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Bryan K. Fair

*University of Alabama - School of Law*, [bfair@law.ua.edu](mailto:bfair@law.ua.edu)

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## RE(CASTE)ING EQUALITY THEORY: WILL GRUTTER SURVIVE ITSELF BY 2028?

Bryan K. Fair\*

### INTRODUCTION

When legal historians examine the rise and fall of the United States, undoubtedly one of the major questions will be why an allegedly great nation would close off effective educational opportunities to so many of its citizens, rendering those educational outsiders at sea, with little ability to compete for global opportunities.<sup>1</sup> Is racism too entrenched to educate everyone to the same extent as those in the white, ruling elite?<sup>2</sup> Modern racial disparities in attainment and performance reflect a longstanding practice of unequal educational opportunity.<sup>3</sup> Educational caste is a legacy of discriminatory laws.

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\* Thomas E. Skinner Professor of Law, The University of Alabama School of Law. I wish to thank my Alabama colleagues for their support. I also owe a debt to my students who have asked me difficult questions about equality and fairness. None of my research would be possible without the support of a team of excellent law librarians at the Law School. Special thanks to my friend and dean, Kenneth C. Randall, for his exceptional stewardship of the University of Alabama School of Law during the past decade. I must also thank our alumni who continue to give back to their alma mater so generously. Finally, I am ever grateful to Patty Lovelady Nelson, who assists me in all my work.

<sup>1</sup> Effective educational opportunity should be a fundamental federal constitutional right. Without it, no person can fully realize his or her potential as a citizen. Without effective educational opportunities, no one can fully benefit from other basic constitutional rights. Those who are left without an education are permanently marginalized and relegated to second-caste status in the society. With effective educational opportunities, more individuals can sustain and defend themselves.

<sup>2</sup> Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that an Alabama statute that has the effect of depriving African Americans of the right to vote is unconstitutional as it violates the Fifteenth Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down a California statute as unconstitutionally distinguishing between Chinese and non-Chinese laundromat owners in violation of the Fourteenth Amendment); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (studying the performance during and after college of both white and black children admitted to selective colleges and universities); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997) (discussing a range of issues on the problem of race and race relations, including the history of race developments in the United States social, economic, and political trends since the Civil Rights movement and the changing political climate).

<sup>3</sup> See, e.g., PETER IRONS, *JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION* (2002) (discussing the Supreme Court's retreat from the *Brown v. Board of Education* decision and the recent cases allowing state officials to maintain one-race schools without threat of judicial intervention); see also E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR:*

The Supreme Court has never dismantled educational caste. It has provided no remedy to restore those persons mired in caste to the positions they would occupy absent discrimination.<sup>4</sup>

Post-*Brown* antidiscrimination policies have been construed not only to prevent whites from maintaining their historic practices of overt exclusion of people of color from premier educational resources, but also to restrict race-conscious remedial policies seeking to expand opportunities for persons formerly excluded.<sup>5</sup> That interpretation of antidiscrimination theory is analogous to telling a serial bank robber that he cannot rob any more banks, but he may keep all the loot he has accumulated. Education banks in the United States have been looted by whites for generations with the acquiescence of federal, state, and local authorities, yielding wealth and progress for many thieves' beneficiaries and semi-literate wastelands for millions of Americans who were robbed of their rights to equal educational opportunity.<sup>6</sup>

Even after token desegregation, most separate, resource-rich, historically white schools and resource-poor, historically minority schools have continued to exist as such.<sup>7</sup> This situation led civil rights lawyers and the NAACP Legal Defense Fund to initiate a class action suit against the U.S. Department of Health, Education, and Welfare for failing to comply with and enforce Title VI of the 1964 Civil Rights Act<sup>8</sup> by continuing to support public schools and colleges that

SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA (1993) (describing the efforts of civil rights activists to desegregate the University of Alabama); DESEGREGATING AMERICA'S COLLEGES AND UNIVERSITIES: TITLE VI REGULATION OF HIGHER EDUCATION (John B. Williams, ed., 3d ed. 1988) [hereinafter DESEGREGATING AMERICA'S COLLEGES AND UNIVERSITIES] (addressing limited access to higher education for blacks in America in relation to Title VI of the 1964 Civil Rights Law); S. EDUC. FOUND., ENDING DISCRIMINATION IN HIGHER EDUCATION: A REPORT FROM TEN STATES (1974) (reporting on the continual segregation and discrimination in public universities). See generally HENRY ALLEN BULLOCK, A HISTORY OF NEGRO EDUCATION IN THE SOUTH: FROM 1619 TO THE PRESENT (1967) (discussing the history of education of African Americans in the South).

<sup>4</sup> See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (holding that discriminating conduct is to be remedied for a specific instance of discrimination in a specific locale); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495-96 (1954) (concluding that since the primary issue of the case was finding that segregation was unconstitutional, the consideration of relief was reserved for reargument by the parties and the Attorney General).

<sup>5</sup> *Brown*, 347 U.S. at 495-96; see *Missouri v. Jenkins*, 515 U.S. 70, 86-89 (1995) (discussing the limits on district courts in fashioning a remedy for desegregation violations).

<sup>6</sup> See Bryan K. Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 TUL. L. REV. 1843 (2004) (arguing that the racial caste system still exists in education and that the decision in *Grutter* does little to expand opportunities for African Americans).

<sup>7</sup> See *United States v. Fordice*, 505 U.S. 717, 721-25 (1992) (describing segregation in higher education in Mississippi).

<sup>8</sup> 42 U.S.C. § 2000d (2003).

practiced race discrimination and segregation.<sup>9</sup> In winning those cases, the plaintiffs proved that separate and unequal treatment was alive and well and that antidiscrimination law was not a viable solution to entrenched educational caste.

Now, three decades later, minorities are still significantly locked out of the best educational opportunities in virtually every state, at every level of training.<sup>10</sup> Yet rather than calls for reconciliation and reparations, one hears calls for race-neutral, color-blind admission criteria, even if such standards will result in little reform. How can this be fair? How can this be equal protection of the law? It is neither fair nor equal, and to conclude otherwise is irresponsible. It is a continuing violation of the equality principle, leaving to yet another generation a reckoning.

What is the relationship between past segregative practices and the small enrollments of students of color at the flagship campuses in each state? Why are there significant test score disparities among various ethnic groups? What can universities do to enroll a diverse group of students, given test score disparities? Can a school adopt race-conscious admissions policies to enlarge its enrollment of minority students or establish a scholarship program for one racial group? How much consideration of race is too much? Does it make a difference if the school or state has had an active history of excluding specific racial or ethnic groups from educational opportunities? Is the attainment of the educational benefits of diversity a compelling state interest? What are the requisites of a narrowly tailored race-conscious policy? Is there a constitutional difference between a policy that gives a fixed point allotment to all members of certain ethnic groups and a policy that makes racial classification a plus in individual files, including the files of nonminority applicants? Does government have an affirmative constitutional duty to dismantle educational caste resulting from its policies? Answers to these and similar questions have eluded resolution for the past twenty-five years.

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<sup>9</sup> See *Adams v. Weinberger*, 391 F. Supp. 269 (D.D.C. 1975) (requiring the Department of Health, Education, and Welfare to fully enforce desegregation plans among many of the same schools at issue in *Adams v. Richardson*); *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973) (holding that federal funding going to states with segregated systems of higher education violated Title VI of the Civil Rights Act).

<sup>10</sup> See Fair, *supra* note 6, at 1863 (showing percentages of minorities on major campuses).

Consider the litigation in Maryland,<sup>11</sup> Texas,<sup>12</sup> California,<sup>13</sup> Georgia,<sup>14</sup> Washington,<sup>15</sup> and, most recently, Michigan.<sup>16</sup> Some states have enacted prohibitory legislation, barring race-conscious policies by state agencies.<sup>17</sup> Some judges have supported the constitutionality of race-conscious remedial policies; others have condemned them as rank discrimination.<sup>18</sup> Similarly, commentators have been divided sharply on the legitimacy of race-based educational affirmative action.<sup>19</sup> Judges and commentators have also split on the meaning<sup>20</sup> and

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<sup>11</sup> See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (holding that the University of Maryland's Banneker scholarship program was an unconstitutional racial classification), *cert. denied*, 514 U.S. 1128 (1995).

<sup>12</sup> See *Hopwood v. Texas*, 78 F.3d 932, 942 (5th Cir. 1996) (holding racial preferences in law school admissions a violation of the Equal Protection Clause and describing Justice Powell's opinion in *Bakke* as being joined by no other Justice).

<sup>13</sup> See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (holding that Proposition 209 did not violate equal protection rights of women and minorities and was not preempted by federal civil rights statutes).

<sup>14</sup> See *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001) (holding that the policy awarding fixed numerical bonus to nonwhite applicants was not narrowly tailored to achieve a compelling interest, and thus violated equal protection).

<sup>15</sup> See *Smith v. Univ. of Wash., Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (holding that a properly designed and operated race-conscious admissions process would not violate either Title VI or the Equal Protection Clause).

<sup>16</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (sustaining an admissions policy seeking to attain the educational benefits of a diverse student body under strict scrutiny); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating an admissions policy awarding fixed bonus points for members of designated racial groups).

<sup>17</sup> California's Proposition 209 is one example that precludes state agencies from adopting race-conscious affirmative action. For information on this Proposition 209 (Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities), see California's Secretary of State website at <http://vote96.ss.ca.gov/Vote96/html/BP/209.htm> (last visited Nov. 19, 2004). Similar legislation has been enacted in other jurisdictions, including Washington, Florida, and Texas.

<sup>18</sup> Compare *Grutter*, 539 U.S. at 343 (allowing law schools to use race in a "narrowly tailored" fashion in the admissions process), and *Smith*, 233 F.3d at 1200 (declaring a race-conscious admissions program constitutional specifically because of the precedent set out in *Bakke*), with *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that a university's admissions program, by discriminating in favor of minority students, violated equal protection).

<sup>19</sup> The body of commentaries and books on affirmative action is expansive. For a discussion of both the arguments for and against affirmative action, see generally THE AFFIRMATIVE ACTION DEBATE (Steven M. Cahn ed., 2d ed. 2002); BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION (1996); BOWEN & BOK, *supra* note 2; LYDIA CHÁVEZ, THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION (1998); CIVIL RIGHTS AND SOCIAL WRONGS: BLACK-WHITE RELATIONS SINCE WORLD WAR II (John Higham ed., 1997); CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES (1996); CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997); SAMUEL LEITER & WILLIAM M. LEITER, AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY (2002); MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW (1997); RACE AND REPRESENTATION: AFFIRMATIVE ACTION (Robert Post & Michael Rogin eds., 1998); M. ALI RAZA ET AL., THE UPS AND DOWNS OF AFFIRMATIVE ACTION PREFERENCES (1999); PHILIP F. RUBIO, A HISTORY OF AFFIRMATIVE ACTION: 1619-2000 (2001); JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996); GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE

ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES (2000); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997).

<sup>20</sup> See generally Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1729 (2001) (arguing that percentage plans reflect the deep educational racial disparities in higher education and that states have a continual obligation to solve this problem); Fran Ansley, *Classifying Race, Racializing Class*, 68 U. COLO. L. REV. 1001 (1997) (arguing for a more group-focused analysis of racial discrimination); Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577 (1998) (justifying public affirmative action as a remedy for private discrimination); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997) (arguing that the Constitution is committed to the realization of a democratic culture even though constitutional law is unable to reach this goal); Robert M. Berdahl, *Policies of Opportunity: Fairness and Affirmative Action in the Twenty-First Century*, 51 CASE W. RES. L. REV. 115 (2000) (arguing that affirmative action in university admissions is the best method of achieving social justice and is much more effective than leaving Americans "to their own devices"); Arunabha Bhoomik, *The Affirmative Action Debate*, 40 HARV. J. ON LEGIS. 195 (2003) (detailing common arguments for and against affirmative action); Martin D. Carcieri, *The Wages of Taking Bakke Seriously: Federal Judicial Oversight of the Public University Admissions Process*, 2001 BYU EDUC. & L.J. 161 (finding that despite *Bakke's* problems, it should still be taken seriously and that Justice Powell's opinion should be faithfully enforced); Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great Was "The Great Dissenter"?*, 32 AKRON L. REV. 629 (1999) (demonstrating that although Justice Harlan was an ardent defender of African American civil rights, his voting record proves that he was not a defender of the civil rights of Asians); Sumi Cho, *Understanding White Women's Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions*, 71 UMKC L. REV. 399 (2002) (proposing theories to explain why white women, themselves a minority, do not, as a group, embrace affirmative action); Marion Crain, *Critical Race Studies: Colorblind Unionism*, 49 UCLA L. REV. 1313 (2002) (arguing that labor unions' colorblind ideology is insufficient to overcome the "racial caste system" in employment); Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the University of California v. Bakke*, 19 YALE L. & POL'Y REV. 341 (2001) (providing a chronology of the Court's internal deliberations about *Bakke* and reprinting Justice Brennan's narrative of the *Bakke* decision); Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky But Classical Liberal Defense*, 100 MICH. L. REV. 2036 (2002) (advocating a standard for measuring the constitutionality of affirmative action programs by comparing them to practices voluntarily used by private competitive institutions); George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608 (1999) (arguing that a holistic view of human dignity best explains and grounds the principle of legal equality); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) (discussing liberal constitutionalism and its flaws); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999) (relating affirmative action to the promotion of the general health and welfare of humankind); Darlene C. Goring, *Private Problem, Public Solution: Affirmative Action in the 21st Century*, 33 AKRON L. REV. 209 (2000) (arguing that affirmative action is not an area solely left for judicial resolution, but is a political matter that requires the involvement of the legislative branch); Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521 (2002) (arguing that the Supreme Court should examine affirmative action realistically, taking into account the condition of African Americans and the impact on America, when it next reviews this policy); Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action*, 2002 U. CHI. LEGAL F. 11 (demonstrating that affirmative action stands on precarious grounds under the existing constitutional doctrine); Paula C. Johnson, *Ad-In/Ad-Out: Deciding Victory and Defeat in Affirmative Action Legal Contestations*, 66 ALB. L. REV. 433 (2003) (arguing that the Supreme Court should reaffirm the legal basis for affirmative action); Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757 (1997) (discussing the current state of affirmative action and the Supreme Court's limitation of its scope in the workplace and higher education); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative*

precedential effect of the Supreme Court's 1978 decision in *Regents of the University of California v. Bakke*.<sup>21</sup> Undoubtedly this sharp ideological division will rage on for the next generation and beyond.

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*Action*, 101 COLUM. L. REV. 928 (2001) (arguing that the liberal view that the benefits of diversity necessitating the continuance of affirmative action is flawed); Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002) (arguing that the perceived unfairness to non-minorities in affirmative action is more exaggerated than real); Theodore McMillian, *In Defense of Affirmative Action*, 54 WASH. U. J. URB & CONTEMP. L. 39 (1998) (defending the legitimacy of affirmative action and arguing that education is the best mechanism to resolve the debate); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997) (reporting and analyzing the results from an empirical study of the effects of sex and race on tenure-track hiring); Jodi Miller, "Democracy in Free Fall": *The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1 (arguing that the legislative use of ballot initiatives to repeal affirmative action is socially undesirable and a dangerous use of lawmaking); Cedric Merlin Powell, *Blinded By Color: The New Equal Protection, The Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191 (1997) (arguing that in adhering to the myth of colorblindness, governments are ignoring the continual effects of past discrimination and therefore, allowing a period of "affirmative inaction"); Cedric Merlin Powell, Hopwood: *Bakke II and Skeptical Scrutiny*, 9 SETON HALL CONST. L.J. 811 (1999) (discussing the doctrinal manipulation of affirmative action and diversity and exposing the flaws of *Hopwood v. Texas*); Melissa L. Saunders, *Equal Protection, Class Legislation, and Color Blindness*, 96 MICH. L. REV. 245 (1997) (arguing that the interpretation of the Equal Protection Clause by the Supreme Court's majority in the racial gerrymandering cases is flawed and inconsistent with the Fourteenth Amendment); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2002) (discussing the misunderstandings that plague the affirmative action debate and proposing a better reconciliation of the conflicting social values); David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657 (opposing the widespread consensus that the Supreme Court should resolve the affirmative action debate as the Court has not been a progressive force on issues of racial justice and has failed to articulate a persuasive justification for overriding affirmative action programs of the legislature); Carol M. Swain et al., *Life after Bakke Where Whites and Blacks Agree: Public Support for Fairness in Educational Opportunities*, 16 HARV. BLACKLETTER L.J. 147 (2000) (arguing that the American public has a more expansive notion of merit than do critics on either side of the affirmative action debate); Russell L. Weaver, *Does "Practicality" Have a Place in the "Canon of Constitutional Law"?*, 17 CONST. COMMENT. 341 (2000) (arguing that race-based affirmative action should be replaced by programs that favor the economically disadvantaged); Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One"*, 89 KY. L.J. 69 (2000) (arguing that the Supreme Court misinterpreted the Equal Protection Clause in *Village of Willowbrook v. Olech*, which held that equal protection may be invoked to challenge individual claims of mistreatment by government officials); William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (2001) (examining whether students of color with commensurate grades score lower on the LSAT than white students); Alexandra D. Mease-White, Note, *Hopwood v. Texas: Challenging the Use of Race as a Proxy for Diversity in America's Public Universities*, 29 CONN. L. REV. 1293 (1997) (examining the continued viability of using affirmative action plans to achieve racial diversity at public universities); Victor V. Wright, Note, *Hopwood v. Texas: The Fifth Circuit Engages in Suspect Compelling Interest Analysis in Striking Down an Affirmative Action Admissions Program*, 34 HOUS. L. REV. 871 (1997) (arguing that the Fifth Circuit erred in finding that *Bakke* is no longer good law and in rejecting the affirmative action policy of the University of Texas School of Law).

<sup>21</sup> 438 U.S. 265 (1978).

But now there is *Grutter v. Bollinger*.<sup>22</sup> Given the recasting of *Bakke* during the last twenty-five years, I anticipate a similar re-mapping of *Grutter*, only this time, Justice Sandra Day O'Connor's opinion will be deconstructed and recast to mean what future legislators, judges, and commentators say she meant, perhaps with little regard to her own words.

The purpose of this Article is to provide a critical guide to *Grutter*, especially its resuscitation of Justice Powell's *Bakke* opinion. My goal is to set forth *Grutter's* meaning, to show on what issues the Court agreed. I set out what the Court has announced as the controlling legal standards and the rationale for and limitations of each principle. I also examine each concurrence and dissent for points of disagreement and future litigation. I then critique *Grutter's* promise, in light of the anticaste principle, explaining why it will not likely effect much change in educational caste.

In Part I, I explore the road from *Bakke* to *Grutter*, especially the shifting interpretation of Justice Powell's *Bakke* opinion by commentators and judges. Since *Grutter* rests largely on what Justice Powell wrote in *Bakke*, I examine Justice Powell's opinion and which Justices agreed with him closely on various issues in Part II. I conclude that at least five justices in *Bakke* endorsed the constitutionality of the Harvard diversity model. Nonetheless, some intermediate federal courts had concluded that *Bakke* was not a controlling precedent and that a majority of the Court had not endorsed the diversity rationale. After *Grutter*, it is clear that such proclamations of *Bakke's* demise were mere speculations by conservative judicial activists. Moreover, it is now clear that five members of the current Court agree that race can be one factor in an admissions policy designed to attain student diversity. Yet, it seems likely to me that other conservative judicial activists and commentators over the next twenty-five years will recast the six *Grutter* opinions, spinning them to diminish this consensus and its potential to eliminate educational caste.

In Part III, I describe the substance and logic of *Grutter*, especially Justice O'Connor's opinion which endorses much of what Justice Powell wrote two and a half decades before, concluding, as Justice Powell did, that some uses of racial classifications are constitutionally permissible. In Part IV, I critique *Grutter* based on an anticaste equality theory. Consistent with the anticaste moorings of the Fourteenth Amendment, I argue that admissions committees, who are aware of test score disparities, should be able to look beyond those scores when enrolling new classes.

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<sup>22</sup> 539 U.S. 306 (2003).



My thesis is that the jurisprudential framework employed by Justice O'Connor in *Grutter* is on a collision course with itself. On one hand, Justice O'Connor opines the significant benefits of educational diversity, creating a pool of diverse, educated leaders representing all the citizens of the United States. On the other, Justice O'Connor concludes that taking account of racial classifications violates core equal protection values and thus must be limited in scope and time. Yet, Justice O'Connor fails to anchor her limiting theory to invidiousness or the smoke-out rationale that she has regularly cited for distinguishing illegitimate and legitimate uses of racial classifications. Justice O'Connor has said repeatedly that context matters, but she does not explain why context in *Grutter* is not likely to be dispositive in upholding educational diversity in twenty-five years and beyond. Thus, in *Grutter*, the Court postpones for another day the taking of racial caste seriously.

## I. BACK TO THE FUTURE

### A. *Disappearing Acts*

One broad critique of cases like *Bakke* and *Grutter* is that the Court has whitewashed the relevant contextual history. As in so many of its opinions, the Court writes in both cases as if history never happened and the most salient, pernicious historical facts are rendered superfluous to contemporary legal reform. Almost no one asks why there are significant disparities in standardized test scores for different ethnic groups or what has been done to close the gaps. Is it one of the lingering effects of past discrimination or is it genetic? Does it matter what the cause is? Is it fair that so few Native Americans, African Americans, Pacific Islanders, and Latinos can gain admission at the best schools in the nation? Is the solution better schools or subsidized preparatory courses? Are these minorities simply not working hard enough?

Consider that for much of the history of public higher education in the United States, administrators at premier colleges and universities excluded various citizens from equal enrollment consideration.<sup>23</sup> One could simply be the wrong ethnicity, wrong race, wrong gender,

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<sup>23</sup> See, e.g., BULLOCK, *supra* note 3 (illustrating the historical exclusion of African American children from the Southern educational system); CLARK, *supra* note 3 (describing the resistance surrounding the desegregation of the University of Alabama); DESEGREGATING AMERICA'S COLLEGES AND UNIVERSITIES, *supra* note 3 (addressing limited access for African Americans in higher education); IRONS, *supra* note 3 (arguing that despite *Brown v. Board of Education*, African Americans still do not have equal access to higher education); S. EDUC. FOUND., *supra* note 3 (demonstrating the desegregation plans of eight states as short of ensuring the integration of African Americans and minorities into the formerly all-white institutions).

wrong class, or wrong religion. If one was not a legacy, the scion of a wealthy donor, or connected in some other important way, publicly-funded higher education could be placed beyond one's grasp. As a result of exclusionary policies, generations of American families attained valuable educational privileges through graduate and professional schools, improving their economic lives and the future opportunities of their children, grandchildren, and so on.<sup>24</sup> Those affirmative action programs for whites were never styled stigmatic or demeaning.<sup>25</sup> The beneficiaries of such privilege must have included many underperformers who were outmatched by many of their classmates, but they gained access anyway. And they thrived, some all the way to the Presidency of the United States.<sup>26</sup>

Simultaneously, disfavored Americans were generation after generation told to stay out of elite schools, relegated to understaffed and underfunded second-caste educational programs, or denied access completely. After generations of under-education and exclusion, it is no wonder that there are test score disparities. Indeed, it is nothing short of extraordinary that the test score gaps are not larger.<sup>27</sup>

One might expect a Court so steeped in the history and traditions of the American people to recall this history and discuss its relevance to questions of constitutional fairness of various educational policies and practices today. Perhaps a case could be made that historic practices were rank discrimination, equivalent to practices adopted by the University of Michigan School of Law. But it is equally plausible that there are important, discernible differences between a policy that says no people of color need apply solely because of their race and one that says that because of past discrimination against people of color, they are entitled to reparations, including admissions opportunities at the very best schools in the United States.<sup>28</sup>

One gets the feeling that some members of the Court are simply unwilling to do the work, ask the hard questions, and tell the whole story. Without it, it is easy to conclude that all racial classifications are so dangerous that they must undergo rigorous scrutiny and con-

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<sup>24</sup> See Fair, *supra* note 6, at 1851–54 (showing how generations of African Americans have been robbed of possible achievements by their exclusion in many of the public schools).

<sup>25</sup> *Id.* at 1853–54 (showing how affirmative action plans were essentially employed for whites via segregation, but no one looked at these programs as being negative like affirmative action).

<sup>26</sup> Charles Forelle, *Grades of Bush '68 Surface in Magazine*, YALE DAILY NEWS, Nov. 2, 1999, <http://www.yaledailynews.com/article.asp?AID=2636>.

<sup>27</sup> See Fair, *supra* note 6, at 1856 (showing test score disparities between African American and white children at ages nine, thirteen, and seventeen).

<sup>28</sup> See James W. Nickel, *Discrimination and Morally Relevant Characteristics*, in THE AFFIRMATIVE ACTION DEBATE 3, 4 (Steven M. Cahn ed., 2002) (“[I]f compensation in the form of extra opportunities is extended to a black man on the basis of past discrimination against blacks, the basis for this compensation is not that he is a black man, but that he was previously subjected to unfair treatment because he was black.”).

tain reasonable durational limits, no matter how beneficial they may be to some.<sup>29</sup>

Yet we live in this country as it has become, and *Bakke* and *Grutter* are consequences of American legal history. To interpret them without reference to that history is both unfair and unwise. It is unfair for the Court to ignore educational discrimination in Maryland where Thurgood Marshall, among others, was turned away from law school; in Texas where Heman Sweatt, among others, was rejected from law school; in Missouri where Lloyd Gaines was excluded from law school; in Oklahoma where Ada Sipuel and G.W. McLaurin were subjected to segregated conditions in graduate school; in Alabama where Autherine Lucy, among others, was threatened and expelled from the University of Alabama;<sup>30</sup> or in most other states where some American citizens were intentionally under-educated.<sup>31</sup>

The Justices have a constitutional and moral duty to do their work, teaching the nation through their opinions. When they fail to take racism and caste seriously, their opinions lack constitutional legitimacy. They cannot shirk their responsibility. When they do, these divisive issues remain unresolved, judicial resources are wasted, and future generations must start again. But the greatest damage is to our nationhood. We remain separated, not by genes, but rather by constitutionally sanctioned, politically constructed, and morally irrelevant divisions having nothing to do with human worth. Real legal reform is impossible if the Court fails to take its responsibilities seriously.

### B. Discretionary Admissions

To illustrate how the Court's lack of responsibility has led to the stifling of legal reform, consider *Bakke* itself. *Bakke* was the Court's first interpretation of the constitutionality of race-conscious remedial policies. It is instructive at once, practically and legally. First, practically, there is simply nothing in the Constitution that sets admissions standards for colleges or professional schools. Administrators have broad discretion to establish criteria and procedures for admission. For example, a school could decide that before enrollment, a student must have worked for three years. A school could set a community service requirement, providing that every applicant spend at least twelve months working in an anti-poverty program. Administrators

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<sup>29</sup> *Grutter v. Bollinger*, 539 U.S. 306, 342 ("[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. . . . [A]ll governmental use of race must have a logical end point.").

<sup>30</sup> S. EDUC. FOUND., *supra* note 3, at 1-2 (discussing "lawsuits attacking racial segregation and discrimination in American higher education").

<sup>31</sup> See Fair, *supra* note 6, at 1863 (showing percentages of minorities on major campuses).

could determine the relevance of grades and/or test scores. They could decide if interviews are required, if geographical preferences are given, if wealthy donors receive special consideration, if alumni children get a bump, or if some special talent or accomplishment is so noteworthy that an applicant should gain admission. Administrators would then have tremendous power and flexibility to determine who would receive limited educational benefits at the best public schools.

Such was the case at the University of California, Davis Medical School ("Davis"). Faculty and administrators established criteria and procedures for admission. First, admissible candidates needed a 2.5 minimum undergraduate grade point average ("UGPA"). Second, each applicant had a personal interview. Third, Davis administrators evaluated the applicants' UGPAs in science courses, MCAT scores, recommendations, extracurricular activities, and other biographical data. Davis did not rank its applicants from highest score to lowest or admit its students in any order. Any applicant to the medical school could receive special consideration from the chair of the committee for reasons wholly unrelated to race.<sup>32</sup>

No aspect of Davis's regular admissions program was unconstitutional even though only three minority students enrolled. African American, Mexican American, and Native American minority groups were unrepresented in the first class.<sup>33</sup> Had Allan Bakke challenged any of those policies on constitutional or statutory grounds, he would have lost.

Davis's legal problems arose from changes it made in admissions after 1970. Davis administrators and faculty were concerned that in its early years of operation, very few of its students were African American, Native American, or Mexican American. Only three out of fifty were Asian Americans. Well over ninety percent of the Davis medical students were racially classified as Caucasians.<sup>34</sup> The faculty decided that there should be more racial diversity in the student body.<sup>35</sup> Of course, Davis did not adopt policies excluding all white applicants. It did not declare whites unfit to attend medical school or unfit to associate with minority students. Its new policies were not grounded in demeaning anti-white stereotypes. Instead, Davis had hard data. Over ninety percent of its medical students shared the same racial classification. Its regular admissions criteria had yielded only one or two African American, Mexican American, or Native American students.

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<sup>32</sup> Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 272-74 (1978).

<sup>33</sup> *Id.* at 272.

<sup>34</sup> *Id.* at 274-76.

<sup>35</sup> *Id.* at 272.

Could Davis do anything to alter these enrollment patterns? Davis did several things, some of which the Court found constitutionally impermissible. First, Davis doubled the size of its entering class.<sup>36</sup> Any school can do this without fear of constitutional litigation. There is simply nothing in the federal Constitution that limits class size. Since I support expanding educational opportunities at our flagship schools, I encourage our best schools to grow. But that alone will not ensure racial or ethnic diversity, or the enrollment of a broad cross-section of any community, especially so long as there are huge disparities in public education within and among school districts. Davis could easily expand its class size without increasing minority representation.

Davis went further, establishing a separate admissions program and separate numeric standards for African American, Mexican American, and Native American students.<sup>37</sup> It also set aside sixteen of the one hundred seats for applicants who were members of those groups only.<sup>38</sup> Allan Bakke could apply to Davis Medical School and did so in 1973 and 1974.<sup>39</sup> But he effectively could apply for one of only eighty-four seats. Those seats, which in theory were open to every applicant, at least in light of actual experience, were effectively not open to African Americans or Native Americans because of their MCAT scores and grades. In reality, whites and a small number of Asian Americans had and would compete for those eighty-four seats.

The Court never explored why or whether that was the reality. Yet, at least implicitly, the Court reinforced the presumption that those nonwhites who were denied enrollment were unqualified, inferior applicants because of their lower numeric profiles. But this presumption too went unexamined. The Court did not explore the factors which have led to disparities in test scores. The Court did not examine educational opportunities in the United States. The Court did not revisit the racist, exclusionary history and traditions of the American people. By failing to do so, the Court reinforced the presumption of minority inferiority and white superiority.<sup>40</sup>

Setting to one side for the moment the Court's jurisprudential obfuscation, one could legitimately critique the Davis special admissions program. First, Davis did establish a racial quota, one which operated both as a floor (ensuring some presence of African American, Hispanic American, and Native American students) and a ceiling (essen-

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<sup>36</sup> *Id.* at 275.

<sup>37</sup> *Id.* at 275-76.

<sup>38</sup> *Id.* at 275.

<sup>39</sup> *Id.* at 276.

<sup>40</sup> See generally A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 119-26 (1996) (outlining a history of "whites in power" assuming that "African Americans were too inferior to be their neighbors").

tially capping the numbers of these minority groups who might enroll).<sup>41</sup> Quotas, even ones designed to promote inclusion and educational opportunities, have a negative aspect. They allow the government to ignore how some race-neutral practices may nonetheless have a disproportionate burden on some groups. Second, one might ask why Davis set its quota at sixteen out of one hundred? How did administrators arrive at that number? Why was that number sufficient? Were whites and a few Asians entitled to eighty-four percent of the seats in the medical school? Why? Third, did the administrators consider California's legal history or the state's future? Fourth, who made the decision to guarantee the admission of a small number of minorities? What was the racial composition of the decision makers? Fifth, did they consider the potential stigma of their policies? Sixth, did they explore all their choices, including race-neutral ones? We know few of the answers to these questions, because neither the school nor the Court bothered to provide them.

But my critique is sharper. If the Court reads our Constitution to prohibit certain quotas, it should explain why eighty to ninety percent of de facto quotas for whites at most of our nation's elite schools are not constitutionally suspect. These quotas are rendered invisible by the Court's anti-discrimination jurisprudence. No matter how a school looks, as long as it does not have an *official* whites-first policy, those historically white schools are protected from legal challenge. And great law schools, whether in Michigan or Alabama, continue to have only a barely-opened schoolhouse door.

I blame the Court for its ineffective jurisprudence. Only some history and traditions of the American people matter. Only some rank discrimination (against whites) matters. Only some discretion (favoring minorities) matters. Only some quotas count. This is not jurisprudence. It is social engineering to preserve ruling elites. It is the codification of American caste under the pretense of establishing equality.

Davis Medical School could have maintained one admissions program. It could have eliminated or maintained a 2.5 UGPA for all applicants. It could have compared every file against all in the pool. It could have started pre-med study programs in poor urban or rural schools in California. It could have admitted the entire class under the same criteria, recognizing that there is in fact a disparity on test scores among different racial groups.

Davis elected a different path. Its special, separate admissions program, its quota, gave Allan Bakke the constitutional and statutory hook he used to go all the way to the nation's highest court.

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<sup>41</sup> *Bakke*, 438 U.S. at 275.

II. RECOLLECTIONS OF *BAKKE*

In *Bakke*, the Court split into two sharply divided ideological camps, with Justice Powell providing the crucial fifth vote on several conclusions.<sup>42</sup> Justice Powell agreed with Justices Brennan, White, Marshall, and Blackmun that race could be considered along with other diversity factors in making admissions decisions.<sup>43</sup> Yet, Justice Powell made clear that in his view, unlike the Brennan group's view, race could not be the sole factor.<sup>44</sup> In another camp, Justice Powell agreed with Chief Justice Burger and Justices Stewart, Stevens, and Rehnquist that Davis's admissions plan—its quota, its separate evaluation of applications, and its separate criteria—was constitutionally infirm and that Allan Bakke should be admitted.<sup>45</sup> Thus, technically, there were two five-to-four decisions, one upholding some use of race in admissions and another striking racial quotas and separate admissions pools.

But it is also correct that the Court was more sharply split four-to-one-to-four in its rationale for decision. When the Court is fractured so many ways, it is difficult to know the precedential value of any case. Did the views expressed by Justice Powell command the votes of five justices? If not, did his opinion have any currency? To evaluate what became a widespread critique, one must look back at the opinions of Justices Powell, Brennan, and Stevens for common ground.

A. *Justice Powell's Opinion*

I have previously examined Justice Powell's *Bakke* opinion.<sup>46</sup> Justice Powell began with an analysis of the scope of Title VI of the 1964 Civil Rights Act.<sup>47</sup> According to the statute's floor manager in the House, the problem confronting Congress was discrimination against African Americans at the hands of recipients of federal funds and how to guarantee them equal treatment:

The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in

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<sup>42</sup> *Id.* at 272.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 272, 320.

<sup>45</sup> *Id.* at 271.

<sup>46</sup> See generally BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLOR BLINDNESS AND THE END OF AFFIRMATIVE ACTION (1997).

<sup>47</sup> *Bakke*, 438 U.S. at 281–87.

short, *assure the existing right to equal treatment in the enjoyment of Federal funds.*<sup>48</sup>

Often, when references are made to the Civil Rights Act of 1964, its historical context is ignored or forgotten. Justice Powell, however, did not ignore this context, holding that Title VI must be held to proscribe only those racial classifications that would violate the Constitution.<sup>49</sup>

Justice Powell next turned to the question of whether the special admissions policy was a goal or a quota:

It is settled beyond question that the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.” The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.<sup>50</sup>

Justice Powell continued, “[A]ll 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.”<sup>51</sup>

Justice Powell did not insist that all racial classifications were invalid. To the contrary, he simply held that racial classifications were subject to strict scrutiny, requiring the government to articulate a “compelling” interest for using them, and proof that the policy was “precisely tailored” to achieve the government’s goal.<sup>52</sup> Davis Medical School set out four goals:

(i) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession”; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.<sup>53</sup>

Only the last goal—educational diversity—was significant enough to meet strict scrutiny according to Justice Powell, concluding that race “may be deemed a ‘plus’ in a particular applicant’s file.”<sup>54</sup> He

<sup>48</sup> *Id.* at 285–86 (alteration in original) (quoting 110 CONG. REC. 1519 (1964)).

<sup>49</sup> *Id.* at 289.

<sup>50</sup> *Id.* at 289–90 (citation omitted).

<sup>51</sup> *Id.* at 291 (alteration in original) (emphasis added) (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

<sup>52</sup> *Id.* at 299. *Bakke* is an excellent example of government’s use of race-neutral criteria that clearly subordinates African Americans and other minorities. When selecting its admissions criteria, Davis knew or should have known that virtually no African Americans, Latinos, or Native Americans would meet them. The result is that many students of color remain closed out of professions under the guise of colorblindness.

<sup>53</sup> *Id.* at 306 (citations omitted).

<sup>54</sup> *Id.* at 317.



supported diversity admissions programs like the one in operation at Harvard University that would compare all applicants to each other for all available seats:

Such [diversity] qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.<sup>55</sup>

For Justice Powell, diversity admissions programs were constitutional because they treated every applicant as an individual with unique subjective qualities. The diversity policy did not rest on one's membership in a group, but rather focused on the individual qualities of every applicant. Therefore, a candidate would never be rejected under such a plan *solely* because of race. Moreover, Justice Powell wrote, good faith by the admissions committees would be presumed, "in the absence of a showing to the contrary."<sup>56</sup>

In his judgment for the Court, Justice Powell wrote that his views were endorsed and joined by at least four other members of the Court.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers The Chief Justice, Mr. Justice Stewart, Mr. Justice Rehnquist, and Mr. Justice Stevens concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the [California] court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For the reasons expressed in separate opinions, my Brothers Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun concur in this judgment.<sup>57</sup>

One year before deciding *Bakke*, the Court announced in *Marks v. United States*<sup>58</sup> a special rule for evaluating sharply fractured opinions. The Court explained, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the 'holding of the Court may be viewed as that position taken

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 318-19.

<sup>57</sup> *Id.* at 271-72.

<sup>58</sup> 430 U.S. 188 (1977).

by those Members who concurred in the judgments on the narrowest grounds.”<sup>59</sup>

*Bakke* is an excellent candidate for a *Marks* analysis since “it has so obviously baffled and divided the lower courts that have considered it.”<sup>60</sup> One aspect of the critique is whether Justice Powell was correct on the numbers that *Bakke* contained two five-to-four decisions. Another aspect of the analysis is the narrowest grounds of each holding.<sup>61</sup>

### B. The Brennan Joint Opinion

Justice Powell asserted that the Brennan group concurred in the holding that the lower “court’s judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed.”<sup>62</sup> If Justice Powell was correct, then five justices held that race could receive some consideration. Thus, the Court was not fractured on this holding, even if it was divided on the rationale.

The Brennan group began by asserting, in part, agreement with Justice Powell.

The Court today . . . affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all. . . . But [the many opinions] should not and must not mask the central meaning of today’s opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.<sup>63</sup>

The above-quoted language confirms that five members of the Court agreed that a government may take some account of race to remedy past discrimination. The Brennan group also agreed with Justice Powell that Title VI, as applied to the instant case, went no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment.<sup>64</sup>

The Brennan group believed that the Davis admissions program was constitutional, and they would have reversed the lower court’s judgment in all respects.<sup>65</sup> It agreed with Justice Powell that a plan

<sup>59</sup> *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

<sup>60</sup> *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (citing *Nichols v. United States*, 511 U.S. 738, 745–46 (1994)).

<sup>61</sup> A full *Marks* critique is beyond the scope of this article. Moreover, it is not clear after *Grutter* if the court has given up on *Marks*. Perhaps it is time for a new rule interpreting fractured opinions.

<sup>62</sup> *Bakke*, 438 U.S. at 272.

<sup>63</sup> *Id.* at 324–25.

<sup>64</sup> *Id.* at 325.

<sup>65</sup> *Id.* at 325–26.

like the "Harvard" plan was constitutional under this approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.<sup>66</sup> Accordingly, the Brennan group concluded that there were also "five votes reversing the judgment below insofar as it prohibit[ed] the University from establishing race-conscious programs in the future."<sup>67</sup> Thus, whatever else one might say about the divergence in the Powell and Brennan group opinions, it is hard to avoid the obvious. In their own words, Justices Powell and Brennan believed there were five votes supporting a model like the Harvard Plan.

The Brennan group made an all too brief pass at describing our nation's "American Dilemma," that ever relevant, lingering conflict between the nation's creed of equality and practice of inequality.<sup>68</sup> So much more might have been said. For the Brennan group, extant societal discrimination against minorities was the rationale for President Kennedy's request that Congress enact Title VI, empowering the government "to cut off federal funds to programs that discriminate against Negroes."<sup>69</sup> The floor manager of Title VI in the House also made it clear that it was designed to "assure Negroes the benefits now accorded only white students in programs of high[er] education."<sup>70</sup> It was discrimination against African Americans in federally funded hospitals, in food distribution programs that gave surplus food to whites but refused it to African Americans, and in similar programs that Congress sought to reverse. The government had been complicit in funding segregation and in the exclusion of African Americans.<sup>71</sup> The Brennan group found the same rationale supporting the Senate's consideration of Title VI.<sup>72</sup> Again, the issue was discrimina-

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<sup>66</sup> *Id.* at 326 n.1.

<sup>67</sup> *Id.* at 326.

<sup>68</sup> According to the Brennan group:

Our Nation was founded on the principle that "all Men are created equal." Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antitheses: slavery. The consequences of this compromise are well known and have aptly been called our "American Dilemma."

*Id.*

<sup>69</sup> *Id.* at 329 (citing President John F. Kennedy, Address to Congress (June 19, 1963), in 109 CONG. REC. 11,161 (1963)).

<sup>70</sup> *Id.* at 330 (citing Rep. Emanuel Celler, Introduction of Title VI to Congress (Jan. 31, 1964), in 110 CONG. REC. 1519 (1964)).

<sup>71</sup> *Id.* at 331 ("It seems rather shocking . . . that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination . . . , on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination." (quoting Rep. Emanuel Celler, Introduction of Title VI to Congress (Feb. 3, 1964), in 110 CONG. REC. 2467 (1964))).

<sup>72</sup> *Id.* at 332-35 (explaining the Brennan group's rationale).

tion against African Americans on account of race. Senator Humphrey echoed comments made in the House:

Large sums of money are contributed by the United States each year for the construction, operation and maintenance of segregated schools.

....

Similarly, under the Hill-Burton Act, Federal grants are made to hospitals which admit whites only. . . .

In higher education also, a substantial part of the Federal grants to colleges, medical schools and so forth, in the South is still going to segregated institutions.

Nor is this all. In several States, agricultural extension services, supported by Federal funds, maintain racially segregated offices for Negroes and whites. . . .

. . . Vocational training courses, supported with Federal funds, are given in segregated schools and institutions and often limit Negroes to training in less skilled occupations. In particular localities it is reported that Negroes have been cut off from relief rolls, or denied surplus agricultural commodities, or otherwise deprived of the benefit of federally assisted programs, in retaliation for their participation in voter registration drives, sit-in demonstrations and the like.<sup>73</sup>

The Brennan group decided that the specific factual context for the adoption of Title VI made it improbable that Congress was announcing a rule of statutory color blindness.<sup>74</sup> Indeed, to the contrary, there is some evidence that racial criteria might be permissible in certain contexts, such as in the placement of children in adoptive or foster homes.<sup>75</sup>

The Brennan group also explained that the proponents of Title VI contemplated and approved the "need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by a federally funded institution," and that "race conscious action is not only permitted but required to accomplish the remedial objectives of Title VI."<sup>76</sup> The Brennan group concluded that whatever might be

<sup>73</sup> *Id.* at 334–35 (quoting Sen. Humphrey, Remarks to Congress (Mar. 30, 1964), in 110 CONG. REC. 6543–44 (1964)).

<sup>74</sup> *Id.* at 336.

<sup>75</sup> The Brennan group noted:

When Senator Johnston offered an amendment that would have expressly authorized federal grantees to take race into account in placing children in adoptive and foster care, Senator Pastore opposed the amendment . . . on the ground that federal administrators could be trusted to act reasonably and that there was no danger that they would prohibit the use of racial criteria under such circumstances.

*Id.* at 339.

<sup>76</sup> *Id.* at 344.

said about Title VI, voluntary race-conscious remedial action is permissible under it.<sup>77</sup>

The Brennan group's analysis of Title VI is instructive on how the Court might teach the nation about our legal history, about context and discrimination, and about how all uses or references to racial classifications are not the same. On Title VI, the Brennan group said so much more than it did about white supremacy, white superiority, and white privilege. Its analysis of those legal issues could have been as thorough as its analysis of Title VI.

One key difference between Justice Powell and the Brennan group was the view that societal discrimination was sufficient grounds for remedial affirmative action. As stated earlier, Justice Powell did not agree. He insisted that only identified, invidious discrimination was sufficient for the adoption of race-conscious remedies.<sup>78</sup> Justice Powell was unwilling to concede the causal link between societal discrimination and the failure of African Americans, Mexican Americans, and Native Americans to present more competitive applications.

Another key difference was the standard of review that the Brennan group would apply to race-conscious programs. Unlike Justice Powell, who insisted on applying strict scrutiny to all race-conscious policies, the Brennan group would only apply intermediate scrutiny to race-conscious policies that did not demean or insult persons because of their race.<sup>79</sup> The Brennan group explained that "racial classifications designed to further remedial purposes 'must serve important government objectives and must be substantially related to achievement of those objectives.'"<sup>80</sup> The Brennan group acknowledged that strict scrutiny was appropriate in fundamental rights and suspect classification cases, but it broke with Justice Powell on whether the Davis program employed a suspect class.<sup>81</sup> Instead, the Brennan group concluded that intermediate scrutiny should be applied.<sup>82</sup>

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<sup>77</sup> See *id.* at 353–55 (showing that Title VI allows voluntary race-conscious remedial action through the Department of Health, Education, and Welfare's regulations, which require affirmative measures be taken to overcome the effects of prior discrimination and authorize the voluntary undertaking of affirmative action programs where institutions have not been guilty of prior discrimination).

<sup>78</sup> Compare *id.* at 353 (showing the Brennan group's analysis), with *id.* at 296 n.36 (showing Justice Powell's analysis).

<sup>79</sup> See *id.* at 355–62 (explaining the application of intermediate scrutiny and the reasons for not applying strict scrutiny).

<sup>80</sup> *Id.* at 359 (citation omitted).

<sup>81</sup> See *id.* at 357 (analyzing suspect class status and determining that "whites as a class [do not] have any of the 'traditional indicia of suspectness'").

<sup>82</sup> See *id.* at 360–61 ("Thus, our review under the Fourteenth Amendment should be strict—not 'strict' in theory and fatal in fact, . . .—but strict and searching . . .").

More than contending that general strict scrutiny cases were inapposite,<sup>83</sup> the Brennan group sought to establish a second rationale for affirmative action. Like Justice Powell, the Brennan group agreed that in cases of invidious discrimination against individuals on account of race, remedial race-conscious remedies were constitutionally permissible.<sup>84</sup> "States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination."<sup>85</sup> Here, the Brennan group implicitly applied the anticaste principle. Government has the power to dismantle cumulative caste caused by past racial discrimination.

The Brennan group makes one more argument for remedial policies:

Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.<sup>86</sup>

The Brennan group was unwilling to fall into the narrow antidiscrimination theoretical trap. It understood that by law and custom, educating African Americans had been prohibited. It knew that slave laws, segregated schools, and massive resistance to equal educational opportunities were the rule and practice in the nation into the 1970s.<sup>87</sup> It did not assume that minority candidates to the medical school were inferior or unqualified. Instead, it believed that many had been denied equal educational opportunities growing up in the 1950s:

[T]he conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance to *Brown I*, or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination, and yet come to the starting line with an education equal to whites.<sup>88</sup>

The Brennan group recognized the patent unfairness in selecting admissions criteria that would exclude large numbers of persons who had been denied the chance to compete fairly because of past dis-

<sup>83</sup> See *id.* at 357 ("Unquestionably we have held that a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.")

<sup>84</sup> *Id.* at 366 n.42.

<sup>85</sup> *Id.* at 366.

<sup>86</sup> *Id.* at 369.

<sup>87</sup> See *id.* at 369–72 (surveying historical discrimination).

<sup>88</sup> *Id.* at 372 (citation omitted).

crimination. The Brennan group recognized racial caste, the uneven playing field, and sought to adopt an anticaste legal theory to dismantle it.

The Brennan group also pointed out the differences between programs that excluded all minorities from competing with whites—on a theory that minorities were inferior—and the Davis program's impact on Allan Bakke.<sup>89</sup> Davis did not establish an exclusive preserve for minority students, excluding all whites. Rather than advance segregation, Davis tried to bring the races together.<sup>90</sup> Furthermore, the Davis program did not stamp Allan Bakke as an inferior, second-class citizen because of his color.<sup>91</sup> Moreover, the Davis program did not stigmatize any minority group as inferior. Instead, it gave applicants, fully qualified to study medicine, a chance to do so, meeting the same degree requirements as other students under the same standards.<sup>92</sup>

The Brennan group did not disagree with Justice Powell that the Harvard Plan was constitutional. Rather, it believed there was no basis for preferring one preference program over the other simply because Harvard did not disclose exactly what weight it gave to race in any application.<sup>93</sup>

### C. *The White, Marshall, and Blackmun Separate Opinions*

Justice White expressed concern that the Court had assumed without full analysis that Title VI provides for a private cause of action. To the contrary, Justice White reasoned that since there was no express provision for private actions to enforce Title VI, and since Congress had so carefully addressed that issue in other titles of the 1964 Act, it was unlikely that Congress had intended by its silence to create a private cause of action to enforce Title VI.<sup>94</sup> Justice White found ample support for his view in the statements of legislators who played a large role in Title VI's passage.<sup>95</sup> Despite his difference of

<sup>89</sup> See *id.* at 374 (“[Davis’ program] does not . . . establish an exclusive preserve for minority students apart from and exclusive of whites.”).

<sup>90</sup> See *id.* (assessing the Davis program).

<sup>91</sup> See *id.* at 375 (examining the effect of the program on *Bakke*).

<sup>92</sup> See *id.* at 376 (expressing the purpose of affirmative action admissions programs).

<sup>93</sup> In comparing the Harvard and Davis programs, the Brennan group wrote:

That the Harvard approach does not also make public the extent of the preference and the precise working of the system while the Davis program employs a specific, openly stated number, does not condemn that latter . . . [T]here is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.”).

*Id.* at 379.

<sup>94</sup> *Id.* at 381 (examining the congressional intent regarding Title VI).

<sup>95</sup> See *id.* at 385–86 (noting that three legislators who were integral in Title VI’s passage acknowledged that no private right of action existed).

opinion, he joined the opinion of the Brennan group on the merits of the Title VI and equal protection questions.<sup>96</sup> Nothing in Justice White's opinion undermined his endorsement of Justice Powell's view that a university may consider race in its admissions process.

Justice Marshall wrote separately, concurring in the judgment of the Court that a university may consider the race of an applicant in making admissions decisions. He would not concede that the Davis program violated the Constitution.<sup>97</sup> Justice Marshall could not believe that "when a state acts to remedy the effects of that legacy of discrimination," the Constitution would stand as a barrier.<sup>98</sup>

Justice Marshall reminded his brethren of our nation's sordid racial history—how the Declaration of Independence's self-evident truths were intended to apply only to white men; how all colonists were implicated in the slave trade; how the protection of slavery was made explicit in the Constitution; how "we the people" in the Constitution did not include those whose skin was the wrong color; how slaves were property and slave owners had the constitutional protection of that property; and how African Americans were regarded as inferior and unfit to associate with whites, and had "no rights which the white man was bound to respect."<sup>99</sup> Even after the Civil War, slavery was replaced by a new system of legal inferiority that lasted for another century until the modern Civil Rights Acts were enacted between 1964 and 1968.<sup>100</sup>

Justice Marshall also admonished the Court for its role in extending the legal disabilities imposed on African Americans through a series of opinions invalidating Congressional Reconstruction.<sup>101</sup> The Court refused to do for African Americans what it had already done for whites—"secure and protect rights belonging to them as freemen and citizens; nothing more."<sup>102</sup> Rather, the Court affirmed that "colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."<sup>103</sup> Justice Marshall concluded that "[t]he position of the Negro today in Amer-

<sup>96</sup> See *id.* at 387 (finding that the question of whether a private right of action exists was tangential to the more vital issues of the merits of Title VI and equal protection).

<sup>97</sup> See *id.* (stating that the Davis program is constitutional and agreeing with the Court's affirmation of consideration of race when making admission decisions).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 387–90.

<sup>100</sup> See *id.* at 390 (noting that emancipation did not give African Americans equal rights in the American judicial system).

<sup>101</sup> See *id.* at 391–94 (listing and describing many of the Court's decisions limiting the legal rights of African Americans).

<sup>102</sup> *Id.* at 392 (quoting Justice Harlan's dissent in the *Civil Rights Cases*, 109 U.S. 3, 61 (1883)).

<sup>103</sup> *Id.* (quoting Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896)).



ica is the tragic but inevitable consequence of centuries of unequal treatment."<sup>104</sup> He continued:

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.<sup>105</sup>

Beyond recalling the nation's history, Justice Marshall reminded the Court that minorities would not lag behind whites had it not been for centuries of unequal opportunity and treatment. This thesis may be lost on some members of the Court, but was not lost on Justice Marshall. While other Justices lament those less qualified, especially favored minorities who undeservingly take spots away from innocent whites who never owned slaves, Justice Marshall condemned a nation that would relegate some citizens to second-class status because of the color of their skin. Absent unequal treatment, Justice Marshall was confident that the disfavored status of African Americans and their exclusion from the American mainstream could be reversed.<sup>106</sup> Justice Marshall concluded that it was beyond dispute that race-conscious remedial measures were constitutional and consistent with the spirit of the Fourteenth Amendment.

It "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color," to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.<sup>107</sup>

Most narrowly, Justice Marshall agreed with Justice Powell that a university may consider race in its admissions process.<sup>108</sup> Yet he advocated for more, for a broader endorsement of race-conscious remedial affirmative action. He wanted the Court to get out of the way and let Davis open opportunities to minorities to go to medical school.<sup>109</sup>

Justice Blackmun participated fully in the joint opinion of the Brennan group. After expressing his hope that the time would come when an affirmative action program would be unnecessary,<sup>110</sup> he

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<sup>104</sup> *Id.* at 395.

<sup>105</sup> *Id.* at 396.

<sup>106</sup> *See id.* (asserting strongly that the history of unequal treatment of African Americans could be reversed).

<sup>107</sup> *Id.* at 398 (citation omitted). Justice Marshall's opinion is especially salient regarding what position people of color would hold absent discrimination. He asserts fully that any honest remedy would result in the elevation of people of color in educational attainment.

<sup>108</sup> *Id.* at 400.

<sup>109</sup> *See id.* at 402 (noting that the Court has come "full circle" in its rulings on African Americans and affirmative action).

<sup>110</sup> *See id.* at 403 (stating that any hope of leaving affirmative action behind is a "slim one").

noted that such time had not yet come. He too disagreed with Justice Powell that there was a constitutional difference between the Davis Plan and the Harvard Plan, even though he conceded that the Harvard Plan was better formulated.<sup>111</sup> Justice Blackmun thought it was ironic that government preferences had been so extensively employed—for veterans, for persons with disabilities, in income taxes, in Native American programs, by geography, for athletic ability, for children of alumni, for the affluent, for the famous, and for powerful people.<sup>112</sup> And Justice Blackmun was convinced that race consciousness was still necessary:

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.<sup>113</sup>

In the end, Justice Blackmun echoed Justice Powell, supporting the constitutionality of an academic institution's consideration of race or ethnicity as one factor among many, in the administration of its admissions program.<sup>114</sup> Like Justice Marshall, he sought to use affirmative action to dismantle racial caste and end racial supremacy.

#### *D. The Stevens Joint Opinion*

Ironically, the sharpest disagreement was set out in Justice Stevens's opinion.<sup>115</sup> Justice Stevens immediately disputed that the Brennan group could announce the "central meaning" of the Court, since it comprised only four Justices.<sup>116</sup> More importantly, the Stevens group narrowed the issues for decision based on Court practice "to avoid the decision of a constitutional issue if one can be fairly decided on a statutory ground."<sup>117</sup> Thus, for the Stevens group, the sin-

<sup>111</sup> *See id.* at 406 (stating that the difference between the two plans is not "constitutionally significant").

<sup>112</sup> *See id.* at 404–06 (describing the various preferences that the government has given to certain groups).

<sup>113</sup> *Id.* at 407.

<sup>114</sup> *Id.* at 406–07.

<sup>115</sup> Today, Justice Stevens is one of the Court's most reliable defenders of remedial affirmative action. He has perhaps traveled the farthest to conclude that government has an affirmative duty to dismantle racial caste.

<sup>116</sup> *See id.* at 408 n.1 (noting that less than a majority could not find a "central meaning").

<sup>117</sup> *Id.* at 411.

gle issue for decision was whether Davis's special admission program violated the provisions of Title VI of the 1964 Civil Rights Act.<sup>118</sup>

For Justice Stevens, it was obvious that Congress intended Title VI to prohibit all race discrimination, including reverse discrimination and affirmative action policies employing race. It was a "prohibition against the exclusion of *any* individual from a federally funded program 'on the ground of race.'"<sup>119</sup> Justice Stevens rejected the view that Title VI did not apply unless the exclusion carried with it racial stigma.<sup>120</sup> Referencing the same comments from congressional debates, Justice Stevens concluded that indeed Title VI did require color-blindness.<sup>121</sup>

Here, the Stevens group discounted the historical context, stating that even though Congress was not concerned with affirmative action when it adopted Title VI, Congress enacted a broad solution that would prohibit reverse discrimination under the principle of color blindness. Race was an improper basis for excluding anyone from participation in a federally funded program.<sup>122</sup>

For the Stevens group, any use of race by a federally funded program violated Title VI.<sup>123</sup> Moreover, Justice Stevens concluded that the university could not question the availability of a private cause of action for the first time before the Supreme Court,<sup>124</sup> concluding the issue was not properly before the Court. Nonetheless, the Stevens group believed such a private right of action did exist.<sup>125</sup> Justice Stevens held that the special admissions program violated Title VI and affirmed the order admitting Bakke to the university. Justice Stevens dissented from the Court's judgment purporting to do anything else.

<sup>118</sup> See *id.* at 421 (finding Title VI of the 1964 Civil Rights Act to be the basis for concluding that the program was unlawful).

<sup>119</sup> *Id.* at 413.

<sup>120</sup> *Id.* at 414.

<sup>121</sup> See *id.* at 414–16 (finding that Congress intended Title VI to be colorblind).

<sup>122</sup> *Id.* at 418. The Stevens group made one analytical mistake when it concluded that Congress was not directly concerned with the legality of affirmative action when it enacted Title VI. Stevens never asked or defined policies that gave whites preferences in admissions. Were not policies excluding minorities from federally funded programs forms of affirmative action for whites? If so, the effect of the Justice Stevens's opinion was to rule that Title VI prohibited the remedial policies designed to eliminate preferences for whites. However, the Stevens group never admitted that preferences for whites constituted affirmative action. Had they done so, the unavoidable question for those justices would have been whether Title VI prohibits race-conscious remedies by federally funded programs seeking to eliminate the lingering effects of historical preferences for whites.

<sup>123</sup> See *id.* (stating that the "meaning of the Title VI ban on exclusion is crystal clear").

<sup>124</sup> See *id.* at 419 (finding conclusively that litigants are afforded a private right of action under Title VI).

<sup>125</sup> See *id.* at 419–21 (holding that "a private action may be maintained under Title VI").

In *Bakke's* wake, federal courts split sharply over its meaning, common rationale, and precedential effect.<sup>126</sup>

### III. CONSTITUTIONALIZING CASTE IN HIGHER EDUCATION

Given the judicial and academic metanarratives that transformed the conventional understanding of *Bakke*, there is reason to ask if *Grutter* might undergo a similar metamorphosis. Consider that, as with *Bakke*, in *Grutter* there are six different opinions, including concurrences, partial concurrences and dissents, and dissents. Under *Marks*, what is the holding in *Grutter* and what are its governing legal principles? Do five justices assent to a single rationale explaining the result? Will *Grutter* baffle the circuits as *Bakke* apparently did? To answer these questions, we must examine *Grutter* closely, especially Justice O'Connor's opinion for the Court.

#### A. The O'Connor Opinion

In *Grutter*, the Court decided whether the use of race as a factor in student admissions by the University of Michigan Law School ("Michigan") was unlawful.<sup>127</sup> Five members of the Court agreed that

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<sup>126</sup> E.g., *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (citing varying opinions in the fifth, ninth, and eleventh circuits). Those schools that adopted post-*Bakke* diversity plans, which were the targets of numerous lawsuits, waited anxiously for clarification from the Supreme Court. It remains to be seen whether *Grutter* resolves the split among the circuits over the constitutionality of diversity admissions plans. I am skeptically optimistic.

<sup>127</sup> Barbara Grutter, a white Michigan resident, applied to the Law School with a 3.8 GPA and a 161 LSAT score. She was initially placed on the wait list, but then rejected. She filed suit in federal court alleging that various university and law school officials had discriminated against her on the basis of her race in violation of constitutional and statutory provisions, including the Fourteenth Amendment, Title VI, and 42 U.S.C. § 1981. Grutter further alleged that her application was rejected because the Law School used race as a predominant factor in admissions, giving applicants who belong to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups. Grutter argued that the Law School had no compelling interest to justify using race in the admissions process. *Id.* at 316–17.

After an extensive bench trial, the federal district court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. The court determined that the Law School's asserted interest in assembling a diverse student body was not compelling because the attainment of a racially diverse class was not recognized as such by *Bakke* and is not a remedy for past discrimination. The court held that even if achieving diversity was compelling, the Law School's policy was not narrowly tailored to further its compelling interest. The court enjoined the Law School's use of race in the admissions process. *Id.* at 321.

The federal court of appeals, sitting *en banc*, reversed the district court and vacated the injunction. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). The appellate court held that Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest. *Id.* at 744–46. Justice Powell's opinion with respect to diversity comprised the controlling rationale for the judgment of the circuit court under the analysis set forth in *Marks v. United States*, 430 U.S. 188 (1977). The court of appeals held that the Law School's use of race was narrowly tailored because race was mainly a potential "plus" factor and because the Law

Michigan's policy was lawful, endorsing Justice Powell's view that student body diversity is a compelling interest that can justify the use of race in admissions.<sup>128</sup>

According to Justice O'Connor, the Law School sought to ensure that its efforts to achieve student body diversity complied with *Bakke*.<sup>129</sup> Justice O'Connor described the key features of the Law School's admissions policy:

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential to contribute to the learning around them. The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, the admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. The policy stresses that no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond the grades and test scores to other criteria that are important to the Law School's educational objectives. . . .

The policy aspires to achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts. The policy does not restrict the types of diversity contributions eligible for substantial weight in the admissions process, but instead recognizes many possible bases for diversity admissions. The policy does, however, reaffirm the Law School's longstanding commitment to one particular type of diversity, that is, racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics, and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers. . . .

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School's program was virtually identical to the Harvard admissions program described approvingly by Justice Powell. *Grutter*, 288 F.3d at 745-46. Four dissenting judges held either that the Law School's use of race was not compelling or that it was not narrowly tailored. *Id.* at 773-818.

The Supreme Court granted *certiorari* to resolve the split among the courts of appeals on the question of whether 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 327 ("[W]e turn to the question whether the Law School's use of race is justified by a compelling state interest.").

<sup>128</sup> *Grutter*, 539 U.S. at 315-16.

<sup>129</sup> *Id.*

The policy does not define diversity solely in terms of racial or ethnic status.<sup>130</sup>

Justice O'Connor began her legal analysis by reviewing established equal protection principles.<sup>131</sup> First, every racial classification should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection has not been infringed. "[G]overnment may treat people differently because of their race only for the most compelling reasons."<sup>132</sup> Racial classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "We apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."<sup>133</sup>

As for the meaning of strict scrutiny, Justice O'Connor made several significant observations:

Strict scrutiny is not "strict in theory, but fatal in fact." Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . .

Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . "[I]n dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts." . . . Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.<sup>134</sup>

Justice O'Connor's legacy on the Court will be her attempt at clarifying these legal standards, especially the relevance of context when evaluating racial classifications.

In light of the above principles, Justice O'Connor considered whether Michigan's use of race was justified by a compelling state interest and whether its admissions policy was narrowly tailored to achieving that interest. Michigan argued that its compelling interest was obtaining "the educational benefits that flow from a diverse stu-

<sup>130</sup> *Id.* (citations and internal quotation marks omitted).

<sup>131</sup> *Id.* at 321 (examining Justice Powell's reasoning in *Bakke* and comparing it with other relevant cases such as *Marks v. United States*, 430 U.S. 188 (1977)).

<sup>132</sup> *Id.* at 326 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

<sup>133</sup> *Id.* (alteration in original and internal quotation marks omitted) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

<sup>134</sup> *Id.* at 326-27 (citations omitted).

dent body.”<sup>135</sup> Justice O’Connor dispelled the notion that remedying past discrimination is the only permissible justification for race-based governmental action.<sup>136</sup>

Justice O’Connor made it clear: “Today, we hold that the Law School has a compelling interest in attaining a diverse student body.”<sup>137</sup> She explained that the Law School’s educational judgment that such diversity is essential to its educational mission is one to which the Court should defer. Justice O’Connor recalled Justice Powell’s reasoning:

“The freedom of a university to make its own judgments as to education includes the selection of its student body.” From this premise, Justice Powell reasoned that by claiming “the right to select those students who will contribute the most to the ‘robust exchange of ideas,’” a university “seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.”<sup>138</sup>

Justice O’Connor explained that in the view of the majority “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 the university is ‘presumed’ absent ‘a showing to the contrary.’”<sup>139</sup> Likewise, Justice O’Connor endorsed the Law School’s aspiration to enroll a critical mass of minority students.<sup>140</sup> She distinguished what the Law School sought to achieve through the educational benefits of diversity from a program of outright racial balancing which she said was patently unconstitutional.<sup>141</sup>

Justice O’Connor also elaborated on the educational benefits that a diverse student body is designed to produce. One benefit is cross-racial understanding. Another is breaking down racial stereotypes. A third is helping students to better understand persons of different races. The Law School argued that these benefits would make classroom discussions livelier, more spirited, and more enlightening.<sup>142</sup>

Additionally, the Court was persuaded by *amici* that student body diversity better prepares students for an increasingly diverse work-

<sup>135</sup> *Id.* at 328.

<sup>136</sup> *Id.* (“But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education.”).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 329 (alteration in original) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978)).

<sup>139</sup> *Id.*

<sup>140</sup> *See id.* at 328 (holding that the Law School has a compelling state interest in attaining a diverse student body).

<sup>141</sup> *See id.* at 330 (“Racial balance is not to be achieved for its own sake.” (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992))).

<sup>142</sup> *Id.*

force.<sup>143</sup> Moreover, military officers and civilian leaders have asserted that a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principal mission to provide national security.”<sup>144</sup> Justice O’Connor also made it clear that higher education should be open to talented and qualified individuals of every race.<sup>145</sup>

After agreeing that Michigan had asserted a compelling state interest, Justice O’Connor then turned to whether the Law School’s policy was narrowly tailored.<sup>146</sup> “The purpose of the narrow tailoring requirement is to ensure that ‘the means chosen “fit” [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.’”<sup>147</sup> Justice O’Connor rejected Justice Kennedy’s assertions that the majority had abandoned strict scrutiny. To the contrary, Justice O’Connor said “[the majority] adhere to *Adarand*’s teaching that the very purpose of strict scrutiny is to take such ‘relevant differences into account.’”<sup>148</sup>

Justice O’Connor concluded that Michigan’s admissions program was narrowly tailored. She wrote:

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.” Instead, a university may consider race or ethnicity only as a “‘plus’ in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” In other words, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to them on the same footing for consideration, although not necessarily according them the same weight.”<sup>149</sup>

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 331 (omission in original) (quoting Brief for Julius W. Becton, Jr. et al.).

<sup>145</sup> *Id.* (“[T]he diffusion of knowledge and opportunity through public institutions of higher learning must be accessible to all individuals regardless of race or ethnicity.”).

All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide their training. As we have recognized, law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.” 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 training and education necessary to succeed in America.

*Id.* at 332–33 (citation omitted).

<sup>146</sup> *Id.* at 333 (“[T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” (alterations in original) (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996))).

<sup>147</sup> *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

<sup>148</sup> *Id.* at 334 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995)).

<sup>149</sup> *Id.* (alterations in original) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315, 317 (1978)).



Justice O'Connor found that the Michigan plan did not operate as a quota.<sup>150</sup> She wrote that "[s]ome attention to numbers" did not "transform the flexible [Michigan] admissions system into a rigid quota."<sup>151</sup> Additionally, Justice O'Connor found that the Law School engaged in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.

The Law School affords this individualized consideration to applicants of all races. . . . Unlike the program at issue in *Gratz v. Bollinger*, *post*, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."<sup>152</sup>

Justice O'Connor also found that the Law School's plan adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. The majority noted that if the Law School did not consider individual experiences, fewer underrepresented minorities would likely enroll. All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a "personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School."<sup>153</sup>

Justice O'Connor underscored how the Law School gave substantial weight to diversity factors besides race. "The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected."<sup>154</sup> This proved to Justice O'Connor that the Law School "weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well."<sup>155</sup>

Next, Justice O'Connor explained that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative. . . . [It] does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."<sup>156</sup> Justice O'Connor concluded that the Law School

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<sup>150</sup> *Id.* at 335.

<sup>151</sup> *Id.* at 336.

<sup>152</sup> *Id.* at 337 (citations omitted) (quoting *Bakke*, 438 U.S. at 317).

<sup>153</sup> *Id.* at 315.

<sup>154</sup> *Id.* at 338.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 339.

did not have to adopt policies that would diminish its ability to achieve diversity and academic selectivity.<sup>157</sup>

Justice O'Connor acknowledged that there are serious problems of justice connected with the idea of a preference itself. Therefore, she wrote, narrow tailoring "requires that a race-conscious admissions program not unduly harm members of any racial group."<sup>158</sup> Justice O'Connor concluded that the Michigan plan did not "unduly burden individuals who are not members of the favored racial or ethnic groups."<sup>159</sup> "Because the Law School considers 'all pertinent elements of diversity,' it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over under-represented minority applicants."<sup>160</sup> The majority concluded that the Michigan plan did not unduly harm nonminority applicants.<sup>161</sup>

Finally, Justice O'Connor noted that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."<sup>162</sup> Because of the "core purpose," the majority concluded that race-conscious admissions policies must be limited in time. "This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands."<sup>163</sup> Here, the Court said that race-conscious admissions policies must have durational requirements. "In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."<sup>164</sup> This requirement, according to the majority, "assures all citizens that the deviation from the norm of equal

<sup>157</sup> See *id.* at 340 ("We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.").

<sup>158</sup> *Id.* at 341.

<sup>159</sup> *Id.* (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

<sup>160</sup> *Id.* (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)).

<sup>161</sup> See *id.* ("We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.").

<sup>162</sup> *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). This final observation seems to undermine much of Justice O'Connor's analysis. The present analysis recalls the colorblindness principle, but one wonders if it has any application to a university admissions program that seeks the educational benefits of a diverse student body, with a critical mass of under-represented minority students who can enliven and enrich discussions alongside diverse non-minority students.

<sup>163</sup> *Id.* at 342.

<sup>164</sup> *Id.*

treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."<sup>165</sup>

### B. *The Ginsburg Concurrence*

Justices Ginsburg and Breyer concurred in the opinion and judgment of the Court, bringing the number to five Justices who joined the judgment that the Equal Protection Clause does not prohibit Michigan Law School's plan to attain the educational benefits that flow from a diverse student body.<sup>166</sup> Justices Ginsburg and Breyer added two further observations. First, they explained that a limitation on the duration of racial preferences was consistent with international norms.<sup>167</sup> Second, they explained that the United States has yet to eliminate significant disparities in the educational opportunities of many Americans, and thus "it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities."<sup>168</sup> They cautioned that "[f]rom today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."<sup>169</sup>

### C. *Justice Scalia's Dissent*

Justice Scalia joined the dissenting opinion of Chief Justice Rehnquist and Parts I-VII of Justice Thomas's opinion. He likened the Michigan program to "a sham to cover a scheme of racially proportionate admissions"<sup>170</sup> and he rejected the majority's view that the Law School had a compelling interest to attain the educational benefits of diversity.<sup>171</sup>

More importantly, Justice Scalia concluded that the "*Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation."<sup>172</sup> He then sketched the scope of potential future claims:

Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant "as an

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<sup>165</sup> *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989)). This part of Justice O'Connor's opinion will invite additional attacks on diversity admissions because it is unclear whether sunset provisions are a constitutional requirement, and, if so, how long is too long.

<sup>166</sup> *Id.* at 344.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 346.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 347.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 348.

individual" and sufficiently avoids "separate admissions tracks" to fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a "good faith effort" and has so zealously pursued its "critical mass" as to make it an unconstitutional de facto quota system, rather than merely "a permissible goal." Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. . . . Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. . . . And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass."<sup>173</sup>

For Justice Scalia, Michigan Law School's plan was unconstitutional.

#### D. Justice Thomas's Opinion

Justice Thomas concurred in part, but dissented from the remainder of the Court's opinion and the judgment of the Court, believing that Michigan's current plan violates the Equal Protection Clause.<sup>174</sup> Justice Thomas explained that "[r]acial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy."<sup>175</sup>

Justice Thomas agreed with the Court "insofar as its decision, which approves of only one racial classification, confirms that further use of race in admissions remains unlawful."<sup>176</sup> Justice Thomas also concurred in the Court's holding that racial discrimination in higher education admissions would be illegal in twenty-five years.<sup>177</sup>

<sup>173</sup> *Id.* at 348–49 (citations omitted).

<sup>174</sup> *Id.* at 351.

<sup>175</sup> *Id.* at 350. Justice Thomas wrote:

Similarly, a university may not maintain a high admission standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

*Id.*

<sup>176</sup> *Id.* at 350–51. Certainly, a future question is whether the majority intended this construction. Read broadly, the *Grutter* majority implies that the university might use race in other aspects of admissions to attain the educational benefits of diversity. For example, a university might use race as one diversity factor in awarding scholarships to individuals.

<sup>177</sup> *Id.* at 351. Again, one can expect future disputes over whether the majority declared what Justice Thomas asserts. Justice O'Connor wrote, "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. And Justice Ginsburg wrote, "From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Id.* at 346. These statements seem incongruent with Thomas's statement.

In his dissent, Justice Thomas explained that there was no "pressing public necessity" or compelling interest at issue in *Grutter*.<sup>178</sup> He argued that "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity.'"<sup>179</sup> Justice Thomas questioned whether the Law School's interest in educational benefits or in diverse students could meet constitutional requirements, concluding that neither part of the Law School's state interest was of pressing public necessity.<sup>180</sup> Justice Thomas criticized the proposition, supported by Justice Powell and the *Grutter* majority, that racial discrimination could be contextualized.<sup>181</sup>

Justice Thomas also wrote that Michigan had "no compelling interest in having a law school at all, much less an *elite* one."<sup>182</sup> Additionally, Justice Thomas rejected the concept that Michigan had any cognizable state interests beyond the education of the state's citizens and the training of the state's lawyers.<sup>183</sup> Since most graduates of the Law School leave the state, Justice Thomas concluded the state interest was illusory.<sup>184</sup> Additionally, Justice Thomas wrote that a marginal improvement in legal education could not justify racial discrimination.<sup>185</sup> Instead, "the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways."<sup>186</sup>

Justice Thomas wrote that the majority made a series of errors. First, under strict scrutiny, the Law School was not entitled to any deference.<sup>187</sup> Second, Justice Thomas was persuaded that other top law schools had accomplished their goals without racial discrimination.<sup>188</sup> Justice Thomas was dissatisfied that the Court had not fully explained why the equal protection inquiry should be relaxed, finding no support for that conclusion in the Constitution or decisions of the Court. Moreover, he cautioned that adherence to the view that there are educational benefits to diversity would have "serious collateral consequences," namely, racial segregation.<sup>189</sup>

<sup>178</sup> *Id.* at 351 (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

<sup>179</sup> *Id.* at 353.

<sup>180</sup> *Id.* at 354–56.

<sup>181</sup> *Id.* at 357.

<sup>182</sup> *Id.* at 358.

<sup>183</sup> *Id.* at 359.

<sup>184</sup> *Id.* at 360.

<sup>185</sup> *Id.* at 361.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* (using phrases like "racial tinkering" and "racial experimentation," Justice Thomas rejected the majority's endorsement of the Michigan Plan).

<sup>188</sup> *Id.* at 362.

<sup>189</sup> *Id.* at 364.

Justice Thomas decried the many devices used by universities to poison what might be a system of admissions based on merit, but he explained he was unwilling to “twist the Constitution” to “prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures.”<sup>190</sup> Justice Thomas’s alternative would have law schools like Michigan abandon their use of the LSAT or lower admissions standards for all applicants.<sup>191</sup>

Justice Thomas not only argued that the majority in *Grutter* abandon settled principles;<sup>192</sup> he then explained how overmatched and underperforming these specially admitted students are at elite schools: “The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.”<sup>193</sup>

Justice Thomas believed that the majority had not relied on principle to support the Law School’s plan and concluded that “[t]he Equal Protection Clause commands the elimination of racial barriers,

<sup>190</sup> *Id.* at 368. While Justice Thomas is clearly opposed to the *Grutter* plan, much goes unsaid. Justice Thomas presumes the race-neutrality of legacy preferences, ignoring that in many, if not most, instances legacy preferences go to privileged persons in the society, whose parents, grandparents, and so on, were the right race, gender, religion, or class. He does not explain why the Equal Protection Clause is so constrained that it cannot dismantle other forms of caste and privilege. For this author, it is inexplicable and unacceptable that educational programs at major universities in the United States are open only to a handful of nonwhites.

<sup>191</sup> *Id.* at 370–71. While I agree with Justice Thomas that the LSAT is an imperfect benchmark for admission to law school, I would put even a finer point on it. Like other standardized tests, the LSAT appears to measure how well a person reads and comprehends text. Those skills are certainly important to educational success. Yet, such tests do not measure a student’s compassion for others, drive, determination, character, work ethic, or other attributes that may tell us more about how a person will perform. That someone takes standardized tests well says nothing of the person’s commitment to hard work, ethics, or public service.

Yet, I do not believe that any race-blind system of admissions will produce educational integration in the United States. I agree with those who seek to distinguish invidious racial discrimination from policies that promote *opportunities* for all.

<sup>192</sup> *Id.* at 371 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995), for the dual propositions that racial classifications are *per se* harmful and that they may not be used to cure societal ills).

<sup>193</sup> *Id.* at 372. Here, Justice Thomas writes passionately about unfairness and stigma. Yet it is difficult to resist asking where Justice Thomas places himself. Was he one of those overmatched minority students, unprepared for the competition, or was he one of the underrepresented minorities who was prepared and deserving of his Yale education and thus unfairly stigmatized by the admission of less qualified minorities? Moreover, his comments seem contrary to earlier remarks about the imperfections of the LSAT. It is unclear how Justice Thomas would decide who is qualified. And, of course, Justice Thomas says nothing about average, underperforming whites who pack elite law schools. The fact is, few Americans are exceptional and many are average. And sometimes average Americans are appointed to judgeships or even elected President of the United States. I wonder if Justice Thomas thinks George Bush was overmatched at Yale and Harvard Business School? Without more, it is difficult to take seriously Justice Thomas’s critique. I cannot imagine that Justice Thomas would relegate so many Americans to less “elite” schools in the name of equality.

not their creation in order to satisfy our theory as to how society ought to be organized."<sup>194</sup>

### *E. Chief Justice Rehnquist's Dissenting Opinion*

Chief Justice Rehnquist agreed with the majority that the appropriate standard of review in *Grutter* was strict scrutiny but was unpersuaded that the Michigan Law School's policies were narrowly tailored to achieve its asserted interest.<sup>195</sup> Chief Justice Rehnquist's critique is sharp. He wrote: "Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing."<sup>196</sup> He attacked the inconsistent meaning of "critical mass" based on huge differentials in the numbers of Native Americans, Hispanic Americans, and African Americans admitted between 1995 and 2000, noting that the Law School does not explain why so few Hispanic Americans (47 to 50) or Native Americans (13 to 19) constitute critical mass versus African Americans (91 to 108).<sup>197</sup> Rehnquist asserted that because the Law School treats underrepresented minorities differently, its critical mass goal is a "sham."<sup>198</sup>

Additionally, he alleged that

the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers."<sup>199</sup>

Rehnquist wrote that the "tight correlation between the percentage of applicants and admittees of a given race . . . must result from careful race based planning by the Law School."<sup>200</sup> Chief Justice Rehnquist reminded the majority that it called programs seeking racial balance "patently unconstitutional."<sup>201</sup> Finally, the Chief Justice insisted that the Law School's program failed strict scrutiny because it

<sup>194</sup> *Id.* at 374 (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting)).

<sup>195</sup> *Id.* at 379.

<sup>196</sup> *Id.* This conclusion seems contrary to the language in the majority opinion. Justice O'Connor found that one aspect of the Law School's goal of attaining the educational benefits of diversity was to enroll a "critical mass" of underrepresented minority students. This conclusion in the dissent is another front for future challenges and perhaps another salvo in the forthcoming assault on *Grutter*.

<sup>197</sup> *Id.* at 381.

<sup>198</sup> *Id.* at 383.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 385.

<sup>201</sup> *Id.* at 386.

was “devoid of any reasonably precise time limit on the Law School’s use of race in admissions.”<sup>202</sup>

#### F. Justice Kennedy’s Dissent

Justice Kennedy agreed with the majority that Justice Powell in *Bakke* stated the correct rule for resolving the issues in *Grutter*.<sup>203</sup> However, he argued that the majority misapplied the strict scrutiny standard and thus undermined Court precedent and strict scrutiny.<sup>204</sup>

Justice Kennedy believed that eighty to eighty-five percent of places in the entering class at Michigan Law School were given to applicants in the upper range of the LSAT and grade profiles.<sup>205</sup> He suspected that beyond the first group, race was likely “outcome determinative for many members of minority groups.”<sup>206</sup>

Justice Kennedy was not satisfied that the Law School had met its burden of proving that it had not utilized race in an unconstitutional way.<sup>207</sup> He believed the Law School failed to conduct individual reviews of applications at the late stages save for race as a predominant factor and the Law School’s numerical critical mass goals.<sup>208</sup> Because individual assessment was not safeguarded through the entire process and because race was a predominant factor in Michigan’s admissions process, Justice Kennedy concluded it was unconstitutional.<sup>209</sup> Although Justice Kennedy reiterated his approval of giving appropriate consideration of race in this one context, he dissented in *Grutter* because he thought the Court had been too deferential, had improperly applied strict scrutiny, and had not been faithful to Justice Powell’s opinion in *Bakke*.<sup>210</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 387.

<sup>204</sup> *Id.* at 388.

<sup>205</sup> *Id.* at 389.

<sup>206</sup> *Id.* Justice Kennedy used statistics to imply that the Michigan Law School was engaged in racial balancing.

<sup>207</sup> *Id.* at 391.

<sup>208</sup> *Id.* at 392.

<sup>209</sup> *Id.* at 392–93. Interestingly, Justice Kennedy made clear that “there is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity.” *Id.*

<sup>210</sup> *Id.* at 395.



IV. DECONSTRUCTING *GRUTTER*A. *The Empty Idea of Equality*

In *Grutter*, the Court employed a jurisprudential paradigm that appears on a collision course with itself. Justice O'Connor opined on the significant benefits of educational diversity, so substantial that the government interest meets the most exacting scrutiny by a majority of the Court. Then, Justice O'Connor explained that taking account of race at all violates core equal protection values and therefore must be limited in scope and time. However, Justice O'Connor failed to cabin her limiting theory to invidiousness or to the "smoke out" rationale she has regularly cited for distinguishing between illegitimate and legitimate uses of racial classifications. If context truly matters, Justice O'Connor does not explain how achieving the educational benefits of diversity could *ever* be invidious. Achieving those benefits should never be illegitimate. It should never violate equal protection.

When government seeks to reduce educational caste, it violates no constitutional interests of any individual because no person has the right to compel the government to maintain educational caste. Indeed, the better rule is that government has an affirmative duty to dismantle educational caste.

Fifty years ago, the Court held in *Brown v. Board of Education*<sup>211</sup> that segregation in public schools was inherently unconstitutional. It ruled that school officials had an affirmative duty to dismantle all vestiges of segregation.<sup>212</sup> And, the Court has said repeatedly: "[A desegregation remedy] is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."<sup>213</sup>

In some ways *Grutter* raises more questions than it answers. Can school officials seek educational diversity only after demonstrating a history of past discrimination? Or, is achieving educational diversity always a state interest of the highest order? What can universities do to enroll a diverse group of students, given existing test score disparities? How much race-consciousness is too much? Does the government have an affirmative duty to dismantle educational caste resulting from its policies? Must government officials restore victims of educational caste to the positions they would have occupied in the absence of educational caste? Will educational diversity policies sur-

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<sup>211</sup> 347 U.S. 483, 495 (1954).

<sup>212</sup> See *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968) (holding that school boards are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

<sup>213</sup> *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

vive strict scrutiny in twenty-five years? Because the Court did not provide answers to most of these questions, one can anticipate more challenges and more sharply divided opinions.

I have explained more fully elsewhere why there will be no real winners after *Grutter*.<sup>214</sup> The Court does not mandate that more minority students must be enrolled at the nation's flagship schools. The Court does not declare that the disproportionate educational advantages that whites receive at the top public schools are unconstitutional. The Court renders most white educational privilege invisible and protected from legal reform. The Court ignores extant educational caste, offers no solution to cumulative educational caste caused by federal, state, and local policies, and provides no remedy to victims of discriminatory caste. The Court does not restore people of color to the position they would have occupied in the absence of discriminatory policies.

*Grutter* maintains the status quo primarily benefiting whites, and rests on an empty idea of equality. It accomplishes no substantive improvement in the elimination of educational caste. It does not open the schoolhouse door. *Grutter* treats all racial classifications as presumptively invidious, even those designed to restore people of color to the position they would have occupied absent so much discrimination favoring whites. Such reasoning renders most remedial strategies or policies unconstitutional.

### B. Taking Educational Caste Seriously

Nearly 135 years ago, Charles Sumner said that his chief goal in sponsoring the Fourteenth Amendment was to eliminate black caste.<sup>215</sup> He thought educational caste in Boston public schools was reprehensible and unconstitutional.<sup>216</sup> He opposed government poli-

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<sup>214</sup> See Fair, *supra* note 6, at 1859–60 (arguing that minorities are not winners when few get into elite schools, that white victimhood is illegitimate, that the Court has avoided discussing educational theft and white privilege, and finally, that few judges recognize the existence of educational caste).

The plaintiffs may prevail, but they cannot win a claim grounded on a theory of white entitlement. Likewise, neither the university nor the student intervenors can win in defense of a policy that allows only a handful of nonwhites to enroll at one of the nation's premier law schools. And, the court itself cannot win institutionally as the arbiter of a decision that affirms white supremacy and caste in the United States.

Bryan K. Fair, *No Matter Ruling, Victory Will Elude All in Cases on Affirmative Action*, B'HAM NEWS, June 22, 2003, at 1C.

<sup>215</sup> See Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381, 384 (1999) (“[O]ne could read the Fourteenth Amendment equality principle through the same lens as some of its Nineteenth century proponents, locating an unmistakable anticaste meaning, elegantly and eloquently championed . . . by . . . Charles Sumner, who challenged the black caste unequivocally.”).

<sup>216</sup> See *id.* at 390 (“In our public schools is the place to commence to break down caste.”).

cies advancing white supremacy.<sup>217</sup> Unfortunately, the Court has not fully embraced the anticaste moorings of the Fourteenth Amendment.

*Brown* was a first and important step, declaring that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."<sup>218</sup> Since *Brown*, the Court has regularly gone backward, restricting its mandate and remedy. The Court has never measured the full constitutional violation, nor has it articulated a full remedy for it. The Court has not taken educational caste seriously. It has not taken the rights of citizens of color seriously. It has not taken educational theft seriously. Indeed, it has not taken its *duty* to lift children of color out of educational caste seriously.

*Grutter* is the latest in a long line of cases indicating that the Court has abandoned the children that *Brown* promised equal protection of the law. *Grutter* illustrates an important rhetorical tradition of the Court, appearing to give so much but *delivering* very little. *Brown* was a mandate to eliminate dual educational systems, a superior one for whites and an inferior one for people of color. It held that segregation placed children of color in a racial caste.<sup>219</sup>

In *Grutter*, the Court does not lay bare continuing caste. It does not apply *Brown's* anticaste principle. The Court discusses context in the most limited manner, constraining what government might otherwise do to expand effective educational opportunities. The Court does not explain how promoting educational diversity could ever violate the Constitution.

## CONCLUSION

*Grutter* is no cure. Even if it opens the door slightly to some remedial policies, it is not likely to last or make much difference. *Grutter* will likely take a beating similar to the one that shackled *Bakke*. Also, school officials that refused to get on the *Bakke* train are just as likely to reject the conservative benefits of *Grutter*.

The Court needs to take itself more seriously. It needs to do the hard work of explaining the difference between policies that promote racial caste and ones that seek to eliminate it. The anticaste principle is the most coherent way up from caste. It has clear moorings in the Fourteenth Amendment. The Court should not, and must not, leave educational caste in place.

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<sup>217</sup> See *id.* at 390 n.32 ("The Declaration speaks of 'all men' and not 'all *white* men' . . .").

<sup>218</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>219</sup> See *id.* at 493–95 (noting that segregation leads to separation in educational opportunities as well as a feeling of inferior status in the community).

One can only speculate what members of the Court think about what position people of color would be in absent discrimination in all aspects of their lives. There is no reason for the Court to believe the status quo is normal. In fashioning its remedy for educational caste, the Court must answer that question. Then, it has a duty to restore people of color to that position. This is difficult work, but it must be done or the American creed will remain a lie.

