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## After *Grutter* Things Get Interesting! The American Debate Over Affirmative Action Is Finally Ready for Some Fresh Ideas From Abroad

CLARK D. CUNNINGHAM\*

The *Connecticut Law Review* has decided at a propitious time to devote its annual symposium to international perspectives on affirmative action: the United States Supreme Court has finally begun to acknowledge the usefulness of looking at the law of other countries and has also finally broken up the logjam blocking constructive policy analysis and development about affirmative action.

Until recently the U.S. Supreme Court generally either ignored the existence of non-American legal systems or rejected the possible relevance of comparative law with dismissive disdain. Typical of the latter is a comment by Justice Powell, concurring in *United States v. Richardson*,<sup>1</sup> an important Watergate era case that dismissed a lawsuit challenging the secrecy of the CIA's budget by taking a very narrow view of standing that made a provision of the Constitution effectively unenforceable.<sup>2</sup> After asserting in the main text of his concurrence that "[u]nrestrained standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government," Justice Powell added in a footnote that "[s]ome Western European democracies have experimented with forms of constitutional judicial review in the abstract, see, e.g., M. Cappelletti, *Judicial Review in the Contemporary World* 71-72 (1971), but that has not been our experience, and I

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<sup>1</sup> 418 U.S. 166, 180 (1974).

<sup>2</sup> *Id.* at 167-70, 179. The plaintiff sought to enforce Article I, Section 9, Clause 7 of the Constitution which states that a "regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *Id.* at 167-68. The Court appeared to acknowledge that if this plaintiff "is not permitted to litigate this issue, no one can do so" and offered the plaintiff the cold consolation that his lack of standing "does not impair the right to assert his views in the political forum or at the polls." *Id.* at 179.

think for good reasons.”<sup>3</sup>

In 1997 Justice Scalia stated flatly in a majority opinion for the Court that “comparative analysis [is] inappropriate to the task of interpreting a constitution . . . .”<sup>4</sup> However, when in 2002 he voiced a similar position, it was in a dissenting opinion. The case was *Atkins v. Virginia*,<sup>5</sup> in which the Court reversed an earlier decision and held that execution of mentally retarded defendants was “cruel and unusual punishment” that violated the Eighth Amendment.<sup>6</sup> Writing for the Court, Justice Stevens referred not only to evidence of a growing consensus in the United States against execution of the mentally retarded, but also to “the world community, [where] the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>7</sup> Even though this nod to other countries appeared only in a footnote, it attracted the ire of Justice Scalia, who responded in his dissent by saying (in the text): “Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”<sup>8</sup>

By 2003 it was clear that the disdain for comparative law displayed by Justice Scalia in *Atkins* was not shared even by the moderate “swing vote” members of the Court. When the Court reversed another precedent, striking down a criminal statute aimed at homosexual conduct in *Lawrence v. Texas*,<sup>9</sup> Justice Kennedy’s majority opinion pointedly stated, this time in the text, that “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”<sup>10</sup> Similarly, less than a week before the conference held for this symposium issue, Justice O’Connor was reported to say in a public speech that the Supreme Court “has its ear to the world.”<sup>11</sup> She went on to predict that “over time we will rely increasingly, or take notice at least increasingly, on international and foreign courts in examining domestic issues.”<sup>12</sup>

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<sup>3</sup> *Id.* at 189, 191 n.10 (Powell, J. concurring).

<sup>4</sup> *Printz v. United States*, 521 U.S. 898, 902, 921 n.11 (1997). Justice Scalia was responding to a suggestion in Justice Breyer’s dissenting opinion that the experience of other countries may “cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.” *Id.* at 977 (Breyer, J., dissenting).

<sup>5</sup> 536 U.S. 304 (2002).

<sup>6</sup> *Id.* at 321.

<sup>7</sup> *Id.* at 306, 316-17 & n.21.

<sup>8</sup> *Id.* at 347-48 (Scalia, J., dissenting).

<sup>9</sup> 123 S. Ct. 2472, 2484 (2003).

<sup>10</sup> *Id.* at 2483.

<sup>11</sup> Bill Rankin, *U.S. Justice is Honored: O’Connor Says Court Has Its Ear to the World*, ATLANTA JOURNAL-CONST., Oct. 29, 2003, at A3.

<sup>12</sup> *Id.* According to another report of the same speech, Justice O’Connor also said, “No institution of government can afford to ignore the rest of the world. . . . The differences between our nations are fewer and less important than our similarities.” Jonathan Ringel, *O’Connor Speech Puts Foreign Law*

Justice O'Connor did not, however, make reference to the law of other countries in the opinion she authored for the Court upholding the affirmative action program used by the University of Michigan Law School in *Grutter v. Bollinger*,<sup>13</sup> nor did any of the other members of the Court.<sup>14</sup>

There had been indications that the Court might consider the relevance of comparative law to affirmative action. In 1999 Justice Ginsburg chose affirmative action as the topic of her Cardozo Memorial Lecture to the Bar of the City of New York, in which she described affirmative action as an "international human rights dialogue."<sup>15</sup> She described in some detail the approach to affirmative action in India and Europe and concluded with the assertion that "comparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights."<sup>16</sup> When it appeared in 2001 that the Court was likely to use its third consideration of the *Adarand Constructors*<sup>17</sup> lawsuit to resolve many of the unsettled issues surrounding affirmative action, the National Organization of Women Legal Defense and Education Fund (perhaps encouraged by Justice Ginsburg's Cardozo Memorial Lecture) chose to devote their entire *amicus* brief to the proposition that international and comparative law were relevant sources of

*Center Stage*, FULTON COUNTY DAILY REP., Oct. 31, 2003, available at LEXIS, News Library, Fulton File.

<sup>13</sup> 123 S. Ct. 2325 (2003). It is tempting, however, to wonder whether a comparison with India's approach to affirmative action may have influenced Justice O'Connor's decision to add the much-discussed penultimate paragraph of the Court's opinion stating that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary . . ." *Id.* at 2347. According to a *New York Times Magazine* article by Professor Jeffrey Rosen, Justice O'Connor had discussed affirmative action with a group of visiting justices of the Supreme Court of India not long before the *Grutter* opinion was written. Jeffrey Rosen, *How I Learned to Love Quotas*, N.Y. TIMES, June 1, 2003, § 6 (Magazine), at 52. He gave the following account:

I had been invited to give a talk about racial preferences for the justices of the Supreme Court of India, who were in Washington on a judicial exchange program. When I arrived at the conference room, I found . . . that the assembled Indian justices were accompanied by their hosts, Justices O'Connor and Stephen G. Breyer, who decided at the last moment to come along for the discussion. . . .

. . . Justice O'Connor . . . seemed skeptical of affirmative action during the question-and-answer period that followed. When an Indian Supreme Court justice was asked how long India's caste-based quota system would continue, he said the quotas would never end. O'Connor raised her eyebrow in response and gave me a meaningful glance of reproach.

*Id.* at 52, 55.

<sup>14</sup> Justice Ginsburg did refer in her concurring opinion, joined by Justice Breyer, to international law, specifically the International Convention on the Elimination of All Forms of Racial Discrimination. *Grutter*, 123 S. Ct. at 2347 (Ginsburg, J., concurring).

<sup>15</sup> Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 253 (1999).

<sup>16</sup> *Id.* at 273-81, 282.

<sup>17</sup> See *Adarand Constructors, Inc. v. Mineta*, 523 U.S. 941 (2001) (granting certiorari).

interpretive guidance for that case.<sup>18</sup>

How could comparison with other countries be helpful in thinking about the issues addressed in the two Michigan affirmative action cases<sup>19</sup> and the issues that need to be addressed in their wake? A “globalization” approach to law need not be an “import model” where domestic law would be replaced or modified by adoption of something developed in another country. The import approach should be avoided for many reasons. Not only does it often imply cultural imperialism but it also entails overcoming at least two very challenging hurdles: (1) showing that the foreign approach is successful in that country, and (2) showing that the many differences between that country and our country do not preclude effective transference. However, one need not huddle over such formidable obstacles to enter the comparative path. A sufficient reason for comparative study is simply to get us to think in new ways—to ask new and different questions and to develop new approaches to answering our existing questions.

I proposed this “new questions” justification for a comparative approach to thinking about affirmative action as the first speaker at the November 6, 2003 symposium hosted by the *Connecticut Law Review* where preliminary versions of the articles in this issue were presented for discussion. Mark Tushnet spoke later as part of the same panel, and he responded rather directly to my suggestion in a presentation that generally cautioned against the use of international comparison for domestic purposes.<sup>20</sup> He concluded that using such comparison as a way to generate new questions might not hurt much, if done cautiously, but might not help much either. Asserting that most of the useful questions about affirmative action were already “rattling around” in domestic discourse, he doubted

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<sup>18</sup> Brief of Amici Curiae NOW Legal Defense and Education Fund, Lawyers Committee for Human Rights, and Allard K. Lowenstein International Human Rights Clinic in Support of Respondents, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (No. 00-730) available at <http://www.nowldef.org/html/issues/whr/pdf/amicusbrief.pdf> (last visited Feb. 12, 2004) (on file with the Connecticut Law Review). The brief is also available at <http://law.gsu.edu/Equality/> (last visited March 4, 2004) [hereinafter Rethinking Equality Website]. For the two earlier Supreme Court decisions in the *Adarand Constructors* litigation see *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) (per curiam) (reversing the Tenth Circuit Court of Appeals and allowing petitioner’s cause of action to proceed) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (vacating the judgment of the Court of Appeals for the Tenth Circuit and remanding for further proceedings).

<sup>19</sup> The two companion cases are *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (holding that the affirmative action approach used for the University of Michigan Law School was not violative of the Equal Protection Clause because it was narrowly tailored to further the compelling state interest in obtaining the educational benefits that flow from a diverse student body) and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (holding that the affirmative action approach used for the University of Michigan undergraduate program violated the Equal Protection Clause of the Fourteenth Amendment because it was not narrowly tailored).

<sup>20</sup> See Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649 (2004) (offering cautionary notes about the use of transnational comparisons in domestic constitutional interpretation).

whether the effort of learning about another country's approach was a cost-effective way of improving the quality of discourse in the United States on this subject. Comparative study, he said, was best justified for the intrinsic interest of learning about the rest of the world.<sup>21</sup>

Prompted in part by Professor Tushnet's remarks, I devote the balance of this article to a preliminary experiment to see if comparative thinking can generate helpful approaches to several related questions that seem to "rattle around" among the various opinions in the *Grutter* case without reaching any satisfactory resolution.

Which groups should be identified to benefit from affirmative action? What criteria and procedures should be used to select the groups and define them? As discussed below, these are considered central questions in India's legal system which have received a great deal of attention from both its courts and the executive branch. In contrast, in the United States, these questions are just beginning to emerge into significance. Both Chief Justice Rehnquist and Justice Kennedy in their dissents in *Grutter* focused on the selection of beneficiary groups. Justice Kennedy emphasized testimony by "[former Michigan] Dean [of Admissions] Allan Stillwagon . . . [about] the difficulties he encountered in defining racial groups entitled to benefit under the School's affirmative action policy."<sup>22</sup> He noted with concern Stillwagon's report that "faculty members were 'breathhtakingly cynical' in deciding who would qualify as a member of underrepresented minorities."<sup>23</sup>

Chief Justice Rehnquist focused in his dissent on evidence he believed indicated that African-American applicants were receiving, without explanation or justification, significantly greater preference from the law school than Hispanic applicants.

From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native

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<sup>21</sup> *Id.* at 663 (concluding that comparative constitutional law has intrinsic intellectual interest although its instrumental value may not be large). Professor Tushnet clearly places a high value on a comparative approach to studying constitutional law, having co-authored a leading textbook in the field, VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

<sup>22</sup> *Grutter*, 123 S. Ct. at 2373 (Kennedy, J., dissenting).

<sup>23</sup> *Id.* (Kennedy, J., dissenting).

Americans.

. . . The school asserts that it “frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected.”

. . . Of these 67 individuals, 56 were Hispanic, while only 6 were African-American, and only 5 were Native American. . . . [I]n 2000, 12 Hispanics who scored between a 159-160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted.

. . . Respondents have *never* offered any race-specific arguments explaining why significantly more individuals from one underrepresented minority group are needed in order to achieve “critical mass” or further student body diversity. They certainly have not explained why Hispanics, who they have said are among “the groups most isolated by racial barriers in our country,” should have their admission capped out in this manner.<sup>24</sup>

Although one wonders whether the Chief Justice actually would have voted to uphold the law school’s affirmative action program as long as it had admitted larger numbers of Hispanic and Native American applicants, the evidence he cited would seem to call for a response. However, the majority opinion authored by Justice O’Connor did not really respond to either Justice Kennedy or Chief Justice Rehnquist’s concerns.

Justice O’Connor seemed to waver about the justification for the law school’s selection of African-American, Hispanics and Native Americans for preferential treatment.<sup>25</sup> The majority opinion began by quoting from the law school’s admission policy which sought “diversity” in the student body in order to “enrich everyone’s education.”<sup>26</sup> African-Americans, Hispanics, and Native Americans were specifically identified *not* to remedy past discrimination against these groups, but “rather to include students who may bring to the Law School a perspective different from that of

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<sup>24</sup> *Id.* at 2366-67 (Rehnquist, J., dissenting) (citations omitted). Justice O’Connor cited the same data, showing that the Law School “accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants . . . who are rejected,” as evidence that “the Law School seriously weighs many other diversity factors besides race . . . .” *Id.* at 2344.

<sup>25</sup> *Id.* at 2332 (discussing the “special reference” in the law school’s admission policy to “African-Americans, Hispanics and Native Americans”).

<sup>26</sup> *Id.*

members of groups which have not been the victims of such discrimination."<sup>27</sup> Thus it would appear that the purpose of the affirmative action program was to improve the quality of the three-year legal education, with the beneficiaries being all law students. However, when one moves to the heart of the majority opinion, the primary concern expressed is that because of "our Nation's struggle with racial inequality, [minority] students are . . . less likely to be admitted in meaningful numbers" absent race-conscious admission criteria.<sup>28</sup> According to Justice O'Connor, the harm that would be caused by this exclusion of minority students was *not* an intellectually impoverished education for non-minority law students but rather a legal profession and leadership elite that fails to be inclusive of "all racial and ethnic groups":

Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized. . . . [L]aw schools [] represent the training ground for a large number of our Nation's leaders. . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.<sup>29</sup>

At this point in the majority opinion special consideration in the admission process for African-American, Hispanics and Native Americans is justified, not because they are needed for effective education of non-minority students, but because the inclusion of "all racial and ethnic groups" in the legal profession, and the establishment of an elite civic leadership, would not otherwise happen.

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<sup>27</sup> *Id.* at 2334 (summarizing the testimony of Professor Richard Lempert, who chaired the Law School's faculty committee that drafted the 1992 admissions policy).

<sup>28</sup> *Id.* at 2344.

<sup>29</sup> *Id.* at 2340-41. One can readily see how Justice O'Connor had by this point in the opinion moved away from the Law School's articulated purpose by imagining a program in which law schools hired African-Americans, Hispanics and Native Americans from all walks of life to attend and participate in law school classes, as a kind of adjunct faculty. Of course one could doubt whether such an approach would be as effective a way of educating non-minority students about the relevant experiences of racially oppressed groups as interacting with fellow students from such groups outside the classroom as well as within, but the two approaches would appear to have the same purpose. However, such an "adjunct faculty" approach would do nothing to accomplish the purpose identified by Justice O'Connor of assuring that the "path to leadership" was "visibly open" to African-Americans, Hispanics and Native Americans. *Id.* at 2341.



The shift in emphasis in the majority opinion from "enriching everyone's education" to cultivating "a set of leaders with legitimacy in the eyes of the citizenry," did not escape the scrutiny of Justice Thomas, whose dissent found the shift "disturbing" because he saw it as an implicit repudiation of the principle that remedying societal discrimination can never justify the government's use of racial classifications.<sup>30</sup> He read the majority opinion as implicitly justifying the law school's program because it benefited minority students: "I believe that what lies beneath the Court's decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups and that racial discrimination is necessary to remedy general societal ills."<sup>31</sup> It is striking that Justice Kennedy, in his separate dissent, interpreted the majority opinion in much the same way, but unlike Justice Thomas, agreed with this justification: "It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered *in order to improve their educational opportunities* is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place."<sup>32</sup>

What if both Justice Thomas and Kennedy are right that the majority opinion in *Grutter* reopens the door, long thought shut tight,<sup>33</sup> to the use of affirmative action to remedy the effects of societal discrimination? But what if what lies through that door is a much more demanding scrutiny of the "special circumstances" (in the words of Justice Kennedy) that require affirmative action to improve educational and other opportunities? For example, will it be possible for schools like the University of Michigan not only to justify affirmative action for African-Americans on the basis of societal discrimination, instead of the educational benefit of diversity, but even to justify giving greater preference to African-Americans than Hispanics on a showing that its pool of African-American applicants are more seriously disadvantaged by societal discrimination than its Hispanic applicants?

These questions seem to run aground on the frequently repeated judicial assertion that the present effects of society-wide discrimination are "inherently unmeasurable."<sup>34</sup> However, India does not agree that effects of

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<sup>30</sup> *Id.* at 2362-63 (Thomas, J., dissenting in part).

<sup>31</sup> *Id.* at 2361 (Thomas, J., dissenting in part) (internal citations omitted).

<sup>32</sup> *Id.* at 2374 (Kennedy, J., dissenting) (emphasis added).

<sup>33</sup> Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 941 (1997) ("Anyone who has read the Supreme Court cases knows that the Court does not accept the remedying of past or present societal discrimination as an acceptable justification for affirmative action.").

<sup>34</sup> See, e.g., *City of Richmond v. J.A. Croson*, 488 U.S. 469, 505-06 (1989) (O'Connor, J., plurality opinion). It is important to remember that these assertions of "unmeasurability" are properly understood as limitations only on the ability of courts to do such measuring, as made clear in the opinion of

past societal discrimination are “inherently unmeasurable” and indeed has constructed its affirmative action programs around an empirical project of measuring such effects. India also does not follow the simplistic American “one size fits all” approach under which any person who is a member of a designated group is automatically eligible for affirmative action and all designated groups are treated as needing the same type and degree of affirmative action.

India begins by dividing the universe of potential affirmative action beneficiaries into three large categories: (1) descendants of the lowest caste groups formerly termed “untouchables” labeled Scheduled Castes (“SCs”) for affirmative action purposes; (2) tribal groups isolated by culture, language and geography termed Scheduled Tribes (“STs”); and (3) descendants of lower caste groups whose ancestors were significantly disadvantaged but still located above the “untouchable” status, termed “Other Backward Classes” (“OBCs”).<sup>35</sup> SCs and STs generally receive greater preferential benefits than OBCs, typically a quota of entry-level government positions that matches their proportion of the general population. OBCs also are assigned a quota, but one that is typically much smaller than their share of the population. This differentiation reflects a consensus that the “untouchables” and “tribals” suffer from greater lingering effects of past discrimination.<sup>36</sup> If this system was roughly translated into an American context, African-Americans, as the descendants of slaves, and Native Americans, as the survivors of extensive conquest and genocide, might compare to the SCs and STs, and receive greater preference than Hispanics, who, like the OBCs, would still receive a degree of affirmative ac-

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Justice Powell in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), where these assertions originated:

Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications. . . . As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new *judicial* rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the *judicial* competence—even if they otherwise were politically feasible and socially desirable.

*Id.* at 295-97 (emphasis added).

<sup>35</sup> See Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1304 (1999); see also Clark D. Cunningham, *Affirmative Action: India's Example*, 4 CIV. RTS. J. 22, 23 (1999). Both articles are also available on the Rethinking Equality Website, *supra* note 18.

<sup>36</sup> *Rethinking Equality in the Global Society: An International Conference sponsored by the Washington University School of Law and the Program on Social Thought and Analysis*, 75 WASH. U. L.Q. 1561, 1657, 1659 (1997) (remarks of panelist M.N. Srinivas) [hereinafter *Rethinking Equality Conference*]. The Rethinking Equality Conference is also available on the Rethinking Equality Website, *supra* note 18.

tion.<sup>37</sup>

As I have described in greater detail elsewhere,<sup>38</sup> designations of which ethnic groups deserved OBC status were extensively litigated under the equal protection provisions of India's constitution during the first 40 years after India adopted its constitution in 1950. Finally, in 1979 the President of India appointed a commission, known as the Mandal Commission, to develop a comprehensive list of OBCs in an attempt to create national uniformity and consensus. The Mandal Commission conducted a national survey that started with generally recognized group categories (typically based on caste name or hereditary occupation) and tested each group using standardized criteria of "backwardness," such as comparing the percentage of group members who married before the age of 17 or did not complete high school to other groups in the same Indian state. "Eleven numerical factors, given varying weights, were assigned to each group based on the survey results and those groups with total scores below a specified cut-off point were then included in a list of OBCs."<sup>39</sup> Although the methodology and criteria used by the Mandal Commission have certainly been criticized, India's approach still provides a striking contrast to that of the United States in that the rules for selecting beneficiary groups were announced in advance and then a transparent empirical process was used to apply those rules to generate the list.<sup>40</sup>

As the result of a leading Supreme Court decision,<sup>41</sup> India further parses the set of persons eligible for affirmative action by virtue of membership in an OBC by applying an economic means test to a candidate's parents (not to the candidate herself) to implement two related goals: (1) to distribute affirmative benefits throughout each group rather than allowing a relatively well-to-do "creamy layer" monopolize them, and (2) to deny affirmative action benefits to individuals who do not really need them.<sup>42</sup>

A comparative glance at India thus offers one vision of what might await us on the other side of the door opened by the *Grutter* decision. This vision of course not only can encourage bold new experimentation, but can also caution us against unintended consequences. When India's Supreme Court approved the major components of the Mandal Report in 1993, it

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<sup>37</sup> This analogy is only offered as a way of understanding the system in India, not as an "import model" proposal for changing American affirmative action.

<sup>38</sup> Cunningham, *supra* note 35, at 23; Cunningham & Menon, *supra* note 35, at 1303-05; Clark D. Cunningham, et al., *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 GEO. L. J. 835, 874-78 (2002).

<sup>39</sup> Cunningham et al., *supra* note 38, at 874-76.

<sup>40</sup> Compare India's approach to the obscure way that the list of groups entitled to affirmative action developed in American federal contracting. *See id.* at 859-73 (providing the history of America's affirmative action plan).

<sup>41</sup> *Sawhney v. Union of India*, A.I.R. 1993 S.C. 477, 558-59.

<sup>42</sup> Cunningham et al., *supra* note 38, at 876-77.

optimistically characterized the methodology of the Mandal Commission as moving India towards its aspiration of becoming a "casteless society," by "cleansing" the category of Other Backward Class from the prejudice and stigma of the caste system.

Once a caste satisfies the criteria of backwardness, it becomes a backward class . . . . [From that point on] the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the State. Born heathen, by baptism, it becomes a Christian—to use a simile.<sup>43</sup>

However, in the decade since that decision, implementation of the Mandal Report has led to widespread concern in India that caste identity has become more salient, not less.<sup>44</sup> The concern that the fruit of "strict scrutiny" of group selection and definition might be a counter-productive perpetuation of racial identity leads me to conclude with a totally different perspective from David Sabbagh, a French scholar who comes from a legal and cultural tradition that provides no affirmative action exception to an official policy of total "color blindness."<sup>45</sup> Sabbagh points out that true "color blindness" is a state of mind, like spontaneity, that can never come into being through conscious effort or intention.<sup>46</sup> For example, the very act of trying to be spontaneous prevents spontaneity. As a long-time student of American affirmative action, he offers the following hypothesis: "affirmative action . . . being . . . a deliberate attempt at reducing the degree of racial identification in the United States must be concealed in order to achieve its intended effect."<sup>47</sup> Thus, although the designers and implementers of affirmative action plans can never themselves be color-blind, he suggests that they may, nonetheless, make progress toward a color-blind society if they conceal from others their use of racial criteria. Sabbagh reinterprets the diversity rationale of Justice Powell's *Bakke* opinion as taking this strategic principle and turning it into constitutional doctrine, observing that "provided universities conceal the rigidity of their affirmative action programs carefully enough, they should be able to count on the

<sup>43</sup> *Sawhney*, A.I.R. 1993 S.C. at 555.

<sup>44</sup> *See, e.g., Rethinking Equality Conference*, *supra* note 36, at 1666, 1668 (remarks of N.R. Madhava Menon); *id.* at 1659 (remarks of M.N. Srinivas).

<sup>45</sup> Daniel Sabbagh, *Judicial Uses of Subterfuge: Affirmative Action Reconsidered*, 118 POL. SCI. Q. 411, 417-18 (2003); *see* Thomas Kirszbaum, "Territorial Positive Discrimination" in French Urban Policy 3 (Mar. 30, 2003) ("France has never seriously considered giving rights to individuals based on ethnic or racial origin.") (working paper presented at Discrimination, Diversity and Public Policy conference sponsored by the Program on Social Thought & Analysis at Washington University in St. Louis) (on file with the Connecticut Law Review).

<sup>46</sup> Sabbagh, *supra* note 45, at 417-18.

<sup>47</sup> *Id.* at 419.

Courts' [sic] benign passivity."<sup>48</sup> His conclusion turns out to be an accurate prediction of the relationship between the decisions in *Gratz* and *Grutter*:

[T]he constitutional validity of affirmative action policies practically depends upon whether the pervasive nature of race consciousness in university admissions remains properly concealed.

....

... Thus, any successful assault on affirmative action in the near future will likely be mitigated by subterfuges of some kind, whose underlying function is only to diminish the visibility of race consciousness in contemporary America.<sup>49</sup>

If we apply Sabbagh's theory, the explicit "bonus point" system used for undergraduate admission is indeed correctly struck down in *Gratz* because of its administrators' candor, as the *Gratz* dissenters complain.<sup>50</sup> Meanwhile the law school's more hidden use of group identity survives precisely because it obscures the impact of race on the formation of the law school student body.<sup>51</sup> Further, if Sabbagh's hypothesis is correct, Justice O'Connor cannot admit in her *Grutter* and *Gratz* opinions that candor is the legally relevant distinction because she herself must understate the role of race in the law school's admission policies if the program sanctioned by the Court is to accomplish its concealed goal of using race to reduce the long-term salience of racial categories.

The drastically different implications of the Indian and French perspectives underscore my insistence that I am not advocating that we "import" either India's explicit and meticulous system for identifying groups who deserve affirmative action nor France's official color-blindedness modified by judicial subterfuge. But these two very different approaches can, I think, help us think more clearly and creatively about the questions of group definition and selection which stubbornly emerge from the *Grutter* decision and which promise to hover over affirmative action controversies to come.

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<sup>48</sup> *Id.* at 433.

<sup>49</sup> *Id.* at 434-35. I know these words were written before the decisions in *Grutter* and *Gratz* because I read them in March 2003 when Sabbagh presented a working version of this article at an international conference on Discrimination, Diversity and Public Policy sponsored by the Program on Social Thought & Analysis at Washington University in St. Louis. He added a postscript about the Supreme Court's decisions when the final version was printed in the fall of 2003. *See id.* at 435.

<sup>50</sup> *Gratz v. Bollinger*, 123 S. Ct. 2411, 2438, 2442 (2003) (Souter, J. dissenting); *id.* at 2442, 2446 (Ginsburg, J. dissenting).

<sup>51</sup> *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (upholding the narrowly tailored case of affirmative action in admissions program).