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The Dark Side of *Grutter*

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I. INTRODUCTION

Liberals have generally cheered the Supreme Court's decision in *Grutter v. Bollinger*[1] as validating the continued use of affirmative action in the struggle against racial injustice.[2] But the Supreme Court's modern race cases rest on a misunderstanding of the nature of contemporary racial discrimination. From *Brown*,[3] to *Bakke*,[4] to *Grutter*,[5] the Court has advanced a color-

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1. 539 U.S. 306 (2003).

2. *See Grutter*, 539 U.S. at 327-30, 334 (holding that diversity is a compelling state interest in an educational context, and upholding the Michigan law school affirmative action program as a narrowly tailored effort to promote diversity). Proponents of affirmative action were generally pleased with the Court's decision in *Grutter*. *See, e.g.*, Steven Lubet, *Affirmative Action Battle Has Just Begun*, BALT. SUN, June 25, 2003, at 15A ("Theodore M. Shaw, counsel for the NAACP Legal Defense and Education Fund, likewise announced that the two opinions, taken together, constitute a strong endorsement of the constitutionality of affirmative action. . . ."); *see also* Monica Davey, *Diversity Still Crucial Issue at University, Students Say*, N.Y. TIMES, June 24, 2003, at A26 (". . .students declared the Supreme Court decisions a victory this afternoon."); Steven Greenhouse & Jonathan D. Glater, *Companies See Law School Ruling as a Way to Help Keep the Diversity Pipeline Open*, N.Y. TIMES, June 24, 2003, at A25 ("Businesses seeking to achieve diversity can breathe a sigh of relief"); *cf.* Neil A. Lewis, *Some on the Right See a Challenge; Angry Groups Seeking a Justice Against Affirmative Action*, N.Y. TIMES, June 24, 2003, at A1 ("The Supreme Court rulings on the University of Michigan admissions policies set off a wave of consternation among conservative groups today.").

3. Brown v. Bd. of Educ., 347 U.S. 483, 493-96 (1954) (invalidating separate-but-equal public schools); *see also* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (requiring desegregation of public schools "with all deliberate speed").

4. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see also id.* at 287-320 (opinion of Powell, J., stating that racial quotas were impermissible, but that race could be used as a "plus" factor in educational admissions).

5. *Grutter*, 539 U.S. at 322-24, 327-42 (2003) (upholding educational affirmative action program giving holistic and individualized consideration to applicants); *but cf.* Gratz v. Bollinger, 539 U.S. 244, 247-76 (2003) (invalidating educational affirmative ac-

blind conception of racial equality that treats race-conscious affirmative action as constitutionally suspect, because it deviates from an aspirational baseline of race neutrality that lies at the core of the equal protection clause. However, race neutrality is a hopelessly artificial concept in a Nation like ours, that continues to make race an operative factor in the allocation of nearly all significant societal resources. Rather, it is colorblind race neutrality that should be viewed as constitutionally suspect, because that is what now constitutes the culture's preferred form of racial discrimination. Contemporary "race neutrality" is simply a modern descendent of the more traditional forms of invidious discrimination that have been practiced in the United States since the Nation was founded. And the Supreme Court's current preference for race-neutrality over race-consciousness is a modern descendent of the Court's own tradition of complicity in racial discrimination.

Part II of this article describes the Supreme Court's current conception of racial discrimination, emphasizing the manner in which the Court has confused the concept of race neutrality with the concept of racial equality. Part III argues that the concept of race neutrality is constitutionally suspect, because it has now become a tool for discriminating against racial minorities. Part IV argues that the only way in which we are ever likely to remedy the systemic discrimination that continues to permeate American culture is by pursuing the precise racial balance goals that the Supreme Court has deemed to be unconstitutional. Part V concludes that the Supreme Court is once again impeding the Nation's progress toward racial equality, as it has done so many times in the past.

II. THE COURT'S CONCEPTION OF EQUALITY

The Supreme Court views racial equality as if it were largely synonymous with race neutrality. As a result, the Court treats all racial classifications as constitutionally suspect, and subjects them to strict scrutiny under the equal protection clause, whether they are invidious or benign.[6] The Court's preference for prospective neutrality has the effect of invalidating most uses of race-conscious affirmative action, which in turn makes it diffi-

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tion program awarding specified number of points to minority applicants as too mechanical to be narrowly tailored).

6. *See Grutter*, 539 U.S. at 324-26; Adarand Constructors v. Pena, 515 U.S. 200, 223-27 (1995).

cult to eliminate the existing inequalities that have been produced by centuries of prior discrimination.[7]

A. RACE NEUTRALITY

The Supreme Court's fondness for race neutrality is traceable to *Brown v. Board of Education*.[8] *Brown* invalidated the race-conscious, separate-but-equal regime of *Plessy v. Ferguson*,[9] holding that, in our racially stratified society, separate was "inherently unequal."[10] *Brown*, therefore, treated race-conscious governmental classifications as intrinsically objectionable, even if race was used in ways that were hypothetically "equal." But *Brown* also generated a logical dilemma. The Nation's long history of official discrimination left a legacy of existing inequalities that could not be remedied merely through the use of prospective race neutrality. Indeed, the ingrained and often unconscious racial attitudes that caused *Brown* to characterize racial segregation as inherently unequal meant that racial minorities could never make up for the considerable head start that whites had given themselves in the race for economic, political and social resources—unless whites were forced to slow down long enough for racial minorities to catch up. Therefore, the race-neutral society that *Brown* envisioned could come into existence only through use of the race-conscious means that *Brown* found objectionable. *Brown* and its progeny ultimately sought to resolve this dilemma by permitting the use of race-conscious measures only where necessary to remedy past or present constitutional violations.[11] However, *Brown* was unclear about precisely *why* race consciousness offended the Constitution.[12]

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7. Justice Ginsburg's dissenting opinion in *Gratz* contains statistics illustrating existing racial inequalities in the distribution of societal resources. *See* Gratz v. Bollinger, 539 U.S. 244, 301-03 (2003) (Ginsburg, J., dissenting).

8. 347 U.S. 483, 493-96 (1954) (invalidating separate-but-equal public schools).

9. 163 U.S. 537 (1896).

10. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

11. *See* Swann v Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (limiting scope of federal court remedial power to redress of constitutional violations); *cf.* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971) (invalidating prohibition on race-conscious pupil assignment designed to advance racial balance as inconsistent with remedial requirements of *Brown*).

12. *Brown* might have been motivated by a number of things, including the desire to reduce racial stigmatization; the desire to equalize intangible factors in the educational process; or the desire to protect associational rights. *See generally* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 448-53 (4th ed. 2001).

The Court's reason for treating race consciousness as constitutionally suspect was fleshed out by Justice Powell's opinion in *Regents of the University of California v. Bakke*.[13] *Bakke* stressed that the problem with racial classifications was that they stereotyped people as members of particular racial groups, rather than treating people as individuals.[14] Moreover, because that was true of *all* racial classifications—whether invidious or benign—all racial classification should be subject to strict scrutiny under the equal protection clause.[15] Affirmative action programs could not therefore use "racial quotas" to achieve "racial balance," because that would subordinate individual characteristics to group membership in a way that violated the tenets of liberalism on which the equal protection clause rested.[16] Once again, however, the Court's understanding of racial discrimination simply reposed the *Brown* dilemma. Because someone's race is an important component of his or her individual identity, individualized consideration must necessarily entail some degree of race-conscious consideration. Justice Powell sought to resolve the dilemma by permitting the use of race as a "plus" factor in what was otherwise an individualized assessment of merit. But that could only be done as part of a program that was narrowly tailored to advance a compelling state interest, thereby satisfying the demands of strict scrutiny.[17] Although the *Bakke* "holding" consisted largely of the views of Justice Powell, a five-Justice majority of the Supreme Court endorsed those views in *Grutter v. Bollinger*.[18]

Grutter reaffirmed the conclusion that strict scrutiny applied to benign as well as invidious racial classifications,[19] but for the first time since its infamous decision in *Korematsu v. United States*,[20] the Supreme Court *upheld* a racial classification after strict equal protection scrutiny.[21] The *Grutter* holding was largely

13. 438 U.S. 265, 269 (1978) (Powell, J.).

14. *Id.* at 298-300, 315 (Powell, J.); *see also Grutter*, 539 U.S. 332-33; Richmond v. Croson, 488 U.S. 469, 493-94 (1989) (plurality opinion of O'Connor, J.).

15. *Bakke* relied on *Brown* in rejecting the claim that benign racial classifications disadvantaging the white majority should be judged more permissively than invidious classifications disadvantaging racial minorities. *See Bakke*, 438 U.S. at 293-99 (opinion of Powell, J.).

16. *Id.* at 289, 307, 315 (Powell, J.); *see also Grutter*, 539 U.S. at 329-30.

17. *See Bakke*, 438 U.S. at 315-19 (opinion of Powell, J.).

18. *See Grutter*, 539 U.S. at 326-29, 332-36.

19. *See id.* at 324-29.

20. 323 U.S. 214 (1944).

21. *See Grutter*, 539 U.S. at 344-45. This was also the first time that Justice O'Connor had ever voted to uphold a racial affirmative action program. *See* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION ACTON: TWENTY-FIVE

unexpected, because several lower courts had invalidated similar affirmative action programs,[22] and because the Court's 1995 decision in *Adarand Constructors v. Pena*,[23] made it look as if strict scrutiny would be fatal for affirmative action. Although the *Adarand* Court expressly held open the possibility that some affirmative action programs might be adequate to survive strict scrutiny,[24] the program at issue in *Adarand* itself was so mild, that the Court's assurance appeared more rhetorical than real.[25] Justice O'Connor's majority opinion in *Adarand* also implied that racial affirmative action would be constitutionally impermissible if race-neutral alternatives had not first been proved inadequate,[26] but her majority opinion in *Grutter* curiously held that the Constitution did *not* require all race-neutral alternatives to be exhausted.[27] Nevertheless, *Grutter* continued the Supreme Court preference for race-neutral over race-conscious classifications, by subjecting only race-conscious classifications to strict scrutiny.[28]

Grutter reaffirmed the *Bakke* view that diversity could constitute a compelling state interest in an educational context,[29] but

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YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 159-63 (2000) (discussing Supreme Court voting blocs on issue of racial affirmative action).

22. *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (invalidating diversity-based affirmative action program for University of Texas student admissions); *see also* Johnson v. Bd. of Regents, 263 F.3d 1234 (2001) (invalidating diversity-based affirmative action program for University of Georgia); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000) (invalidating diversity-based affirmative action program for Montgomery County, Maryland magnet school); Tuttle v. Arlington County, 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000) (invalidating diversity based affirmative action program for Arlington, Virginia public schools); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) (invalidating diversity-based affirmative action program for Boston Latin School); Taxman v. Piscataway Township Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997) (invalidating diversity-based affirmative action program for New Jersey high school teacher layoffs); Podberesky v. Kirwin, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) (invalidating University of Maryland minority college scholarship program); *but see* Smith v. University of Washington Law School, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (dismissing as moot prospective challenge to diversity-based-affirmative action program for University of Washington Law School, and holding that student diversity did constitute compelling state interest).

23. 515 U.S. 200 (1995).

24. *See Adarand*, 515 U.S. at 237 (strict scrutiny is not necessarily fatal scrutiny).

25. What the Court found constitutionally suspect was simply a rebuttable presumption that racial minorities were socially and economically disadvantaged—something that would seem to be beyond dispute. *See id.* at 205-10 (describing presumption).

26. *See id.* at 237-38; *see also* Richmond v. Croson, 488 U.S. 469, 507 (1989).

27. *See Grutter*, 539 U.S. at 339-40.

28. *See id.* at 326.

29. *See id.* at 323, 328-30.

it also strongly endorsed *Bakke*'s distaste for racial quotas. In upholding the racial affirmative action program used by the University of Michigan law school, the *Grutter* Court went to great pains to stress that the program was valid because it merely used race as a "plus" factor in "a highly individualized, holistic review of each applicant's file,"[30] and did not entail the use of racial quotas that "would amount to outright racial balancing, which is patently unconstitutional."[31] The Court hammered the point home on the same day by invalidating, in *Gratz v. Bollinger*,[32] the separate racial affirmative action program used by the University of Michigan undergraduate college. It found that the undergraduate program's automatic award of a fixed number of points to minority applicants denied "individualized consideration" to each applicant, and had "the effect of making 'the factor of race. . .decisive' for virtually every minimally qualified underrepresented minority applicant."[33] Although it is likely that future affirmative action programs will now be structured to emulate the program upheld in *Grutter*, the Court's insistence on holistic consideration of admissions files may increase the administrative burden imposed on admissions offices enough to reduce the amount of affirmative action that schools can afford to undertake.

The precedential value of *Grutter* is uncertain for at least two reasons. First, the case may or may not be limited to the educational context in which it was decided. Justice Scalia's contrary suggestion notwithstanding,[34] diversity may not be recognized as compelling in other contexts such as employment, where the goal is productivity rather than the exchange of intellectual ideas and perspectives. Second, because Justice O'Connor has become the swing vote on the issue of affirmative action, the precedential value of *Grutter* may be limited by both

30. *Id.* at 337.

31. *Id.* at 330. Like Justice Powell in *Bakke*, *see* 438 U.S. 265, 316-19 (1978), Justice O'Connor's majority opinion in *Grutter* paid homage to the Harvard affirmative action plan as a model of holistic, individualized consideration that did not make use of racial quotas. *See Grutter*, 539 U.S. at 335-37. The deference shown to Harvard is ironic, in light of Harvard's history of using quotas to limit the admission of Jews. *See id.* at 369 (Thomas, J., concurring in part and dissenting in part).

32. 539 U.S. 244 (2003) (invalidating racial affirmative action program at University of Michigan undergraduate College of Literature, Science and Arts).

33. *See Gratz*, 539 U.S. at 271-72, *quoting* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (Powell, J.) (ellipsis in original).

34. *See Grutter*, 539 U.S. at 348 (Scalia, J., dissenting) (suggesting that diversity justification endorsed by majority could be used to justify affirmative action in public and private employment).

her personal policy preferences and her tenure on the Court. If a more conservative Justice were to replace Justice O'Connor, *Grutter* might be narrowly interpreted or even overruled. If the case were narrowly interpreted, Justice Kennedy's position in *Grutter* might become controlling, and the law of affirmative action could once again revert to its post-*Adarand* status. Affirmative action would remain theoretically permissible, but in actuality, no program would likely be found to survive strict scrutiny.[35] However, it may also be true that considerations of efficiency and collegiality will make the Court reluctant to revisit the racial affirmative action issue in the immediate future. Despite political changes on the Court, it took 19 years for *Planned Parenthood of Southeastern Pennsylvania v. Casey*[36] to supplant *Roe v. Wade*[37] with respect to the issue of abortion, and 17 years for *Lawrence v. Texas*[38] to overrule *Bowers v. Hardwick*[39] with respect to the issue of homosexual sodomy.[40] Perhaps *Grutter* will remain the law through inertia for a similar period of time.

Prior to *Grutter* and *Gratz*, the Supreme Court politics of affirmative action was fairly simple to ascertain. A five Justice conservative bloc—consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas—virtually always voted against affirmative action. A four-Justice liberal bloc—consisting of Justices Stevens, Souter, Ginsburg and Breyer—virtually always voted in favor of affirmative action.[41] In the wake of *Grutter* and *Gratz*, things have become a bit more complicated. Justice O'Connor voted with the liberal bloc to uphold the affirmative action plan in Grutter, 5–4,[42] and Justices O'Connor and Breyer voted with the conservative bloc to invalidate the affirmative action plan in Gratz, 6–3.[43] There now seem to be seven votes to reject the proposition advanced by the Fifth

35. Like Justice O'Connor prior to *Grutter*, Justice Kennedy has never voted to uphold a racial affirmative action program. This is also true of Justices Scalia and Thomas, and with one exception, of Chief Justice Rehnquist. *See* SPANN, *supra* note 21, at 159-63 (discussing Supreme Court voting blocs on issue of racial affirmative action).

36. 505 U.S. 833 (1992).

37. 410 U.S. 113 (1973).

38. 539 U.S. 558 (2003).

39. 478 U.S. 186 (1986).

40. I owe this insight to a comment made by my colleague Professor Mark Tushnet at a Georgetown University Law Center Supreme Court Institute program on *Grutter* and *Gratz* in the summer of 2003.

41. *See* SPANN, *supra* note 21, at 159-63 (discussing Supreme Court voting blocs on issue of racial affirmative action).

42. *See Grutter*, 539 U.S. at 310 (majority opinion of O'Connor, J.).

43. *See Gratz*, 539 U.S at 247, 276 (O'Connor, J., joining majority opinion and concurring); *id.* at 281-82 (Breyer, J., concurring in the judgment).

Circuit in *Hopwood v. Texas*,[44] that race can never be used in an affirmative action plan, even to advance educational diversity. Because only Justices Scalia and Thomas would now support such an approach,[45] some form of racial affirmative action is likely to remain at least theoretically constitutional.

The diversity reasoning of *Grutter* could also undermine other lower court decisions. For example, *Grutter* might now authorize the use of minority scholarships, such as those invalidated by the Fourth Circuit in *Podberesky v. Kirwin*,[46] as a means of getting minority students actually to attend the schools that admitted them in the hope of increasing diversity. Similarly, Grutter might now authorize the use of race-conscious teacher layoffs, such as those invalidated in *Taxman v. Piscataway Township Board of Education*,[47] as a means of promoting faculty diversity in the exchange of ideas to which students are exposed. *Grutter* might even authorize efforts to increase diversity in the pool of doctors or lawyers available to serve minority communities, even though such an interest was expressly rejected as not compelling by Justice Powell in *Bakke*.[48] On the present Court, it

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44. *See* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) ("...any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.").

45. *See Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part) ("The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."); *id.* at 350 (Thomas. J., concurring in part and dissenting in part) ("Similarly, a university may not maintain a high admission standard and grant exemptions to favored races."); *id.* at 371 ("...the majority still cannot commit to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications.") (emphasis in original).

46. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) (invalidating minority college student scholarship program). Note that *Grutter*'s insistence on ensuring that all students be able to compete for all seats may be read to preclude the use of minority scholarships. *See Grutter*, 539 U.S. at 334 (a program cannot insulate one category of applicants from competition with all other applicants).

47. 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997) (invalidating diversity-based affirmative action program for high school teacher layoffs). Note that Justice O'Connor has previously voted against race-conscious teacher layoffs, but she has declined to rule them out in all cases. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 293-94 (1986) (O'Connor, J., concurring).

48. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310-11 (1978) (opinion of Powell, J., stating that any compelling interest in increasing health care to minority communities can be advanced through race-neutral means). To the extent that the quality of professional services for a diverse population can be improved by increasing the diversity of the professionals who provide those services, *Grutter* might make this interest compelling. *Cf. Grutter*, 539 U.S. at 348 (Scalia, J., dissenting) (suggesting that diversity justification endorsed by majority could be used to justify affirmative action in public and private employment).

appears as if Justice O'Connor will have the decisive vote in determining how such policy issues will be resolved.

B. SOCIETAL DISCRIMINATION

Liberal celebrations notwithstanding, Justice O'Connor's majority opinion in *Grutter* seems likely to prolong rather than ameliorate the problem of racial discrimination. It holds that affirmative action programs must be narrowly tailored in order to survive strict scrutiny,[49] but it defines narrow tailoring to mean non-responsiveness to the continuing problem of systemic discrimination. Consistent with *Bakke*'s assertion that racial classifications are unconstitutional because they treat people as members of a group rather than as individuals, *Grutter* views racial discrimination as something that is particularized rather than pervasive in nature.[50] Accordingly, it reaffirms prior cases asserting that affirmative action cannot constitutionally be used to remedy general "societal discrimination."[51] This, in turn, allows the Court to treat the concept of racial equality as if it were largely synonymous with the concept of prospective race neutrality. As long as the continuing effects of prior discrimination can be disregarded by denominating them "societal," formal equality can be achieved merely by insisting on prospective colorblindness.

The Supreme Court has repeatedly asserted that the goal of reducing systemic or "societal discrimination" is a constitutionally impermissible goal for race-conscious affirmative action. The Court believes that the pursuit of such a goal would authorize affirmative action programs that were too vast, and too burdensome on innocent whites.[52] Moreover, it would permit the state to utilize quotas to achieve racial balance in a way that was inconsistent with the race-neutrality foundations of *Brown*. Therefore, the Court has historically limited race-conscious affirmative action to narrowly tailored remedies for particularized acts of past discrimination that were supported by reliable legis-

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49. *See Grutter*, 539 U.S. at 333-34 (requiring narrow tailoring, and upholding Michigan law school affirmative action program as a narrowly tailored effort to promote diversity).

50. *See id.* at 324, 326 (equal protection clause protects personal rights rather than group rights).

51. *See id.* at 323-24, 328 (rejecting remedies for "societal discrimination" and remedies designed to promote racial balance).

52. *See id.* at 323-24, *citing Bakke*, 438 U.S. at 310 (Powell, J.).

lative, judicial or administrative findings.[53] Although *Grutter* has now authorized the use of affirmative action to promote diversity, it has nevertheless reaffirmed the traditional prohibition on using affirmative action to remedy general societal discrimination.[54]

By ruling race-conscious remedies for societal discrimination out of bounds, the Supreme Court has enabled itself largely to sidestep the dilemma posed by *Brown* and *Bakke*. The Court's reconceptualization of "racial equality" as something that can exist despite the continued systemic effects of past discrimination avoids most needs to authorize the use of race-conscious remedies in the pursuit of equality. Prospective race neutrality typically becomes adequate to satisfy whatever demands the equal protection clause imposes, because the inequalities that cannot be eliminated through race-neutral means typically do not count for equal protection purposes. That sort of reconceptualization is precisely what the Court used to deal with the problem of Northern school desegregation in the post-*Brown* era. Not wanting to force suburban white children to go to school with inner-city black or Latino children, the Supreme Court simply *defined* one-race minority schools to be "desegregated" despite the fact that their racially identifiable character had not changed.[55] Justice Ginsburg's dissenting opinion in

53. This position was articulated by Justice Powell in *Bakke*, 438 U.S. at 307-10 (Powell, J.), and reasserted by Justice Powell in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-79 (1986) (plurality opinion of Powell, J.). Lead by Justice O'Connor, this view has now been adopted by a majority of the full Supreme Court. *See Grutter*, 539 U.S. at 323-24 (majority opinion of O'Connor, J., citing *Bakke* as rejecting interest in remedying societal discrimination); *id.* at 330 (rejecting racial balancing as "patently unconstitutional"); *see also* Richmond v. Croson, 488 U.S. 469, 496-98 (plurality opinion of O'Connor, J., rejecting societal discrimination); Metro Broad. v. F.C.C., 497 U.S. 547, 610-14 (O'Connor, J., dissenting) (rejecting societal discrimination); *Wygant*, 476 U.S. at 288 (O'Connor, J. concurring) (rejecting societal discrimination); Johnson v. Transp. Agency, 480 U.S. 616, 647-53 (1987) (O'Connor, J., concurring in the judgment) (rejecting societal discrimination).

54. *See Grutter*, 539 U.S. at 323-24, 328.

55. Because of *de facto* residential segregation, inner-city school students are often predominantly minority while students in surrounding suburbs are often predominantly white. Meaningful desegregation of these schools would, therefore, require busing between inner-city and suburban schools. However, the Supreme Court held in *Milliken v. Bradley (I)*, 418 U.S. 717, 737-47 (1974), that interdistrict busing was prohibited in the absence of an interdistrict constitutional violation—something that did not typically exist in the suburbs, where there were too few minority students to warrant segregation. Then, in *Milliken v. Bradley (II)*, 433 U.S. 267, 279-88 (1977), the Court implied that the remedy for unconstitutionally segregated inner-city schools could consist of mere remedial education programs. Finally, in *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249-50 (1991), the Court stated that a school district could become "unitary," once the district "had complied in good faith with the desegregation decree"

Gratz offers a striking statistical demonstration of the ways in which societal discrimination continues to make racial minorities an identifiable underclass in American culture.[56] But the Supreme Court has now chosen simply to *define* racial equality as something that takes no cognizance of those inequalities. *Grutter*'s recognition of a constitutionally legitimate interest in educational diversity may superficially seem to be an exception to this characterization.[57] However, I believe that after more careful scrutiny, *Grutter* is better understood as having little to do with the interests of racial minorities.

III. RACE-NEUTRAL DISCRIMINATION

The Supreme Court's preference for race neutrality, rooted in its reluctance to confront the continuing problem of systemic societal discrimination, turns out to be a fairly effective way of engaging in racial discrimination. By reading the Constitution to preserve the racial status quo in the allocation of significant societal resources, the Nation's white majority is able to continue discounting the interests of racial minorities in ways that are too passive to be immediately recognized as oppressive. Even *Grutter* is discriminatory in this sense, because it authorizes only marginal increases in racial diversity while prohibiting more meaningful systemic change. Interestingly, Justice Thomas identifies and exposes this aspect of the majority opinion, but he remains unwilling to endorse systemic remedies himself.

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and "the vestiges of past discrimination had been eliminated to the extent practicable." The *Milliken* and *Dowell* cases, therefore, allow previously segregated inner-city ("dual") schools to become "desegregated" ("unitary") schools without any change in their racial composition. They also effectively re-constitutionalized the separate-but-equal status of public schools that *Brown* had formally declared unconstitutional. Because the Supreme Court has never expressly stated that a school system can be both segregated and unitary, it is possible to read the *Milliken* and *Dowell* cases as standing for the alternate proposition that racially segregated school systems remain dual because of their racially identifiable character, but that the Constitution simply does not permit them ever to be made unitary because of the constraints imposed by *Milliken I*. Whatever theoretical foundation such a reading might have, as a practical matter, it still permits the maintenance of segregated schools.

56. *See Gratz v. Bollinger*, 539 U.S. 244, 299-304 (Ginsburg, J., dissenting).

57. Indeed, it is not clear why promoting the educational diversity that *Grutter* recognizes as a compelling governmental interest is not itself a remedy for the "societal discrimination" that *Grutter* finds to be beyond the reach of race-conscious affirmative action. To the extent that the lack of diversity in elite educational institutions is caused by the societal discrimination embedded in admission standards, it is possible to read *Grutter* as retreating from the Court's previous ban on the use of race-conscious affirmative action to remedy societal discrimination.

A. PASSIVE OPPRESSION

The United States has a long tradition of invidious discrimination against racial minorities, and an equally long tradition of insisting on both the *de jure* and the *de facto* relevance of race in nearly all aspects of American life. It is not surprising, therefore, that the culture's new-found affinity for prospective race neutrality in the post-*Brown* era comes at a time when racial minorities have begun to make economic, political and social gains through the use of race-conscious affirmative action. By arresting those gains, current demands for race neutrality are simply the modern incarnation of the same invidious discrimination that the culture has used to oppress racial minorities in the past. It seems more than a mere coincidence that contemporary voter initiative proposals requiring race neutrality, and even prohibiting the collection of statistical data in racial categories, have been sponsored by political conservatives (who have historically opposed racial minority rights) rather than by political liberals (who have historically favored minority rights).[58]

Similarly, the Supreme Court's refusal to allow even majoritarian political remedies for societal discrimination, fits comfortably within a long tradition of Supreme Court impediments to the advancement of racial equality. It is reminiscent of earlier Supreme Court decisions upholding the appropriation of Indian lands,[59] upholding slavery,[60] upholding official segregation,[61] upholding the exclusion of Japanese-American citizens from their

58. Ballot initiatives prohibiting government consideration of race in educational admissions, hiring and contracting have been enacted in California (Proposition 209) and Washington (Initiative 200). Governor Jeb Bush of Florida has issued an executive order prohibiting the consideration of race in state university admissions. *See* Erik Lords, *Taking Sides*, BLACK ISSUES IN HIGHER EDUC., Feb. 27, 2003, at 26. A proposed initiative (Proposition 54) in California that would have prohibited the collection of most demographic data by race, was defeated in the October 7, 2003 recall election in which Arnold Schwarzenegger replaced Gray Davis as Governor of California. *See* Rebecca Trounson & Nancy Vogel, *Total Recall: Propositions 53 and 54; Both Ballot Measures Go Down in Defeat*, L.A. TIMES, Oct. 8, 2003, at A26. These proposals have been sponsored or supported by Ward Connerly, the black conservative regent of the University of California who spearheaded the adoption of California Proposition 209. *See id.*; Katherine Corcoran, *Support Narrows For Racial Initiative; Interest Grows Among Latinos, Field Poll Finds*, SAN JOSE MERCURY NEWS, Aug. 19, 2003, at 13.

59. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (European discovery of land now constituting United States, and conquest of indigenous Indian inhabitants, divested Indians of title to that land).

60. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (invalidating congressional statute prohibiting slavery in Louisiana Territory).

61. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding separate-but-equal racial segregation).

homes,[62] and upholding *de facto* racial segregation.[63] Viewed against this backdrop, the Supreme Court's insistence on defining narrow tailoring to preclude remedies for societal discrimination is more than just curious.[64] The Court's position is itself constitutionally suspect, because it seems to be motivated by a desire to ensure that racial minorities continue to occupy their traditional social status as subordinate to whites. Despite the lofty rhetoric that is typically used to advocate it, there is nothing noble about contemporary race neutrality.

The thing that animates the Supreme Court's conception of racial discrimination is a belief that it should be understood as a particularized phenomenon that is unrelated to the statistically disproportionate hardships suffered by racial minorities as a group. However, the most oppressive forms of contemporary discrimination are systemic in nature. They are revealed by racially-correlated statistical disparities, and not by pairing individual discriminators with individual victims. The reason that racial minorities occupy a perpetual underclass in the United States is that they are statistically underrepresented in the allocation of societal resources.[65] And that remains true even though the Supreme Court finds it difficult to identify a particularized cause of that pervasive underrepresentation.[66]

The serious conceptual difficulty encountered in trying to distinguish between particularized discrimination and societal discrimination is illustrated by the Supreme Court's recent foray into race-conscious redistricting. The Court has held that the "predominant" consideration of race in drawing voting district lines offends the equal protection clause of the Constitution, because it violates the individual rights of voters who are placed in

62. *See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding World War II military exclusion order directed at Japanese-American citizens).

63. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208-09 (1973) (adopting expansive interpretation of de jure segregation, but reaffirming prohibition on use of race-conscious remedies to eliminate *de facto* segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17-18 (1971) (same); *cf*, Washington v. Davis, 426 U.S. 229, 238-48 (1976) (reading equal protection clause to permit racially disparate impact not directly caused by intentional discrimination).

64. *See Grutter v. Bollinger*, 539 U.S. 306, 323-24, 328, 334 (2003) (rejecting societal discrimination and use of racial quotas to achieve racial balance).

65. Justice Ginsburg's dissenting opinion in *Gratz* contains statistics illustrating existing racial inequalities in the distribution of societal resources. *See* Gratz v. Bollinger, 539 U.S. 244, 301-03 (2003) (Ginsburg, J., dissenting).

66. *See, e.g.*, Richmond v. Croson, 488 U.S. 469, 498-508 (1989) (despite stark statistical disparities, record was insufficient to reveal any past racial discrimination in Richmond, Virginia construction trades).

particular districts because of their race.[67] But as Justice Ginsburg has pointed out, redistricting is an activity that is almost always based on the statistical presence of various groups in various districts. Redistricting has no bearing whatsoever on individual rights.[68] In that sense, societal discrimination is like redistricting. It is solely about the statistical representation of various groups in the allocation of resources. It has nothing whatsoever to do with the individual rights that the Supreme Court claims to be protecting as it perpetuates societal discrimination.[69]

Here is a way to appreciate the racial discrimination that is entailed in the Supreme Court's refusal to allow remedies for societal discrimination. It seems reasonably clear that most whites would not want to trade places with blacks. Indeed, one study found that white college students would want $1 million per year in damages if they were suddenly to be made black rather than white.[70] The reason for this is presumably because of the nonparticularized societal discrimination that continues to exist against blacks in American culture. The Supreme Court not only refuses to recognize such discrimination as something for which the Constitution provides a remedy, but it actually reads the equal protection clause as *prohibiting* affirmative action remedies for such discrimination. However, the Court *does* read the Constitution to prohibit discrimination against whites who are burdened by affirmative action programs. And it does so even though any discrimination against whites is equally nonparticularized.

It is just as hard to tell which individual white is harmed by affirmative action as it is to tell which individual black is harmed by the societal discrimination that gives rise to the need for af-

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67. *See* Miller v. Johnson, 515 U.S. 900, 916-17 (1995) (articulating "predominant factor" test).

68. *See id.* at 946-47 (Ginsburg, J., dissenting, arguing that redistricting has no bearing on individual rights).

69. This lies at the core of a longstanding debate concerning individual and group rights under the equal protection clauses. *Compare* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 48-52 (1976) (arguing that discrimination, and consequently discrimination remedies, should be viewed as individual phenomena) *and* Michael J. Perry, *The Principle of Equal Protection*, 32 HASTINGS L.J. 1133, 1145-48 (1981) (same), *with* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 J. PHIL. & PUB. AFF. 107, 147-77 (1976) (arguing that discrimination, and consequently discrimination remedies, should be viewed as group phenomena).

70. *See* ANDREW HACKER, TWO NATIONS 32 (1992) (describing study); *see also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1759 (1993) (discussing study described by Hacker).

firmative action. The abolition of affirmative action might increase the number of whites admitted to a particular program, but no particular white can know whether he or she would have been the one admitted. Many whites with similar credentials will inevitably be competing for the few additional slots that are freed up by the abolition of affirmative action, and some of those whites will inevitably be displaced by the better qualified blacks who are no longer admitted to more prestigious programs because of the demise of affirmative action.[71] Similarly, the abolition of general societal discrimination might increase the number of blacks admitted to a particular program, but no particular black can know whether he or she would have been the one admitted. Because of the many imponderables involved, counterfactual futures simply cannot be predicted with the degree of precision that would be required to turn systemic racial discrimination into particularized racial discrimination. That is true whether the systemic discrimination is caused by affirmative action or by general societal discrimination.

However, even if one insists on ignoring systemic discrimination and characterizing unconstitutional racial discrimination as the violation of an individual right—as the Supreme Court insists on doing[72]—that characterization is equally applicable to both affirmative action and societal discrimination. To the extent that the burdens of affirmative action can be personified by the harm to one individual white who might have been admitted to a program in the absence of affirmative action, the burdens of societal discrimination can be personified by the harm to one individual black who might have been admitted to a program in the absence of societal discrimination. The only difference is the race of the groups (or individuals) that the Supreme Court decides to protect or abandon. If the victims are white, the Supreme Court will protect them by invalidating the offending affirmative action program. But if the victims are black, the

71. Where there are both a large number of applicants for a limited number of spaces and a large number of white applicants relative to the number of minority applicants, affirmative action will significantly increase the probability that particular minority applicants will be admitted to a program. However, the abolition of affirmative action will *not* significantly increase the probability that particular white applicants will be admitted to the program. *See* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1045-50 (2002). Perhaps this is the ultimate point of Justice Stevens' objection to the plaintiffs' standing to challenge the affirmative action program at issue in *Gratz*. *See Gratz v. Bollinger*, 539 U.S. 266, 283-88 (2003) (Stevens, J., dissenting).

72. *See Grutter v. Bollinger*, 539 U.S. 306, 324, 326 (2003) (equal protection clause protects personal rights rather than group rights).

Supreme Court will abandon them and disregard the offending societal discrimination. As it has done so often in the past, the Supreme Court is simply favoring the interests of whites over the interests of racial minorities. In a culture replete with invidious societal discrimination against racial minorities, the Supreme Court has focused its attention on the more marginal burdens that affirmative action imposes on whites. That is called racial discrimination.

B. JUSTICE THOMAS

Justice Thomas recognizes that the *Grutter* majority is ignoring the systemic nature of contemporary discrimination, and is providing only incidental benefits to racial minorities. In fact, his *Grutter* dissent contains the seeds of a fairly radical theory of social change. But his curious commitment to a race-neutral conception of equality ultimately causes him to favor the denial of all race-conscious remedies over the provision of remedies that are more comprehensive.

Justice Thomas calls *Grutter*'s concern with diversity merely "aesthetic," because it makes the student bodies at elite institutions look more colorful, without measurably improving the social circumstances of underprivileged minorities.[73] In arguing that this aesthetic concern does not amount to a compelling state interest, Thomas claims that the Court's real interest is in protecting elitism. If elitism were not a concern, a school could increase its diversity in race-neutral ways simply by modifying its admissions standards to accept all qualified students; by abandoning practices that disproportionately disadvantage minorities, such as legacy preferences; or by discontinuing the use of racially skewed standardized tests, such as the LSAT.[74] Thomas also suggests that racial minority interests are being sacrificed in order to promote diversity at elite institutions, arguing that blacks learn better in historically black schools; that affirmative action beneficiaries do not learn as much as students who are admitted without preferences; and that minority beneficiaries are stigmatized by affirmative action.[75]

Justice Thomas recognizes that the underrepresentation of racial minorities in the allocation of societal resources is the product of established cultural practices that collectively consti-

73. *See id.* at 354-55 n.3 (Thomas, J., dissenting).
74. *See id.* at 355-61, 367-71.
75. *See id.* at 364-66, 371-74.

tute societal discrimination. He also recognizes that minority interests are commonly sacrificed in order to preserve that societal discrimination. Moreover, his elitism argument gains increased plausibility when one recalls that the Court was willing to uphold an affirmative action plan for the Michigan law school in *Grutter*, but was not willing to uphold a similar plan for construction workers in *Adarand*.[76]

The radical feature of Justice Thomas's position is his stated willingness to abandon the cultural practices that perpetuate the continued existence of societal discrimination. For him, that would be a race-neutral way of solving the problem of systemic discrimination. The problem with that solution, however, is that the society at large is almost certainly unwilling to abandon those cultural practices. The practices are so deeply ingrained that they seem inevitable rather than optional. Although we have known about the discriminatory implications of traditional admissions standards, legacies, and LSAT scores for decades, we remain noticeably reluctant to abandon them. However, for some reason, we *are* willing to carve out occasional affirmative action exceptions to those cultural practices for racial minorities. But Justice Thomas would invalidate all such exceptions on the grounds that they are race conscious, even though he would endorse the more radical step of abandoning those cultural practices completely.

Justice Thomas's commitment to race neutrality seems logically to be rooted in either the belief that the status quo is race neutral; the belief that prospective race neutrality will eventually eliminate any racial inequities that exist in the current allocation of resources; or the belief that existing inequities are preferable to the negative consequences of affirmative action. However, none of those positions is tenable.

Far from being race neutral, the status quo has been racially skewed by a long history of discrimination. This is illustrated by the continued existence of the very cultural practices that Justice Thomas himself identifies as discriminatory.

The notion that prospective neutrality could eventually enable racial minorities to overcome the disadvantages imposed by

76. *See* Adarand Constructors v. Pena, 515 U.S. 200 (1995). Note, however, that this argument can also cut the other way. To the extent that the Supreme Court is motivated by the desire to protect whites who are harmed by affirmative action, the Court was more willing to protect the less-elite white construction workers in *Adarand* than the more-elite white law school applicants in *Grutter*.

a history of discrimination seems extremely counterintuitive. Minorities could overcome the enormous head start that has been given to whites only if minorities were *more* qualified than whites to satisfy the standards built into those cultural practices—standards that favor whites over minorities. And no one seems to believe that racial minorities are *more* qualified than whites.

The argument that affirmative action will ultimately harm racial minorities by stigmatizing them and producing other collateral harms has more facial plausibility.[77] Empirical studies suggest that even when the benefits of affirmative action outweigh the attendant harms, the harms themselves remain significant.[78] And I argue in the present article that the limited affirmative action authorized by *Grutter* is likely to have only marginal benefits for racial minorities.[79] Nevertheless, the argument that racial affirmative action is unconstitutional because it harms its intended beneficiaries is not an argument that I am able to take seriously. It seems reasonably clear that the benefits of *real* affirmative action—affirmative action that successfully addressed the problem of existing "societal discrimination"—would greatly outweigh any increase in the stigmatization harms that racial minorities are already forced to endure. One is better off having resources than being thought well of while continuing to languish in a perpetual underclass. But even if it were a closer question, an institution with the racial history of the Supreme Court[80] lacks the moral authority to tell racial minorities what is in their own best interest. If Justice Thomas's anxieties about affirmative action were shared by racial minorities in general, those anxieties would merit more careful consideration. However, when they echo the views of the very white majority whose privileged status would be reduced by affirmative action, those anxieties seem as disingenuous as they do paternalistic. One cannot help but recall that slavery used to be defended by its white supporters on the grounds that the institution of slavery was good for

77. *See supra* text accompanying note 75 (Justice Thomas asserting that affirmative action has negative consequences for racial minorities).

78. *See, e.g.*, STONE ET AL., *supra* note 12, at 593-94 (discussing empirical research, including Linda Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CAL. L. REV. 1251 (1998)).

79. *See supra* introductory paragraph for Part III.

80. *See supra* text accompanying notes 59-64 (discussing cases in which Supreme Court has promoted racial inequality).

blacks, because it elevated blacks from their natural savage state.[81]

If Justice Thomas comes to recognize his conception of race neutrality as unrealistic, he may be willing to endorse more meaningful race-conscious remedies. As some commentators have suggested, Justice Thomas may simply be acting out a deep-seated psychological resentment of liberals who never took his accomplishments seriously, by opposing the very affirmative action programs from which he himself benefited.[82] But he seems not yet to have realized that it is also possible to punish liberals from the left, and not only from the right.

IV. RACE-CONSCIOUS EQUALITY

Only vigorous efforts to redistribute societal resources in ways that are unapologetically race-conscious are likely to make any qualitative change in the systemic discrimination that continues to characterize American culture. But *Grutter*'s treatment of such racial-balance remedies as inconsistent with a liberal conception of individual rights consigns the concept of affirmative action to a role of marginal utility. Moreover, the lack of any meaningful distinction between the Court's decisions in *Grutter* and *Gratz* makes the Court's racial jurisprudence seem both arbitrary and capricious. And it may be invidious as well.

A. RESOURCE REDISTRIBUTION

In a culture that was free from racial discrimination, one would expect to see resources distributed in ways that were racially proportional. The maldistribution of resources that exists in contemporary American culture is, therefore, evidence of continuing racial discrimination—either active discrimination, or more passive acquiescence in the lingering effects of past discrimination. Logically, such discrimination must exist either in the selection of the criteria that we use to govern resource allocation; in the manner in which we apply those criteria; or in the

81. *See* ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY 217 (1974); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 188-89 (1979); *see also* Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AMER. L. 497, 521-22 (2003) (discussing argument advanced in DAVID HOROWITZ, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY (2002) that blacks were made better off by institution of slavery).

82. *See, e.g.*, Maureen Dowd, *Could Thomas be Right,?* N.Y. TIMES, June 25, 2003, at A25.

training that we provide to satisfy those criteria. This syllogistic conclusion can be avoided only if one believes that racial minorities are inherently inferior to whites in their ability to satisfy our allocation criteria. And that, of course, would be simply another form of racial discrimination.

If we were serious about racial equality, we would want to redistribute societal resources in ways that promoted racial balance. And we would be willing to use racially proportional guidelines and quotas to achieve that racial balance. Race conscious efforts to promote racial balance would enable us to approximate the distribution of resources that would exist in a nondiscriminatory culture, which is something that we have not otherwise been able to achieve. And treating racial balance as an explicit goal would constitute an unambiguous statement of our societal goals and priorities, which would be refreshing in its candor.[83] Racial balance would also constitute a legal standard that was easier for policymakers to implement than the current affirmative action standards, which require policymakers to guess about the Supreme Court's likely response to particular uses of race. In fact, I suspect that most organizations wishing to promote diversity and avoid unconscious racial discrimination have in the past, and would in the future, find racial balancing to be a useful prophylactic technique. But most important, racial balance is likely to offer the only effective protection against the various versions of societal discrimination that are embedded in our more traditional resource allocation criteria. Such societal discrimination is too ingrained, subtle and pervasive to be confronted directly, but is automatically counteracted by the racially proportional allocation of resources.

Rather than facilitating the redistribution of societal resources in a way that would promote racial balance, the Supreme Court has actually held such redistribution to be unlawful. As has been noted,[84] Justice O'Connor's majority opinion in *Grutter* states that such a goal "would amount to outright racial balancing, which is patently unconstitutional."[85] But it is very difficult to see why that should be so. The Court states that it is motivated by a desire to ensure that race-conscious remedies are not too broad, and are not too burdensome on whites.[86] But that is

83. *Cf.* Gratz v. Bollinger, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting, noting the benefits of candor in the pursuit of diversity).

84. *See supra* text accompanying note 31.

85. *Grutter v. Bollinger,* 539 U.S. 306, 330 (2003).

86. *See id.* at 323-24, *citing Bakke*, 438 U.S. at 310 (Powell, J.).

nonresponsive. The whole point of racial balance is to stop giving whites the resources that they have in the past secured through societal discrimination, rather than through more legitimate means. The argument that racial balance is bad because it would burden whites simply entrenches the problem.

A more serious justification for the Court's aversion to racial balancing is that the consideration of race is inconsistent with the right that people possess in a liberal culture to be treated as individuals rather than as members of a racial group.[87] But that argument is ultimately self-consuming. If allocating resources based on race is a denial of individual rights, then refusing to reallocate resources after they have initially been allocated by race is also a denial of individual rights. Once a culture embarks along the path of race-conscious resource allocation—as American culture did with a vengeance—it creates a zero-sum relationship between affirmative action and discrimination that cannot be eliminated until racial balance is restored. Whenever we allocate a resource, we are either allocating it to whites in a way that reinforces societal discrimination, or to racial minorities in a way that ameliorates societal discrimination. There is no middle ground, because there is no such thing as a race-neutral allocation. There is only the pretense of race neutrality that occurs when we elect to use inertia as our preferred form of racial discrimination. Which, of course, is precisely what the Supreme Court has done by reading the Constitution to prohibit the race-conscious pursuit of racial balance.[88]

Despite the Supreme Court principle of treating people as individuals rather than as members of a racial group, it should be noted that *Grutter* does *not* prohibit the consideration of race in the allocation of societal resources. *Grutter* holds that race *can* be considered, as long as it is treated as a "plus" factor in a "holistic" evaluation of individual attributes, and is not treated mechanically as a racial quota.[89] In this regard, the Court's ap-

87. *See supra* text accompanying notes 14-16 (discussing Justice Powell's concern in *Bakke* that individuals not be treated as mere stereotypical members of various racial groups). The Supreme Court has gone out of its way to stress that the equal protection clause gives rise to individual rather than group rights. *See Grutter*, 539 U.S. at 326, citing Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).

88. Race neutrality is also unrealistic in contemporary American culture. Race is a characteristic that is simply too salient and too pervasive to be ignored. Try to think about things like welfare reform, law-and-order, D.C. statehood, the war in Iraq, or the sexual assault charges filed against Kobe Bryant without thinking about race. Race should technically have nothing to do with any of those topics, but it realistically has a lot to do with them all.

89. *See Grutter*, 539 U.S. at 328, 333-36.

proach to race in *Grutter* is similar to its approach in *Miller v. Johnson*,[90] where the Court held that race could be considered as a factor in the redistricting context as long as it was not the "predominant" factor.[91] In both instances, the Supreme Court has adopted a position that is truly curious. It has rejected the polar extremes of prohibiting all consideration of race, or of allowing the express pursuit of racial balance. Instead, it has in effect adopted the position that race can be considered as long as five members of the Court do not think that race has been given too much weight.[92] It is striking that the Justices would conclude that the Supreme Court was institutionally more competent than the policymaking arms of American culture to decide on appropriate uses of race, given the Court's historical record on the issue.[93] Moreover, the Court's efforts to distinguish between permissible and impermissible uses of race do not seem to be particularly coherent.

B. *GRUTTER* V. *GRATZ*

The Supreme Court purports to distinguish between constitutionally permissible and constitutionally impermissible uses of race in its contrasting *Grutter* and *Gratz* opinions. *Grutter* upholds the race-conscious affirmative action program used by the University of Michigan law school.[94] It holds that the consideration of race satisfies strict scrutiny if it is used to advance the state's compelling interest in promoting student diversity in an educational context, and is narrowly tailored in a way that treats

90. 515 U.S. 900 (1995).

91. *See id.* at 916-17 (articulating "predominant factor" test); *see also supra* text accompanying notes 67-69 (discussing difficulties in viewing race-conscious redistricting as violating any individual equal protection right).

92. This is similar to what the Supreme Court did for a time in obscenity cases, when the Court regulated potentially obscene materials by majority vote because it was unable to agree on a definition of obscenity. *See, e.g.*, Redrup v. New York, 386 U.S. 767, 769-71(1967) (per curiam). The Court's focus on racial balancing, avoiding quotas and ensuring individualized consideration, focuses attention on distracting details and diverts attention from the issue of whether the culture favors racial equality or continued societal discrimination. In this regard, the Court is engaged in classic Kelman-esque legitimation. The Court's predominant regulatory agenda is implemented beneath the radar, because the culture's attention is focused on the details rather than the thrust of the Court's actions. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 269-95 (1987) (describing cognitive model of legitimation); *see also* GIRARDEAU A. SPANN, RACE AGAINST THE COURT 151-59 (describing Supreme Court legitimation techniques in racial context).

93. *See supra* text accompanying notes 60-64 (describing historical Supreme Court decisions that were hostile to the interests of racial minorities).

94. *See Grutter*, 539 U.S. at 343-44.

race as only one of many factors in an individualized consideration of each applicant's relative merits.[95] It is this "holistic" use of race as a "plus" factor rather than as an inflexible percentage "quota" that ensures that race is not being used in a way that "makes an applicant's race or ethnicity the defining feature of his or her application."[96] Moreover, this individualized consideration, as part of a program that has "a logical end point," ensures that the use of race does not impose an undue burden on innocent whites.[97]

Gratz invalidates the race-conscious affirmative action program used by the University of Michigan undergraduate college.[98] It reaffirms that diversity can be a compelling state interest in an educational context,[99] but holds that the use of race-conscious affirmative action does not satisfy the narrow tailoring requirement for strict scrutiny if it results in the award of a fixed number of points to each minority applicant.[100] Such a mechanical award of points is inconsistent with the individualized consideration required by the equal protection clause because it "has the effect of making 'the factor of race. . .decisive' for virtually every minimally qualified underrepresented minority applicant."[101] Under the facts of *Gratz*, the award of points was likely to be dispositive because the undergraduate program awarded 20 points to racial minorities (out of the 100 necessary to secure admission), even though it would award only 5 points to an applicant whose "'extraordinary artistic talent' rivaled that of Monet or Picasso."[102]

Although the affirmative action programs at issue in *Grutter* and *Gratz* met different constitutional fates, the two programs are analytically indistinguishable. As columnist Michael Kinsley has pointed out, for any individual applicant, race is either dispo-

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95. *See id.* at 333-44.

96. *See id.* at 335-37.

97. *See id.* at 342-43. The "logical end point" for the Michigan law school program appears to have been provided by Justice O'Connor's belief that such programs will no longer be necessary 25 years from now. *See id.* at 343. In fact, Justice Thomas actually concurred in "the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years." *See id.* at 351 (Thomas, J., concurring in part and dissenting in part). If this is indeed part of the Court's "holding," it suggests that the constitutionality of an affirmative action plan can be saved through the Court's imposition of an informal sunset provision.

98. *See Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

99. *See id.* at 247.

100. *See id.* at 269.

101. *See id.* at 271, *quoting* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (Powell, J.) (ellipsis in original).

102. *See Gratz*, 539 U.S. at 273, *quoting Bakke*, 438 U.S. at 324 (Powell, J.).

sitive or it is not. This is true no matter how many factors go into an admissions decision. And it is true whether race is used holistically in connection with a flexible admissions process, or mechanically in connection with a mathematical score.[103] Therefore, the differences that exist between the ways in which race was used in *Grutter* and in *Gratz* are simply irrelevant to any constitutionally protected individual right. If it is constitutionally permissible for race to determine the fate of an applicant, that applicant's fate is not changed by the details of the program that gave rise to the consideration of race.[104]

The manner in which race is used can, of course, change the *statistical* effect that race will have on an overall admissions process, as well as the *probability* that members of a given race will be admitted to a particular school. An affirmative action program in which race is permitted to play a large role can result in the admission of more minorities than a program in which race is permitted to play only a small role. Assuming for the sake of argument that the *Grutter* and *Gratz* programs do differ in the number of applicants for which they will permit race to be dispositive, that difference still cannot be constitutionally significant. Because the Supreme Court insists that the equal protection clause protects *individuals* rather than *groups*,[105] the statistical impact of an affirmative action program on particular racial groups is beside the point. The fact that an affirmative action plan produced an increase in the number of minority students is no more relevant than the fact that the Court's invalidation of that plan would produce an identical increase in the number of white students. Both statistics might be relevant to a concept of racially-correlated group rights, but neither is relevant to the concept of individual rights that the Supreme Court deems to be controlling.

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103. *See* Michael Kinsley, *Want Diversity? Think Fuzzy*, WASH. POST, June 25, 2003, at A23. To the extent that a "holistic" admissions process might seem intuitively different from a more mechanical process, that intuition is likely to be nothing more than a function of the size of the applicant pool. It is possible to compare a small number of applicants without using mechanical sorting devices such as the numerical scores utilized in *Gratz*, but it is difficult to see how a large number of applicants can be compared without using some sort of scoring system. *See infra*, text accompanying note 114.

104. It is worth noting that seven Justices voted in ways that treated *Grutter* and *Gratz* as indistinguishable. Only Justices O'Connor and Breyer saw constitutionally significant differences between the two cases. *Compare Gratz*, 539 U.S. at 247 (listing votes of Justices) *with Grutter*, 539 U.S. at 310 (listing votes of Justices).

105. *See Grutter*, 539 U.S. at 324, 326 (equal protection clause protects personal rights rather than group rights).

One might be tempted to argue that the statistical impact of racial affirmative action on an overall admissions process can be translated into a violation of an individual right, because it reduces the probability that any particular white applicant will be admitted to the program at issue. In order for that argument to prevail, however, the Constitution would have to guarantee individuals some particular probability of admission, either in absolute terms or relative to other races. The Constitution does not, of course, guarantee individuals any probability of admission in absolute terms, and if it were read as guaranteeing a probability of admission relative to other races, the Constitution would require precisely the racial balance that *Grutter* finds to be "patently unconstitutional."[106]

On a less abstract level, it is likely that the *Grutter* and *Gratz* affirmative action programs are very similar in actual operation. *Grutter* holds that the Michigan law school program is sufficiently individualized to satisfy the narrow tailoring requirement of strict scrutiny.[107] Justice Rehnquist, however, argues convincingly that the program is really about racial balance.[108] The stated justification for the law school program was to enroll a "critical mass" of minority students sufficient to promote a meaningful exchange of ideas among students, and to ensure that minority students did not feel isolated or like spokespersons for their race. But in reality, the law school ended up admitting percentages of minority students that closely corresponded to the percentages of minority students in the law school applicant pool. A majority of the underprivileged minority students were black; half that number were Latino; and one-sixth of the number were indigenous Indians. Justice Rehnquist notes that if the true goal of the program were to ensure the admission of a critical mass, there would not be such a large, racially proportional variation among the number of minority students admitted. He also emphasizes that the tiny number of Indian students admitted could not meaningfully be considered a critical mass.[109] Justice Kennedy also asserts that the law school's increased use near the end of the admissions season of daily reports showing the racial breakdown of admitted students sug-

106. *See id.* at 330.
107. *See id.* at 333-44.
108. *See id.* at 379-85 (Rehnquist, J., dissenting).
109. *See id*; *see also id.* at 347 (Scalia, J., concurring in part and dissenting in part, arguing that law school program was really designed to achieve racial balance); *id.* at 388-90 (Kennedy, J., dissenting) (same).

gests that the law school was pursuing racial balance in a fairly automatic manner.[110] Therefore, the manner in which the law school treats race in the program that the *Grutter* Court upholds, ultimately seems as mechanical as the manner in which the undergraduate college treats race in the program that the *Gratz* Court invalidates.[111]

Similarly, *Gratz* holds that the Michigan undergraduate program is too mechanical in its consideration of race to satisfy the narrow tailoring requirement of strict scrutiny. Justice Souter, however, points out that the undergraduate affirmative action program is actually more individualized than the majority concedes.[112] Unlike the program struck down in *Bakke*, every applicant gets to compete for every seat under the Michigan undergraduate program. Moreover, race is only one of a number of factors that are taken into account in the pursuit of diversity, and the number of points awarded to racial minorities is the same as the number of points awarded for other diversity factors such as outstanding athletic ability. In addition, the undergraduate program gives admissions officers the discretion to "flag" applications for more individualized attention when they believe that numerical scores alone do not adequately capture important characteristics. Justice Souter also notes that the undergraduate program provides for more individualized consideration of applicants than the fixed percentage plans the Solicitor General favored as a race-neutral alternative.[113] Law professors probably find it easy to understand why the Michigan undergraduate program assigned a numerical value to the factor of race. It is similar to the manner in which professors commonly assign numerical values to particular arguments in grading exams. Those professors would certainly claim that they were giving individualized consideration to each exam, but the use of numerical scores greatly facilitates that individualized consideration.[114] Therefore, the manner in which the undergraduate program ultimately treats race seems as individualized as the way in which

110. *See id.* at 390-94 (Kennedy, J., dissenting). Note, however, that Justice O'Connor's majority opinion appears to dispute the accuracy of Justice Kennedy's assertion. *See id.* at 336.

111. *See Gratz v. Bollinger*, 539 U.S. 244, 267-77 (2003) (invalidating undergraduate affirmative action program).

112. *See id.* at 291-92 (Souter, J., dissenting).

113. *See id.*

114. To the extent that *Gratz* stands for the proposition that automatic numerical values cannot be used in the process of evaluating a large pool of applicants for admission, it is like telling a professor that he or she must undertake the Herculean task of grading 10,000 exams without using points.

race is *actually* treated under the law school program that the Court upheld in *Grutter*.[115]

The real difference between the law school program upheld in *Grutter* and the undergraduate program invalidated in *Gratz* seems to be that the Supreme Court believes that the *Gratz* program gave too much weight to the factor of race, and it did so in a manner that was too transparent. That is what the Monet-and-Picasso example seems to illustrate in Justice Rehnquist's majority opinion in *Gratz*,[116] and that is what seems to bother Justice O'Connor in her *Gratz* concurrence.[117] I suspect that in actual operation, both programs would end up admitting largely the same individual minority students, and would therefore have the same general effect on white applicants. But even if I am wrong about this, it is unlikely that differences in the weight given to the factor of race within the range of these two programs could rise to a level of constitutional significance.

There is a real irony in the emphasis that both cases place on the use of points and numerical goals, with *Grutter* finding that such a use of numbers did not play an impermissible role,[118] and *Gratz* finding that it did.[119] The thing that the Court finds troubling about numbers is their potential to serve as quotas that insulate minority applicants from competition in order to promote racial balance.[120] But that concern seems backwards. Assuming that minorities are not inherently inferior to whites, we would expect a nondiscriminatory "holistic" admissions program, that was designed to promote diversity, to end up with a racially proportional allocation of seats. However, if a program attempts to use numerical methods to facilitate that goal (as in *Gratz*), the program is unconstitutional because of its resemblance to a quota. Therefore, in order for a program to be constitutionally acceptable (as in *Grutter*), it will have to take great pains to ensure that its consideration of diversity factors does not produce results that make it *look* like quotas were used. The only way to do this reliably is by taking conscious precautions to ensure that the numerical percentages of minority admissions

115. *See Grutter*, 539 U.S. at 333-44 (upholding law school affirmative action program).

116. *See Gratz*, 539 U.S. at 273; *see also supra*, text accompanying note 102.

117. *See id.* at 279-86 (O'Connor, J., concurring, noting high number of points awarded to racial minorities relative to number of points awarded for some other diversity factors).

118. *See Grutter*, 539 U.S. at 335-36.

119. *See Gratz*, 539 U.S. at 269-74.

120. *See Grutter*, 539 U.S. 335-36.

vary from year to year, and do not correspond too closely to the percentages of various racial groups in the applicant pool or in the general population. Thus, the use of a "floating" racial quota will be necessary to ensure that the program looks like a valid holistic program, rather than an invalid quota program that was intended to promote racial balance.[121] Since the institution will have to pay a lot of attention to numbers either way, it is a bit perverse to say that a program is valid only if it gives *more* consideration to numbers in order to create the impression that it gave *less* consideration to numbers. In this regard, the *Gratz* program is probably more honest than the *Grutter* program—which is what makes it unconstitutional.[122] A Supreme Court rule that produces such a result cannot be a proper rule of constitutional law unless our goal is to promote disingenuousness, which, as Justice Thomas suggests, may well be the case.[123]

There is no constitutionally significant difference between the *Grutter* and *Gratz* programs. *Gratz* is simply more honest than *Grutter*, which demands an unfortunate charade. The degree to which numbers are used mechanically as opposed to

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121. There may even be an incentive to reject highly qualified minorities—especially those who are likely to end up actually attending more prestigious schools—in order to show that a school is using highly individualized admissions standards rather than quotas. That allows a school to demonstrate that it has admitted white students with lower scores than some of the minority students who were rejected. *See Grutter*, 539 U.S. at 338 (focusing on acceptance of white applicants with lower scores than rejected minority applicants as evidence of individualized consideration).

122. This irony was not lost on Justice Ginsburg. *See Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting, noting benefits of candor in Michigan undergraduate affirmative action program).

123. *Cf. Grutter*, 539 U.S. at 371-72 (Thomas, J., concurring in part and dissenting in part, arguing that law school program seeks only "facade" of class that "looks right").

Justice O'Connor's aversion to the use of numbers in *Gratz*, 539 U.S. at 277-80, is ironically inconsistent with the Justice O'Connor's own use of numbers in *Grutter*, suggesting that 25 more years of affirmative action will be enough. *See Grutter*, 539 U.S. at 343. Presumably, Justice O'Connor chose that 25 year number because 25 years is the amount of time that had elapsed between the 1978 decision in *Bakke* and the 2003 decision in *Grutter*. That is a pretty "mechanical" and "mathematical" manner in which to decide how long affirmative action will continue to be constitutionally permissible. Why not instead permit affirmative action to be used for another 350 years, as an approximation of the time that elapsed between the introduction of slavery in the Colonies and the time of the *Grutter* decision? It also seems unrealistic to think that continuing societal discrimination will permit the United States to achieve any meaningful level of racial equality in next 25 years, after having failed to do so for centuries. Moreover, Justice O'Connor's endorsement of a time-period test, rather than some sort of functional test, for the continued validity of affirmative action is in tension with her rejection of a mechanical trimester test in favor of a more functional "undue burden" test to define the scope of the constitutionally protected right to abortion. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877-79 (1992) (joint opinion of O'Connor, Kennedy and Souter, JJ.).

flexibly in the pursuit of racial diversity, hardly seems to be a matter of constitutional significance. And the argument that we should hide our conscious consideration of race in order to convey the impression that race is a less salient characteristic in contemporary culture than it really is seems counterproductive. The whole point should be to *highlight* our race consciousness so that we can no longer complacently pretend that we live in a race-neutral culture. *Grutter* and *Gratz* allow the continued use of race-conscious affirmative action, but only with the understanding that it will not be used in ways that make any systemic modifications in the current allocation of resources. The opinions take great pains to ensure that the continuing effects of societal discrimination will remain beyond the reach of race-conscious remedies. And that, in turn, perpetuates the invidious discrimination against racial minorities that has always characterized American culture. The Supreme Court is unwilling to concede that American culture is structurally discriminatory. But the recognition of continuing structural discrimination seems like the most important thing that is at stake in the affirmative action debate. In a sense, *Grutter* and *Gratz* may present the worst of both worlds for racial minorities. They leave open the possibility that affirmative action will sometimes be constitutionally permissible, thereby preventing racial minorities from becoming too unruly. But under the prevailing standards, truly beneficial affirmative action programs will rarely be upheld in reality. That is not a bad strategy for continued racial oppression.

V. CONCLUSION

The Supreme Court's recent affirmative action decisions in *Grutter* and *Gratz* reaffirm the limited availability of race-conscious affirmative action to make modest adjustments in the allocation of societal resources. However, they also reaffirm the Court's explicit prohibition on the use of affirmative action to redress the pervasive "societal discrimination" that continues to harm racial minorities. The pursuit of racial balance in the allocation of societal resources offers the only realistic hope of ever solving the problem of systemic racial discrimination in the United States. But that is precisely the remedy that the Supreme Court has chosen to view as constitutionally impermissible. As a result, the Court is now able to use the concept of prospective race neutrality as a means of freezing existing racial inequalities in the distribution of resources. And it is able to do so while pur-

porting to advance the abstract goal of racial equality. Because the Supreme Court has a long history of sacrificing racial minority rights for the advancement of white majority interests, it is at least curious that we would continue to endorse a model of judicial review that permitted the Supreme Court to formulate racial policy for the Nation. It is as if our commitment to the principle of racial equality were as disingenuous now as it has been throughout so much of our history.