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JUSTICE KENNEDY'S STRICTER SCRUTINY AND THE FUTURE OF RACIAL DIVERSITY PROMOTION

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Justice Kennedy's Stricter Scrutiny and the Future of Racial Diversity Promotion

Nelson Lund*

I. Introduction

More than half a century after *Brown v. Board of Education*, the Supreme Court is closely and bitterly divided about the meaning of that decision, and about the meaning of the Equal Protection Clause to which it appealed. The first major decision of the Roberts Court, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,¹ took a small step away from a constitutional vision that permits racial discrimination by the government whenever courts believe that the effects on society will be salutary. Amid the doctrinal shambles created by the Rehnquist Court, this is a healthy development. We may hope, but should not assume, that the Court will take significant additional actions to curtail the use of racial classifications by the government, and by private parties subject to statutes that on their face forbid racial discrimination. Nor should we be shocked if new appointments to the Court soon produce a massive shift in the other direction, which would open the way for the entrenchment and expansion of racially discriminatory policies

throughout American society.

After reviewing the principal modern strand of equal protection decisions involving non-remedial racial classifications in the field of education,² this paper describes and assesses the decision in *Parents Involved*.

II. *Bakke*

In 1978, the Supreme Court first gave serious consideration to what Nathan Glazer called “affirmative discrimination.” In *Regents of the University of California v. Bakke*,³ which arose from a quota that reserved 16% of the seats in a state medical school for minority students, four Justices concluded that the Civil Rights Act of 1964 forbids such discrimination.⁴ Justice Stevens, along with Chief Justice Burger and Justices Stewart and Rehnquist, relied on the statutory language: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁵ Four others (Justices Brennan, White, Marshall, and Blackmun) broadly concluded that both the statute and the Constitution permit the use of “benign” racial quotas and preferences that do not stigmatize any group or impose the brunt of their adverse effects on those least well represented in the political process.⁶ Writing only for himself, Justice Powell concluded that the statute and the Constitution forbid blatant quotas, like those at issue in the *Bakke* case itself, but allow more subtle systems of racial discrimination.⁷

Rejecting the unmistakably clear terms of the statute, Powell claimed to find indications in the legislative history that it would

sometimes be permissible to discriminate against whites in programs covered by the statute. Unfortunately for his position, there were repeated statements by the bill's major proponents, including Senator Hubert Humphrey, confirming what the statute said, namely that discrimination against persons of any race is forbidden.⁸ Nor was Powell able to produce a single statement by anyone in Congress indicating that the bill would permit discrimination against any racial group.

Desperately, Powell pointed to statements which he thought meant that some members of Congress believed that "the bill enacted constitutional principles," thus justifying a conflation of statutory meaning with Fourteenth Amendment judicial decisions.⁹ But this gambit, too, was analytically empty. First, none of the proponents said that constitutional principles permit discrimination against some racial groups. Second, the fact that some members of the enacting Congress believed that the language of the bill was consistent with *their* interpretation of the Constitution hardly implies that they believed the meaning of what they wrote could be changed if *somebody else* interpreted the Constitution differently. And even if one accepted the proposition that Congress meant to codify whatever the constitutional case law was in 1964, Powell himself acknowledged that even as of 1978 the Court had *never* "approved preferential classifications in the absence of proved constitutional or statutory violations."¹⁰

The four advocates of "benign" discrimination joined Powell in rewriting the statute to say that recipients of federal funds may discriminate on the ground of race, color, or national origin whenever a majority of the Supreme Court concludes that the Constitution allows such discrimination. That holding has since been reaffirmed, making the text of the Civil Rights Act essentially irrelevant in this

area.

While the Court held that only its own evolving equal protection doctrine would determine what kinds of racial discrimination governments would be permitted to practice, the *Bakke* Court could not agree on what that doctrine was going to be. Writing for himself alone, Powell purported to apply traditional strict scrutiny, under which all racial discrimination is forbidden unless it is “precisely tailored to serve a compelling governmental interest.”¹¹ He then concluded that a medical school’s interest in assembling a racially diverse student body is a compelling interest because it serves what Powell cryptically called the First Amendment goal of promoting the “robust exchange of ideas.”¹² Turning to the narrow tailoring prong of the test, Powell endorsed the Harvard admissions approach, which purports to treat race and ethnicity as one “factor” along with others, thus making it difficult to prove which whites are being rejected because they are white and which are being rejected for other reasons.

Because it is obviously meaningless to treat anything as a “factor” unless it will sometimes be the deciding factor, the Harvard/Powell approach unquestionably entails racial discrimination. Nor does it put any meaningful limits on this practice, as is clear once one actually thinks about the implications of Powell’s soothing comment that those who lose out to preferred minorities will not have been “foreclosed from *all* consideration” because of their race or ethnicity.¹³ And lest there be any doubt that Powell thought that the narrow-tailoring requirement left schools with extraordinarily wide latitude to discriminate, he helpfully added that “a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy [like Harvard’s], would operate it as a cover for the functional equivalent of a quota system.”¹⁴

For at least two reasons, *Bakke* settled almost nothing as a matter of constitutional doctrine. First, Powell's position was inconsistent with that of the four other Justices who had reached the constitutional issue, and it was debatable what the "narrowest grounds" for the Court's judgment were under the *Marks* rule.¹⁵ Second, Powell's reliance on the First Amendment suggested that the reach of the *Bakke* holding did not extend beyond the realm of higher education.

III. *Gratz and Grutter*

Outside the context of university admissions, which *Bakke* suggested might be uniquely affected by the First Amendment, the Burger and Rehnquist Courts produced a series of opinions that created as much uncertainty as *Bakke* produced in the field of education. In a series of cases involving employment, government contracting, and government licenses, the Court was sharply divided between those who would almost never uphold the use of racial preferences except to remedy proven discrimination and those who would frequently uphold discrimination aimed at benefitting select racial minorities.¹⁶ Justice O'Connor, who was often the deciding vote, took a middle position in which she purported to apply strict scrutiny on a case-by-case basis, without seeking to articulate clear rules that could be applied in a consistent and predictable manner.

In 2003, the Court finally put an end to a quarter century of uncertainty about the constitutionality of racial discrimination in university admissions. Responding to a circuit split about the implications of the splintered result in *Bakke*, the Court reviewed two cases involving preferential admissions to the University of Michigan's undergraduate college and to its law school. These

decisions can be summarized quite succinctly: the Court adopted Justice Powell's position in *Bakke* as the law of the land.

In *Gratz v. Bollinger*,¹⁷ the undergraduate college had used a mechanical system that gave certain minorities a fixed number of bonus points in the admissions process. In a 5–4 opinion written by Chief Justice Rehnquist, the Court applied strict scrutiny and invalidated the system, much as Powell had rejected the mechanical quota in *Bakke*. In the more significant case involving the law school, *Grutter v. Bollinger*,¹⁸ Justice O'Connor wrote a 5-4 four majority opinion upholding a system in which certain minorities had their race treated as a "plus factor" in admissions.

The Court's opinion in *Grutter* summarized Powell's position in *Bakke*, and expressly adopted it.¹⁹ The crucial elements were as follows. First, the law school offered its desire for a "diverse student body" as the compelling governmental interest that justified its policy of ensuring the admission of a "critical mass" of blacks, certain selected Hispanics, and American Indians. The Court deferred to what it accepted as the state's educational judgment, alluding to "a special niche in our constitutional tradition" occupied by universities and citing Powell's reliance on the First Amendment.²⁰ The Court added that it was also influenced by its belief that America needs to produce a racially diverse cadre of future leaders. Second, the Court held that the law school's program was narrowly tailored because it entailed the "individualized consideration" of applicants, in which characteristics other than race were considered along with race, and in which a rejected applicant from a disfavored race is not "foreclosed from *all* consideration for that seat simply because he was not the right color or had the wrong surname."²¹

The Court's opinion rejected the proposition that the school was required to begin by exhausting the use of race-neutral

alternatives that might have achieved its racial diversity goals. One obvious and facially race-neutral alternative would have been to hold an admissions lottery among all applicants who had the minimum qualifications deemed necessary for successful law school performance; another alternative would have been to decrease the emphasis for all applicants on undergraduate GPA and LSAT scores. The Court specifically rejected the proposition that the school was required even to consider achieving the desired diversity by means that “would require a dramatic sacrifice of . . . the academic quality of all admitted students.”²²

Finally, the Court acknowledged that a “core purpose” of the Fourteenth Amendment was to eliminate governmentally imposed racial discrimination, and inferred from this that discriminatory programs like Michigan’s must be “limited in time” and must have a “logical end point.”²³ No time limits were imposed, however, and the Court seemed to imply that racial preferences might be used forever if certain minorities continued to be disproportionately screened out by admissions standards that involve what the Court called “academic quality.” The Court did require “periodic reviews” to determine whether racial discrimination is still needed to achieve the desired diversity, but seemed to leave it completely up to the schools to determine how much diversity they want and how much racial discrimination is needed to achieve that much diversity.²⁴

The *Grutter* majority purported to apply a familiar constitutional test, but in fact radically transformed its meaning. As Powell had suggested in *Bakke*, “strict scrutiny” was taken to mean virtually no scrutiny, at least as to university admissions policies that discriminate against certain races, such as whites and Asians. To put the point another way, *Grutter* creates a safe harbor for such discrimination that extends over the whole ocean, except for one little

cove that contains strictly unbending quotas and absolutely mechanical preferences like those at issue in *Bakke* and *Gratz*. To see how radically *Grutter* reshaped the constitutional standard of review, consider the Court's responses to a few of the objections raised in the dissenting opinions.

First, as Justice Thomas pointed out, the Court had previously approved governmental racial discrimination only in the service of two "compelling interests": national security during wartime and providing a remedy for past discrimination by the government. In *Grutter*, the Court found a compelling state interest in a public law school's desire to effect marginal changes in the nature of classroom discussions and related educational activities. This is especially striking when combined with the Court's refusal to require the Michigan law school even to consider relaxing the highly selective academic standards it applies to most applicants. The "compelling" state interest is only a desire to make marginal and speculative educational improvements without compromising the school's perceived status as an elite institution.

This is a strange use of the term "compelling state interest." Thomas noted that 10% of the nation's states have no public law school at all and only three other states maintain schools that are comparable to Michigan's in terms of perceived status and selectivity. How exactly is it that Michigan has a "compelling" interest in having any public law school at all, let alone a highly selective one, let alone a highly selective one that uses radically different admissions standards for different racial groups? We are never told.

Furthermore, the supposedly compelling nature of Michigan's interest as a state in maintaining a school of this kind becomes even harder to take seriously when one considers the facts: a) that less

than 6% of applicants to the Michigan bar are graduates of the Michigan Law School; b) that only 27% of the students at the law school are from Michigan; and c) that less than 16% of the school's students remain in the state after graduation.²⁵ "Compelling state interest" seems to mean a governmental desire that the Court finds consistent with its own pragmatic judgments about what is good for American society.

Second, as Justice Thomas also pointed out, the Court's refusal to require the law school to consider facially race-neutral methods of increasing racial diversity contrasts quite strikingly with its decision in *United States v. Virginia*.²⁶ In that case, the Court required an all-male military school to admit women despite the school's contention that doing so would require it to adopt less effective educational methods and would change the character of the institution. Although that case applied the supposedly *more relaxed* standard of "intermediate scrutiny," considerations of academic freedom and the First Amendment were given no apparent weight in the Court's analysis.

The *Grutter* majority ignored Justice Thomas' discussion of *United States v. Virginia*, thus leaving unrebutted the inference that strict scrutiny was now less strict than intermediate scrutiny had been only a few years before. Or that the First Amendment gives more academic freedom to law professors than to professors at a military academy. Or that what really drove the Court in both cases was its own assessment of the social value of the challenged practices.

Third, the Court says that "outright racial balancing . . . is patently unconstitutional,"²⁷ and accepts without question the law school's claim that it was not engaged in such balancing. This would be less striking were it not for the fact that Chief Justice Rehnquist's dissenting opinion proved beyond any reasonable doubt that the law

school was in fact engaged in outright racial balancing. Over a period of several years, the school admitted the favored minorities in almost perfectly exact proportion to their share of the applicant pool. Furthermore, it was able to achieve this result only by treating some of these minorities very differently than others.²⁸

The Court made no effort to explain how the school's "critical mass" rationale for its program could lead it to admit twice as many blacks as Hispanics, or why it chose to relax its admissions standards for blacks much more than for Hispanics.²⁹ The majority responded to Rehnquist by noting that the statistics on actual enrollment showed more variation than the statistics on admissions. But that is obviously a result of the fact that the school has little ability to control which admitted students actually enroll. What the school *could* completely control—who was admitted and who was rejected—was almost perfectly controlled to reflect the racial balance in the applicant pool. The Court's response to Rehnquist contains nothing to undermine his conclusion that the school's "alleged goal of 'critical mass' is simply a sham."³⁰

The majority's rejection of Rehnquist's analysis—or more accurately, his conclusive demonstration—together with its reshaped conception of a compelling governmental interest, effectively reduces strict scrutiny to something like rational basis review. So long as the Court can imagine or hypothesize some connection between a government's decision and some purpose of which the Court approves on grounds of social policy, *Grutter* indicates that it can be upheld. And this is so even in a case where the facts show that the government is actually engaged in a sham that conceals a practice that the Court itself says is "patently unconstitutional."

The precedent to which *Grutter* bears the greatest formal resemblance is *Plessy v. Ferguson*.³¹ Like the *Grutter* Court, the

Plessy majority acknowledged that the object of the Fourteenth Amendment “was undoubtedly to enforce the absolute equality of the two races before the law.”³² Notwithstanding this admission, however, *Plessy* held that racial segregation laws were constitutionally permissible if they pass the following test: “[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.”³³ This is essentially the same test deployed in *Grutter*, which treated the Michigan Law School’s diversity plan as a reasonable means toward the “important and laudable” goal of promoting classroom discussions that are “livelier, more spirited, and simply more enlightening and interesting.”³⁴

The *Plessy* Court was also plainly concerned with the adverse effects that might flow from judicial interference with a practice that was highly valued by politically powerful interests.³⁵ Similarly, the *Grutter* Court emphasized its view that it is crucially important to our society—and especially to American business and the American military—to ensure that more people of certain racial backgrounds attend what are perceived to be elite schools.³⁶ And, like the *Plessy* Court, *Grutter* accepted the government’s utterly implausible and unsubstantiated claim that it had constitutionally permissible purposes in adopting the challenged practices.³⁷

The *Plessy* decision, of course, included a lone dissent from Justice Harlan, disputing the majority’s legal analysis and eloquently challenging the majority’s view that enforced segregation would promote racial harmony. *Grutter* provoked an equally eloquent, and much better reasoned, dissent from Justice Thomas.³⁸ Programs like the one at issue in *Grutter* have always been quite unpopular with the general public,³⁹ and Thomas’ critique of their effects is intellectually

powerful. The *Grutter* majority opinion, however, probably does reflect the dominant opinion in contemporary elite culture.

The extraordinary breadth of the elite consensus is illustrated by Richard Epstein's heroic effort to reconcile support for governmental racial preferences with libertarian principles.⁴⁰ Professor Epstein rightly calls his a "shaky" defense, for it requires him to contend that a government agency should be allowed to engage in racial discrimination, notwithstanding the obvious public choice objections and the obvious historical evidence that confirms these objections. Professor Epstein's response begins with the libertarian premise that racial discrimination by private actors ought to be allowed and with the analytical point that free markets will place significant constraints on irrational discrimination:

I have noted the close analytical connection between the antidiscrimination norm and the presence of monopoly power. The former should be used as an effort to limit the state as well as private use of monopoly power. On this view, however, the antidiscrimination principle has no role to play to the extent that it is invoked to limit the ordinary principle of freedom of association as it applies to those private individuals and firms that do not possess any monopoly power at all. . . . [O]nce any individual or institution is stripped of that monopoly power, then everyone else finds their strongest protection in the power to go elsewhere if they do not like the terms and conditions on which any one provider chooses to offer some goods or services. Free entry thus becomes

the low-cost antidote to discrimination and abuse in competitive settings.⁴¹

Assuming that these starting points are valid, how can one justify discrimination by the greatest monopoly of all, namely the government? Professor Epstein's surprising answer is that government universities are adequately and appropriately disciplined by competition from private institutions, many of which have voluntarily decided to engage in such discrimination. In order to evaluate this argument, one ought to consider the fact that what we have here is competition between government agencies staffed by self-perpetuating groups of life-tenured professors on one side, and tax-exempt, nonprofit, government-subsidized institutions staffed by self-perpetuating groups of life-tenured professors on the other. To say the least, such competition does not curtail irrational and ill-motivated discrimination in the same way as competition among business firms whose owners suffer real economic consequences when they engage in irresponsible behavior.

A little glimpse of the reality underlying Michigan's professions of good faith was provided in the testimony of the former admissions director at the law school. "He testified that faculty members were 'breathhtakingly cynical' in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans."⁴² Sure enough, Cubans were excluded from this government-operated law school's diversity program.⁴³

Even in the business world, the "voluntary" nature of racial preference programs is something of a myth.⁴⁴ And in law schools, these programs are effectively mandatory. A school that refused to

employ racial preferences would soon be threatened with disaccreditation by the American Bar Association,⁴⁵ a government-designated monopolist whose approval is needed before a law school's graduates can be admitted to the bar in many states.⁴⁶ Given the severe adverse consequences that most schools would suffer if there were even a public threat of disaccreditation, it is no surprise that everyone "voluntarily" does just what this government-designated accrediting monopolist wants done.⁴⁷ Thus, Professor Epstein's "classical liberal" defense of governmentally imposed racial preferences is even shakier than he acknowledges.

His conclusion, however, is one that enjoys nearly universal approbation among his professional peers. Indeed, our elite culture is almost monolithically in favor of racial preferences, at least in public. This apparent consensus may be somewhat misleading, inasmuch as opponents of racial preferences are routinely treated as racists or at best disgustingly insensitive moral dullards. Perhaps some who publicly acquiesce in the views of their rather domineering colleagues do not really share those views. But they do acquiesce.

The same elites who so strongly defend today's racial preferences are merciless in their condemnation of *Plessy's* endorsement of enforced racial segregation. It is worth recalling, however, that enforced segregation was strongly supported by the dominant elites of the *Plessy* era, in both the South and the North and in both conservative and progressive circles.⁴⁸ Today's leaders support a different kind of racial discrimination than those of a century ago, and one that has surely been much less pernicious. Still, it remains to be seen whether our elite thinkers will eventually attract the same kind of contempt that they now express for the views of their predecessor elites.

IV. *Parents Involved*

In retrospect, Justice Kennedy's dissent in *Grutter* takes on special significance. He agreed with the majority that Justice Powell's *Bakke* approach should be adopted by the Court. Under that approach, university admission programs "may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary."⁴⁹ Kennedy's disagreement with the majority lay in the application of strict scrutiny. Unlike the majority, he recognized that Michigan's program was "a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."⁵⁰

Like *Grutter*, the Roberts Court's first case in this area was decided 5-4. *Parents Involved* arose from pupil assignment policies adopted by two local school districts. Both districts tried to keep the racial composition of each school within a specified range defined by reference to the demographic makeup of the entire district (crudely characterized as white/non-white by one district, and as black/non-black by the other). To that end, they closed certain schools to certain students—who would otherwise have had a right to attend—if admitting those students would contribute to what the authorities regarded as excessive racial imbalance. The Court applied strict scrutiny and held the policies unconstitutional.

Chief Justice Roberts' majority opinion distinguished *Grutter* in two respects. First, *Grutter* had treated student body diversity as a compelling interest, but this was at least in part because of special First Amendment considerations that applied only in the context of higher education. Exactly what the First Amendment has to do with

any of this was left unexplained. Second, *Grutter* involved racial classifications that were part of a “highly individualized, holistic review.”⁵¹ The policies in this case, by contrast, resemble those in *Gratz* because they used racial classifications in a “nonindividualized, mechanical” way.⁵² The Court’s statement is not inaccurate, but it seems to constitute another misguided judicial endorsement of Justice Powell’s sophistical distinction between using race as “a” factor that will be the deciding factor in some set of decisions and using race as “the only” factor in some set of decisions.

The Court invalidated both pupil assignment plans, primarily on the related grounds 1) that their effects on the schools’ racial balance were so minimal that they could not have been necessary to accomplish any goal that could be regarded as compelling, and 2) that the districts failed to consider other methods of achieving their stated goals, which were in any event too amorphous to justify the use of crude racial classifications. This is a narrow holding.

In a portion of his opinion joined only by a plurality of four, Roberts also concluded that racial balancing, under whatever name, is not a constitutionally permissible goal. Because the goals of these school districts were framed in terms of local demographics, this case was distinguished from *Grutter*, where the Court had concluded (accurately or not) that Michigan’s law school had not counted back from its applicant pool to arrive at the number of minorities needed for educationally beneficial diversity in its student body.

Justice Kennedy wrote separately to emphasize his endorsement of race-conscious policies aimed at encouraging racially diverse student bodies. In his view, racial balancing is not an unconstitutional goal,⁵³ but it must be pursued by means that do not involve differential treatment of individuals “based solely on a systematic, individual typing by race.”⁵⁴ Kennedy gave several

examples of policies that would not even need to be subjected to strict scrutiny: keeping track of students by their race; siting new schools and drawing attendance zones with an eye toward racial balancing; allocating resources and recruiting students and teachers so as to promote racial diversity in the schools.

Justice Breyer's lengthy dissent for four Justices argued that the policies at issue were permissible attempts by the school districts to combat the effects of phenomena such as residential housing patterns, and thus to achieve the kind of racial integration aimed at by *Brown v. Board of Education*. Chief Justice Roberts' plurality opinion and Justice Thomas' concurrence sharply criticized Breyer's reading of *Brown* and other precedents, as well as the dissent's contention that the legality of racial discrimination should be determined by little more than the motives of those engaging in it. Kennedy made similar criticisms of Breyer's dissent, though in milder terms.

Parents Involved is significant primarily because it declines to continue down the path pointed out by *Grutter*. As the swing vote, Justice Kennedy's views are the best predictor of future decisions in this area, at least in the near term, and will probably be treated more or less as the law by most lower courts. As one would expect from his *Grutter* dissent, Kennedy has reaffirmed his strong reluctance to approve direct discrimination against individuals except as a last resort. It is worth noting that he took this position in a case involving policies that burdened members of all races, which judges as conservative as Alex Kozinski and Michael Boudin would have upheld.⁵⁵ This confirms that Kennedy does not regard the term "strict scrutiny" as an all-purpose incantation that can be used to bless appealing outcomes. Kennedy takes the narrow tailoring requirement

seriously and he does not think that “as a last resort” means “whenever convenient or efficient or politically expedient.”

At the same time, one must recognize that Kennedy has firmly rejected the proposition that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁵⁶ This makes it difficult to predict how much indirect or “nonindividualized” discrimination he (or, until he provides further elaboration, the lower courts) will permit. The discriminatory policies at issue in *Parents Involved*, moreover, were crude and sloppy, which made it very easy to find that they failed the “narrow tailoring” test. With a modicum of ingenuity, school districts may be able to find more subtle means of achieving the same effects, just as *Grutter* showed how to evade *Gratz*’s ban on mechanical racial preferences.

Kennedy seemed to suggest as much by alluding approvingly to “a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component.”⁵⁷ This comment, and some of his opinion’s other reflections on race and education, indicate that he sees a legitimate role for benign or affirmative discrimination in American schools. This may portend developments that will disappoint most conservatives, even if we are not witnessing what Heather Gerken hopefully and condescendingly calls a “dawning awareness” in Kennedy of certain “complexities” in these issues.⁵⁸

Grutter itself, moreover, is untouched by *Parents Involved*. Nothing in the Roberts opinion or the Kennedy opinion implies a willingness to put meaningful constraints on the grossly discriminatory admissions policies that pervade higher education, or to undo the mockery that *Grutter* made of strict scrutiny. Nor has the Court, or any Justice, offered a meaningful explanation of the creepy Powell/*Grutter* assertion that the First Amendment should be read as

a license for the government to discriminate against college and university students on the basis of their race. Until that happens, or *Grutter* is overruled, this area of the law will remain offensively incoherent.

V. Conclusion

Remarkably little has changed since *Bakke*.

- In 1978, four members of the Court would have allowed the government virtually unfettered discretion to practice what they regarded as benign forms of racial discrimination. Three decades later, four members of the Court take essentially the same position, and will clearly not be deterred by any of the contrary precedents that have built up during that period.
- In 1978, four Justices read the Civil Rights Act of 1964 to forbid racial discrimination without regard to the motive for the challenged policy. Today, four members of the Court would give the Fourteenth Amendment (and perhaps also the Civil Rights Act) a roughly similar interpretation, though it is not clear how far they would go in challenging existing precedent.
- In 1978, Justice Powell's middle position was that racial discrimination practiced for judicially approved diversity purposes is permissible, but that care must be taken to limit its reach and obscure the identity of its victims. Today's swing Justice has expressly endorsed Powell's legal formula,⁵⁹ although Kennedy's application of this approach

seems less latitudinarian than the one suggested in Powell's *Bakke* opinion.⁶⁰

How much longer will this equilibrium remain stable? We seem to be one vote away from significant progress toward a relatively robust enforcement of antidiscrimination principles. We are also but one vote away from the opposite approach, which would endorse virtually any discriminatory law that a court believes was “enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.”⁶¹ It is hard to believe that the Court won't shift in one direction or the other fairly soon. But one might have said the same thing in 1978.

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1. 127 S. Ct. 2738 (2007).
2. This discussion is drawn largely from Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 Nw. U. L. Rev. 249 (2004).
3. 438 U.S. 265 (1978).
4. *Id.* at 408, 412-21 (Stevens, J., concurring in the judgment in part and dissenting in part).
5. 42 U.S.C. § 2000d.
6. 438 U.S. at 324-79 (Brennan, J., concurring in the judgment in part and dissenting in part).
7. *Id.* at 269-320 (opinion of Powell, J.).

8. *See, e.g., id.* at 414-16 (Stevens, J., concurring in the judgment in part and dissenting in part).
9. *Id.* at 285 (opinion of Powell, J.).
10. *Id.* at 302; *see also id.* at 307.
11. *Id.* at 299.
12. *Id.* at 312-14.
13. *Id.* at 318 (emphasis added).
14. *Id.*
15. “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 by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation marks and citation omitted).
16. For a review of the cases, see Nelson Lund, *The Rehnquist Court’s Pragmatic Approach to Civil Rights*, 99 *Nw. U. L. Rev.* 249, 262-75 (2004).
17. 539 U.S. 244 (2003).
18. 539 U.S. 306 (2003).
19. The Court did not conclude that Powell’s opinion represented binding precedent. *See id.* at 325.
20. *Id.* at 329.
21. *Id.* at 341 (quoting Powell’s opinion in *Bakke*, 438 U.S. at 318) (emphasis added).

22. 539 U.S. at 340. The “dramatic sacrifice” of what the Court calls “academic quality” that would result from decreasing the emphasis on undergraduate GPA and LSAT scores was amply illustrated by statistics drawn from the record in the case. *See, e.g., Grutter v. Bollinger*, 137 F. Supp. 2d 821, 864 (E.D. Mich. 2001); *Grutter v. Bollinger*, 288 F.3d 732, 797 & nn.22-23 (2002) (Boggs, J., dissenting).

23. 539 U.S. at 341-42.

24. “We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.” *Id.* at 343 (quoting respondents’ brief). The Court went on to say that it “expects” racial preferences to become unnecessary within twenty-five years. *Id.* Contrary to Justice Thomas’ reading, *id.* at 351, I do not think the Court “held” that preferences would become unconstitutional within that period. Rather, the Court seems only to have made a prediction whose significance, if any, is a function of the Justices’ clairvoyance.

25. *See Grutter*, 539 U.S. at 359 (Thomas, J., concurring in part and dissenting in part).

26. 518 U.S. 515 (1996).

27. *Grutter*, 539 U.S. at 330 (citations omitted).

28. *See id.* at 381-83 (Rehnquist, C.J., dissenting).

29. *See id.* at 382.

30. *Id.* at 383. *Cf. Johnson v. Transp. Agency*, 480 U.S. 616, 662-64 (1987) (Scalia, J., dissenting) (contending that the characterization of the facts in the case by the majority and by Justice O’Connor were inconsistent with factual findings by which the Court was bound under Fed. R. Civ. P. 52(a)).

31. 163 U.S. 537 (1896).

32. *Id.* at 544. Similarly, the *Grutter* Court acknowledged that a “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” 539 U.S. at 341 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

33. 163 U.S. at 550.

34. 539 U.S. at 330 (quoting the District Court).

35. “Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.” 163 U.S. at 551.

36. *See* 539 U.S. at 330-32.

37. 163 U.S. at 551 (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”). *Cf.* the *Grutter* majority’s inapt response to Chief Justice Rehnquist’s dissent).

38. For a critique of the legal reasoning in both the majority and dissenting opinions in *Plessy*, see Nelson Lund, *The Constitution, the Supreme Court, and Racial Politics*, 12 Ga. St. U. L. Rev. 1129 (1996). For the reasons discussed above, I believe that Thomas’ legal critique of the *Grutter* majority is sound. Thomas’ analysis of the likely consequences of the majority’s decision, moreover, is much more detailed than the conclusory statements in the analogous passages in Harlan’s *Plessy* dissent.

39. *See, e.g.*, Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 Harv. J. Legis. 217, 225-28 (2003) (summarizing evidence of widespread public opposition to racial preferences).

40. Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky But Classical Liberal Defense*, 100 Mich. L. Rev. 2036 (2002).
41. *Id.* at 2050.
42. *Grutter v. Bollinger*, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting).
43. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 824 n.1 (2001).
44. *See, e.g.*, Roger Clegg, “Striking a Balance: EEO, Diversity, and Affirmative Action,” Testimony before the Equal Employment Opportunity Commission, May 1 6 , 2 0 0 6 , http://www.ceousa.org/index.php?option=com_docman&task=doc_view&gid=147&Item; *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 765 (1976).
45. *See, e.g.*, Gail Heriot, *The ABA’s ‘Diversity’ Diktat*, Wall St. J., April 28, 2008.
46. *See, e.g.*, Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 Colum. L. Rev. 60, 71 n.60 (2004); *see also* American Bar Association, *The American Bar Association’s Role in the Law School Accreditation Process*, at <http://www.abanet.org/legaled/accreditation/abarole.html> (last visited May 21, 2008) (“The Council of the ABA Section of Legal Education and Admissions to the Bar is the United States Department of Education recognized accrediting agency for programs that lead to the first professional degree in law.”).
47. *See, e.g.*, Stewart E. Sterk, *Information Production and Rent-Seeking in Law School Administration: Rules and Discretion*, 83 B.U. L. Rev. 1141, 1145 n.9 (2003); *see also* Ronald A. Cass, *The How and Why of Law School Accreditation*, 45 J. Legal Educ. 418, 422-23, 425 (1995).
48. *See, e.g.*, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 258-62 (2002); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1, 49-53 (1999).

49. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).
50. *Id.* at 389.
51. 127 S. Ct. at 2753.
52. *Id.* at 2753-54.
53. *Id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment).
54. *Id.* at 2792.
55. *See id.* at 2796-97 (discussing the views of Kozinski and Boudin).
56. *Id.* at 2791 (quoting Chief Justice Roberts' plurality opinion). As Justice Breyer points out, the aphorism appears to have originated in Judge Carlos Bea's dissent in the court below. *See id.* at 2833-34 (Breyer, J., dissenting); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 426 F.3d 1162, 1222 (2005) (Bea, J., dissenting) ("The way to end racial discrimination is to stop discriminating by race.").
57. 127 S. Ct. at 2793.
58. *See* Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 Harv. L. Rev. 104, 107, 113, 121, 123-24 (2007).
59. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).
60. *Grutter's* radical dilution of the strict scrutiny test was quite consistent with, even if not absolutely implied by, Powell's comment that "a court would not assume that a university, professing to employ a facially nondiscriminatory ["plus factor"] admissions policy, would operate it as a cover for the functional equivalent of a quota system." 438 U.S. at 318.
61. *Plessy*, 163 U.S. at 550.