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THE RONALD H. BROWN CENTER FOR CIVIL RIGHTS AND
ECONOMIC DEVELOPMENT
SYMPOSIUM

**WHEN “VICTORY” MASKS RETREAT: THE
LSAT, CONSTITUTIONAL DUALISM, AND
THE END OF DIVERSITY**

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INTRODUCTION

In 1839, Africans aboard the *Amistad* killed most of their captors and forced a surviving Spanish sailor to sail them toward their home. The Spanish sailor did indeed sail for Africa—during the day. At night, he sailed toward the American coast. As a result, the ship zigzagged north and landed off the coast of Long Island. The slaves, who had fought for their liberty at a time when the American Revolution was still a vivid memory, were promptly arrested, charged with murder, and held to determine whether they were free men or cargo to be handed over. Spain, the American officer who captured the Spanish ship, and the residents of Long Island who first helped the Africans get to shore, all later claimed the slaves as property.

The federal District Court held that the Africans were free and that they had been kidnapped in violation of Spain’s own laws.¹ The Circuit Court affirmed. Unbeknownst to the Africans, the United States appealed the decision to the U.S. Supreme Court in order to protect its relationship with “Her Catholic Majesty” of Spain. In the film *Amistad*, which recounts

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¹ See *United States v. The Schooner Amistad*, 40 U.S. 518, 519 (1841).

this famous story, the Africans light a bonfire and dance in celebration of their impending freedom. They had been told it was the job of the court to say what the law is. Two federal courts had certainly spoken.

Roger Baldwin (Matthew McConaughey), the bespectacled abolitionist lawyer had to break the news to Cinque (Djimon Hounsou) that in America, it is just not that simple. The plight of the Africans reflected the conflicting legal norms between American domestic law, which recognized and protected the institution of slavery, and international treaties and laws, which condemned the practice of abducting Africans and transporting them across the high seas. This conflict, in turn, hinged on the conflict between economic and political interests and our nation's professed commitment to equality. How could any lawyer explain this ante-bellum American "dilemma" to the innocent, hapless Africans? Why indeed must they remain imprisoned after the court ordered that they were "free"?

Baldwin struggled for a moment and then presented an apology; the law had "almost worked," he said. "Almost worked!" Cinque, hearing this, said to his abolitionist counsel, "*What kind of a land is this where you almost mean what you say? Where laws almost work?*"²

*Grutter v. Bollinger*³ was celebrated by both liberals and conservatives as a victory for affirmative action. But some victories mask retreat. It is ironic that the new, colorblind racial system announced in *Grutter* may prove more effective in containing the challenges posed over the past few decades by movements for racial justice than any intransigent, overtly racist backlash could possibly have been.⁴

The case arose when the University of Michigan School of Law rejected Barbara Grutter, a white female with a 3.8 grade point average and a 161 LSAT score. She argued she was denied admission because race, rather than her objective qualifications, was a "predominant" factor in her non-selection.⁵ She challenged

² AMISTAD (Dreamworks Video 1997).

³ 539 U.S. 306 (2003).

⁴ HOWARD WINANT, *THE NEW POLITICS OF RACE: GLOBALISM, DIFFERENCE, JUSTICE* (2004).

⁵ *Grutter*, 539 U.S. at 317 ("Petitioner... alleged that her application was rejected because the Law School use[d] race as a 'predominant' factor, giving applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups.'")

not only the policy at the University of Michigan's law school, but also a long standing precedent—the 1978 case of *Board of Regents v. Bakke*.⁶ The decision in *Bakke*, written by Justice Powell, famously held that while all race-conscious programs were subject to strict scrutiny and required, inter alia, a compelling justification, the need for diversity in admissions justified the consideration of race.⁷

The long standing consensus that Powell was right was upset when the Fifth Circuit, in the infamous *Hopwood*⁸ case, momentarily set forth a revisionist interpretation—that Powell's decision was not the law, and the claim of "diversity" was not a sufficiently compelling reason to discriminate against innocent whites in the admissions process. *Grutter* is widely touted as a victory because it rejected the "heresy" of *Hopwood* and affirmed that Powell's decision was the law; it affirmed a qualified right of even state-run law schools to consider race.

Grutter went on to place the imprimatur of the Supreme Court on the value of having a student body that includes individuals from different racial and ethnic groups. Race matters and is relevant in the context of the need for a diverse student body. More specifically, the *Grutter* Court went so far as to uphold the value of having a "critical mass" of black students.⁹ *Grutter* erased the shadow of *Hopwood*. So the story goes, "We won!" Finally. Hurrah!

Despite the new life that *Grutter* was supposed to have breathed into the constitutional legitimacy of race consciousness in admissions, law schools are becoming increasingly resegregated. There is a systemic, nationwide decline in minority enrollment that has been ongoing for the last ten

(citation omitted).

⁶ 438 U.S. 265 (1978).

⁷ See *id.* at 320.

⁸ 78 F.3d 932 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Hopwood* examined the University of Texas School of Law's admissions program that gave substantial racial preferences to certain classes of minority students. *Id.* at 934. In holding this policy unconstitutional under the Fourteenth Amendment, the Court noted the law school had failed to present a compelling justification for preferring some races over others, even when the purpose was correcting racial imbalances in the student body. *Id.*

⁹ See *Grutter*, 539 U.S. at 335–36 ("The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.").

years.¹⁰ Several factors converge to create the problem. One factor, a constant for many years, is of course the gap between the mean LSAT scores of blacks and whites. The mean score for blacks is 141.6.¹¹ For whites, it is 152.1.¹² But like race, LSAT scores are in themselves a neutral fact. The new problem flows from a pattern of law schools imposing increasingly higher minimum LSAT requirements.¹³

I. IMPACT OF MINIMUM LSAT REQUIREMENTS

A preliminary study of fifteen New York law schools illustrates the trend.

School	2004 Official Guide ⁱ		2006 Official Guide ⁱⁱ		Net Change A-A
	25th LSAT	# / % A-A	25th LSAT	# / % A-A	
Albany	148	53 / 6.6%	151	36 / 4.8%	-32%
Brooklyn	154	77 / 5.0%	158	60 / 4.0%	-22%
Buffalo	152	52 / 7.1%	152	46 / 6.2%	-12%
Cardozo	152	44 / 4.5%	157	43 / 4.1%	-2%

¹⁰ As John Nussbaumer, professor and associate dean at the Thomas M. Cooley Law School, has noted:

The total number of African-Americans enrolled at all ABA-approved law schools peaked in 1994 at 9,681 students, which at that time represented 7.5% of all enrolled students. . . .

From 1994–2004, . . . total law school enrollment increased to 140,376 students (+8.8%) and total minority enrollment increased to 29,489 students (+19.8%). But total African-American enrollment decreased from 9,681 to 9,488 students (-2%), which represents just 6.8% of all enrolled students.

John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167, 167–68 (2006) (footnotes omitted).

¹¹ This is based on 1999–2000 figures. SUSAN P. DALESSANDRO, LISA A. STILWELL & LYNDY M. REESE, LAW SCH. ADMISSION COUNCIL, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 1997–1998 THROUGH 2003–2004 TESTING YEARS 13 (2005).

¹² *Id.*

¹³ The ABA denies accreditation to any law school with average scores below this level; indeed, the usual requirement is average LSAT scores of at least 142. In addition, it tends to deny accreditation to a school that admits any students, regardless how few, with scores below 140. See *infra* note 14 and accompanying text.

CUNY	145	66 / 14.3%	148	51 / 11.4%	-23%
Columbia	166	108 / 9.2%	167	111 / 9.0%	+3%
Cornell	164	32 / 5.6%	164	45 / 7.6%	+41%
Fordham	157	125 / 8.3%	160	90 / 5.9%	-28%
Hofstra	145	75 / 8.4%	151	61 / 6.0%	-19%
New York	148	101 / 6.7%	151	94 / 6.1%	-7%
NYU	168	100 / 7.6%	167	119 / 8.8%	+19%
Pace	149	40 / 5.6%	151	26 / 3.4%	-35%
St. John's	151	60 / 6.5%	153	63 / 6.6%	+5%
Syracuse	148	46 / 5.9%	152	34 / 4.3%	-26%
Touro	144	74 / 11%	148	75 / 9.9%	+1%
Totals	153	1,053 / 7.2%ⁱⁱⁱ	155	954 / 6.3%^{iv}	-9%

ⁱ Data collected in Fall 2002.

ⁱⁱ Data collected in Fall 2004.

ⁱⁱⁱ Total enrollment for all schools was 14,573 students.

^{iv} Total enrollment for all schools was 15,054 students.

While the study includes a limited number of law schools, given the above-mentioned gap in test scores, the trend so obviously reflected here is virtually inevitable for schools that have similar admissions policies.

According to Professor Shepherd, there are no accredited law schools that admit students with LSATs of less than 142.¹⁴ This is higher than the average score for blacks. This minimum cut-off approach represents an irrebuttable presumption that students who do not have at least a 142—the majority of black would-be applicants—are unfit to go to law school. This is disturbing because many students who are disqualified in this way actually have significantly higher grades than their white counterparts.

¹⁴ George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 114 (2003).

None of the ABA-accredited law schools ha[ve] students with an average LSAT score below approximately 142. The ABA denies accreditation to any law school with average scores below this level; indeed, the usual requirement is average LSAT scores of at least 143. In addition, it tends to deny accreditation to a school that admits any students, regardless how few, with scores below 140.

Id. (footnote omitted).

According to William Kidder, "the data reveal that law school applicants with essentially equivalent college grades are apt to receive widely discrepant LSAT scores depending upon their race or ethnicity."¹⁵

Combined data from 1976 to 1979 and 1985 reveal that 26% of African Americans with 3.25+ UGPAs were denied admission from every ABA law school to which they applied, compared to 14% of Chicanos and 15% of Whites White Applicants consistently had higher admissions rates than African Americans among those with 3.75+ UGPAs¹⁶

Ironically, the test makers themselves argue against using the LSAT in this manner. As the Law School Admission Council's own guidelines state, "[t]he LSAT should be used as only one of several criteria for evaluation and should not be given undue weight solely because its use is convenient" and that "[c]ut-off LSAT scores . . . are strongly discouraged" because, "[s]ignificantly, cut-off scores may have greater adverse impact upon applicants from minority groups than upon the general applicant population."¹⁷ Furthermore, according to Dean John Nussbaumer, there is no "valid, reliable, and objective evidence establishing that these practices have a legitimate educational purpose."¹⁸ The imposition of cut-off scores represents an as yet unanchored over-reliance upon and misuse of the LSAT.

This over-reliance upon the LSAT is the proximate cause of the systemic decline in minority enrollment.¹⁹ Of course the current trend is merely the camel's nose in the tent. Absent affirmative action, to have an even chance of getting into an elite school, such as the University of Michigan, one needs a 165 on

¹⁵ 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, 1084 (2001) (quoting Joseph Gannon, *College Grades and LSAT Scores: An Opportunity to Examine the "Real Differences" in Minority-Nonminority Performance*, in TOWARDS A DIVERSIFIED LEGAL PROFESSION 282 (David M. White ed., 1981)).

¹⁶ William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 26-27 (2003).

¹⁷ LAW SCH. ADMISSION COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES (2005), available at <http://www.lsacnet.org/publications/CautionaryPolicies.pdf>.

¹⁸ Nussbaumer, *supra* note 10, at 170.

¹⁹ See *id.*

the LSAT.²⁰ As Justice Thomas noted, only 1.1% of black students score at that level.²¹ If the current trend continues, with schools continuing to raise their numerical prerequisites, the prospect of law schools returning to the virtually lily white patterns of the 1960s is practically assured.

The imposition of minimum LSAT requirements nullifies the beneficial effects of *Grutter* on several levels. In the aftermath of this great victory of *Grutter*, we are experiencing an incredible duality. While *Grutter* trumpets the value of diversity as a matter of law, the practical reality is one in which diversity is devalued; *Grutter* supports the inclusion of a "critical mass" of black students, but in practice, the artificial headwinds of elitist standards are moving minority admissions increasingly in the direction of token representation. This duality in practice flows from the duality of the opinion. The problem is not that the Court did not mean what it said when it banged its powerful gavel in favor of diversity and racial inclusion. It is simply that the emancipatory significance of *Grutter* occurs at a sterile, abstract, and formal level. While *Grutter* did hold all those things that resonate as "victory," the question is how did the Court get there? The rationale and the elitist norms that animate the opinion constitute a fertile subtext in which institutional exclusion has taken root.

Gary Orfield, attempting to understand the phenomenon of resegregation in inner city schools, attributes much of what is happening in that context to the jurisprudence of the Supreme Court which reversed or radically revised much of constitutional law in this area in a series of opinions after 1988.²² The resegregation of the inner city schools ironically seems to begin about the same time. He argues the two patterns are linked. I believe something similar is happening here. The reasoning and normative framework of *Grutter*, despite its emancipatory billing, has empowered the current resegregation pattern.

²⁰ See *Grutter v. Bollinger*, 539 U.S. 306, 376 n.14 (2003) (Thomas, J., concurring in part and dissenting in part) (noting an LSAT score of 165 is used as a benchmark because the University of Michigan School of Law uses it as the relevant score range for an applicant to be considered).

²¹ *Id.* at 376.

²² GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* 17–19 (2004), <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf>.

II. LOCATING *GRUTTER*: UNIVERSALISM V. CONTEXT

Initially there were two models of affirmative action.²³ The liberal wing on the Court associated affirmative action with the integrative ideal, a remedy for continuing discriminatory barriers minorities face in our society. Thus, Justice Marshall states, "We recognized, however, that these principles outlawing the irrelevant or pernicious use of race were inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination."²⁴

Under this approach affirmative action programs were viewed as benign. "A Program that employs racial or ethnic criteria . . . calls for close examination;" when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are "bound to approach our task with appropriate deference . . ."²⁵ Within the "benign discrimination" model the context of the historical experience of blacks *as a group* trumped the formalism of equal protection methodology, which since *Korematsu* required as a rule that all racial classifications be subjected strict scrutiny.²⁶ Thus, under this approach affirmative action was reviewed under a deferential standard.

Against this view of affirmative action as "benign" was a colorblind approach enthroneing the individual, not the group, as the proper unit of inquiry.

[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background . . . rather than the individual only because of his membership in a particular group Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance When they touch upon an individual's race or ethnic background, [they must be] precisely tailored to serve a compelling governmental interest.²⁷

Under this colorblind framework all racial classifications were subject to strict scrutiny. "When a classification denies an

²³ See D. Marvin Jones, *No Time for Trumpets: Title VII, Equality, and the Fin de Siecle*, 92 MICH. L. REV. 2311, 2334-44 (1994).

²⁴ *Fullilove v. Klutznick*, 448 U.S. 448, 518 (1980) (Marshall, J., concurring).

²⁵ *Id.* at 472 (opinion of Burger, C.J.); see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

²⁶ See *Fullilove*, 448 U.S. at 507 (Powell, J., concurring).

²⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (citations omitted).

individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect."²⁸ Constitutional litigation is the moral equivalent of war. And for some time the two sides, each representing radically different models or paradigms of equality, faced each other across an imaginary no-man's land of constitutional indeterminacy and the inability of the court to muster a stable majority for either view.

When the Court first considered race in *Bakke*, it did not reach a majority opinion, leaving the issue of scrutiny undecided. In that case, four justices analyzed the constitutionality of the program applying intermediate scrutiny, while Justice Powell, writing only for himself, advocated using strict scrutiny. The same type of split occurred in 1980 when the Court considered the constitutionality of a program to reserve federal public works funds for minority-owned businesses in *Fullilove v. Klutznick*; three Justices applied strict scrutiny while three opted for intermediate scrutiny. For several more years, the Court wavered on the proper level of scrutiny.²⁹

In the context of contracting affirmative action, voluntary affirmative action was blessed by the deferential *Fullilove* framework, while in the context of public employment discrimination law under *Washington v. Davis*,³⁰ and *Wygant v. Jackson Board of Education*,³¹ a strict scrutiny approach prevailed. Voting rights were governed by yet another standard.³²

In 1988, however, the two theories essentially collapsed into one. Thus in *Croson*, in the context of a minority set-aside ordinance, the Court rejected the deference of *Fullilove* and applied strict scrutiny with fatal effect. "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."³³

²⁸ *Id.* at 305.

²⁹ Soraya Fata & Amy Schumacher, Current Event, Grutter v. Bollinger, 123 S. Ct. 2325 (2003), 11 AM. U. J. GENDER SOC. POL'Y & L. 1215 (2003).

³⁰ 426 U.S. 229 (1976).

³¹ 476 U.S. 267 (1986).

³² United Jewish Org, Inc. v. Carey, 430 U.S. 144 (1977).

³³ City of Richmond v. J.A. Croson Co., 488 U.S. 469, 515 n.5 (Stevens, J., concurring) (quoting Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring)).

Under the strict scrutiny approach all racial classifications must be strictly justified by a compelling reason and even then will pass muster only if the program is "narrowly tailored."³⁴ In essence the court replaced an ad hoc, checkerboard pattern of decision-making with a categorical, one size fits all approach to race. Strict scrutiny became a requirement in all cases of racial classification under the equal protection clause.³⁵ This heightened scrutiny was anchored by the principle of colorblindness as a universal norm. "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."³⁶ The persistent theme in the Court's jurisprudence is that race consciousness is invidious per se. "[D]istinctions between citizens solely because of their ancestry are by their very nature odious."³⁷ Implicitly, by applying strict scrutiny, the Court equated affirmative action with the erstwhile segregation of blacks.³⁸ In one case the Court hyperbolically equated affirmative action with "apartheid."

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.³⁹

This equation of affirmative action with discrimination is in turn associated with what one writer calls a "narrative of imposition."⁴⁰ While the earlier model associated affirmative

³⁴ *Id.* at 507.

³⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *see also Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

³⁶ *Croson*, 488 U.S. at 493.

³⁷ *Adarand*, 515 U.S. at 215.

³⁸ *See id.* at 245 (Stevens, J., dissenting) ("[The Court] would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers.").

³⁹ *Shaw*, 509 U.S. at 648.

⁴⁰ As Richard Delgado and Jean Stefancic have written:

We march, link arms, and sing with the newcomers, identifying with their struggle. At some point, however, reaction sets in. We decide the group has gone far enough. At first, justice seemed to be on their side. But now we see them as imposing, taking the offensive, asking for concessions they do not deserve. Now they are the aggressors, and we the victims.

....

action with the history and lived experience of blacks, the colorblind model posits that this so called remedy works at the expense of "innocent people."⁴¹ This jurisprudence of colorblindness, overrunning the terrain of equal protection much like the frogs of Egypt, covers subject matter areas ranging from minority contractors to voting rights.⁴²

Grutter is entirely consistent with this approach. The differences between the *Grutter* and *Crosen-Shaw* outcomes result from interest-convergence.⁴³ The universalism that all racial classifications are inherently suspect remains intact. In *Grutter*, the Court simply says that diversity is a compelling reason per se. No record of prior discrimination is necessary. The interest, which converges with formal equality, is that of academic freedom. It is this, the sphere of decision-making and the need for deference in here, which provides the foundation for the *Grutter* approach.

But I say all this to say that *Grutter* is in my view simply an extension of the *Crosen* approach. Many seem to make a facile move of associating diversity with the integrative ideal: part of the solution as a tool for inclusion. On the other hand, most in the civil rights community recognize *Crosen* as the antithesis of the integrative deal, part of the problem. *Crosen* is rightly seen this way: it rationalizes institutional inequality with slogans of colorblindness. But in my view neither *Grutter* nor its animating norm of diversity are part of the solution, they are each part of the problem. This is true because there is no real difference between the principles, which underlie both *Grutter* and *Crosen*. Those who wish to use *Grutter* as a support for any emancipatory program will soon confront the fact that at the end of the day *Grutter* and *Crosen* are two branches of the same tree. If I am

We decide the group is asking for "special" status. We find their demands excessive, tiresome, or frightening.

Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025, 1026 (1994).

⁴¹ See *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) ("[S]uch measures would risk placing unnecessary burdens on innocent third parties who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978))).

⁴² See *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw*, 509 U.S. 630.

⁴³ See generally DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES OF RACIAL REFORM* (2005).

right, what kind of fruit is the *Grutter* approach likely to bear?⁴⁴

III. MERIT V. MINORITY STUDENTS AS INDIVIDUALS

Grutter affirms diversity while it also affirms the quantitative measures that inevitably privilege members of social elites, the overwhelming majority of whom are white. The current practice, which makes these quantitative measures all-controlling, threatens to return us to 1960's levels of segregation. If current trends continue, blacks may once again comprise only 3.5% of various law school populations.⁴⁵ Implicit in *Grutter* was the premise that we need a critical mass of black students because they bring perspectives which cannot be duplicated, in a racially homogenous environment. The only conclusion to be drawn as we move in the direction of historic levels of de facto segregation is that blacks are academically inferior as a group. This message devalues black students and devalues diversity. Thus, *Grutter* upholds diversity in the abstract, but by upholding a "testocracy,"⁴⁶ which is discriminatory, it plants the seeds of the resegregation we are seeing.

On the one hand, we have a system based on individual merit, yet under the current quantitative approach, minority applicants are effectively treated as a number. To be an individual is to be more than a number. The paradox of a merit system based on test scores is that minorities are unable to show their true worth as individuals. They are invisible as individuals. Effectively, given their average scores, blacks are increasingly seen as members of an inferior group. They are stigmatized by the testing practices of most law schools.

⁴⁴ A bad tree cannot bring forth good fruit; neither can a good tree bring forth bad fruit. *Matthew* 7:16-18 (New American).

⁴⁵ For example in 1969, black students made up only 3.5% of the entire University of Michigan student body. See John Friedl, *Making a Compelling Case for Diversity in College Admissions*, 61 U. PITT. L. REV. 1, 7 (1999).

⁴⁶ I borrow the term from Professor Lani Guinier. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968 (1996). "We argue that the 'meritocracy' is neither fair nor democratic, neither genuinely predictive nor functionally meritocratic. . . . Instead, a 'testocracy' masquerades as a meritocracy. By testocracy we refer to test-centered efforts to score applicants, rank them comparatively, and then predict their future performance." *Id.*

IV. DIVERSITY V. DISCRIMINATION

The most important dualism we are experiencing is that on the one hand, *Grutter* is egalitarian, while on the other, it is colorblind. *Grutter* envisions diversity as a public norm, but the question of how to implement it as a private responsibility. *Grutter* supports diversity but on the premise that race is a proxy for ethnicity or culture. By having significant numbers of minorities, this creates a stimulating academic environment. Despite this alchemy of transmuted race into culture, race is still a permissible consideration only when it is considered on a case-by-case basis along with other factors such as geography, disadvantage, etc.

Under the framework of *Grutter*, compensatory justice is not a permissible basis for preferring minorities. Such a preference, in *Grutter's* terms, victimizes innocent whites. As such, *Grutter* operates as a shift of focus. First, doctrinally, we do not look at racism or discrimination because it is irrelevant to the justification for inclusion.⁴⁷ But more importantly, *Grutter* shifts the focus by presenting a decision premised on discourse of colorblindness as some kind of victory. Having created an illusory linkage between colorblindness and inclusion, minorities have embraced diversity as part of a vocabulary of emancipation. Diversity as a norm is received as a kind of big tent under which both conservatives and liberals, as well as minority advocates and advocates of merit, could meet and find consensus on inclusion. But *Grutter* privatizes the project of inclusion and divorces all discussion of minorities from any reference to history or the current social context of continuing patterns of discrimination. This freewheeling decontextualization has laid the groundwork perfectly for the current crises.

At a theoretical level, the problem with formal equality and its alter-ego, color blindness, is that it is concerned only with process. It is a framework of equality of opportunity only. The spectre only hinted at by the current statistics is the spectre of racial caste. The meaning of resegregation of American law schools is that blacks will not only lack a means of legal education, but will lack an important avenue of social mobility as well. By affirming an ahistorical, individualistic, and socially

⁴⁷ See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1625–26 (2003).

decontextualized colorblindness, the *Grutter* Court embraces a narrow vision of equality which has no terms for, and no way to conceptualize, the problem of racial caste. The anti-caste concern is simply beyond the horizon of the Court's equal protection methodology.

But the key fallacy involved in the story of *Grutter* as a victory is the notion that in the private sphere of academia, there is a clear consensus rejecting the racism of black inferiority. The idea is that once law schools were free to consider race, the enlightened liberal culture of academia would continue to embrace minorities. My hypothesis is that stereotypical thinking is still quite prevalent.⁴⁸ The stereotype that blacks are intellectually inferior was the rationalization of choice for the era of segregation. While a majority of law professors and deans clearly favor racial inclusion in the abstract, I doubt that this preference will survive fierce competition for elite status among law schools.

Elitism and racism are not distinct. Elite standards are intertwined with stereotyped rationalizations of racial disparities.⁴⁹ Imagine a dean who says he simply wants to

⁴⁸ See generally D. MARVIN JONES, RACE, SEX, AND SUSPICION: THE MYTH OF THE BLACK MALE 8 (2005) (stating that although "stereotypes, originating in unconscious racism, become the evil from which the black male must be shielded," the purpose of the book is not "to defend the black male," but "to deconstruct him").

"Social science research suggests that stereotypes serve as powerful heuristics, supplying explanations for events even when evidence supporting nonstereotypical explanations exists, and leading us to interpret situations and actions differently when the race of the actors varies." T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1067 (1991) (citations omitted); see also Jennifer L. Eberhardt & R. Richard Banks, Letter to the Editor, *Rutgers, Race and Reality*, N.Y. TIMES, Mar. 11, 1995, at 23 (discussing political conservatives' and liberals' prevailing assumptions of African Americans' inferiority); Brent Staples, Editorial, *The Presumption of Stupidity*, N.Y. TIMES, Mar. 5, 1995, at 14 (discussing assumptions about African Americans that exist independently of affirmative action).

⁴⁹ In the first instance, the "objectivity" of the standard is non-existent. The standards are chosen from a perspective of privileged whites based on the qualities that they feel are important. To some extent, the standards chosen are those that confirm their own class and race experiences as the norm. See Sturm & Guinier, *supra* note 46, at 1034-35 (explaining that there is a "preoccupation with the false promise of quantitative measurement" in the "selection, hiring and promotion process[es]").

[C]onventional selection methods advantage candidates from higher socio-economic backgrounds and disproportionately screen out women and people of color, as well as those in lower-income brackets. When combined with other unstructured screening practices, such as personal connections and

position his law school. But s/he witnesses this pattern of dwindling minority enrollments. How does s/he rationalize it? If black students are increasingly not getting in, the answer must increasingly be that they were not qualified. So long as a substantial number of blacks do get in, the racial implications of even disproportionate exclusion of minorities is ambiguous. However, as minorities increasingly dwindle toward token numbers, the sheer systematic nature of their exclusion will objectively signify group unsuitability.⁵⁰ Either deans must begin questioning and jettisoning discriminatory standards or risk constructively saying that the stereotypes of black inferiority are somewhat true. Of course the rationale explaining the paucity of minorities is normally couched in terms of educational disadvantage, but at the point of zero, or its functional equivalent, the explanation becomes irrelevant. Objectively, law schools are both buying into and sending the message that blacks are, as a class, and as a rule, not fit to be in law school. The practice of minimum LSAT scores and its underlying ideology of merit inevitably draw on and perpetuate the historic narrative of black inferiority.

These racial politics find synergy with the escalating attacks on affirmative action. In his closing remarks to the Court in *Brown v. Board of Education*,⁵¹ Thurgood Marshall framed the issue as whether "Negroes are inferior to all other human beings."⁵² The issue today is the same as the issue in *Brown*.

alumni preferences, standardized testing creates an arbitrary barrier for many otherwise-qualified candidates.

Id. at 982; see also Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1491-92 (1997) (concluding, after a review of the history of law school admissions standards, that these standards were developed in the context of the legal profession's explicit efforts to exclude minorities and women, and that this fact explains much of the LSAT's disproportionate impact on minorities).

My point is related but distinct: that the disparate outcomes on the test are rationalized through an unanchored hypothesis, consisting of a prior assumption that the fault is with blacks and not with the test. The hypothesis is not entirely unanchored, however, for racial stereotypes effectively serve as the anchor.

⁵⁰ This comes under the heading of "unexplainable on grounds other than race." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

⁵¹ 347 U.S. 483 (1954).

⁵² RICHARD KLUGER, *SIMPLE JUSTICE* 677 (2004) (quoting Thurgood Marshall).

V. STANDARD 211—AUTONOMY V. EQUAL JUSTICE

As I write, law professors I know and respect are bravely attempting to persuade the ABA to reform its accreditation practices: to stop its own over-reliance upon LSAT scores.⁵³ To do this, many have sought to have the ABA impose a standard of diversity as a mandatory feature of admissions policies, as well as a requirement of “measurable results.” On the surface this is entirely consistent with *Grutter*.⁵⁴ This is true because in the

⁵³ See ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS [hereinafter STANDARDS FOR APPROVAL], Standard 211, available at <http://www.abanet.org/legaled/standards/chapter2.html>.

Consistent with sound legal education policy and the Standards, a law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and a program that assists in meeting the unusual financial needs of many of these students, but a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students.

Id.

⁵⁴ Professor Bernstein has argued that the Standard is unconstitutional on its face.

[T]he ABA has just ordered law schools to . . . violate the law—and is resorting to blackmail to achieve its end.

Under these standards, any law school that seeks to maintain or acquire ABA accreditation will be required to engage in racial preferences in hiring and admissions, regardless of any federal, state or local laws that prohibit of such policies.

....

Racial preferences will thus generally be necessary to comply with Standard 211—despite the fact that several states, including California and Florida, ban race as a factor in law school admissions or hiring or both.

....

Nothing in *Grutter* would permit such a law school to engage in racial preferences.

David Bernstein, *Affirmative Blackmail* (Feb. 16, 2006), available at http://www.cato.org/pub_display.php?pub_id=5561.

Bernstein is clearly wrong because the statute is stated in entirely race neutral terms as the interpretation makes clear. There are two fundamental, fatal flaws in Bernstein’s reasoning. The first problem has to do with the dichotomy between identification and selection (a critical dichotomy that Bernstein ignores). The admissions process may be thought of as comprising two distinct stages. In the first stage, one must identify the audience of students targeted or sought after through the admissions process, and recruit and motivate members of that audience to apply. This is the identification stage. In the second stage, the school now has a pool of applicants and must select applicants from among this pool. This is the selection

interpretations of the standard, a means to the goal of "measurable results are all race-neutral."⁵⁵ The standard largely reprises the strategies of race-neutrality developed in the context

stage. *Grutter* says that race may not be, in itself, a dispositive factor in selection. *Grutter* in no way limits the authority or discretion of the school to recruit those students that the University thinks would be good students. Bernstein seems to have shot from the hip and not considered that the standard, as further articulated by the interpretation, largely limits race-consciousness to the identification or recruitment stage. This is still race neutral with respect to the actual selection decision. Because of the recruitment emphasis the standard is entirely consistent with *Grutter*.

The second problem is with Bernstein's use of legal language. Bernstein's false moral equations ignore the difference between norms or goals and the means used to achieve them. Diversity, a student body composed of people from all walks of life is a goal and one entirely consistent with equal opportunity: it is precisely the image one would expect to see were there no discrimination. Naked racial preference is not the same. The means used to achieve diversity would seem to be the arbiter of constitutionality. This is what Bernstein vitriolically overlooks.

⁵⁵ The interpretation reads in pertinent part:

This standard does not specify the forms of concrete actions a school must take in order to satisfy its equal employment obligation. The satisfaction of such obligation is based on the totality of its actions. Among the kinds of actions that can demonstrate a school's commitment to providing equal opportunities for the study of law and entry into the profession by qualified members of groups that have been the victims of discrimination are the following:

- a. Participating in job fairs and other programs designed to bring minority students to the attention of employers.*
- b. Establishing procedures to review the experiences of minority graduates to determine whether their employers are affording equal opportunities to members of minority groups for advancement and promotion.*
- c. Intensifying law school recruitment of minority applicants, particularly at colleges with substantial numbers of minority students.*
- d. Promoting programs to identify outstanding minority high school students and college undergraduates, and encouraging them to study law.*
- e. Supporting the activities of the Council on Legal Education Opportunity (CLEO) and other programs that enable more disadvantaged students to attend law school.*
- f. Creating a more favorable law school environment for minority students by providing academic support services, supporting minority student organizations, promoting contacts with minority lawyers, and hiring minority administrators.*

STANDARDS FOR APPROVAL, *supra* note 53, Standard 211, Interpretation 211-1.

of local governments attempting to comply with the race-neutral contracting requirements of *Croson*.⁵⁶ In the *Croson* context, local governments, unable to use goals and timetables, are often using job fairs, increased recruitment, and increasing the "attractiveness" of their markets to minorities. This standard is constitutional only to the extent that it adheres carefully to this boundary between racial quotas and goals on the one hand and race-neutral criteria on the other.

The bottom line though is neither the ABA nor any agency can require a certain percentage of minorities. Requiring "measurable results" in terms of programs and job fairs need not produce any particular percentage. Standard 211 does not reach that point and cannot reach that point. This boundary between race-conscious practices involved in identifying and recruiting qualified blacks on the one hand and race conscious results on the other traces the dividing line between effective strategies for racial inclusion and those which are not. In my experience race-neutral approaches generally produce tokenism.⁵⁷ "In order to get beyond racism, we must first take account of race. There is no other way."⁵⁸

In the admissions process of law schools itself, Rachel Moran vividly notes how such race-neutral practices failed miserably to produce meaningful percentages of minorities at Berkeley. If one scrapes away the rhetorical patina of "results" and strips the standard down to the actual means endorsed, there is no difference, as narrowly constrained by *Grutter*, between this standard and the failed race-neutral practices of the past. It is perhaps hoped that somehow the whole might be greater than the sum of its parts: that authority of the ABA as the accrediting

⁵⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

⁵⁷ See William C. Kidder, *Silence, Segregation, and Student Activism at Boalt Hall*, 91 CAL. L. REV. 1167 (2003) (reviewing ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002)).

Yet, in the six years since affirmative action was banned (1997-2002), these groups comprised only 11.3% of first-year enrollments at Boalt. By contrast, African Americans, Latinas/os, and American Indians comprised 23.4% of total first-year Boalt enrollments in the most recent years with affirmative action (1993-1996), meaning that Proposition 209 and the U.C. Regents' ban had the overall effect of slashing enrollments for these groups by more than half at the University of California's flagship law school.

Id. at 1173.

⁵⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 406 (1978) (Blackmun, J., concurring).

body together with the rhetoric of official exhortation will produce something more here than the race-neutral means employed would suggest. But this is an unanchored hope. To the extent that the pool of minorities continues to shrink because of escalating LSAT minimum scores, the LSAT minimum score becomes the sole arbiter of the universe of minority students who gain admission. While appeals to diversity can create enhanced competition for this shrinking pool it has no effect on the size of the pool or the trend toward shrinking which is taking place.

The problem underlying the irony of a case that extols diversity as a goal but limits the means of achieving it to race neutral standards is the embedded dichotomy between educational autonomy and equal justice. A core normative premise of *Grutter* is the autonomy of educational institutions to choose the kinds of students who will enrich the learning process. *Grutter* is not animated by any concern for blacks, simply the desire to create a space of freedom or liberty for educators to develop their pedagogical values through the admissions process. Implicit here is the notion that educational institutions have no obligation to address issues of social or inequality. *Grutter* is deaf, dumb, and blind to those concerns.⁵⁹

Those who advocated Standard 211, in my view, did so out of a just concern about increasing racial exclusivity and ultimately about racial caste. But *Grutter*, as a creature of educational autonomy, is not conceivably a viable platform to base any program of racial justice. *Grutter* is not within the paradigm of equal justice but within a much older paradigm of laissez-faire. *Grutter* is the new *Lochner*. *Grutter* will continue to constrain means to race-neutral means, to uphold an LSAT testocracy, which is crushing minority hopes, to insulate the academy from any serious critique of the narrative of black inferiority, which is increasingly becoming more dense and more salient within the admissions practices of law schools who have under *Grutter* renewed freedom to raise LSAT scores as high as they like no matter the adverse impact. If tokensism arises from this it is not irony, it is not inconsistent; it is a precise reflection of the

⁵⁹ The University is free to define diversity in such a way that diversity embraces students who in their backgrounds reflect a concern for issues of social inequality. But, *Grutter* does not associate itself with any substantive social justice norms and Universities, in my view, are left free—laissez-fair above all—to ignore them.

subordination of equality, as social justice, to the norm of autonomy (liberty). The normative hierarchy of *Grutter* is in direct conflict with minority social goals.

VI. RACIAL CLIMATE

The increasing over-reliance upon the LSAT does not occur in a vacuum. In 1995, the Regents of the University of California abolished the use of racial, ethnic, and gender preferences in admissions.⁶⁰ The following year, the state's voters cemented the Regents' decision by constitutionalizing the ban on preferences.⁶¹ In November 1998, Washington voters passed Initiative 200, a ballot initiative with wording identical to Proposition 209.⁶² In November 1999, Governor Jeb Bush adopted his "One Florida" plan, by executive order. Under this plan, Florida discontinued race-conscious affirmative action in the public university system, beginning in 2000 at the undergraduate level, and in 2001 at the graduate and professional levels.⁶³ At the time of this writing, anti-affirmative action groups have succeeded in placing on the ballot before Michigan voters a measure that would dismantle the gains of recent years by banning all race- and sex-conscious programs throughout state employment, contracting, and education. "A major object of the effort is to eliminate affirmative action admissions at the University of Michigan"⁶⁴

There is startling lacunae separating the discussion of the over-reliance on the LSAT and the attacks on affirmative action.

⁶⁰ See William Claiborne, *California Ban on Affirmative Action Cleared; State's Voter Initiative Goes Into Effect Today*, WASH. POST, Aug. 28, 1997, at A01.

⁶¹ See *id.*

⁶² See Steven A. Holmes, *Victorious Preference Foes Look for New Battlefields*, N.Y. TIMES, Nov. 10, 1998, at A25.

Proposition 209 was adopted by the voters of California as a ballot initiative in the November 5, 1996 general election, by a margin of 54 to 46 percent of the nearly 9 million votes cast. Formally entitled the "California Civil Rights Initiative," Proposition 209 amends the California Constitution so that it generally prohibits race- and gender-based affirmative action by California state agencies.

Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 195-96 (1997) (footnotes omitted).

⁶³ See Anita Kumar, *UF's Grad Schools Lag in Minorities*, ST. PETERSBURG TIMES (Fla.), July 5, 2003, at 1B.

⁶⁴ Miranda Massie, *Civil Rights Are in Peril; Court of Appeals Lets Regressive Amendment Go On 2006 Ballot*, DETROIT FREE PRESS, Nov. 22, 2005, at 13.

Both have the same effect. The increasing acceptance by voters of propositions banning affirmative action may represent a widening, deepening embrace of the idea that blacks are lowering standards and standing in the way of more qualified white applicants. It seems more than coincidental that the diminishing black enrollments are occurring in tandem with these referenda. I write, not to prove that the current over-reliance is based on stereotypes, but to make a plea that the current pattern of resegregation be seen in a larger context—one in which Americans in the post-civil rights era are questioning, retreating from, or rejecting the assumptions and premises of the "second reconstruction."

VII. SOLUTIONS: TOWARD A NEW STRATEGY FOR RACIAL JUSTICE: LEGISLATIVE REFORM

So, where do we go from here? First, we need some friends. We need some new allies. The entire civil-rights struggle needs a new interpretation, a broader interpretation. We need to look at this civil-rights thing from another angle—from the inside as well as from the outside That old interpretation excluded us. It kept us out. So, we're giving a new interpretation to the civil-rights struggle, an interpretation that will enable us to come into it, take part in it⁶⁵

As a tactical matter, proponents have accepted a paradigm that misdirects attention and energy into trench warfare, rather than into pursuing a progressive agenda. By reacting defensively to the current onslaught, they have foreclosed discussion of new, innovative strategies for racial and gender justice⁶⁶

Grutter is not our friend. It reflects our new captivity within the paradigm of formal equality as it intersects and links up with an equally imprisoning ideology of merit. In its doubleness, its appearance as a harbinger of inclusion, it is seductive to try to work within its framework. We must not.

I think that what we need to do is try to understand how African Americans faced with a similar political-legal dilemma addressed the problem. I have said in many ways the current

⁶⁵ Malcolm X, *The Ballot or the Bullet* (Apr. 3, 1964), available at <http://www.historicaldocuments.com/BallotortheBulletMalcolmX.htm>.

⁶⁶ Sturm & Guinier, *supra* note 46, at 955.

problem of resegregation of the nation's law schools is reminiscent of the historical moment of *Brown*. Charles Hamilton Houston, the architect in *Brown*, utilized a strategy, which I refer to as co-opting the dominant paradigm. He accepted the segregationist law as it was; he initially made no effort to relitigate *Plessy v. Ferguson*.⁶⁷ (*Grutter* may well be the new *Plessy*.) He then went on to use the law as it was to different ends than that for which it had been constructed. As I write, this debate is going on in the law reviews about these practices. Simultaneously, law professors I know and respect are bravely attempting to persuade the ABA to reform its accreditation practices: to stop its own over-reliance upon LSAT scores. To do this, many have sought to have the ABA impose a standard of diversity as a mandatory feature of admissions policies, as well as a requirement of "measurable results." This would, in my view, be only superficially consistent with *Grutter*, because it smacks of either redistributive justice or affirmative action goals, which will be read as a "quota." This, in my view, is to argue out of a just concern about racial caste against the dominant paradigm. Advocating diversity will not work, because even if one sees it as an anti-racist norm, it is still, at best, tenuously and precariously situated on the agenda of legal education. Diversity is a currency that is increasingly losing its purchasing power in the face of increasing competition, as the American public shifts away from all notions of "affirmative action."

Let us speak no more of this diversity. And let us stop attempting to close the barn door lest the horse of affirmative action is stolen. The significance of *Grutter* is that the horse is already gone.⁶⁸ But we need not mourn its loss.⁶⁹ Affirmative

⁶⁷ 163 U.S. 537 (1895).

⁶⁸ Affirmative action still exists as a remedy for identified, proven discrimination. See *United States v. Paradise*, 480 U.S. 149, 168-70 (1987); *Local 28 of Sheet Metal Workers Int'l Ass'n. v. EEOC*, 478 U.S. 421, 445 (1986).

However, voluntary affirmative action, as that term has always been understood, is passé. Affirmative action has traditionally meant one of two things. In its broadest meaning, it was understood as a floor or minimum level beyond which traditionally unrepresented minorities would not sink, and to conservatives, a quota. More narrowly, it was understood as a notion that race was always relevant to admissions or hiring where blacks were concerned as a marker for disadvantage or in *Bakke's* terms "unique perspectives." In any case, it was understood to authorize a broad, systemic use of race. I do not think either of those readings survive *Grutter*.

Grutter stands for two fundamental constitutional values. One is the right of the individual to be considered as an individual not merely a member of a group. The

second is the "freedom of the university to choose" a student body which includes students of diverse backgrounds. What *Grutter* finds in the margins of its colorblind approach is a liberal interpretation to what individualized treatment may encompass.

Grutter expressly held that the university *may* consider race on a case-by-case basis. *Grutter* also endorsed the goal of the university in seeking a "critical mass of blacks."

But this mantra of "critical mass" was "tricky magic." The Court upholds race-consciousness, but only as a discretionary thumb on the scale—as a metaphor to guide discretion, not as a fixed percentage or floor:

This was done, Shields testified, to ensure . . . a critical mass of underrepresented minority students. . . . Shields stressed, however, that he did not seek to admit any particular number or percentage of . . . minority students.

....

. . . Jeffrey Lehman, also testified. . . [that he] did not quantify critical mass in terms of numbers or percentages. . . . When asked about the extent to which race is considered in admissions, Lehman testified that it varies from one applicant to another. In some cases, according to Lehman's testimony, an applicant's race may play no role

Grutter v. Bollinger, 539 U.S. 309, 318–19 (citations omitted).

However, in the case the admissions director did not associate a critical mass with any particular percentage. It was an ever present but "background" consideration. To appreciate the limits of *Grutter* let us ask what more a university could do. A spectrum of inclusive strategies appear below:

- A. The state, the university, or the department mandates racial goals or minimum percentages of blacks which should be admitted to achieve a "critical mass."
- B. The university decrees that to achieve "diversity" all blacks "shall" be given preferential treatment in the selection process on the basis of race to promote diversity.
- C. The university decrees that all departments must strive for diversity and that officials "may" consider race in the selection process on a case by case basis to achieve diversity.
- D. The university decrees that all departments must achieve measurable results in terms of diversity and that to do so they shall affirmatively identify, recruit, and encourage minorities to apply.

A. is so clearly unconstitutional as to require no discussion. B. in my view would be equally unconstitutional as well. *Grutter* represents a structural resolution in *that it makes the individual admissions expert or team the locus of decision-making* as to what criteria to use in deciding whom they want. Moreover, it authorized this discretion in the context of a process that considered race on a "case-by-case" basis. This "freedom to choose" and its inherent flexibility and sensitivity is precisely what liberal individualism celebrates and requires. Any effort to substitute systemwide program for flexibility, or to impose race-consciousness across the board would collide with the whole logic of *Grutter*.

Let's translate this into doctrinal terms. *Grutter's* premise is that we must engage in a balancing test to determine the legality of voluntary affirmative action. The presumptive harm of considering race must be balanced against the goal of achieving a diverse student body. *Grutter* resolves the balance in favor of diversity but only because the program is "narrowly tailored." It is narrowly tailored because it is flexible. It is flexible because the court limits the program in time (it must

action was only a wistful, doomed strategy of addressing the issue of discrimination. The issue was discrimination; it is still the same. While the traditional notion of affirmative action is passé, the anti-discrimination framework is still viable. I want to suggest a way this framework can be used in the context of the current problem. Let us recall Professor Kidder's statistical scenario. A black student with a 3.75 grade point average has no better chance of getting into even one law school than the average white student with a 3.25 average. Thus, even some of the most highly qualified black students will be rejected under current admissions policies. As the over-reliance upon the LSAT continues and minimum LSAT scores increase, the disparity between qualifications and acceptance will likely increase. At the same time, it is my suspicion that the practice of imposing minimum standards is not only yet to be validated, but also incapable of validation.

As a civil rights lawyer for over twenty years, my starting point is, "Where would that student go to obtain legal redress? Who is he going to call?" In a practical sense, the answer is no one. With the exception of Title VI, under all available statutes s/he would have to show some intentional wrongdoing to trigger a meaningful level of judicial review.⁷⁰ Without such a showing,

sunset in twenty-five years) and because race is not the predominant factor in the selection process. Flexible in context refers to considering race on a case-by-case basis. The decision to institutionalize a racial preference in any form *in the selection process* is the kind of sweeping, inflexible program that would be suspect as racial politics. Said another way, how could any systemic or standardized consideration of race *in the selection process* (as opposed to the recruitment stage) be individualized as *Grutter* commands?

C. is constitutional because it is precisely the case that *Grutter* addresses. D. is constitutional as well because while race is considered for purposes of recruitment no one is prejudiced in the selection process itself. There is no cognizable taking or harm. Of course, the only effective way to help blacks would be A. This is what *Grutter* forbids.

⁶⁹ I would note that I have fought for affirmative action in the past. I represented the NAACP in local debates with Ward Connerly. I represented the NAACP again when Governor Bush held hearings on his misleading and divisive "One Florida" plan, and have devoted much of my life to civil rights issues.

⁷⁰ See *Washington v. Davis*, 426 U.S. 229, 230-31 (1976). As summed up by one law professor:

A "racially neutral" policy is not unconstitutional merely because it results in racial disparity that the government cannot objectively justify. *Washington v. Davis* seems to signal that if governmental officers are ignorant of racial disparity produced by the policies that they have adopted, or even if they know but are indifferent, they do not violate the

there would be no requirement for the offending school to validate the practice. Tracing the pattern of over-reliance on the LSAT to some identifiable discriminatory animus/discriminatory intent is a practical impossibility.

The issue under Title VI is slightly different, but the door seems, in all practicality, just as closed. Under Title VI, states are in fact prohibited from discriminating on the basis of adverse impact.⁷¹ In the past, students have succeeded in challenging admissions practices that disproportionately excluded them.⁷² However, in *Alexander v. Sandoval*,⁷³ the Supreme Court held that no private right of action exists because Congress did not specifically create one.⁷⁴ Title VI's prohibition against disparate impact is intact. Certainly, the Department of Education can promulgate regulations against disparate impact. Some have argued that a private party could sue to enforce regulations prohibiting disparate impact.⁷⁵ But this is a speculative theory of litigation⁷⁶ linked to what strategically is a circumlocutory approach.

Constitution so long as they did not intend to bring about such a result.

David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 509–10 (2004) (footnote omitted); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (holding that discriminatory intent must be proven before the Court will find that the Equal Protection Clause has been violated).

⁷¹ Although Title VI does not by its terms provide for disparate impact litigation, regulations promulgated to implement the statute explicitly forbid federally funded entities from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination . . ." 29 C.F.R. § 31.3 (2005).

⁷² See *Grove City Coll. v. Bell*, 465 U.S. 555, 563 (1984); Preston C. Green, III, *Can Title VI Prevent Law Schools From Adopting Admissions Practices That Discriminate Against African-Americans?*, 24 S.U. L. REV. 237, 247–48 (1997) (discussing disparate impact regulations and the possibility of establishing university-wide discrimination under Title VI).

⁷³ 532 U.S. 275 (2001).

⁷⁴ See *id.* at 293.

⁷⁵ See Carolyn Magnuson, *'Disparate-Impact' Suits May Survive After High Court Ruling on Civil Rights Act*, TRIAL, July 2001, at 17, 17 (noting that "[a]s a result of the decision, some lawyers say, the future of civil rights litigation may rest more on 42 U.S.C. § 1983"); see also *id.* at 96 (quoting Adele Kimmel of Trial Lawyers for Public Justice as saying, "I don't think every door has been closed").

⁷⁶ Most likely, courts would defer to administrative agencies—here the Department of Education—in enforcing the regulations. That is, they would likely dismiss such lawsuits. See Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1186 (2000).

What is missing is a substantive right to sue for testing abuse. My sense is that the minimum score approach is deeply entrenched in our current academic culture. It is a recent expression of hegemonic notions of merit interacting with a society-wide retreat on the civil rights assumptions of the 1960s. There is a need for a statute which would provide legal redress for the student who is qualified in terms of grades and all other relevant criteria, but who is disqualified by express or implied minimum score requirements on the LSAT. We need to test the test. We need new legislation in the form of a statute which would make law schools presumptively liable for the discriminatory impact of admissions test requirements. To rebut the presumption, law schools utilizing minimum test score requirements would have to validate the cut-off they were imposing.

The legitimacy of the LSAT would not be in question. In the past, blacks have assumed the position of someone trying to prove that there is something wrong with the test. Under the framework I propose, the burden will be on schools that misuse the test to explain why they are doing this. Of course my colleagues tell me there is no support for such a bill in either house of Congress. This is not the issue. By merely introducing legislation we can highlight, in hearings and in the media, how this practice is unanchored—creating an artificial and insurmountable barrier to the dreams of minorities, while facilitating a virtual shut down in the pipeline of minority attorneys. The system will not respond to slogans like diversity. The master's tools will never dismantle the master's house. But history has shown it does sometimes respond to political resistance. The effort at legislative reform could become a site of effective resistance and public education.

If we form coalitions, if we put this issue on the front burner of our political agenda, we can win this. But unless we do this, we will, like the abolitionist lawyer in the film, have to apologize to a generation of would-be black law students why, despite the Court's insistence on formal equality, they cannot go to law school. And we would have to explain to them how the law "almost works."