deference to educational goals and into deference to educational means.[86] This deference, combined with the presumption of good faith, led the instant Court to accept Respondents' purported interest in diversity at face value.[87] *Bakke* contemplated that the Court would accept the validity of proposed educational goals but nevertheless skeptically inquire into

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75. *Id.* at 394-95 (Kennedy, J., dissenting).

76. *Id.* at 391 (Kennedy, J., dissenting) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995)); *see also* United States v. Virginia, 518 U.S. 515, 533 (1996) ("The burden of justification is demanding and it rests entirely on the State.").

77. *See Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting).

78. *Id.* at 329. *But see Virginia*, 518 U.S. at 555.

79. *See Grutter*, 539 U.S. at 366 (Thomas, J., concurring in part and dissenting in part); *Virginia*, 518 U.S. at 555.

80. *Virginia*, 518 U.S. at 555.

81. *See Grutter*, 539 U.S. at 328-30.

82. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (plurality opinion).

83. *See supra* note 26 and accompanying text.

84. *See Bakke*, 438 U.S. 265 (plurality opinion).

85. *Compare Grutter*, 539 U.S. at 328 (holding that deference should be given to a university's educational goals), *with Bakke*, 438 U.S. at 314 (holding that a university's academic freedom cannot come at the expense of individual rights).

86. *See Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). Justice Kennedy stated: "The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal." *Id.* (Kennedy, J., dissenting).

87. *See supra* note 55 and accompanying text.

whether they were the university's actual purpose.[88] Accordingly, the *Virginia* Court accepted that diversity was a persuasive justification but found that this was not the Commonwealth's actual purpose.[89] By accepting Respondents' asserted interests without suspicion, the instant Court applied a level of deference even greater than that recognized under intermediate scrutiny.[90]

The instant Court also shifted the burden of proof recognized by Justice Kennedy[91] by applying a presumption of good faith to Respondents' policy.[92] In *Bakke* the plurality indicated that a presumption of good faith would be appropriate only where there was no racial classification and strict scrutiny did not apply.[93] The instant Court assumed Respondents' policy was a racial classification[94] but nevertheless recognized a presumption of good faith for Respondents.[95] Thus, the instant Court effectively shifted the burden of proof under strict scrutiny from the state actor to the individual.[96]

The effect of the presumption of good faith can be seen in the fact that the instant Court relied almost exclusively on Respondents' testimony.[97] The instant Court specifically dismissed evidence of a correlation between the percentage of minority admittees and minority applicants that may have suggested an underlying quota.[98] The instant Court also dismissed evidence that during the admissions process, Respondents' tracking of the number of minorities admitted eliminated individual review.[99] Instead, the instant Court relied on Respondents' own assertion of their good faith.[100] This result is inconsistent with the idea that all racial classifications are highly suspect and subject to the strictest scrutiny.[101] By applying a good

88. *Bakke*, 438 U.S. at 314 (plurality opinion). *But see id.* at 318 (plurality opinion). In *Bakke*, the Court held that where there was a facially neutral admissions policy, the Court would not assume that the university had ulterior motives. *Id.* (plurality opinion).

89. *See supra* notes 48-49 and accompanying text.

90. *Compare* United States v. Virginia, 518 U.S. 515, 535-36, 555 (1996) (discussing that deferential review is error under intermediate scrutiny), *with Grutter*, 539 U.S. at 328-29 (holding that deference and a good faith presumption are appropriate under strict scrutiny).

91. *Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting); *cf. Virginia*, 518 U.S. at 535-36.

92. *See Grutter*, 539 U.S. at 329.

93. *See supra* notes 16, 30 and accompanying text.

94. *See Grutter*, 539 U.S. at 326.

95. *See supra* note 54 and accompanying text.

96. *See Grutter*, 539 U.S. at 391-94 (Kennedy, J., dissenting).

97. *See supra* note 61 and accompanying text.

98. *See supra* note 60 and accompanying text.

99. *See supra* note 59 and accompanying text.

100. *See supra* note 61 and accompanying text.

101. *See supra* note 14 and accompanying text.

faith presumption to a racial classification, the instant Court altered strict scrutiny.[102]

The new standard created by the instant Court contrasts with its holding in *Adarand*.[103] In *Adarand*, the Court specifically held that all racial classifications would be held to strict scrutiny.[104] Based on its deference and presumption of good faith, however, it is questionable whether the instant Court actually applied strict scrutiny.[105] The *Adarand* Court reasoned that good motives alone were not enough to satisfy strict scrutiny.[106] The new presumption of good faith changes this reasoning.[107] In *Bakke*, the presumption of good faith essentially meant that courts should uphold policies that are not facially discriminatory in the absence of discriminatory motives.[108] By applying this presumption within strict scrutiny, the instant Court negated the holding of *Adarand*.[109]

Despite the instant Court's unprecedented strict scrutiny analysis, its outcome is consistent with the holding of *Bakke*.[110] *Bakke* clearly supports applying a good faith presumption where the university first ensures individual review in its admissions policy.[111] Under this analysis, however, there would be no racial classification and thus strict scrutiny would not apply.[112] The instant Court could have found that the policy of considering race as one factor in the admissions policy was not a racial classification.[113] Under that interpretation, the instant Court could have applied a presumption of good faith and upheld the policy without invoking strict scrutiny.[114] Instead, the instant Court blended both the good faith presumption and deference into strict scrutiny and created a new standard of review for future racial classifications.[115]

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102. *See generally* Grutter v. Bollinger, 539 U.S. 306, 387-95 (2003) (Kennedy, J., dissenting).

103. *See id.* at 371 (Thomas, J., concurring in part and dissenting in part). *Compare id.* at 328, *with* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228-29 (1995).

104. *See supra* notes 38-40 and accompanying text.

105. *See Grutter*, 539 U.S. at 380 (Rehnquist, C.J., dissenting).

106. *See supra* note 38 and accompanying text.

107. *See Grutter*, 539 U.S. at 371 (Thomas, J., concurring in part and dissenting in part).

108. *See supra* notes 16, 30 and accompanying text.

109. *See Grutter*, 539 U.S. at 371 (Thomas, J., concurring in part and dissenting in part).

110. *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 n.52, 319-20 (1978) (plurality opinion) (rejecting an admissions policy that does not ensure individual review), *with Grutter*, 539 U.S. at 337, 343 (upholding an admissions policy that ensures individual review).

111. *See supra* notes 16, 30 and accompanying text.

112. *See supra* notes 16, 30 and accompanying text.

113. *Compare Bakke*, 438 U.S. at 318-19 (plurality opinion) (holding that where there is individual review good faith is presumed), *with Grutter*, 539 U.S. at 337 (finding that Respondents' admissions program ensured individual review).

114. *See supra* notes 16, 30 and accompanying text.

115. *See Grutter*, 539 U.S. at 328.

Although the outcome of the instant case is in keeping with precedent, the analysis by the instant Court could have led to a different outcome in *Virginia*.[116] In *Virginia*, six justices[117] invalidated the institute's admissions policy, holding that deferential review was error under intermediate scrutiny.[118] Five of those same Justices[119] upheld the policy in the instant case, holding that deferential review and a good faith presumption were appropriate under strict scrutiny.[120]

It is unclear whether future courts will apply the analysis of the instant case despite its tendency to produce outcomes that conflict with *Virginia*.[121] The Court does not appear to have redefined strict scrutiny only for the facts of the instant case. *Adarand* requires that the same standard of review apply to all facial discriminations—benign or not.[122] Therefore, the unfortunate effect of the instant case may be to lower the standard of strict scrutiny even where discrimination is far from "benign."

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116. *See supra* note 90 and accompanying text.

117. The six justices in the majority were Justice O'Connor, Justice Stevens, Justice Kennedy, Justice Souter, Justice Ginsburg, and Justice Breyer. United States v. Virginia, 518 U.S. 515, 518 (1996).

118. *Id.* at 555.

119. Of the six Justices in the majority in *Virginia*, only Justice Kennedy dissented in the instant case. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

120. *Id.* at 328. The instant Court stated:

> Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."

Id. at 329 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318-19 (1978) (plurality opinion)).

121. *See supra* note 90 and accompanying text.

122. *See supra* note 40 and accompanying text.