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Of Bakke's Balance, Gratz and Grutter: The Voice of Justice Powell

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Of *Bakke*’s Balance, *Gratz* and *Grutter.*

The Voice of Justice Powell

Paul R. Baier

Justice Powell’s Bakke balance, announced all alone twenty-five years ago, is now the law of the land. Hopwood is dead. This Essay of judicial personality and process traces the influence of Justice Powell’s soft voice, his mediating way, through the competing judicial opinions in *Gratz* and *Grutter.* Bakke’s balance is the formula by which the Court purports to decide both the University and the Law School’s case. *Gratz* is no problem. It is faithful to Bakke’s balance, but *Grutter* is a harder call. Justice O’Connor for the Court tells us she is applying the magic formula of “strict scrutiny,” but is she really? The Court splits over application of strict scrutiny to Michigan Law School, where the author taught in his youth. His Essay teaches what lies at the heart of his institutional mission in class: Magic formulae are no substitute for judicial judgment. What the author sees in Justice O’Connor’s opinion for the Court is a new balance, *Grutter*’s balance, which goes beyond Justice Powell in Bakke. The new emphasis on inclusion in Grutter suggests a new weighing of competing interests beyond the educational benefits achieved by racial and ethnic diversity in the classroom. This is the end approved by Justice Powell in Bakke, but debunked by the competing, strident roars of “Judicial Lions”—Justices Antonin Scalia and Clarence Thomas who are of the Categorical School of judicial process. Ironically, the first Justice John Marshall Harlan’s categorical imperative, “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens,” yielded in the day to Harlan’s own mediating balance in the old Cumming case, a short three years after Justice Harlan’s dissent in *Plessy v. Ferguson.* Justice O’Connor’s *Grutter* opinion, drawing upon the tool of analogy in the judicial process, speaks of access, opportunity, and inclusion—an entirely new chord as the author hears it. *Grutter* sounds a new compelling interest and weighs the balance anew. Like Justice Powell before her, Justice O’Connor takes the way of mediation between America’s past and America’s future. Her method in *Gratz* and *Grutter* lies at the heart of the Court’s judicial process in constitutional law, as the author has grown to understand it. Throughout his Essay, the author compares the mediating voice—the voice of balance—the voice of Justice Powell, to the other diverse voices of the Court’s judicial personalities. In hard cases, there are no absolutes. The Court is at its best in mediating between categorical imperatives. This was Justice Powell’s way in Bakke. His voice has been heard in *Gratz* and *Grutter.* The experiment continues. A sense of neighborhood, a sense of love of fellow man, a sense of shared destiny, not race hate, is the author’s sense of Grutter’s balance.

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INTRODUCTION

Gratz v. Bollinger and Grutter v. Bollinger, to my mind, echo the soft, mediating voice of Mr. Justice Powell. Bakke's balance, if I may catch Justice Powell's contribution in a word, mediates between the strident, self-assured voice that insists our Constitution is color-blind and the soft, mediating voice of Justice Powell's contribution in a word, mediates between the strident, self-assured voice that insists our Constitution is color-blind and the soft, mediating voice of Justice Powell's contribution in a word, mediates between the strident, self-assured voice that insists our Constitution is color-blind.
and the softer, moderate voice that allows a law school to take race into account in composing itself and in staking out its mission. In Justice Powell's view, the future of our Nation is at stake. The hope is fervent that diversity of experience, born in part of color, enriches our classes; that to live together, we must know one another; that in the context of higher education and in our law schools, Bakke's balance is best.

I subscribe to the hope and to the holdings of Gratz and Grutter. Rather than mouth the usual formulas of the law—"strict scrutiny," "compelling interest"—my aim is to emphasize the vital place of judicial personality and judicial method in the life of what inescapably appears to me as our living Constitution.

I. THE PERSONALITY OF THE JUDGE

Now, by way of thanking the editors of the Tulane Law Review for their invitation to "deconstruct" Gratz and Grutter, let me say in all candor that I do not like that vogueish word "deconstruct." My job as a teacher is to build understanding. Hence, I must leave deconstruction to Court watchers whose minds are jackhammers. I prefer to start with an insight from Tulane Law School's great friend, Judge John Minor Wisdom.

I first met Judge Wisdom at Mother's Restaurant near the United States Court of Appeals for the Fifth Circuit. It was lunchtime. Judge Tate invited me to tag along. I wanted to know from Judge Wisdom whether he agreed with a certain proposition of Continental legal thought. One of the advantages of teaching law in Louisiana is its link to European legal thinkers. Professor Joseph Dainow, John Henry Wigmore's friend at LSU, brought to my attention the Science of Legal Method, a comparative collection that puts into English much of Europe's enduring juristic ideas. Wigmore's volumes opened my eyes thirty years ago at LSU Law School, just as it opened Cardozo's in 1917. This, in turn, prompted my question. So I gazed into Judge

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6. The locus classicus, to my way of thinking, is Professor Paul A. Freund's On Understanding The Supreme Court (1949).
7. See SCIENCE OF LEGAL METHOD: SELECT ESSAYS BY VARIOUS AUTHORS (Ernest Bruncken & Layton B. Register trans., 1917).
Wisdom's Catahoula eyes and asked him whether he agreed with the proposition that "there is no guarantee of justice." I was cut off quickly. "That's Eugen Ehrlich," he exclaimed with glee. Judge Wisdom was justly proud of his Tulane learning and was not to be outquoted by an LSU law professor. John Minor Wisdom made the recitation his own: "There is no guarantee of justice except the personality of the judge." 

Judge Wisdom rendered immediately: "Of course that's true."

II. OF BAKKE'S BALANCE

Justice Powell's judicial personality is evidenced throughout his lonely opinion in Bakke. He was all alone, joined by no other Member of the Court. His was the deciding vote between, on the one hand, constitutionally sanctioning the use of race in reserving sixteen

Today a great school of continental jurists is pleading for a still wider freedom of adaptation and construction. . . . The judge as interpreter for the community of its sense of the law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision—"libre recherche scientifique." That is the view of Gény and Ehrlich and Gmelin and others. Courts are to "search for light among the social elements of every kind that are the living force behind the facts they deal with." The power thus put in their hands is great, and subject, like all power, to abuse; but we are not to flinch from granting it. In the long run "there is no guaranty of justice," says Ehrlich, "except the personality of the judge." The same problems of method, the same contrasts between the letter and the spirit, are living problems in our own land and law. Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today. The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.

CARDozo, supra, at 16-17 (footnotes omitted).

9. Austrian legal scholar and teacher (b. 1862, Czernowitz, Austrian Empire; d. May 2, 1922), credited with founding the discipline of the sociology of law. Ehrlich's sociology of law was based on the free-law or sense-of-justice conception formulated in Germany by Hermann Kantorowicz. Ehrlich's major work, Grundlegung der Soziologie des Rechts, was translated into English as Eugen Ehrlich, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (1936).


Justice Lewis F. Powell, Jr., c. 1986
Photographer: Ken Heinen
Reproduced from the Collection of the Supreme Court of the United States
seats out of a hundred for minority medical school students at the University of California at Davis, and, on the other, statutorily condemning race discrimination, *simpliciter*, under section 601 of the Civil Rights Act of 1964. Justice Powell’s view was that Title VI’s seemingly absolute prohibition against race discrimination “must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.” Thus, “[t]here simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.” Of course, Justice Powell’s reading of section 601 is anathema to those who insist upon “plain meaning.”

Four of his colleagues disagreed with him on the statutory question. But Justice Powell’s search for purpose and context is a hallmark of his judicial ways and of great judging. Anyone familiar with the hundreds of articles on affirmative action would have to agree with Justice Powell’s observation that the concepts of “discrimination” and “equal

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12. “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000).
14. *id*.
15. Chief Justice Burger, Justice Stewart, Justice Stevens, and Justice Rehnquist. The Justices who approved affirmative action also numbered four—Justice Brennan, Justice White, Justice Marshall, and Justice Blackmun. Together they found that Title VI and the Fourteenth Amendment permitted adoption of race-conscious means to overcome past societal discrimination. Thus, says Professor J. Harvie Wilkinson III, *Bakke*’s noted compromise was largely the making of the Court’s “ninth man.”

Between the statutory foursome of Burger, Stevens, Stewart, and Rehnquist, and the permissive foursome of Brennan, White, Marshall, and Blackmun was Justice Powell. “Powell took his position at the outset and never got anyone to go along with him,” one Court insider was quoted as saying.

To some, Powell’s vote came as a surprise . . . Yet the result was typical of Powell the diplomat, Powell the balancer, Powell the quiet man of the middle way.

protection” are susceptible of varying interpretations.17 At this point, Justice Powell quoted Holmes’s *apergus* that a word or phrase “is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” Holmes is weighty authority in my book of judicial process. So much, then, for section 601. “In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”19 It is significant to note that Congress and the Executive Branch have relied on Justice Powell’s purposive interpretation for twenty-five years up to *Gratz* and *Grutter*. Indeed, Congress has specifically rejected legislative proposals to make section 601 colorblind along the lines of California’s Proposition 209.20

As to the guarantee of the Fourteenth Amendment, Justice Powell’s *Bakke* balance, paradoxically, first enforces an absolute: The Equal Protection Clause protects persons not groups; it affords individuals, including Allan Bakke, equal protection of the laws.

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17. After quoting the language of section 601, which, like that of the Equal Protection Clause, “is majestic in its sweep,” Justice Powell observed:

The concept of “discrimination,” like the phrase “equal protection of the laws,” is susceptible of varying interpretations, for as Mr. Justice Holmes declared, “[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”

*Bakke*, 438 U.S. at 284 (quoting *Towne v. Eisner*, 245 U.S. 418, 425 (1918)).


The best discussion I have read of the “newspeak” of “reverse discrimination” is from the poignant pen of Paul M. Gaston, of the University of Virginia Faculty: “[I]t is hard not to find something grotesque in the claim of a moral equivalency between two diametrically opposed realities. It strains credulity to believe anyone can actually believe that affirmative action and white supremacy are occupants of a common bed of evil.” Paul M. Gaston, *Reflections on Affirmative Action: Its Origins, Virtues, Enemies, Champions, and Prospects in Diversity Challenged: Evidence on the Impact of Affirmative Action* 277, 287 (Gary Orfield ed., 2001) [hereinafter *DIVERSITY CHALLENGED*].

18. *Bakke*, 438 U.S. at 284 (quoting *Towne*, 245 U.S. at 425 (Holmes, J)).

19. *Id* at 287.

regardless of color.21 “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”22 This is judicial vision as I know it in the United States Reports.

I am reminded of the opening part of Justice Powell’s judicial oath: “I will administer justice without respect to persons.”23 The purported distinction between a goal of minority representation and a racial quota was brushed aside as semantics. White applicants could compete for only 84 seats, rather than the 100 open to minority applicants. This is a line drawn on the basis of race and Justice Powell was unwilling to relax judicial review: “Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”24

Justice Powell’s grasp of the Court’s evolving precedents over thirty years led him to reject the University’s plea that discrimination against whites is not suspect if its purpose is benign.25 This would not do. “The clock of our liberties, however, cannot be turned back to 1868.”26 I sense another defining element of Mr. Justice Powell. The majestic guarantee of equal protection is not fettered to the broken chains of slavery. Equal protection evolves over time. Equal protection embraces all persons, white or black.

Justice Powell’s Bakke opinion reminds me of Justice Brandeis’s judicial workways: “Master of both the microscope and telescope.”27 Justice Powell is attentive to small details of fact, while at the same time insisting upon principled constitutional judgment. He sees serious problems of justice raised by racial preferences. Surely there are. “Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups.”28 “[P]referential programs may only reinforce common stereotypes holding that certain

22. Id.
23. Appointment of Mr. Justice Powell, 404 U.S. xi, xi-xiii (1972) (reciting the oath in its entirety).
25. Id. at 295.
26. Id.
27. Charles E. Hughes, Mr. Justice Brandeis, in Mr. Justice Brandeis 1, 3 (Felix Frankfurter ed., 1932).
groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”

“[T]here is a measure of inequity in forcing innocent persons in [Bakke's] position to bear the burdens of redressing grievances not of their making.”

“Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them.”

Justice Powell's *Bakke* opinion builds on the large grasp of Louisiana's only Supreme Court Justice, Edward Douglass White. This pleases me. E. D. White's dissent in the old *Pollock v. Farmers' Loan & Trust Co.* case rejects the notion of the mutability of

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29. *Id.*
30. *Id.*
31. *Id.* at 298-99.
32. Louisiana's Edward Douglass White, sadly, is largely a forgotten figure in the minds of contemporary students of the Constitution, including mine, who when asked are unable to identify the oil portrait of Chief Justice White that I keep in my office. By way of penance, they must read my article *Edward Douglass White: Frame for a Portrait*, 43 *LA. L. REV.* 999 (1983). Holmes and White, having fought against one another on opposite sides in the Civil War—Holmes in Union Blue, White in Confederate Gray—later sat side by side as Brothers on the Supreme Court of the States:

In fitting accord two men taken out of the heart and turmoil of American history sat in the middle chair and a Union soldier on his left. On some anniversary, I forget what, perhaps one of Holmes's wounds, the Chief Justice would bring him a red rose to be pinned on his robe. Chief Justice White was not a great Chief Justice, but a beloved figure.

DEAN ACHESON, MORNING AND NOON 59 (1965).


33. See 157 U.S. 429 (1895) (holding unconstitutional a direct tax void for want of apportionment, including the Income Tax Act of August 15, 1894, as levied a tax upon rents or income from real property), *overruled by* South Carolina v. Baker, 485 U.S. 505 (1988). The Court was equally divided upon the validity of a tax on income from personal property. Justice White's dissent was not only his first dissenting opinion, but also his first important opinion upon any grave constitutional question. Those charged with remembering White by his written words selected the following connected passages from his first *Pollock* dissent to affix to Mr. P. Bryant Baker's great bronze statue of Chief Justice White:
constituent principle based on shifting political and social judgments, as this would foreclose consistent application of the Constitution from one generation to the next. Professor Archibald Cox says the same thing in his book, *The Role of the Supreme Court in American Government.* 34 Quite judiciously, Justice Powell quotes the professor's book in rejecting the same professor's elastic arguments, as counsel on the brief and at oral argument, in the *Bakke* case. 35 This is judicial statesmanship, you can be sure.

Deft handling of precedents is required. Justice Powell has obvious command of the landscape: "[W]e have never approved preferential classifications in the absence of proved constitutional or statutory violations." 36 *Lau v. Nichols* 37 and *United Jewish Organizations of Williamsburg, Inc. v. Carey* 38 are carefully distinguished. One standard, and one standard alone, governs the Court's equal protection review. If the University's purpose is to assure some specified percentage of minority students in its student body "merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid." 39 "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution

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Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. . . . The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that . . . this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will . . . be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

*Id.* at 650-52 (White, J., dissenting).


35. The Court's role, said Justice Powell, is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place." *Bakke*, 438 U.S. at 299 (internal quotations omitted) (quoting COX, supra note 34, at 114).

36. *Id.* at 302.


38. 430 U.S. 144 (1977). "[U]nlike *Lau* and *United Jewish Organizations*, there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts." *Bakke*, 438 U.S. at 305.

forbids. Careful assessment of the University’s other purposes resulted in Justice Powell rejecting all but one of them. One excerpt from his separate opinion is enough to show Justice Powell’s telescopic mastery:

[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of “societal discrimination” does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

Strict attention to the record is another hallmark of a great judge. Virtually no evidence in the record indicated that the University’s special admissions program was either needed or geared to improve delivery of health care to underserved minority communities.

The fourth goal of the University was the attainment of a diverse student body. “This clearly is a constitutionally permissible goal for an institution of higher education.” Justice Powell’s Bakke balance addresses a competing interest: “The freedom of a university to make its own judgments as to education includes the selection of its student body.” The First Amendment, as interpreted by Justice Powell’s former teacher, Professor (later Justice) Felix Frankfurter, supplies an

40. Id.
41. Id at 310.
42. Id at 311-12.
43. Id at 312.
44. Justice Powell earned an LL.M. after a year of post-graduate study at the Harvard Law School in 1932:

The curriculum, the facilities, and the faculty were, as everyone now knows, hopelessly old-fashioned. Thomas Reed Powell held forth in Constitutional Law, Felix Frankfurter in Administrative Law and Federal Jurisdiction, Roscoe Pound in Jurisprudence. What everyone may not have discovered is that there was no solid line of fire from those battlements; there was enough crossfire to keep the students engaged and alert. When Professor Frankfurter was told that on some constitutional issue Professor Powell had taken an opposite position, Frankfurter responded, “Good! You invite Powell to come to our seminar next week and we’ll have it out.” When the invitation was duly conveyed, Powell answered, “Why should I debate Felix in his seminar. He thinks twice as fast as I do—and not half as straight.”

As a member of Lewis Powell’s postgraduate class, and his steady admirer from that time forth, I should like to think that the postgraduate year was a
accommodating doctrinal root. Bakke’s balance, as voiced by Justice Powell, also respects an empirical judgment of educational experience:

The atmosphere of “speculation, experiment and creation”—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in Keyishian, it is not too much to say that the “nation’s future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples.

Whether diversity in fact achieves these goals is subject to strident debate. But Justice Powell’s tempered way required that he respect the educational judgment of the University. The University, however, cannot go overboard: “[T]he question remains whether the program’s racial classification is necessary to promote this interest.” With this, Bakke’s balance is cut finer and finer. This is judging with a scalpel, not a sledgehammer. The University’s program was seriously flawed:

It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of

formative influence in his professional life, that somehow it contributed to those qualities of fair-mindedness, openness, candor and comprehensiveness, to that combination of intellectual rigor and human sensitivity, that characterize Justice Powell. But to speak in this way of influences is to minimize the role of the individual himself. It is not so much a question of influence as of affinity—or, as the wise saying has it, “If you would carry back the wealth of the Indies, you must bring the wealth of the Indies with you.”


[T]hey said of Frankfurter, as he said of Ames, that with him “you took not courses but the man.” He put on a theatrical performance before his classes, said David Lilienthal. He was a man “who could read the dictionary and make it exciting,” as he bounced around, spending hours on one aspect of one case, so that his courses came to be known as “the case-of-the-month” clubs.


46. Bakke, 438 U.S. at 312-13 (footnote omitted).

47. Id. at 314-15.
qualifications and characteristics of which racial or ethnic origin is but a single though important element."

The University's special admissions program, "focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity." Mr. Justice Powell knows when and where to place his emphasis. He does so sparingly. Only one other word is italicized in his 152-page opinion in Bakke: "It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others."

Harvard College's Admissions Program, by contrast, was Justice Powell's model of a balanced program that considers race as one factor, among others, in composing a diverse college class. What was key for Justice Powell is that a race conscious admissions program must treat "each applicant as an individual in the admissions process." His formulation was linked to his ideal of the scope of equal protection. The "fatal flaw" in the University's program "is its disregard of individual rights as guaranteed by the Fourteenth Amendment."

Justice Powell's Bakke balance concludes:

The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

48. Id at 315.
49. Id.
50. Id at 295.
51. Id at 318.
52. Id at 320.
53. Id at 318.
As I see it, this is a careful, moderate approach. 54 Justice Powell's Bakke balance mediates between absolute colorblindness and "competitive consideration of race and ethnic origin" 55 in the composition of our nation's institutions of higher education. As in all judgments resolving what the late Professor Paul Freund calls "constitutional dilemmas," 56 value is balanced against value, judicial choice is kept as narrow as possible between competing interests painstakingly weighed. 57

The tools of government must not be too blunt. But a judicial measure of caution, and of deference, on review is the wiser course. Justice Powell acknowledged risks of subterfuge, but he presumed the University's good faith. His opinion draws fine lines, but he defends them with the wisdom of his former teacher, Justice Frankfurter. 58 "A boundary line ... is none the worse for being narrow." 59

Of Justice Powell, Professor Paul Freund said: "Again and again, explicitly and implicitly, Justice Powell has sought a more measured justice by attending to the complexities, the nuances and gradations, of a controversy." 60 Measured justice, I have tried to show, is Bakke's balance. Justice Powell was all alone in Bakke. For myself, I think of what Holmes once said: "Only when you have worked alone,—when

54. "A treasure that has remained conspicuously with Justice Powell is the gift of moderation." Freund, supra note 44, at 169. Professor Freund quotes the seventeenth-century English divine Thomas Fuller: "Once in an age the moderate man is in fashion[.] Each extreme courts him, to make them friends; and surely he hath a great advantage to be a Peacemaker betwixt opposite parties." THOMAS FULLER, THE HOLY STATE AND THE PROFANE STATE 207 (Maximilian Graff Walton ed., 1938).

55. Bakke, at 320.


Equal protection, not color blindness, is the constitutional mandate, and the experience with liberty of contract should caution against an absolute legal criterion that ignores practical realities. Measures to correct racial imbalance are like those to correct an imbalance in the bargaining position of labor. At least as transitional measures they may serve to promote, not to deny, the equal protection of the laws.

57. Reviewing Justice Powell's earliest work on the Court, Professor Gerald Gunther considered Lewis F. Powell's performance "especially heartening." "[H]e already reveals the single most important trait for responsible 'balancing': the capacity to identify and evaluate separately each analytically distinct ingredient of the contending interests." Gerald Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 7 (1972).

58. Bakke, 438 U.S. at 318.

59. Id. (internal quotations omitted) (quoting McLeod v. Dilworth, 322 U.S. 327, 329 (1944) (Frankfurter, J.)).

60. Freund, supra note 44, at 172.
you have felt around you a black gulf of solitude more isolating than
that which surrounds the dying man, and in hope and in despair have
trusted to your own unshaken will,—then only will you have
achieved."61

III. GRATZ AND GRUTTER

On the one hand, Gratz rejects the University of Michigan's
minority admissions program.62 The Court, in an opinion written by
Chief Justice Rehnquist, relies on Justice Powell's Bakke balance.63 On
the other hand, Grutter approves the University of Michigan Law
School's program, crafted along different, more moderate, lines.64
Justice O'Connor writes for the majority. Her vote is decisive in these
split, five-to-four, decisions. In Gratz and Grutter, following Justice
Powell's admired example,65 Justice O'Connor takes the middle way.
She takes the way of Bakke's balance.
Or does she really?

A. Gratz v. Bollinger

Certainly Gratz is no problem. Chief Justice Rehnquist knocks
out the University of Michigan's twenty-point system as gross race
discrimination.66 Both the Chief Justice's majority opinion and Justice
O'Connor's separate concurring opinion, if I may speak my faith,
"consist with the letter and spirit"67 of Justice Powell's voice. As to the
letter of Bakke, the Chief Justice condemns the University's policy
because it "automatically distributes 20 points, or one-fifth of the
points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race."68

63. Id. at 281.
68. Gratz, 539 U.S. at 268.
Fundamentally, Michigan's twenty-point system conflicts with Justice Powell's opinion in *Bakke*, which emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity.69

As to following the spirit of *Bakke*, as to following the generous sensitivity of Lewis Powell, Justice O'Connor shows herself of the same voice: “Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race.”70 “[T]he selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed.”71 Looking to the future, as judges must look to the future, Justice O'Connor invites the University “to modify its system” so that it affords “the necessary individualized consideration.”72 Justice O'Connor's second to last sentence in her *Gratz* opinion is telling: “But the current system, as I understand it, is a nonindividualized, mechanical one.”73

Judgment on the Court, I emphasize in class, is necessarily personal. Each justice is sworn to decide cases, “according to the best of my abilities and understanding” and “agreeably to the Constitution.”74 Every justice, I am sure, takes the weighty responsibility seriously. In Lewis Powell's words: “Every justice is ever conscious of that responsibility.”75

Ultimately, application of *Bakke* in *Gratz* and *Grutter* involves inescapable judgment. The paradox of *Gratz* and *Grutter* is that justices on both sides of the Court's split-fence rely on Justice Powell's

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69. Id.
70. Id. at 287 (O'Connor, J., concurring).
71. Id. (O'Connor, J., concurring).
72. Id. at 288 (O'Connor, J., concurring).
73. Id. (O'Connor, J., concurring).
74. See, e.g., Appointment of Mr. Justice Powell, 404 U.S. xi, xi-xiii (1972) (reciting the oath in its entirety).
75. See Baier, supra note 1, at 411.
opinion in *Bakke*. Perhaps the justices asked themselves, as I have wondered myself, what would Lewis F. Powell, Jr. say?

For the Court's majority in *Gratz*, and for Justice O'Connor concurring separately, the blunt allocation of twenty points out of a hundred based on race simply goes too far. This is a judgment that follows Justice Powell's voice in *Bakke*, as I hear it.

B. Grutter v. Bollinger

*Grutter*, on the other hand, is a harder call. The Court's opinion purports to follow *Bakke'*s balance. Mr. Justice Powell is all over Justice O'Connor's opinion for the Court in *Grutter*. The fit is tight. The Law School's program of minority admissions, says Justice O'Connor, is exactly the model that Justice Powell voiced twenty-five years earlier in *Bakke*. Thus: “Like the Harvard plan, the Law School's admissions policy ‘is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'” Again: “We also find that, like the Harvard plan Justice Powell referenced in *Bakke*, the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.”

From these excerpts, the conclusion seems inexorable that *Grutter*, like *Gratz*, echoes the voice of Justice Powell. The University of Michigan Law School not only modeled its minority admissions program after the Harvard plan, but the Court is satisfied that the record of the fifteen-day bench trial in *Grutter* shows the Law School also administered its program in accordance with Justice Powell's view of equal protection.

Not so at all, according to Chief Justice Rehnquist's mastery of the microscope. His *Grutter* dissent is sharp: “Stripped of its ‘critical mass’ veil, the Law School's program is revealed as a naked effort to

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76. *Gratz*, 539 U.S. at 283.
78. *Id*. at 338 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).
79. *Id*.
80. *Id*. at 338.
achieve racial balancing.”81 The tight correlation between the percentage of African-Americans, Hispanics, and Native Americans in the applicant pool and the percentage of admitted applicants who are members of these groups—“is far too precise to be dismissed as merely the result of the school paying ‘some attention to [the] numbers.””82 The Law School’s disparate admissions practices with respect to these minority groups “demonstrate that its alleged goal of ‘critical mass’ is simply a sham.”83 From Chief Justice Rehnquist’s statistical tables, we are invited to adjudge the University of Michigan Law School guilty of “careful race based planning.”84 Says the Chief Justice: “I do not believe that the Constitution gives the Law School such free rein in the use of race.”85 Nor does Justice Kennedy, who accuses the majority of ignoring reality: “[T]he concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.”86

I have no doubt that Chief Justice Rehnquist and Justice Kennedy are sincere in their convictions. But, if I may add a personal note, their joint condemnation of Michigan Law School’s minorities admissions program gives me pain.

Why the pain?

I started my teaching career at Michigan Law School a generation ago thanks to Doug Kahn. I was a lowly Instructor in Law perched literally in an ivy-twined tower. I heard Yale Kamisar’s booming voice for the first time at a faculty meeting. I heard Francis Allen’s87 soft voice welcome me to his home on Lakehaven Drive. Judicial condemnation of the University of Michigan Law School, its faculty, its deans, its administrators, hits me hard. I think of Daniel Webster’s plea before Chief Justice Marshall in the Dartmouth College case: “It is, Sir, as I have said, a small College. And yet those who love it.”88 Again, I wonder, what Justice Powell would say if he were

81. Id. at 364 (Rehnquist, C.J., dissenting).
82. Id. at 367 (Rehnquist, C.J., dissenting) (alteration in original).
83. Id. (Rehnquist, C.J., dissenting).
84. Id. at 369 (Rehnquist, C.J., dissenting).
85. Id. (Rehnquist, C.J., dissenting).
86. Id. at 371 (Kennedy, J., dissenting).
88. Trs. of Dartmouth Coll. v. Woodward, 4 Wheat. 518 (1819). Mr. Webster’s immortal peroration does not appear in Henry Wheaton’s report of the decision, but was preserved for all by Chauncy A. Goodrich, a professor at Yale College, who made a special trip to the Supreme Court to hear Webster argue the cause of Dartmouth College before Chief
called down to deconstruct *Gratz* and *Grutter*? Of two things, I am sure. First, he would not like the word “deconstruct.” He would insist that the task be left to legal scholars, in whom Justice Powell had an abiding faith. Second, his deference to educators, his refusal to overrule their reasoned judgments, his trust in their sincerity and good faith—all are part of Justice Lewis F. Powell, Jr.'s judicial personality. To me, *Gratz* and *Grutter* show that his voice endures. Justice Powell's model of justice, as I see it, reconciles the Court's split decisions. I have no doubt that his figure, as well as his precedent, was in the mind of Justice O'Connor when she labored over these cases.

What comes to my mind, as I ponder the paradox of *Gratz* and *Grutter*, is what Holmes used to say about the need for flexibility in the joints of the machine. And I can't help but believe that the soft voice of Justice Powell counsels restraint before the Court condemns as liars and cheats the Law School's Dean (Jeffery Lehman), its Directors of Admissions (Dennis Shields and Erica Munzel), and its Chair of the faculty committee that drafted the admissions policy (Professor Richard Lempert), as well as the expert witnesses who testified on the Law School's behalf. This, I daresay, goes too far.

In one important particular, Justice O'Connor's rehearsal of the testimony of the fifteen-day bench-trial in *Grutter* catches my eye—the testimony of Barbara Grutter's expert witness, Dr. Kinley Larntz. Justice O'Connor's majority opinion notes that, “Dr. Larntz conceded, however, that race is not the predominant factor in the Law School's admissions calculus.” This is more evidence of Justice O'Connor's use of Justice Brandeis's painstaking microscopic analysis. Good faith

Justice Marshall, Justice Joseph Story, and others. Goodrich's account, in turn, is quoted by Rufus Choate in his eulogy on Daniel Webster. Rufus Choate, Remarks Before the Circuit Court on the Death of Mr. Webster, reproduced in Addresses and Orations of Rufus Choate 222 (2d ed. 1878).

89. Justice Powell liked the connotations of the word “scholar”: [W]hen he termed someone that, he had paid an honest compliment. He once told me he had been offered a professorship in law at the University of Virginia, which he had in the end declined, though not without regrets. But he sought what he termed “scholarly attributes” in opinion writing, a meticulous care in understanding and stating the facts of a case, painstaking research into its background, honest and in-context citation of precedent and authority, and a search for a principled solution to problems, together with an abjurement of the polemical and propagandistic.


90. *Grutter*, 539 U.S. at 327.

91. *Id.*
on the part of Dean Lehman and his Michigan Law School colleagues is presumed under Bakke’s balance. Justice O’Connor makes good use of the presumption. I have no doubt of the sincerity of her convictions either. Justice Powell’s voice, I am sure, guided her twice in Gratz and Grutter.

But there is more to Justice O’Connor’s opinion for the Court in Grutter than an echo of Bakke’s balance. A subtle nuance of her own making emerges from the Court’s opinion in Grutter. She adds a new weight to the balance, as I read her opinion: namely the Court’s emphasis on the value of inclusion and opportunity in our law schools. This goes beyond the diversity weight of Bakke’s balance. The scales of justice are tipped anew. Before I explain what I mean, I must turn to the clash over strict scrutiny evident in Gratz and Grutter.

IV. RACE DISCRIMINATION, STRICT SCRUTINY, AND JUDICIAL JUDGMENT

Of course, the usual formulae of the law of race discrimination and equal protection are all over the competing opinions of the Justices in Gratz and Grutter. But magic formulae, I tell my students, are no substitute for inescapable judicial judgment. The same thing is true of what I understand is happening in these split decisions.

Chief Justice Rehnquist’s dissent in Grutter insists that, “[b]efore the Court’s decision today, we consistently applied the same strict scrutiny analysis regardless of the government’s purported reason for using race and regardless of the setting in which race was being used.” To prove his point, the Chief Justice quotes from—guess?—Justice O’Connor’s opinion for the Court in Adarand Constructors, Inc. v. Pena. And Chief Justice Rehnquist, invoking the voice of Justice Powell, adds: “We likewise rejected calls to apply more lenient review based on the particular setting in which race is being used. Indeed, even in the specific context of higher education, we emphasized that ‘constitutional limitations protecting individual rights may not be disregarded.’

Justice Kennedy’s dissent in Grutter is adamant: Justice Powell’s formula of strict scrutiny in Bakke has been abandoned by the Court.

94. Id. at 365 (Rehnquist, C.J., dissenting) (citing Bakke, 438 U.S. at 314).
and has been replaced with a unitary formulation.\textsuperscript{95} The opinion of Justice Powell states the correct rule for resolving this case, but the Court does not apply strict scrutiny, and according to Justice Kennedy, "by trying to say otherwise, it undermines both the test and its own controlling precedents."\textsuperscript{96} What is Justice O'Connor's answer to these assertions?

First, as to ends, Justice O'Connor for the Court rejects the categorical imperative: "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."\textsuperscript{97} Thus, "today, we hold that the Law School has a compelling interest in attaining a diverse student body."\textsuperscript{98} Justice Powell's weighing and balancing of twenty-five years ago—"all alone"—is now the controlling law of the Equal Protection Clause. The Fifth Circuit's \textit{Hopwood v. Texas} decision,\textsuperscript{99} I tell my students, is dead.

As to ends, Chief Justice Rehnquist and Justice Kennedy have no quarrel. Their disagreement over application of strict scrutiny goes to the means employed. Says the Chief Justice: "Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."\textsuperscript{100} The Chief Justice's dissent concludes: "Here the means actually used are forbidden by the Equal Protection Clause of the Constitution."\textsuperscript{101} Says Justice Kennedy: "The Court takes the first part of Justice Powell's rule but abandons the second."\textsuperscript{102} The last paragraph in Justice Kennedy's dissent in \textit{Grutter} has a sentence that is striking to my eye: "It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place."\textsuperscript{103} I have italicized the word "opportunities" in Justice

\begin{footnotesize}
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\item \textsuperscript{95} \textit{Id} at 370 (Kennedy, J., dissenting).
\item \textsuperscript{96} \textit{Id} (Kennedy J., dissenting).
\item \textsuperscript{97} \textit{Id} at 331.
\item \textsuperscript{98} \textit{Id} at 332.
\item \textsuperscript{99} \textit{Hopwood v. Texas}, 78 F.3d 932, 945 (5th Cir. 1996) ("[T]here has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in \textit{Bakke}, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court caselaw strongly suggests, in fact, that it is not.").
\item \textsuperscript{100} \textit{Grutter}, 539 U.S. at 366 (Rehnquist, C.J., dissenting).
\item \textsuperscript{101} \textit{Id} at 370 (Rehnquist, C.J., dissenting).
\item \textsuperscript{102} \textit{Id} (Kennedy, J., dissenting).
\item \textsuperscript{103} \textit{Id} at 375 (Kennedy, J., dissenting) (emphasis added).
\end{itemize}
\end{footnotesize}
Kennedy's telling sentence so that I might, in turn, emphasize a point of my own. There is nothing in Bakke's balance, as Justice Powell voiced it, about the goal of using race to improve the educational opportunities of racial minorities. This brings us back to Justice O'Connor's adding a weight of her own to Grutter's balance.

Nowhere in Justice Powell's 152-page opinion in Bakke is there any reference to the goal of inclusion, to the goal of opening the door of opportunity to racial minorities, who live under our Constitution and who share the aspirations all of us hold dear. This was an important goal of the University of California Regents in the Bakke case, as Professor Paul Mishkin told the Court in his Boalt Hall brief.104 Harvard Law School's Professor Archibald Cox, who I mentioned earlier argued the Regents' case in the Supreme Court, was of counsel on the Regents' brief. In Bakke, these eminent lawyers opened their brief by telling the Court: "The outcome of this controversy will decide for future decades whether blacks, Chicanos and other insular minorities are to have meaningful access to higher education and real opportunities to enter the learned professions, or are to be penalized indefinitely by the disadvantages flowing from previous pervasive discrimination."¹⁰⁵ Whatever one thinks about the merits of penalizing indefinitely minorities who suffer the disadvantages of "previous pervasive discrimination," it is perfectly clear that the goal of inclusion, the chord of opportunity and access, was sounded in the Regents' brief in Bakke. "The country is well-served by programs like the one at the Davis medical school. They are positive proof to those so long excluded from positions of responsibility that all citizens are truly to be offered a chance to perform in professional roles."¹⁰⁶ The brief speaks of "increasing aspirations among minorities that have viewed medicine as a field closed to them and thus unworthy of pursuit."¹⁰⁷ And we are told: "[I]n the real world the mere elimination of formal barriers against minorities could not actually produce equality of opportunity."¹⁰⁸

As to the fit between the goal of inclusion and the means of race-conscious admissions, Paul Mishkin from Boalt Hall and Archibald

105. Id.
106. Id. at 16-17.
107. Id. at 32-33.
108. Id. at 35.
Cox, whose voice I first heard in my law school classes at Harvard, advised the Court: “It is almost certainly impossible to admit more than an isolated few minorities by resort to any referent truly neutral as to race.”109 But none of this is a part of Justice Powell’s Bakke balance.

Thus, if I am to fulfill the scholar’s role as Justice Powell admired it, if I am to contribute an insight that builds understanding of the Supreme Court, its judicial personalities, its judicial methods, let me say that I find my insight in the chord of inclusion that Justice O’Connor adds to the Court’s newly voiced Grutter balance.

A. Justice O’Connor’s Grutter Balance

Justice O’Connor’s analysis in Grutter observes that “only one of the interests asserted by the university survived Justice Powell’s scrutiny.”110 We are told: “Justice Powell approved the university’s use of race to further only one interest: ‘the attainment of a diverse student body.’”111 But the weight of diversity as an end in Justice Powell’s Bakke balance is linked to the First Amendment, to academic freedom, and to obtaining “the educational benefits that flow from a diverse student body.”112 This is only one way that Justice O’Connor, quoting from Respondent Lee Bollinger’s brief, describes the interest in diversity in her opinion in Grutter. Justice O’Connor, speaking for the Court and following Justice Powell’s Bakke balance, writes: “The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici.”113 And more: “Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission.”114

The end of a diverse student body, according to Bakke’s balance, is improved learning in our law schools.115 But educational benefits may not be the only interest served by our nation’s law schools. Might there not be room, on balance, for the weight of inclusion?

109. Id. at 39.
111. Id.
112. Id. at 365 (internal quotations omitted).
113. Id. at 332.
114. Id. at 333.
Learning is certainly at the heart of a law school’s institutional mission, as I understand what I do day by day. For what it is worth, like the Court in *Grutter*, I believe the educational benefits recited in Justice O’Connor’s opinion “are not theoretical but real”: “cross-racial understanding,” “break[ing] down racial stereotypes,” “enab[ling] [students] to better understand persons of different races,” “livelier, more spirited, and simply more enlightening and interesting” classroom discussion.” The Law School’s amici, the expert reports entered into evidence at trial, and numerous studies “show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”

There are those who doubt these educational benefits, or make fun of them, as do Justice Antonin Scalia and Justice Clarence Thomas. More of this later under the heading *Judicial Lions*. As I said, I do not doubt these educational benefits, and I have done my duty by reading the amicus brief of the American Educational Research Association, William Bowen and Derek Bok’s book, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, Gary Orfield and Michal Kurlaender’s *Diversity Challenged: The Evidence on the Impact of Affirmative Action*, and a compendium entitled *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities*—all of which are cited by Justice O’Connor in her opinion for the Court in *Grutter*. I invite the reader to climb the Mount Everest of amici briefs on both sides (I count 160) and to ponder the sociological and psychological data hurled at the Court’s feet in *Gratz* and *Grutter*—to say nothing of the views of General Motors or of General H. Norman Schwartzkopf.

But the weight of educational benefits flowing from a diverse student body that Justice Powell approved in *Bakke* is quite different
from the weight of inclusion and opportunity stressed by the Regents and nowhere addressed by Justice Powell in his opinion in Bakke.

B. The Chord of Inclusion

Racial and ethnic diversity that serves access, opportunity, and inclusion as distinct ends in themselves—is the chord of inclusion quietly voiced by Justice O'Connor in Grutter. This weight of inclusion, as I hear it, is new. The amicus curiae brief of the American Bar Association, which is not mentioned in Justice O'Connor's opinion for the Court, is especially compelling in sounding the same goal.

It is from the military that Justice O'Connor derives the Court's chord of inclusion. And here she uses the vital tool of analogy in the judicial method of the Court to voice the weight of inclusion in Grutter. Thus, from the amicus curiae brief of a weighty list of our nation's military leaders, generals and civilians alike, "based on [their] decades of experience," Justice O'Connor recites the conclusion that a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." This is the role-model weight of diversity. True, Wygant v. Jackson Board of Education rejects it. But Wygant involved layoffs, a difference a sensitive judicial eyepiece might see. Comes the analogy: “We agree that 'it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective.'" But the military's need for a "racially diverse officers corps in a racially diverse setting" is nowhere linked to Bakke's diversity balance, that is, to improving educational benefits.

Next, Justice O'Connor's Grutter balance, building upon the military analogy, addresses the context of higher education. And here, as everywhere else in the law, context makes a difference. This was Professor Felix Frankfurter's lifetime teaching of the judicial process as a Justice of the Court. Before him, Justice Brandeis,
borrowing from the regulae iuris of Rome, professed his faith in facts: "Ex facto jus oritur. That ancient rule must prevail in order that we may have a system of living law." I try to teach the same lesson in class.

Justice O'Connor in Grutter quotes from Mr. Justice Frankfurter's opinion in Gomillion v. Lightfoot—the telescopic view of how to read the Great Guarantees of the Constitution: "Context matters when reviewing race-based governmental action under the Equal Protection Clause." "The Constitution," said Justice Frankfurter, "commands neither logical symmetry nor exhaustion of a principle." Justice O'Connor herself is forced to back away from broad language in her opinion for the Court in City of Richmond v. J.A. Croson Co. that suggests remedying past discrimination is the only permissible justification for race-based governmental action. But there is nothing new in the Court cabining its holdings to the controlling variant facts, as Professor Frankfurter taught so well at Harvard Law School. For her part in the judicial process of Gratz and Grutter, Justice O'Connor admonishes that, both as to means and as to ends, application of the formula of strict scrutiny must always remain responsive to the context in question. Thus, "strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the government's reasons for using race in a particular context." Justice O'Connor's reference to sincerity in this sentence is also a subtle nuance of judgment evident to my eye.

And what of the value of inclusion in higher education? This, as I hear it, is a new chord in Justice O'Connor's Grutter balance. Hear her voice for yourself. "[O]ppportunity through public institutions of higher education must be accessible to all individuals regardless of.

126. For a refined excursion through the classical jurists' ideas of regulae iuris, see Peter Stein, Regulae Iuris: From Juristic Rules to Legal Maxims (1966).
128. Grutter, 539 U.S. at 331 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 343-44 (1960) (admonishing that, "in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts").
131. Grutter, 539 U.S. at 331-32.
132. Id.
race or ethnicity." She quotes from the amicus curiae brief of the United States—never mind our Government opposed the Blue and Gold in *Gratz* and Michigan Law School in *Grutter*—affirming that “ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.” And more: “Nowhere is the importance of such openness more acute than in the context of higher education.” I am reminded of Justice Powell’s quoting Archibald Cox’s book against Cox’s argument in the *Bakke* case. It is at this point that Justice O’Connor, for herself, for the Court, and, hopefully, for the Nation, echoes the voice of a preacher, the voice of Dr. Martin Luther King at the Lincoln Memorial: “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” There are times in the life of our Constitution when the Court must voice hope and find the mediating way. This, as I hear it, is the voice of *Gratz* and *Grutter*.

Ironically, I hear the same chord of inclusion in the voice of the first Justice John Marshall Harlan in his immortal dissent in *Plessy v. Ferguson* in 1896. It, too, rings down from the past, from a time when the justices sat in the Old Senate Chamber of the Capitol: “The destinies of the two races, in this country, are indissolubly linked together, and the interest of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.” Race hate, to my mind, is different from inclusion, from access. I like Justice John Paul Stevens’s figure, the difference between a “No Trespassing” sign and a “Welcome” mat.

133. *Id.* at 334.
134. *Id.* (internal quotations omitted) (quoting Brief for the United States as Amicus Curiae at 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).
135. *Id.*
139. “The old courtroom in the Capitol, which had been the Senate chamber of Benton, Henry Clay, and Webster, combined dignity with truly republican simplicity. I felt about it the way, years later, a security officer of mine felt when I pointed out to him the spot not far from the Place Royale in Paris on which Henry of Navarre was murdered. ‘Gee, Mr. Secretary,’ he said, ‘there’s a hell of a lot of history around here!’” ACHESON, *supra* note 32, at 56-57.
wondered, too, what the first John Marshall Harlan would say of *Gratz* and *Grutter*. Might he not see a difference of context? At any rate, his categorical conclusion that the Constitution is colorblind yielded to competing considerations in the old *Cumming v. Richmond County Board of Education* case, which also involved a question of educational policy, and yielded Justice Harlan's own mediating application of the Equal Protection Clause.\(^{142}\)

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," should ignore this distinction.

The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

\(^{142}\) 175 U.S. 528, 544 (1899):

The plaintiffs in error complain that the Board of Education used the funds in its hands to assist in maintaining a high school for white children without providing a similar school for colored children. The substantial relief asked is an injunction that would either impair the efficiency of the high school provided for white children or compel the Board to close it. But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children. The Board had before it the question whether it should maintain, under its control, a high school for about sixty colored children or withhold the benefits of education in primary schools from three hundred children of the same race. It was impossible, the Board believed, to give educational facilities to the three hundred colored children who were unprovided for, if it maintained a separate school for the sixty children who wished to have a high school education. Its decision was in the interest of the greater number of colored children, leaving the smaller number to obtain a high school education in existing private institutions at an expense not beyond that incurred in the high school discontinued by the Board.

Of Harlan's *Cumming* decision, biographer Linda Przybyszewski is justly critical: "*Cumming v. Richmond County Board of Education* in 1899 is a short, stiff decision for the majority in which [Justice Harlan] refused to grant an injunction to make the school board
In the context of our Nation's law schools, Justice O'Connor emphasizes their role as "the training ground for a large number of the Nation's leaders." Individuals with law degrees occupy roughly half of the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. (And every seat on the Supreme Court of the United States.) Her next paragraph stands out. It speaks starkly of minority access, of inclusion, of diversity in the service of opportunity:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training . . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

In all likelihood, other justices of the Court influenced Justice O'Connor's opinion. Fashioning the Opinion of the Court is a joint enterprise. Justice Stevens, who joined Justice O'Connor's opinion in Grutter, said nothing for himself. Whether he was silent at Conference or among Chambers, I do not know. But given his telling metaphor
of the welcome mat, I suspect Justice Stevens welcomed the chord of inclusion carefully worked into the Court's opinion. 147

As I hear her, Justice O'Connor voices a new compelling interest in Grutter. She weighs a new balance—a balance, if I am correct, beyond Justice Powell's in Bakke. Her contribution is vital. Once inclusion is worked into the formula, the Law School's modest admission of minorities is a necessary means to a legitimate end, just as the Regents argued in Bakke. For the Court, like Justice Powell before her, Justice O'Connor takes the mediating way between America's past and America's future.

Bakke's balance, scaled anew in Grutter, thus extends into the future. The Court's twenty-five year time limit gives me no difficulty. 148 This is the common law tradition of our Constitution. I

not repeat anything his colleagues said. Because his former law clerk Jeffery Lehman was the former Dean of Michigan Law School, Justice Stevens worried that this might create the appearance that he was biased in favor of the University. He raised the matter at Conference before the April 1, 2003 oral argument in Grutter. The other eight Justices "unanimously and very firmly" urged him to stay in the case because the Justices could not sit out each time one of their former clerks was involved.

Justice Stevens, reading from his April 2, 2003, Grutter Conference notes, delivered a lengthy defense of the Law School's admissions program. "If we impose our will on the nation, there will really be a sea change in societal behavior that will not easily be reversed." Id. (internal quotations omitted). "In the final analysis, I thought the real question was, 'Who should decide?' The nine of us sitting in the chambers of the Supreme Court or the accumulated wisdom of the country's leaders?'" Id (internal quotations omitted). The amicus brief submitted by former military leaders, including retired General H. Norman Schwarzkopf and General Wesley Clark, was "very powerful" in arguing that a diverse military needs affirmative action at service academies and universities as a well-spring of minority officers.

Justice John Paul Stevens urged the Conference to treat Justice Powell's lone opinion in Bakke as controlling authority in Grutter because major institutions had relied on it since 1978. At Conference: "[W]e were all concerned about the length, the duration a preference program might take." Id (internal quotations omitted). But any concern blacks would become permanently dependent on preferences would "work itself out." "Presumably it is in the universities' self-interest to eliminate the preference as soon as it is no longer necessary . . . There is no reason for the majority to grant preferences to the minority unless those preferences serve the best interests of the majority." Id. (internal quotations omitted).

This extraordinary contemporaneous oral "history," so to speak, shows that Justice Stevens voiced his separate views in Grutter v. Bollinger at Conference, if not in the Reports. Like Mr. Justice Frankfurter before him, Justice John. Paul Stevens considers it a matter of judicial conscience and a point of honor to voice whatever angle of vision his eye sees in the facts of record and in the law of the case. He said precisely this, to my student Carolyn Pratt Perry, who wrote a seminar paper on Justice Stevens and who visited him in Chambers on our annual Greyhound field trip to the Court, circa 1978.


hear an echo of the Court's formula in *Brown v. Board of Education*—
"all deliberate speed."149 And as I see it, Justice O'Connor's method in
*Gratz* and *Grutter* lies at the heart of the Court's judicial process, in
constitutional law and elsewhere.

In hard cases, there are no absolutes.150 The Court does better to
mediate between black and white. Holmes said it best in this flash of
insight from *Hudson Water Co. v. McCarter*.

All rights tend to declare themselves absolute to their logical
extreme. Yet all in fact are limited by the neighborhood of principles of
policy which are other than those on which the particular right is
founded, and which become strong enough to hold their own when a
certain point is reached.151

A sense of neighborhood, a sense of love of our fellow man, a
sense of shared destiny, not race hate, is my sense of *Grutter*’s
balance.152

V. OTHER VOICES

A. David H. Souter, Ruth Bader Ginsburg, Stephen G. Breyer

The judicial workways of Justices David H. Souter, Ruth Bader
Ginsburg, and Stephen G. Breyer in *Gratz* and *Grutter* merit a few
comments from my point of view of process and personality.

I have read David H. Souter's revealing essay, *Mr. Justice
Duncan*, tucked away in the *New Hampshire Bar Journal*.153 It
illuminates Justice Souter's way, as he tells us of his predecessor on the
New Hampshire Supreme Court, Laurence Ilsley Duncan—“a

150. According to the illuminating compendium of Felix Frankfurter's extra-judicial
essays on the Court and the Constitution, Frankfurter observed:

“But when, in any field of human observation, two truths appear in conflict it is
wiser to assume that neither is exclusive, and that their contradiction, though it may
be hard to bear, is part of the mystery of things.” But judges cannot leave such
contradiction between two conflicting “truths” as “part of the mystery of things.”
They have to adjudicate. If the conflict cannot be resolved, the task of the Court is
to arrive at an accommodation of the contending claims. This is the core of the
difficulties and misunderstandings about the judicial process. This, for any
conscientious judge, is the agony of his duty.

FELIX FRANKFURTER ON THE SUPREME COURT 508 (Philip B. Kurland ed., 1970) (quoting
152. In short, times have changed. In the words of ABA President Dennis W. Archer,
consummate master craftsman of the law.”154 “He believed the world had a fair claim to the highest use of his power to bring order to human thought, for the sake of liberty and the common good.”155 Duncan was “a technician who believed the record was king.”156 So does Justice Souter, who tells us in his *Gratz* dissent that, “[a]lthough the freshman admissions system here is subject to argument on the merits, I think it is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record.”157 Says Souter, “[s]ince the record is quiet, if not silent, on the case-by-case work of the [Admissions Review] committee, the Court would be on more defensible ground by vacating and remanding for evidence about the committee’s specific determinations.”158 Like Duncan, Justice Souter bores into soft spots: “The point system cannot operate as a de facto set-aside if the greater admissions process, including review by the committee, results in individualized review sufficient to meet the Court’s standards.”159

There was more to Duncan, however, than technical powers, “or they would not have been the technical powers of a great judge.”160 What is Souter’s measure of a great judge?

He was a great judge because he saw beyond records and articulated premises, to litigants and to the sources of a court’s strength to do right by litigants, whatever the right might be. He took the long view, even when the litigants were not the most sympathetic and even when a majority in his own court were, in his judgment, wrong.161

There is a measure of the long view, as I see it, in Justice Souter’s *Gratz* dissent. For him, and for Justice Ginsburg, the constitutionality of Michigan’s twenty-point system is a matter of degree falling on the right side of *Bakke*’s balance:

The very nature of a college’s permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants’ chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant

154. *Id.*
155. *Id.* at 87.
156. *Id.* at 83-84.
158. *Id.* at 298 (Souter, J., dissenting).
159. *Id.* (Souter, J., dissenting).
161. *Id.*
characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell’s plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its “holistic review”; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose.\textsuperscript{162}

All judgment is a matter of degree. “It suffices for me,” said David Souter, “that there are no Bakke-like set-asides and that consideration of an applicant’s whole spectrum of ability is no more ruled out by giving 20 points for race than by giving the same points for athletic ability or socioeconomic disadvantage.”\textsuperscript{163} This is Justice Souter’s nuanced judgment. His is also a voice of judicial balance.

Justice Ginsburg’s dissent in \textit{Gratz}, in the style of Louis Brandeis’s mastery of the telescope, focuses on the larger landscape of law and fact, and their interplay. She objects to the Majority’s insistence that “the same standard of review controls judicial inspection of all official race classifications.”\textsuperscript{164} She objects to \textit{Adarand}’s plea for “consistency” in the application of strict scrutiny across all terrains of governmental action.\textsuperscript{165} “[W]e are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.”\textsuperscript{166} “Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty stricken and underperforming institutions.”\textsuperscript{167} Justice Ginsburg’s footnotes painstakingly document her opinion, in the style of Justice Brandeis’s “Mount Everest of footnotes.”\textsuperscript{168}

\begin{itemize}
  \item \textsuperscript{162} \textit{Gratz}, 539 U.S. at 297 (Souter, J., dissenting) (citation omitted).
  \item \textsuperscript{163} \textit{Id} at 298 (Souter, J., dissenting).
  \item \textsuperscript{164} \textit{Id} at 300 (Ginsberg, J., dissenting).
  \item \textsuperscript{165} \textit{Id} (Ginsburg, J., dissenting) (citing \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200, 224 (1995)).
  \item \textsuperscript{166} \textit{Id} at 299 (Ginsburg, J., dissenting).
  \item \textsuperscript{167} \textit{Id} at 300 (Ginsburg, J., dissenting) (footnotes omitted).
  \item \textsuperscript{168} Dean Acheson, law clerk to Mr. Justice Brandeis during the October 1919 and 1920 Terms, later Secretary of State under President Truman, mused as to Brandeis’s footnotes:

\begin{quote}
He wrote the opinion; I wrote the footnotes.
My footnotes up to that time were the Mount Everest of footnotes. Today, Justices of the Supreme Court write textbooks as marginal annotations of their opinion, but up to that time I had written the greatest footnotes, fifteen pages of footnotes.
\end{quote}
\end{itemize}
way of the scholar is her way. She makes good use of scholarship in the law reviews. Quoting Professor Carter in the *Yale Law Journal*, she reports that “[t]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression is to trivialize the lives and deaths of those who have suffered under racism.”

She also notes Professor Carter’s point that “[t]o pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn’t exist.”

Says Justice Ginsberg, “[t]he stain of generations of racial oppression is still visible in our society and the determination to hasten its removal remains vital.”

As to the University’s admitted allocation of twenty points in *Gratz*, Justice Ginsburg insists on honesty, as Justice Brandeis insisted on honesty: “If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”

Justice Souter’s dissent in *Gratz* says the same thing: “Michigan states its purpose directly and, if this were a doubtful case

And what were we trying to do? We were collecting all the legislation and all the decisions of the forty-eight states and the Territories of the United States as to what was an intoxicating beverage. The purpose of this, of course, was to show that when Congress said “one half of one per cent of alcohol by volume is intoxicating,” that that was reasonable, because all the states had said everything in the world beside that. And compared to the confusion of the states, this was Reason Incarnate. So I went to work on the opinion.

Dean Acheson, *Recollections of Service with the Federal Supreme Court*, 18 ALA. LAW 355, 364-65 (1957), quoted in Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1151 (1973). “The idea of footnotes was the Justice’s, but the compilation of them was mine. They established a world’s record in footnotes to that time and constituted 57 per centum of the opinion by volume. They were a noble work, worthy of a better cause.” ACHESON, supra note 32, at 79.

Louis D. Brandeis himself, upon graduation with the highest average ever from Harvard Law School, clerked for Mr. Justice Horace Gray, of the Massachusetts Supreme Judicial Court, later Mr. Justice Gray of the Supreme Court of the United States. For more on the history and growth of the law clerk institution and the sundry duties of what Learned Hand called “puisne judges,” see generally ON LAW CLERKING: A COMPREHENSIVE VIEW (Paul R. Baier ed., 1974).


170. *Id.* (Ginsburg, J., dissenting) (internal quotations omitted) (quoting Carter, supra note 169, at 434).

171. *Id.* at 303 (Ginsburg, J., dissenting) (citation omitted).

172. *Id.* (Ginsburg, J., dissenting).
for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.\footnote{173} I see Justice Holmes's touch in Justice Souter's writing.

Regarding the Fourteenth Amendment, Justice Ginsburg in \textit{Gratz}, joined by Justice Souter and Justice Breyer, sees in the Equal Protection Clause a balance quite different from Justice Powell's in \textit{Bakke}.

In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated.\footnote{174}

Justice Breyer's contribution to the symposium of \textit{Gratz} and \textit{Grutter} is a single sentence in a single paragraph—brevity unusual, but welcome, from my former professor of law—his opinion concurring in the judgment of the Court in \textit{Gratz}.\footnote{176} “[G]overnment decisionmakers may properly distinguish between policies of inclusion and exclusion,” says Justice Breyer succinctly, “for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally.”\footnote{177}

\section*{B. Judicial Lions}

The first Justice Harlan's categorical imperative, “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens,”\footnote{178} is assuredly the voice of Justice Antonin Scalia, the first Italian-American on the Court. I have walked the streets of Siena, Italy, with Justice Scalia (courtesy of Tulane University School of Law). Antonin Scalia is a rousing personality, whom I like and respect. As a judge, I would cast him as a street fighter. The “Security of the Absolute” also shapes the judicial temper of Justice Clarence Thomas, the second African-American on the Supreme Court. Thus, Thomas asserts, “I would hold that a State's use of racial

\footnotesize
173. \textit{Id.} at 299 (Souter, J., dissenting).
174. \textit{Id.} at 301 (Ginsberg, J., dissenting).
175. \textit{Id.} (Ginsburg, J., dissenting) (citation omitted).
176. \textit{Id.} at 288-89 (Breyer, J., concurring).
177. \textit{Id.} at 289 (Breyer, J., concurring) (citation omitted).
discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause." The judicial personality of our friend Justice Categorical haunts the Supreme Court in Grutter like Hamlet's Ghost. I have heard Justice Thomas's deep, resonant voice at LSU. It clashes vociferously with that of his predecessor of color, Justice Thurgood Marshall. They view the Fourteenth Amendment's text and context from different angles. They weigh the competing interests at stake on diverse scales of justice. Like the first John Marshall Harlan, the current judicial personalities of Justice Antonin Scalia and Justice Clarence Thomas roar like lions in Gratz.


180. "Since the Congress that considered and rejected the objections to the 1866 Freedman's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 398 (1978) (Marshall, J., concurring in part). Inconceivable? Not to Justice Clarence Thomas.

University of Virginia Law School Professor J. Harvie Wilkinson III (later Chief Judge of the United States Court of Appeals for the Fourth Circuit) catches the tensions of affirmative action as they collide in the text and purpose of the Fourteenth Amendment: "History teaches, we have noted, the prodigious dangers of encouraging racial patterns of thought. Yet it asks us something else besides: whether a constitution, after generations of endorsing color-consciousness, can abruptly demand that the world be color-blind." WILKINSON, supra note 15, at 294.


181. "[I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier." Bakke, 438 U.S. at 387 (Marshall, J., concurring in part). Whatever one thinks of the theoretical divide between Justice Thurgood Marshall and Justice Clarence Thomas, it is the fact that Justice Marshall's judicial personality lingers still at Conference, which is precisely the point of this Essay. "[T]he man who would, as a lawyer and jurist, captivate the nation would also, as colleague and friend, profoundly influence me." Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992). "Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth." Id. Thurgood Marshall reminded us "that the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality." Id. at 1218. "No one could help but be moved by Justice Thurgood Marshall's spirit; no one could avoid being touched by his soul." Id. at 1220.

Justice O'Connor's new book, has an entire chapter on Justice Marshall, with an engaging snapshot of Justice Marshall in his Chambers at the Court, facing page 135. "S-a-a-a-n-d-r-a," he called out once, "did I ever tell you about the welcome I received in Mississippi?" O'CONNOR, supra note 65, at 136 (internal quotations omitted).

and Grutter. It is a fact that Holmes called the first Justice Harlan, “Mylionhearted friend.”

1. Justice Antonin Scalia

Justice Scalia’s dissent in Grutter certainly roars. The Law School’s “critical mass” idea “challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.”182 Michigan’s only interest, according to Justices Scalia and Thomas, is the state’s interest in maintaining a “prestige” law school whose high admissions standards disproportionately exclude blacks and other minority groups.183 If the supposed benefits of diversity are as compelling as the Law School claims, it should be forced to lower its admissions standards and give up its “super duper” status (as Scalia put it during oral argument).184 Justice Scalia makes fun of the aims of the Law School. He ridicules the goal of “cross-racial understanding”—“This is not, of course, an ‘educational benefit’ on which students will be graded on their Law School transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding).”185 He sees trouble ahead: “[T]oday’s Grutter-Gratz split double header seems perversely designed to prolong the controversy and the litigation.”186 I like his figure of speech, “split double header.”187 Justice Scalia anticipates future lawsuits. “I do not look forward to any of these cases.”188 His last categorical roar:—“The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”189

183. Id. (Scalia, J., dissenting).
MS. MAHONEY [Counsel for Respondents Bollinger, et al.]: Your Honor, I don’t think there’s anything in this Court’s cases that suggests that the law school has to make an election between academic excellence and racial diversity. The interest here is having a—
QUESTION [JUSTICE SCALIA]: If it claims it’s a compelling State interest. If it’s important enough to override the Constitution’s prohibition of racial discrimination, it seems to me it’s important enough to override Michigan’s desire to have a super-duper law school.
185. Grutter, 539 U.S. at 344 (Scalia, J., dissenting).
186. Id. at 345 (Scalia, J., dissenting).
187. Id. (Scalia, J., dissenting).
188. Id. at 346 (Scalia, J., dissenting).
189. Id. (Scalia, J., dissenting).
2. Justice Clarence Thomas

Justice Thomas’s dissent in *Grutter* is also loud, self-assured, and single-minded. A note of sympathy is drowned out by an absolute. “Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School,”\(^{190}\) says Justice Thomas.

But,—Comes the Absolute—: “The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of ‘strict scrutiny.’”\(^{191}\) Justice Thomas is heated: “I believe that the Law School’s current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.”\(^{192}\) Very heated: “The majority upholds the Law School’s racial discrimination not by interpreting the people’s Constitution, but by responding to a faddish slogan of the cognoscenti.”\(^{193}\) He quotes his own opinion in *Adarand*: “Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society.”\(^{194}\) Mr. Justice Thomas roars louder and louder: “Diversity” is only “a fashionable catchphrase.”\(^{195}\) Michigan Law School’s real interest is only an “aesthetic”\(^{196}\)—That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.\(^{197}\) And louder: “A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic—so much so that the majority uses them interchangeably.”\(^{198}\) Comes the loudest roar of all, jaws wide open:—“Finally, even if the

\(^{190}\) *Id.* at 346 (Thomas, J., dissenting).
\(^{191}\) *Id.* (Thomas, J., dissenting).
\(^{192}\) *Id.* at 347 (Thomas, J., dissenting).
\(^{193}\) *Id.* at 346 (Thomas, J., dissenting).
\(^{195}\) *Id.* at 349 n.3 (Thomas, J., dissenting).
\(^{196}\) *Id.* at 349 (Thomas, J., dissenting).
\(^{197}\) *Id.* (Thomas, J., dissenting).
\(^{198}\) *Id.* (Thomas, J., dissenting).
Law School's racial tinkering produces tangible educational benefits, a marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest in either its existence or in its current educational and admissions policies. In *Grutter*, may I say, Justice Thomas eats Michigan Law School for lunch.

The mediating way, the way of judicial balance in *Gratz* and *Grutter*, is anathema to Justices Scalia and Thomas. “[T]he Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways.” There is none of the middle ground. There is none of Justice Powell's soft voice. There is none of *Bakke*’s balance. Competing First Amendment interests, first sounded by Justice Frankfurter in *Sweezy v. New Hampshire*, later voiced all alone by Justice Powell in *Bakke*, and finally accepted by the Court in *Grutter*, are brushed aside angrily. Justice Thomas quotes Justice Frankfurter’s *Sweezy* opinion against the Court itself: “In my view, ‘it is the business’ of this Court to explain itself when it cites provisions of the Constitution to invent new doctrines—including the idea that the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause.” Entering Felix Frankfurter's mind, Clarence Thomas says, “I doubt that when Justice Frankfurter spoke of governmental intrusions into the independence of universities, he was thinking of the Constitution's ban on racial discrimination.

Justice Thomas answers *Grutter*'s social science with social science of his own. Racial heterogeneity actually impairs learning among black students. The purported “beneficiaries” are underperforming in the classroom. “The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving.” Stigma matters to Justice Thomas. “When blacks take positions in the highest places of government, industry, or academia, it is an open question today

199. *Id.* at 353 (Thomas, J., dissenting).
200. *Id.* (Thomas, J., dissenting).
201. *Id.* at 354 (Thomas, J., dissenting) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).
202. *Id.* at 355 (Thomas, J., dissenting).
203. *Id.* at 359-60 (Thomas, J., dissenting).
204. *Id.* (Thomas, J., dissenting).
205. *Id.* at 361 (Thomas, J., dissenting).
whether their skin color played a part in their advancement. The question itself is the stigma... Under the majority's "unprecedented deference to the Law School—a deference antithetical to strict scrutiny," Justice Thomas fears serious collateral consequences. To wit, "[a]n HBC's [Historical Black College's] rejection of white applicants in order to maintain racial homogeneity seems permissible." According to Justice Thomas: "Contained within today's majority opinion is the seed of a new constitutional justification for a concept I thought long and rightly rejected—racial segregation." And what about United States v. Virginia, where, in stark contrast, "this Court gave no deference. " Apparently where the status quo being defended is that of the elite establishment—here the Law School—rather than a less fashionable Southern military institution, the Court will defer without serious inquiry and without regard to the applicable legal standard.

"The sky has not fallen at Boalt Hall at the University of California, Berkeley," says Justice Thomas. After California's adoption of Proposition 209, Boalt Hall, in 2002, "without deploying express racial discrimination in admissions," enrolled fourteen blacks (down only seven from 1996) and thirty-six Hispanics (up eight from 1996). (Justice Thomas says nothing, however, about the University of Texas Law School, after Hopwood, where the data are strikingly different.) Again a roar:

206. Id. (Thomas, J., dissenting).
207. Id at 354 (Thomas, J., dissenting).
208. Id at 356 (Thomas, J., dissenting).
209. Id. (Thomas, J., dissenting)
211. Grutter, 539 U.S. at 356 (Thomas, J., dissenting).
212. Id. (Thomas, J., dissenting).
213. Id at 357 (Thomas, J., dissenting).
214. Id. (Thomas, J., dissenting).
215. Id. (Thomas, J., dissenting).
216. The most recent (2003) data I have seen, painstakingly detailed in William C. Kidder, The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School School Admissions, 1950-2000, 19 HARV. BLACK LETTER L.J. 1, 31 (2003), reveal a precipitous drop in African American enrollments after affirmative action was banned. Across the five schools, African Americans were 6.65% of enrollments with affirmative action, but 2.25% of enrollments without affirmative action. In effect, the clock was turned back on three decades of affirmative action in California. At Boalt Hall, African Americans were 2.7% of enrollments from 1997 to 2001. By comparison, Blacks were 9.0% of enrollments in the first five years in which affirmative action took full effect (1968-1972). Likewise, African Americans were 7.5% of enrollments at UCLA in the
The Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution. And the same Court that had the courage to order the desegregation of all public schools in the South now fears, on the basis of platitudes rather than principle, to force the Law School to abandon a decidedly imperfect admissions regime that provides the basis for racial discrimination.217

Justice Thomas offers his own deconstruction: "I believe what lies beneath the Court's decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, and that racial discrimination is necessary to remedy general societal ills."218

Three more roars and my parsing of Thomas's dissent in *Grutter* is ended.

Roar the First:—"The Law School is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law. The Law School seeks only a façade—it is sufficient that the class looks right, even if it does not perform right."219

Roar The Second, aimed at the Majority's 25-year license to the Law School to violate the Constitution upon its "fabricated" compelling state interest:—"No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years. Nor is the Court's holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time."220

Finally, Roar The Third, Justice Thomas's closing lines in *Grutter*.—

first five years of affirmative action (1967-1971) but only 2.3% of enrollments thirty years later (1997-2001). The University of Texas came full circle as well, as a half-century of hard-fought yet halting progress was erased. In 1951, Heman Sweatt and the five other African American entrants to the first post-de jure segregation class at UT constituted 2.1% of enrollments. African Americans were a nearly identical proportion of enrollments (2.2%) at UT in 1997-2001. The extent to which Boalt, UCLA, and UT became resegregated is particularly disheartening in light of the recent history of those institutions. Boalt Hall and UCLA combined to award nearly 600 law degrees to African Americans between 1987 and 1997, and UT produced some 650 Black attorneys prior to *Hopwood.*

Id. (footnotes omitted).
218. Id. (Thomas, J., dissenting) (citation omitted).
219. Id. at 360 (Thomas, J., dissenting).
220. Id. at 363 (Thomas, J., dissenting).
For the immediate future, however, the majority has placed its imprimatur on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to “[d]o nothing with us!” and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated.221

My reaction? I think immediately of what appears on the last page of the 24th of Howard, the voice of Mr. Justice Grier, the Latin from Cicero: “Haud equidem invideo, miror magis.”222 (“It is not so much that I am angry, but rather that I marvel at it.”) Or if I may avouch Holmes as a witness: “The great ordinances of the Constitution do not establish and divide fields of black and white.”223

C. The Court and Its Critics

Rather than answer Justice Scalia and Justice Thomas point by point, let me respond to a few of their louder roars, which it is beyond my academic nature to leave unanswered. (I have paraphrased Justice Scalia’s dissent in Planned Parenthood of Southeastern Pennsylvania v. Casey224 only slightly.)

My idea of a judicial personality includes a good mind. One critic of the Court has said that the Justices compose “A Court of Mediocrity,” that Justice Scalia’s brainpower is “head and shoulders above his colleagues,”225 and that Justices Kennedy and Souter are “intellectual ciphers”—the latter assertion by way of loud innuendo.226 Whatever else I know, I am confident in saying that the Justices who accepted “diversity” as a compelling interest in Grutter and who approved the Law School’s “critical mass” explanation are not “gullible” minds. Ridicule and sarcasm have no place, I daresay, in the vital work of the Court. I do not like it. Justice Powell is my ideal of

221. Id. at 364 (Thomas, J., dissenting) (citation omitted) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).
224. 505 U.S. 833, 981 (1992) (Scalia, J., dissenting) (“I must, however, respond to a few of the more outrageous arguments in today’s opinion, which it is beyond human nature to leave unanswered.”).
226. Id. at 79.
judicial personality, a Virginia gentleman. Justice O'Connor in her new book, *The Majesty of the Law: Reflections of a Supreme Court Justice*, gives us a sketch of her own: "Lewis was very hardworking and attended to every detail. He was concerned in every case about the equity at the bottom line—about reaching a fair and just result."

Justice Powell, of course, held firm to his understanding of the Constitution. "Underneath that gentlemanly exterior was a firmness and resolve. When he decided on a course of action, he would hold his ground."

But Justice Powell, as I know him, would not roar. He would not ridicule. The same is true of Justice O'Connor. Her method in *Gratz* and in *Grutter* is Justice Powell's method. She, too, holds firmly to her ground: "Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission...." I sense a slightly louder tone of voice here, in response to the claim that the Law School's interest is only an "aesthetic"—that the distinction between diversity's educational benefits and race for its own sake "is purely sophistic." To the contrary, the Court is convinced of the "sincerity of the reasons advanced by [the Law School] for the use of race in that particular context." Justice O'Connor, as I read her opinion in *Grutter*, is no Sophist Judge.

Justice Thomas's claim that "the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society" gives me pause. The Thirty-Ninth Congress, which adopted the Fourteenth Amendment and the race-based affirmative action programs of the Freedman's Bureau Act, "cannot have intended the amendment to

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227. And before Justice Powell, Justice Louis D. Brandeis: "He never gave way to bad temper because his views had not prevailed, nor dealt disrespectfully with the arguments of the majority, as too often occurs." ACHESON, supra note 32, at 94.

228. O'CONNOR, supra note 65, at 150.

229. Id. Justice O'Connor adds: "Lewis Powell followed the precept of another famous Southerner, General Robert E. Lee: 'Do your duty in all things. You cannot do more. You should never do less.'" Id.


231. Id. at 349 (Thomas, J., dissenting).

232. Id. at 350 (Thomas, J., dissenting).

233. Id. at 331.

234. Id. at 348 (Thomas, J., dissenting) (quoting Adarand Constructors, Inc. v. Pena, 515 US 200, 240 (1995) (Thomas, J, concurring in part and concurring in judgment)).
forbid the adoption of such remedies by itself or the states,"235 as Eric Schnapper has documented. "[T]he framers of the fourteenth amendment cannot have intended it to nullify remedial legislation of the sort Congress simultaneously adopted."236 Candidly, Texas Law School Professor Lino Graglia, an ardent foe of affirmative action, agrees: "I very much doubt that the Equal Protection Clause of the Fourteenth Amendment was meant to preclude state efforts to help blacks as blacks."237 Yale Law School Professor Jed Rubenfeld says the same thing, and tellingly: "In July 1866, the Thirty-Ninth Congress—the selfsame Congress that had just framed the Fourteenth Amendment—passed a statute appropriating money for certain poor women and children. Which ones? The act appropriated money for 'the relief of destitute colored women and children.'"238 What is Professor Rubenfeld's advice in the Yale Law Journal? "Justices Scalia and Thomas, whose commitment to original understandings and practices is also a matter of record—should drop their categorical opposition to race-based affirmative action measures."239 They have not. Nor have Justices Scalia and Thomas paid any attention to "our Nation's understanding" of equal protection voiced by the many elected Members of Congress who appeared as amici curiae in Gratz and Grutter in support of such classifications—condemned by our Judicial Lions, Justices Scalia and Thomas, but which these same Representatives and United States Senators show are in the People's law up to this day.240

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236. Id. at 789.
238. Rubenfeld, supra note 20, at 430.
239. Id. at 427.

Congress has consistently rejected bills introduced to eliminate or prohibit race-conscious decision making needed to promote access to government resources and benefits. With the benefit of this Court's decision in [Adarand], Congress has reached a considered decision to preserve race as one factor in providing access to the benefits of federal programs and initiatives. For example, the 105th Congress rejected the "Riggs Amendment," which would have prohibited "discrimination and preferential treatment in connection with admissions to institutions of higher education" under the Higher Education Act of 1965. Likewise, in 1997, a bipartisan majority of the House Judiciary Committee voted to table H.R. 1909, a bill sponsored by Representative Canady that would have prohibited the consideration of race or gender in any federal program or initiative. Elected
Justice Frankfurter hired the first African-American law clerk. If I may enter his mind, he probably thought that racial diversity and minority opportunity in his Chambers contributed to the public good and to the appearance of justice at the Court, not that he was violating the Fifth Amendment to the United States Constitution.

I do not see the seed of segregation that Justice Thomas sees in *Grutter*. Although whites at “Historically Black Colleges” are few in number, they are welcome. Their exclusion in order to maintain racial homogeneity, should it come to pass, presents a different case, or so the Court might see it. I am sure Justice Ginsburg sees *United States v. Virginia* differently.

As far as tarring minority students with a badge of inferiority, this is a risk that both minority law students and the University of Michigan Law School are willing to take if the badges are to come down. And coming down they are, as I read Michigan’s *Law Quadrangle Notes* and know my own LSU Law Center. As for the claim that the Michigan Law School is not looking for minority students who will succeed in the study of law, may I say this is not the

representatives of both parties have joined together to preserve race-conscious decision making as a tool for fulfilling Congress’ constitutional charge to eradicate the legacy of inequality that results from this nation’s long history of racial discrimination by providing broad access to the programs, opportunities, and resources sponsored by the federal government.

241. “On the Court, he had hired the first Negro law clerk, in 1948-49.” BAKER, supra note 142, at 310. Liva Baker writes:

He never forgot a poignant conversation concerning that appointment which took place in his chambers. When his Negro messenger heard about the appointment, he said, “Mr. Justice, that was a mighty fine thing you did, hiring one of our people to be your clerk.”

Frankfurter chided him gently. “Tom,” he said, “I have heard that kind of remark from others, but I am surprised to hear it from you. Don’t you know that I selected William Coleman because, on the basis of character and ability, I felt he deserved the position?”

“Mr. Justice,” replied the messenger, “do you think in this world our people get what they deserve?”

*Id.*

242.

It would be absurd to invalidate special admissions programs out of a misguided concern for effects on minorities, who stand to gain most from such programs and who, as indicated by the amici in this case, are ardent exponents of the programs. The attitude of minority students about the supposed stigmatic effects of such programs is, perhaps, aptly summarized by a recent remark related to one of the authors of this brief: “Just let me have some of that establishment stigma.”

Michigan Law School,\textsuperscript{243} or the LSU Law Center, that I know. Justice Thomas's loudest roar—"[T]he Law School has no compelling interest in either its existence or in its current educational and admissions policies"\textsuperscript{244}—strikes me as shocking. All I will say is that the Governor of Michigan\textsuperscript{245} and the General Motors Corporation\textsuperscript{246} disagree. Finally, Justice Thomas's question of stigma can be answered by a few minutes' contact and talk between persons of goodwill. Justice Clarence Thomas, of Pin Point, Georgia, as I have heard him roar in the \textit{Reports} and laugh over supper with LSU law students, is a lion of weight to be reckoned with, to be sure, for a long, long time (born June 23, 1948).

D. \textit{Professor Lino Graglia \& Co.}

Law professors, like the personalities of the Court, are a diverse crowd. \textit{Tulane Law Review}'s invitation to Professor Lino Graglia, of the University of Texas School of Law, to join our table delights me. His deconstruction of \textit{Grutter}, I am sure, will clash with mine. He is a lion scholar, whose roar I enjoy. I admire his tenacity. Like Justice Scalia, Professor Graglia is blessed with the fire of Sicilian blood. As

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\textsuperscript{243} In the words of Evan Caminker, who succeeded Jeffrey Lehman as Dean of the University of Michigan Law School in August 2003, shortly after \textit{Grutter v. Bollinger} was announced:

\begin{quote}
I believe, with all due respect, that such a challenge to our identity and aspirations is misguided. It is laudable for the State to choose to build a superb educational institution serving both the State's citizenry and the country as a whole. And the Law School clearly repays the State's confidence.

We attract the best and brightest and offer them an unsurpassed legal education. Our students serve our State and Nation exceedingly well even during their schooling by, for example, ably representing real clients in our first-rank clinical programs. Our graduates become leaders in courtrooms, boardrooms, judicial chambers, and governmental cabinets both within the State and all across the land. The suggestion that only private schools may maintain standards of excellence high enough to put graduates in leadership roles serving vital interests around the country and world—while we public institutions should clip our wings—is ill-considered.
\end{quote}


\textsuperscript{246} See Brief of Amicus Curiae General Motors Corp. at 261, \textit{Grutter v. Bollinger}, 539 U.S. 306 (2003) (No. 02-241) ("General Motors strongly believes that the future of American businesses depends upon the availability of a diverse group of well-trained graduates.").
for Professor Graglia's convictions, he may be right. In my assessment of the other fellow's views, I always try to keep in mind Justice Holmes's advice to Justice Sutherland, when the latter turned 70 years old: "When I reached your age, Sonny, I finally realized that I am not God."

Earlier on the road from Brown to Grutter, I asked for Professor Graglia's advice. This was in his office at the University of Texas Law School. I was fighting to save two small, rural elementary schools out in the country in Rapides Parish, Louisiana—one white, one black—from a federal desegregation decree that killed both schools in the pursuit of a logical extreme. In my judgment, the decree crossed Holmes's line of demarcation limiting all rights. There was no accommodation. There was no judicial balance. Professor Graglia sympathized with me. Here was another disaster by decree for his book, but he was not optimistic. We parted company. I made my way to the John Minor Wisdom United States Courthouse on Camp Street. After two hearings and twenty-four months in the Fifth Circuit, I got four out of six judicial votes but lost the case. So it goes. We did better in United States v. Louisiana, where we managed by a vote of 3-0 in the Fifth Circuit to fend off Justice Categorical's summary judgment dismantling Southern University Law Center. This gave me comfort. Three of Judge John Minor Wisdom's successors on the Fifth Circuit tempered the lower court (Chief Judge Charles Schwartz's) logical extreme with Holmes's neighborhood of competing interests.

Professor Graglia is a strident opponent of Bakke's balance. "With the other justices splitting four to four on the applicability of Title VI to whites, Justice Powell wrote the deciding opinion, choosing,
typically for him, to have it both ways,”255 says our Texas friend. “Powell, always seeking a middle way, held that discrimination against whites was every bit as unconstitutional as discrimination against blacks, except that just a little of it would be okay.”252 Of Justice Powell’s “diversity” rationale, Professor Graglia says, “surely no one except him would have imagined that racial ‘diversity’ is a ‘compelling interest’ in higher education.”253 I do not think it will trouble Professor Graglia that “the congenitally ambivalent Justice O’Connor,”254 as Graglia describes her, far from imagining diversity as a compelling interest, holds exactly that in *Grutter v. Bollinger*. Professor Graglia will still roar.

Why is that? Because, along with others, Professor Graglia sincerely believes “[t]he principle that no person should be disadvantaged by government because of race—a corollary of the basic democratic ideal of individual human worth, dignity, and responsibility . . . is perhaps as valuable and as close to an absolute as any principle we have;” and “to qualify the principle is effectively to destroy it.”255 The late Professor Alexander Bickel of the Yale Law School is of the same mind: “For at least a generation the lesson of the great decisions of this [Supreme] Court and the lesson of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society.”256

I am reminded of Professor Bickel’s criticism in his book *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* of Justice Hugo Black’s reading of the Fourteenth Amendment.257 Of Justice Black’s dissent in *Adamson v. California*,258 Bickel says: “Within two years, Professor Charles Fairman had conclusively disproved Justice Black’s contention; at least, such is the weight of opinion among disinterested observers.”259 To this, Hugo Black writes in the margin of his personal copy of Bickel’s book: “That is his view

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252. *Id.* at 1221-22.
253. *Id.* at 1223.
254. *Id.*
256. *Id.* at 585 (quoting Brief of Amicus Curiae Anti-Defamation League of B’nai B’rith at 16, *DeFunis v. Odegaard*, 416 U.S. 312 (1974)).
259. BICKEL, *supra* note 257, at 102 (footnote omitted).
and the 'weight of opinion' is his own view."260 Later in the book when Bickel attacks Justice Black's view of the First Amendment as resting "on a historical hypothesis suspected of being (or known to be) erroneous,"261 Justice Black writes, "An imputation, one of many, that my expression of views about the First Amendment are intellectually dishonest."262

Now, for reasons I have voiced, I do not subscribe to Professor Graglia and Co.'s "series of absolutes." I am quoting another of Justice Black's marginal annotations to Professor Bickel's book—"His series of absolutes."263 I do not agree, respectfully, with Professor Graglia when he says "the Bakke decision was not an instance of judicial good faith."264 Nor to my eye is there anything ambivalent about Justice O'Connor's opinions in Gratz and Grutter. There is only balance, the middle way, the way of Justice Powell.

VI. SOME CONCLUDING OBSERVATIONS

A. Erwin N. Griswold

Twenty-five years ago, Harvard Law School's Dean, Erwin N. Griswold, offered "Some Observations on the DeFunis Case."265 Later in life, Dean Griswold followed my struggle to save Southern University Law Center with great interest. He offered encouraging words to me in the moments of self-doubt and distrust that come to us all. He helped me grow as a teacher and as a scholar. His note of approval when I took Bruce Fein to task for putting Justice Scalia on a pedestal in his article A Court of Mediocrity,266 means much to me. Erwin N. Griswold got us on the road to Grutter in the first place. As Dean of Harvard Law School, he implemented a policy of inclusion

260. This annotation appears in Justice Black's penciled handwriting on the left-hand margin of page 102 of Justice Black's personal copy of Bickel's book, housed when I studied it during my year as a Judicial Fellow at the Court (1975-76) in the Hugo Black Reading Room of the Supreme Court of the United States.

261. BICKEL, supra note 257, at 110.

262. This time Justice Black's response to Bickel is spread over the bottom margin, in bold handwriting, of page 110 of Justice Black's copy of Bickel's book.

263. This penciled retort is in Justice Black's copy of Bickel's book, on the right-hand margin of page 103.

264. Graglia, supra note 237, at 1224.


266. Fein, supra note 225, at 75.
that brought modest numbers of racial and ethnic minorities, as well as women, to the Harvard Law School.267

Let me pay my respects, and my debt, to Dean Griswold by invoking his wisdom of twenty-five years ago in concluding my own Tulane table talk on Gratz and Grutter.

To paraphrase only slightly Dean Griswold's syllogism in his observations on the DeFunis case:

Major premise. The Constitution is color-blind. It forbids discrimination on grounds of race or color.

Minor Premise. [Grutter] was denied admission because [she] is white.

Conclusion. The exclusion of [Grutter] violated the Constitution.268

Of this syllogism, the syllogism of the Absolutist School, Dean Griswold says,

But that is delusively simple. It ignores history. More specifically, it overstates the major premise; and it understates the minor premise. It ignores history because it disregards prior discrimination and allows no room for affirmative action. It makes it impossible to take steps to correct or alleviate the consequences of past discrimination, not only to individual members of minority groups, but also to society as a whole. It overstates the major premise because the Constitution is not wholly color-blind.... What the Constitution forbids is invidious discrimination, and there are many refinements and nuances in determining that question.269

DeFunis was not denied admission because "he was white, simpliciter," says Dean Griswold.270 "The problem was much more complicated than that."271 The Law School denied DeFunis admission because, taking into account a considerable complex of factors, including the fact that he was not a member of a minority group, a judgment was made that the overall structure of the first year class at the University of Washington law school would better apportion the opportunities of legal education and reflect the needs of the community if another were selected rather than he.272

267. See Bowen & Bok, supra note 119, at 5.
268. Griswold, supra note 265, at 518.
269. Id. at 519.
270. Id.
271. Id.
272. Id.
Of course, the rationale of *Gratz* and *Grutter* diverges from Dean Griswold's. *Bakke*'s balance intervenes. But in his next paragraph of twenty-five years ago, a paragraph of process and method, Dean Griswold voices the same chord of balance that is Justice Powell's way:

> There are many delicacies in this judgment. And there are surely limits within which it can be made. . . . It is of course appropriate to emphasize the delicacy of such judgments, and the existence of the limits. But this should not lead to the bald adoption of the syllogistic approach which simply ignores the difficulties, the nuances and the real problems in this area.

Justice O'Connor's opinion for the Court in *Grutter* acknowledges that in our society "race unfortunately still matters." Justice Ginsburg, like Brandeis before her, documents the fact. Of this real problem, in their dissents, Justice Scalia and Justice Thomas say nothing at all. They blow only one horn of a constitutional dilemma, as Paul Freund was fond of saying. "Blowing one horn of a dilemma may produce the purest of tones, but the poorest of constitutional melodies." "It is another heresy which prefers the part to the whole and attempts to deal with the complexity of life by a single supreme simplicity." A "single supreme simplicity" is exactly what Justice O'Connor is wary of. And Justice Powell before her. And Mr. Justice Frankfurter in his day.

### B. The Voice of Justice Powell

I believe Erwin N. Griswold would be pleased with the Court's judgment in *Gratz* and *Grutter*. I know he admired Justice Powell. Dean Griswold once told me that he regarded his behind-the-scenes role in the nomination of Lewis F. Powell, Jr. to the Supreme Court as his greatest public service. Perhaps in *Gratz* and in *Grutter*, Dean

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273. *Id.*
275. *Freund, supra* note 56, at 23.
277. Two of President Nixon's choices were rejected by the Senate. Dean Griswold, who was then Solicitor General, called Attorney General Mitchell and recommended Lewis Powell. "He doesn't want it," Mitchell replied. . . . "How do you know," [Griswold] asked. "We have our sources." Ever painstaking, Dean Griswold pushed ahead: "You will never know unless the President calls Lewis Powell personally and offers him the nomination." That is exactly what happened.
Griswold would hear the same echo of Justice Powell’s voice that I hear.

The day he died, early Tuesday morning, August 25, 1998, I talked to my seminar students about Justice Powell. I played a tape recording of his swearing-in, a treasured piece of sound unearthed years earlier on a seminar field trip to the Supreme Court and to the National Archives.\textsuperscript{278} Justice Powell botched his oath of office. “And that I will faithfully and impartially discharge and perform”—this was Chief Justice Burger’s cue—but somehow Lewis F. Powell, Jr., left hand raised, right hand on the Bible, recited only: “And that I will faithfully . . . discharge and perform.” He plumed forgot “impartially.” Chief Justice Burger let it pass. The day he died, Lewis Powell’s soft Southern voice was heard at LSU Law Center.

Justice Powell, I tell my students, was a paragon of impartiality and judicial balance, as I understand the Court’s personalities and its process. I recall sending him a letter about his mediating opinion in \textit{Bakke}. In Justice Powell’s soft voice of judicial balance, I sensed the Richmond, Virginia, echo of Chief Justice Marshall. This is high praise, but Justice Powell deserved it. Ever modest, he wrote back doubting the comparison and saying his place in judicial history “will be only a footnote.”

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\begin{small}
After talking it over with [Mrs. Powell (Josephine) and] his family, Lewis F. Powell, Jr., of Virginia accepted the nomination [and the Senate confirmed].

“I regard that as my finest public service,” Dean Griswold said of his behind-the-scenes role.
\end{small}
\end{flushright}

Baier, \textit{supra} note 1, at 411.

\textsuperscript{278} In the seminar, my students reach the peak of their legal education in the third year when otherwise they are quite asleep mentally from the rote of Mr. Langdell’s case method. They serve as mock Justices of the United States Supreme Court and hear a case currently pending and argued by two other members of the seminar, who use the actual briefs submitted by the lawyers in the case, most recently \textit{Lawrence v. Texas} (5-4 for Lawrence in the seminar; 5-4 for Lawrence in the Supreme Court). For details of the seminar, see O.W Wollensak, \textit{Hugo Lafayette Black and John Marshall Harlan: Two Faces of Constitutional Law—With Some Notes on the Teaching of Thayer’s Subject}, 9 S.U. L. REV. 1, 22-23 (1982). For other innovations in what the author has dubbed a “pedagogy of persons” in our law schools, see Paul R. Baier, \textit{What Is the Use of a Law Book Without Pictures or Conversations?}, 34 J. LEGAL EDUC. 619, 637 (1984).
Justice Powell’s voice is now the law of the land. My faith is that our Nation is better off twenty-five years after *Bakke*. As to twenty-five years hence, to quote Justice Powell, “We shall see.”279

279. *Wilkinson*, supra note 89, at 118-19:

[Justice Powell] taught, by example, a serenity in the face of ambiguity and uncertainty, something I found it difficult to achieve. “We shall see,” he would sometimes say, when I rushed to ask if such and such would occur. His caution made him believe that careless and ebullient optimism could be a dangerous state.

Five years later, Professor Wilkinson wound up his radiant reprise *From Brown to Bakke: The Supreme Court and School Integration: 1954-1978*, by quoting Professor Freund: “The very fact that *Bakke* is somewhat fuzzy . . . leaves room for development, and on the whole that's a good thing.” *Wilkinson*, *supra* note 15, at 306 (internal quotations omitted). Wilkinson adds:

How much *Bakke* itself would influence the future remained to be seen. Contemporaries knew *Brown* to be a landmark case. “But none,” noted Professor Kurland, “could really say in 1954 just how important it was to be.” So it was in 1978. *Bakke*, as *Brown* had been, was only a beginning. Where, one has to wonder, will it end?