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Reversing *Grutter*

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REVERSING *GRUTTER*

Lackland H. Bloom, Jr.*

ABSTRACT

In 2023, the Supreme Court modified its 2003 decision in Grutter v. Bollinger. That decision had allowed colleges, graduate schools, and professional schools to explicitly consider race in the admissions process. In two cases decided together, Students for Fair Admissions v. Harvard University and University of North Carolina, a 6–3 majority of the Court held that colleges could not employ a general racial preference but could take account of how race affected the specific applicant. The decision was based on the Court’s understanding of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Chief Justice Roberts wrote the opinion for the Court in which he held that the justifications put forth by the colleges were too vague to be evaluated by the judiciary, that racial preferences inflicted real harm, and that Grutter itself had recognized that the employment of racial preferences in college admissions were a temporary measure. In the process, Chief Justice Roberts reaffirmed that the color-blind principle was the proper focus of the Equal Protection Clause with respect to race, rejecting the competing anti-subordination theory, made it clear that universities were forbidden from providing a remedy for societal discrimination, and reaffirmed that establishing racial proportionality was an illegitimate goal. In this respect, Chief Justice Roberts brought the law in line with Bakke, J.A. Croson, and Adarand. The majority rejected Justice O’Connor’s conclusion in Grutter that university admissions were in a different context entailing less severe analysis under Equal Protection. Justice Thomas, the only justice who participated in both Grutter and the Fair Admissions cases, wrote a very lengthy concurrence expanding on the Chief Justice’s opinion and making a few points of his own.

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I. INTRODUCTION

In *Grutter v. Bollinger*, by a 5–4 vote, the Court had approved of the use of race as one factor in diversity analysis,¹ endorsing Justice Powell's approach in *Regents of the University of California v. Bakke*.² *Grutter* seemed to settle the issue of the use of race as a factor in college admissions. And yet, the Court continued to revisit the issue: first in *Fisher v. University of Texas (Fisher I)*³ and then in *Fisher v. University of Texas (Fisher II)*.⁴ The Court returned to the issue in the consolidated cases of *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*.⁵

I was surprised that the Court granted certiorari in both *Fisher I* and *Fisher II*. And I was equally surprised that it granted certiorari in the Harvard and University of North Carolina (UNC) cases. The use of race in the college admissions process is a controversial issue with the public and the press.⁶ As such, the Court could have viewed the issue as settled, though perhaps incorrectly. I can imagine a pragmatic Court taking the position that we have no need to reopen that can of worms. As Justice Powell seemed to recognized in his *Bakke* opinion, it is an issue on which

1. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). In *Grutter*'s companion case, *Gratz v. Bollinger*, the Court invalidated the use of racial preferences in the undergraduate college at the University of Michigan on the grounds that the program was too mechanical. *Gratz v. Bollinger*, 539 U.S. 244, 274–76 (2003). I have written two previous articles on the constitutionality of racial preferences in college admissions. See Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459 (2004) [hereinafter Bloom, *Grutter*]; Lackland H. Bloom, Jr., *Hopwood, Bakke and the Future of the Diversity Justification*, 29 TEX. TECH L. REV. 1 (1998) [hereinafter Bloom, *Hopwood*].

2. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–324 (1978) (Powell, J., announcing the judgment of the Court).

3. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297 (2013).

4. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365 (2016).

5. *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

6. See, e.g., Elizabeth Redden, *Confronting Racism in Admissions*, INSIDE HIGHER EDUC. (Oct. 25, 2020), <https://www.insidehighered.com/admissions/article/2020/10/26/will-conversation-turn-action-when-it-comes-issues-racial-equity> [https://perma.cc/36WN-S8TH].

colleges are in need of legal guidance.⁷ Like Justice Powell's opinion in *Bakke*, *Grutter* attempted to supply that guidance.⁸ Since *Grutter*, there has been no split among the circuits on the issue.⁹ The university community, as well as the elites, seemed to accept *Grutter*.¹⁰ *Grutter* was wrong as a matter of law, as the dissents pointed out,¹¹ but Justice O'Connor's opinion was at least plausible. *Grutter* was not like *Roe v. Wade*, which the Court overruled the previous term¹² and was incapable of reasoned justification. The Court makes many mistakes. If *stare decisis* means anything, it must mean that the fact that a later Court believes that an earlier Court's decision was incorrect is an insufficient reason to overrule or reject it. Something more is required.¹³ Students for Fair Admissions asked the Court to consider whether *Grutter* should be overruled.¹⁴ The Court, however, did not explicitly overrule *Grutter*, though it clearly pulled the rug out from under the *Grutter* opinion, causing Justice Thomas to conclude in his lengthy concurrence that the Court had, "for all intents and purposes," overruled *Grutter*.¹⁵

So what explains the Court's persistent willingness to revisit the issue of the use of race in the college admissions process? It is only speculation on my part, but I believe that Chief Justice Roberts is firmly committed to the color-blind theory of equal protection and race.¹⁶ Chief Justice Roberts is only one person, but he is the Chief Justice and undoubtedly is quite influential with his colleagues.

Justice O'Connor seemingly applied a hardline color-blind approach in the public contracting field in *Richmond v. J.A. Croson Co.*¹⁷ and *Adarand Constructors, Inc. v. Peña*,¹⁸ but noted in *Grutter* that context matters when she deviated from the color-blind approach in the college admissions context.¹⁹ This is what I referred to as a plausible distinction previously.²⁰ For

7. Cf. *Bakke*, 438 U.S. at 306–18.

8. See *Grutter v. Bollinger*, 539 U.S. 306, 328–43 (2003).

9. See Vinay Harpalani, *The Supreme Court and the Future of Affirmative Action*, CHICAGO-KENT COLL. OF LAW: SCOTUSNOW (Oct. 24, 2019), <https://blogs.kentlaw.iit.edu/iscotus/the-supreme-court-and-the-future-of-affirmative-action> [<https://perma.cc/G8YL-DGNE>].

10. See, e.g., Erwin Chemerinsky et al., *Grutter v. Bollinger: Joint Statement of Constitutional Law Scholars*, C.R. PROJECT, <https://civilrightsproject.ucla.edu/legal-developments/court-decisions/joint-statement-of-constitutional-law-scholars> [<https://perma.cc/VQ7K-EW3Y>].

11. See *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting).

12. *Roe v. Wade*, 410 U.S. 113 (1973), overruled by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

13. See *Dobbs*, 597 U.S. at 264–68 (considering five additional factors that counseled in favor of overturning *Roe* beyond the mere fact that the Court believed *Roe* was wrongly decided).

14. Petition for Writ of Certiorari at 21–35, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (No. 21-707).

15. See, e.g., *Fair Admissions*, 600 U.S. at 287 (Thomas, J., concurring).

16. See generally Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 74–81 (explaining the theory that the Constitution is colorblind and the adoption of this theory by Justices Scalia and Thomas).

17. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494, 510–11 (1989).

18. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224–25, 237 (1995).

19. See *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

20. See *infra* notes 33–36 and accompanying text.

Chief Justice Roberts, there was nothing plausible about it.²¹ Rather, it was an unwarranted deviation from the true principle of equal protection and race.²² As such, it was a major problem that could not be ignored.²³ This may explain the Court's interest in revisiting *Grutter* and the use of race in college admissions.

This is pure speculation, however, and the Court may have granted certiorari in *Fisher II* as a vehicle to reject the *Grutter* analysis. This assumes that Justice Kennedy would approve of rejecting the *Grutter* analysis, consistent with his *Grutter* dissent, even though he wrote the majority opinion in *Fisher II* sustaining the University of Texas's admissions program.²⁴ Justice Scalia died between the oral argument and publication of the opinion in *Fisher II*, leaving only four Justices who might have been inclined to reject *Grutter*.²⁵ The Court almost certainly concluded that four Justices could not overrule or modify a five-Justice majority (*Grutter*), so a challenge to *Grutter* would need to wait for another day.

That day came with the explicit reliance on race in the Harvard²⁶ and UNC admissions programs.²⁷ At the outset, as the respective district courts held, both programs could easily be sustained under *Grutter*.²⁸ So, if the admissions practices of the two schools were to be invalidated, *Grutter* would need to be modified.

II. *GRUTTER V. BOLLINGER*

What did *Grutter v. Bollinger* hold? In a 5–4 decision over four vigorous dissents, the Court in *Grutter* validated the University of Michigan Law School's reliance on race in the admissions process.²⁹ The Michigan Law School relied on race in the admissions process to ensure that African-Americans, Hispanics, and Native-Americans, all of whom had been historically discriminated against, would be represented in the student body

21. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 226–29 (2023).

22. See *id.*

23. See *id.*

24. See *Grutter*, 539 U.S. at 387–95 (Kennedy, J., dissenting); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 369–89 (2016).

25. See Vinay Harpalani, *Victory is Defeat: The Ironic Consequence of Justice Scalia's Death for Fisher v. University of Texas*, 164 U. PA. L. REV. ONLINE 155, 155–56 (2016), <https://www.pennlawreview.com/2016/04/07/victory-is-defeat-the-ironic-consequence-of-justice-scalias-death-for-fisher-v-university-of-texas> [<https://perma.cc/P8DE-8954>] (noting that only 7 Justices would decide the case and that Justice Kennedy's vote would likely be the swing vote).

26. For a complete decimation of the district court opinion in the Harvard case, see Heather Mac Donald, *Harvard Admits Its Preferences*, THE NEW CRITERION (Nov. 2019), <https://newcriterion.com/issues/2019/11/harvard-admits-its-preferences> [<https://perma.cc/4TAX-BWA6>].

27. See *Fair Admissions*, 600 U.S. at 192–98.

28. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 203–04 (D. Mass. 2019), *rev'd*, 600 U.S. 181 (2023); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 666–67 (M.D. N.C. 2021), *rev'd* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

29. *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003).

in “meaningful numbers,” i.e., “a critical mass.”³⁰ The Michigan Law School defined “critical mass” as that number by which members of the group would not feel isolated.³¹ The Court then endorsed Justice Powell’s conclusion in his *Bakke* opinion that “student body diversity is a compelling state interest that can justify the use of race in university admissions.”³² Justice O’Connor purported to apply strict scrutiny.³³ She then observed that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”³⁴ This was a crucial move in the opinion. It permitted her to ignore her previous opinions in *J.A. Croson* and *Adarand*.³⁵ She then deferred to the law school’s conclusion that racial diversity in the student body would result in educational benefits.³⁶ Justice Powell, in his opinion in *Bakke* arguing that student body diversity was a compelling state interest, focused exclusively on the impact on the educational process itself.³⁷ Justice O’Connor in *Grutter* focused on this internal impact, but also focused, to a significant extent, on the external impact of producing a significant number of minority graduates.³⁸ In doing so, she shifted the focus from the broad-based diversity, favored by Justice Powell in *Bakke*, to racial diversity by emphasizing the need to prepare students to work within an increasingly diverse workforce.³⁹ Arguably, Justice O’Connor was unduly influenced by the amicus briefs filed on behalf of a coalition of major corporations as well as a brief filed on behalf of several prominent retired military officers.⁴⁰ She concluded that the nation’s institutions of higher learning must be accessible to all applicants regardless of race.⁴¹ She noted that law schools are “the training ground for a large number of the Nation’s leaders.”⁴² This aspect of Justice O’Connor’s opinion focused on racial diversity to the exclusion of all other facets of diversity. Justice Kennedy argued that the admissions process was not narrowly tailored.⁴³ Justice O’Connor stressed that the law school need not consider alternatives that would radically change its character as a highly selective academic institution.⁴⁴ Justice O’Connor addressed whether a race-conscious admissions program, such as that employed by the Michigan Law School, would inflict undue harm on innocent individuals who were not eligible

30. *Id.* at 316.

31. *Id.* at 318.

32. *Id.* at 325.

33. *Id.* at 326–27.

34. *Id.* at 327.

35. *See* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

36. *See Grutter*, 539 U.S. at 328.

37. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 269, 311–13 (1978) (Powell, J., announcing the judgment of the Court).

38. *See Grutter*, 539 U.S. at 330–32.

39. *See id.*; *see also* Bloom, *Grutter*, *supra* note 1, at 472.

40. *See Grutter*, 539 U.S. at 330–32 (citing the amicus briefs multiple times); *see also* Bloom, *Grutter*, *supra* note 1, at 474.

41. *See Grutter*, 539 U.S. at 332–33.

42. *Id.* at 332.

43. *See id.* at 392–93 (Kennedy, J., dissenting).

44. *Id.* at 340.

for the racial preference.⁴⁵ These considerations informed her stance that racial preferences in college admissions must be temporary.⁴⁶ She opined that the use of race in college admissions might not be necessary in twenty-five years.⁴⁷

Justice Scalia dissented on the ground that the school could not show it acted to further a compelling interest.⁴⁸ Justice Thomas, the only justice who participated in *Grutter* and *Fair Admissions*, filed a dissenting opinion largely taking issue with the Court's conclusion that a compelling state interest existed.⁴⁹ Chief Justice Rehnquist filed a dissenting opinion, emphasizing that the record showed that the law school's use of race amounted to unconstitutional racial balancing.⁵⁰ Justice Kennedy filed a dissenting opinion arguing that the majority failed to apply the strict scrutiny requirement of narrow tailoring.⁵¹

III. TWO THEORIES OF EQUAL PROTECTION AND RACE

There seem to be two different theories with respect to governmental use of racial classifications under the Equal Protection Clause.⁵² The theory the Court relied on in *Fair Admissions*⁵³ and the public contracting cases, *J.A. Croson*⁵⁴ and *Adarand*,⁵⁵ as well as the theory that Justice Powell relied on in his opinion in *Bakke*,⁵⁶ is the color-blind theory. This is sometimes referred to as the anti-classification theory.⁵⁷ Under that theory, the government can rely on racial classifications only if it can satisfy strict scrutiny by establishing that it has a compelling interest and that its means are narrowly tailored to further that interest.⁵⁸ The trait or classification, such as race, can be challenged by anyone, not merely by a member of a minority group.⁵⁹

45. *Id.* at 341.

46. *Id.* at 342–43.

47. *Id.* at 343.

48. *Id.* at 347 (Scalia, J., concurring in part and dissenting in part) (“If that is a compelling state interest, everything is.”).

49. *See id.* at 349–53 (Thomas, J., concurring in part and dissenting in part).

50. *Id.* at 379 (Rehnquist, J., dissenting).

51. *Id.* at 387 (Kennedy, J., dissenting).

52. Both theories are derived from Justice Harlan's dissent in *Plessy v. Ferguson*, where he wrote, “There is no caste here. Our Constitution is color-blind.” 163 U.S. 537, 559 (1896). The academic literature on this dispute is voluminous. *See, e.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).

53. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 261–62 (2023).

54. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

55. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–24 (1995).

56. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978) (Powell, J., announcing the judgment of the Court).

57. *See* Varun Swaminathan, *Harvard Law School Professor Jeannie Suk Gersen Discusses the Future of Affirmative Action*, NELSON A. ROCKEFELLER CTR. (July 20, 2023), <https://rockefeller.dartmouth.edu/news/2023/07/harvard-law-school-professor-jeannie-suk-gersen-discusses-future-affirmative-action> [<https://perma.cc/TMK9-8NFE>].

58. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

59. *See, e.g.*, *Adarand*, 515 U.S. at 229–230.

The competing theory is the anti-subordination theory, which holds that racial classifications are legally acceptable as long as they don't disadvantage a race that has been subject to a history of racial discrimination.⁶⁰ Justice Brennan seemed to rely on a version of the anti-subordination theory in his *Bakke* dissent.⁶¹ A majority of the Court has never adopted the anti-subordination theory. One aspect of the color-blind theory recognized by Justice Powell in his *Bakke* opinion is that every "person" is entitled to protection against governmental use of racially discriminatory classifications, not simply members of minority groups.⁶² Justice Powell, who wrote the first opinion validating racial preferences in college admissions, could not have been clearer in grounding his approach in the color-blind theory.⁶³ One significant aspect of Chief Justice Roberts's opinion is the complete rejection of the anti-subordination theory, as well as the endorsement of the competing color-blind theory.⁶⁴ The anti-subordination theory may have support in the academic community, but it has been rejected by a clear majority of the Supreme Court on several occasions.⁶⁵

IV. CHIEF JUSTICE ROBERTS'S OPINION

Chief Justice Roberts opened his opinion with a lengthy segment arguing that the color-blind theory was supported by the original understanding of the Fourteenth Amendment as well as by the Court's precedent.⁶⁶ Justice Thomas made this argument in even greater detail.⁶⁷

So, what did Chief Justice Roberts, writing for the majority, find wrong with the *Grutter* analysis? He identified three problems with the *Grutter* approach.

The first reason that *Grutter* needed to be modified related to the application of the equal protection doctrine.⁶⁸ Chief Justice Roberts wrote that the contention that racial diversity was essential to the achievement of the universities' stated educational benefits was a vague concept incapable of judicial evaluation.⁶⁹ The universities, in contrast, insisted it was essential to rely on race in the admissions process so as to "train future leaders"; prepare them to work in an "increasingly pluralistic society"; and "enhance appreciation, respect, and empathy, cross-racial understanding,

60. See Siegel, *supra* note 52, at 1472–73.

61. See *Bakke*, 438 U.S. at 361–65 (Brennan, J., concurring in the judgment in part and dissenting part).

62. See *id.* at 289–90 (Powell, J., announcing the judgment of the Court).

63. See *id.* at 292–94.

64. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 201–10, 214–30 (2023).

65. Cf. *id.* at 246–52 (Thomas, J., concurring).

66. See *id.* at 201–08. Justice Sotomayor, dissenting, took issue with the argument that the original understanding and precedent of the Equal Protection Clause supported a color-blind principle. See *id.* at 318–31 (Sotomayor, J., dissenting).

67. See *id.* at 246–52 (Thomas, J., concurring).

68. See *id.* at 214–16.

69. See *id.*

and break down stereotypes.”⁷⁰ The universities also asserted that racial diversity would “promot[e] the robust exchange of ideas,” “broaden and refin[e] understanding,” and “produc[e] new knowledge stemming from diverse outlooks.”⁷¹ The Court also observed that the categories of groups entitled to racial preferences were unduly vague and would result in difficulties of application.⁷² The majority noted that it would be impossible for judges to determine whether these objectives had been achieved as well as whether racial preferences in the admissions process contributed to the achievement of these goals.⁷³ This argument calls to mind the concurring opinion of Judge Garza on the Fifth Circuit panel in *Fisher I*, where he argued that the judiciary was incapable of evaluating the concept of “critical mass,” a concept that played a central role in *Grutter* and *Fisher* but was absent from *Fair Admissions*.⁷⁴ This aspect of Chief Justice Roberts’s opinion stressed that when strict scrutiny is the standard, the Court is unwilling to accept vague generalities as compelling interests.⁷⁵ Rather, strict scrutiny demands precision capable of judicial evaluation.⁷⁶ This further undermines racial diversity as a compelling interest.⁷⁷ It also prevents universities from engaging in “holistic” consideration of applicants where race is a factor in the analysis.⁷⁸ Holistic review can be self-justifying, prohibiting any comparison. The university can, and will, say that it considered all the information in the applicant’s file and concluded that admission was warranted. There can be no response to that. Every file is different. Holistic review renders meaningful judicial evaluation impossible. The university can still engage in holistic review as long as race is not a factor.⁷⁹ Race is different from all other factors in the diversity calculation.⁸⁰ Only race invokes the Constitution and requires courts to apply strict scrutiny.⁸¹ The lesson of *Fair Admission* is that courts must be able to apply strict scrutiny in a meaningful manner.

The second reason Chief Justice Roberts gave for modifying the *Grutter* analysis is that reliance on race in the admissions process causes

70. *Id.* at 214. Justice Thomas, in his lengthy concurring opinion, noted that the universities had failed to prove that a racial preference in the admissions process furthered these vague goals. *See id.* at 253 (Thomas, J., concurring).

71. *Id.* at 214; *see also* *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 631 F.3d 213, 255, 258 (5th Cir. 2011) (Garza, J., concurring) (labelling educational benefits of racial diversity as grounded in intuition).

72. *Fair Admissions*, 600 U.S. at 214–16; *see also* Bloom, *Grutter*, *supra* note 1, at 468.

73. *Fair Admissions*, 600 U.S. at 215.

74. *Fisher I*, 631 F.3d at 258 (Garza, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003). In his *Fisher I* concurrence, Judge Garza wrote, “[B]y using metaphors like ‘critical mass,’ and indefinite terms that lack conceptual or analytical precision, but rather sound in abject subjectivity, to dress up constitutional standards, *Grutter* fails to provide any predictive value to courts and university administrators tasked with applying these standards consistently.” *Fisher I*, 631 F.3d at 258 (Garza, J., concurring).

75. *See Fair Admissions*, 600 U.S. at 214–15.

76. *See id.*

77. *See id.*

78. *See id.* at 217–219; 229–31.

79. *See id.* at 230–31.

80. *See id.*

81. *See id.* at 214.

real harm.⁸² This is an acknowledgement that college admissions are a zero-sum game.⁸³ Colleges might like to focus on the applicants who are admitted due to racial preferences. However, Chief Justice Roberts observed that there is another side to the coin. He pointed out that just as some applicants are benefitted by the employment of racial preferences, others are burdened by them.⁸⁴ Presumably, some applicants are denied admission because their race is not preferred.⁸⁵ This constitutes actual harm from the use of racial preferences, and it is illegal both under Title VI and the Equal Protection Clause.⁸⁶ He also observed that the racial diversity theory relied on by both Harvard and UNC seems to assume that there is a minority viewpoint that is targeted by the use of race in the admissions process.⁸⁷ If so, this would be racial stereotyping inconsistent with equal protection of the law.⁸⁸ The Court characterized this assumption as “offensive” and “demeaning.”⁸⁹

The third reason for modifying *Grutter* was that, in the case, Justice O’Connor emphasized that even in the university admissions context, the use of racial preferences must be temporary—there must be a logical stopping point.⁹⁰ If diversity is essential to the academic process, when will it not be? Apparently, the explicit use of race in college admissions goes on and on into the distant future in defiance of the warnings of Justice O’Connor’s opinion in *Grutter*. Chief Justice Roberts concluded, based on his consideration of the record, that neither Harvard nor UNC had any plan to discontinue the use of race in the admissions process in the near future.⁹¹ Much has been made of Justice O’Connor aspiration in *Grutter* that the explicit consideration of race would no longer be necessary in twenty-five years.⁹² However, as Chief Justice Roberts noted, there was much more than that.⁹³ Justice O’Connor emphasized the need for a logical stopping point with respect to the use of race in college admissions.⁹⁴ In this section

82. *See id.* at 218–19.

83. *Id.* at 218.

84. *Id.* at 218–19.

85. *See id.*

86. *See id.* at 197–98, 219–21.

87. *See id.* at 219–20; *see also* Bloom, *Grutter*, *supra* note 1, at 471.

88. *Fair Admissions*, 600 U.S. at 220.

89. *Id.* at 220–21.

90. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

91. *Fair Admissions*, 600 U.S. at 224–25; *see also id.* at 315–16 (Kavanaugh, J., concurring) (emphasizing the significance of a time limit).

92. *See, e.g.*, Tiana Headley, *Harvard Admissions Case Tests O’Connor’s 2003 Call on Race Bias*, BLOOMBERG (Aug. 11, 2021, 3:45 AM), <https://news.bloomberglaw.com/us-law-week/harvard-race-admissions-case-tests-oconnors-25-year-prediction> [<https://perma.cc/X57P-E9UE>].

93. *See Fair Admissions*, 600 U.S. at 224–25. Before noting that, in twenty-five years, perhaps racial preferences would be unnecessary, Justice O’Connor emphasized the need for a time limit: “[R]ace-conscious admissions policies must be limited in time.” *Grutter*, 539 U.S. at 342. She continued, “Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.” *Id.* She emphasized that there must be “a termination point,” and that racial preferences in admissions must be “a temporary matter.” *Id.*

94. *Grutter*, 539 U.S. at 342.

of his opinion, Chief Justice Roberts has disabled the educational benefits of racial diversity as a compelling state interest for lack of a meaningful stopping point.⁹⁵

Turning to the dissents, Chief Justice Roberts noted that they assumed remedying societal discrimination was a compelling state interest.⁹⁶ He pointed out that such a concept was rejected by a majority of the Court from *Bakke* and on.⁹⁷

Near the end of the opinion, Chief Justice Roberts noted that universities can consider “how race affected [the applicant’s] life, be it through discrimination, inspiration, or otherwise.”⁹⁸ The Court then emphasized that it was not providing a method for universities to evade the substance of its holding by a standard essay question on the application.⁹⁹ The Court clarified that any reliance on race in the admissions process must be individualized to the applicant and may not simply be a group-based racial preference.¹⁰⁰ If diversity is essential to the educational process, at what point in the very distant future will it become less essential or non-essential? If a purported compelling state interest goes on and on with no end in sight, then it cannot be a compelling state interest justifying the use of race.

V. OTHER PROBLEMS WITH *GRUTTER*

There were some problems with the *Grutter* analysis that Chief Justice Roberts failed to address. Justice Thomas addressed many of these issues in his lengthy concurring opinion.¹⁰¹ In *Grutter*, Justice O’Connor purported to apply strict scrutiny.¹⁰² Under that demanding standard, the state was required to show that the challenged practice served a compelling state interest.¹⁰³ The Court in *Grutter* identified that interest as obtaining the educational benefits of diversity.¹⁰⁴ The majority indicated that they were not experts on educational policy, and consequently, they deferred to the Michigan Law School to establish that (1) educational benefits flowed from student body diversity and (2) a compelling interest existed.¹⁰⁵ Deference is inconsistent with strict scrutiny.¹⁰⁶ It is quite appropriate for the Court to ask the state what interest it is pursuing. However, once the interest is identified, it is for the Court to determine whether such an interest

95. See *Fair Admissions*, 600 U.S. at 221–25; see also Bloom, Hopwood, *supra* note 1, at 72.

96. *Fair Admissions*, 600 U.S. at 226.

97. See *id.* at 226–27.

98. *Id.* at 230.

99. *Id.*

100. See *id.* at 231.

101. See generally *id.* at 231–87 (Thomas, J., concurring).

102. See *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003).

103. *Id.* at 327.

104. *Id.* at 328–29.

105. See *id.* at 328.

106. See *Fair Admissions*, 600 U.S. at 217–18; see also Bloom, *Grutter*, *supra* note 1, at 468–69.

is compelling as a matter of law.¹⁰⁷ There should be no room for deference on this issue.¹⁰⁸

Justice Thomas, dissenting in *Grutter*, noted that it is well-known that African-Americans do more poorly than Whites and Asian-Americans on timed standardized tests.¹⁰⁹ Michigan Law School is a highly selective school in which high test scores matter greatly in the admissions process.¹¹⁰ Thus, the law school limits the number of admissible African-Americans in its applicant pool. To make up for this limited number, the law school employs a racial preference to compensate for its own exclusionary action.¹¹¹ Justice Thomas seemed to suggest that the school would not need to employ a racial preference if it simply lowered its admission standards (based on standardized test scores).¹¹²

Justice O'Connor, in her majority opinion in *Grutter*, responded to this argument raised by Justice Thomas. She noted the law school need not consider an alternative that would radically change the character of the institution (i.e., as highly selective).¹¹³ But why? As Justice Thomas noted, the very selectivity of the institution created the problem that the school was attempting to resolve.¹¹⁴ *Grutter* seems to stand for the proposition that a highly selective educational institution, in order to achieve racial diversity, need not lower its academic standards in the admissions process even though its high standards exclude a greater percentage of African-Americans. Justice Thomas seemed to take the position that if standardized scores would continue to be used in the same way, the law school could choose to be highly selective or racially diverse, but it cannot be both.¹¹⁵ Justice O'Connor disagreed.¹¹⁶ Chief Justice Roberts did not address this issue in his *Fair Admissions* opinion.

Arguably, Justice O'Connor improperly shifted the burden of proof to the plaintiffs on the narrow tailoring aspect of strict scrutiny. Justice Kennedy wrote that there were many suspicious circumstances involved in the Michigan Law School's admissions process, including the closeness of the percentage of racially preferred minorities in the applicant pool and the percentage admitted, as well as the review of the daily reports on minority admissions by the Director of Admissions late in the admissions season.¹¹⁷ Considering this, Justice Kennedy was unable to conclude whether

107. See *Fair Admissions*, 600 U.S. at 206–07. In his concurring opinion, Justice Thomas observed, “The Court also correctly refuses to defer to the universities’ own assessments that the alleged benefits of race-conscious admissions programs are compelling.” *Id.* at 256 (Thomas, J., concurring).

108. See *id.* at 252 (Thomas, J., concurring).

109. See *Grutter*, 539 U.S. at 368–70 (Thomas, J., concurring in part and dissenting in part).

110. *Id.* at 312–15.

111. *Id.* at 369–70 (Thomas, J., concurring in part and dissenting in part); see also Bloom, *Grutter*, *supra* note 1, at 484; Bloom, Hopwood, *supra* note 1, at 61.

112. See generally *Grutter*, 539 U.S. 369–71 (Thomas, J., concurring in part and dissenting in part).

113. *Id.* at 340.

114. See *id.* at 369–71 (Thomas, J., concurring in part and dissenting in part).

115. See generally *id.* at 369–71.

116. See *id.* at 340.

117. See *id.* at 390–92 (Kennedy, J., dissenting).

the law school was acting in good faith, as it said it was, or whether it was giving undue weight to race late in the process in order to achieve racial proportionality.¹¹⁸ As such, Justice Kennedy concluded that the Michigan Law School must lose.¹¹⁹ Justice Kennedy argued that, under strict scrutiny, the burden of proof rested with the law school; in his mind, it failed to carry that burden.¹²⁰ To the contrary, Justice O'Connor, writing for the majority, found that the law school had satisfied strict scrutiny.¹²¹ This caused Justice Kennedy to respond that Justice O'Connor was not really applying strict scrutiny.¹²² Strict scrutiny is a tough standard to satisfy. It is impossible to keep the Justices from cheating. However, with the strict scrutiny standard, and the deferential rational basis standard at the other end of the spectrum, it is fairly obvious when the Court says that it is applying one standard of review yet clearly deviates from it (as Justice O'Connor did in *Grutter*). In *Fair Admissions*, Chief Justice Roberts failed to emphasize that strict scrutiny means strict scrutiny. The defendant must carry the burden of proof.

Related to the application of strict scrutiny, Justice O'Connor presumed good faith on the university's part.¹²³ This is inconsistent with the application of the strict standard of review. The defendant law school must establish that its reliance on race in the admissions process is narrowly tailored to serve a compelling state interest absent any favorable presumptions.¹²⁴ It seems as if Justice O'Connor was paving the way to uphold racial preferences rather than applying the law as it stood. Once again, Chief Justice Roberts did not focus on the *Grutter* majority's distortion of the strict standard of review in his *Fair Admissions* opinion.

VI. JUSTICE GORSUCH'S CONCURRENCE

One of the important holdings of *Bakke* was that Title VI and the Equal Protection Clause are equivalent with respect to racial discrimination.¹²⁵ That holding was produced by a conjunction of the opinions of Justices Powell and Brennan.¹²⁶ The majority in *Bakke* interpreted Title VI as equivalent to the Equal Protection Clause by ignoring the text of the statute and relying on bits and pieces of legislative history.¹²⁷ Harvard University is a private institution.¹²⁸ As such, the Constitution does not apply directly. However, Harvard does accept a massive amount of federal funds.¹²⁹ As a

118. *See id.* at 389–92.

119. *Id.* at 395.

120. *Id.* at 391–94.

121. *Id.* at 343.

122. *Id.* at 387 (Kennedy, J., dissenting); *see also* Bloom, *Grutter*, *supra* note 1, at 488.

123. *See Grutter*, 539 U.S. at 343.

124. *See id.* at 326.

125. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J., announcing the judgment of the Court).

126. *See id.* at 284–89; *see also id.* at 328–36 (Brennan, J., concurring in the judgment in part and dissenting in part).

127. *See id.* at 283–87.

128. *See Harvard University*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-colleges/harvard-university-2155> [<https://perma.cc/QH5X-GS4T>].

129. *See HARVARD UNIV., FINANCIAL OVERVIEW 5* (2021), https://finance.harvard.edu/files/fad/files/fy21_financial_overview.pdf [<https://perma.cc/FU86-DK9R>].

result, Title VI does apply.¹³⁰ The holding in *Bakke*, that Title VI means whatever the Equal Protection Clause means, permitted the Court to analyze the *Fair Admissions* case as if it were an equal protection case.¹³¹

Title VI prohibits an institution receiving federal funds from discriminating on the basis of race.¹³² The Equal Protection Clause says nothing about racial discrimination.¹³³ Title VI provided a much more direct method of invalidating the racial admissions policy of the University of California Davis School of Medicine in *Bakke*.¹³⁴ Under the majority holding in *Bakke*, the Court rendered the clear text of Title VI irrelevant.¹³⁵ It transformed a challenge of race discrimination by a recipient of federal funds into an equal protection challenge. Justice Gorsuch, a strong textualist, argued in *Fair Admissions* that Title VI means what it says and not what Justices Powell and Brennan read it to mean.¹³⁶ Considering that the Court read the Equal Protection Clause to mean that racial preferences in college admissions need to withstand traditional strict scrutiny, it may not make much difference.¹³⁷ Still, as Justice Gorsuch demonstrated, it makes sense to get the legal interpretation correct.

VII. THE DISSENTS

Justice Sotomayor responded to every legal argument made by the majority and concurrences.¹³⁸ Her dissent applied to both cases. Because Justice Jackson recused herself in the Harvard case, her dissent applied to only the UNC case.¹³⁹ Justice Jackson's dissent began with a description of racial wealth disparities for which federal and state governments bore responsibility.¹⁴⁰ Her apparent purpose for this lengthy disquisition was to argue that the explicit reliance on race as a factor in the college admissions process would remedy this disparity over time, thus eliminating the need for racial preferences.¹⁴¹ The subtext of her opinion was that it is all about money. College admissions are rigged in favor of the wealthy who can afford the services that make their children more academically desirable. If we can eliminate racially based wealth disparities, there will be no need for racial preferences in admissions, according to Justice Jackson.

The majority and dissenters disagree as to the meaning of equal protection with respect to race. The majority argued that the original understanding of the Equal Protection Clause established a principle of

130. See Civil Rights Act of 1964, 42 U.S.C. § 2000(d).

131. See *Bakke*, 438 U.S. at 287.

132. 42 U.S.C. § 2000(d).

133. See U.S. CONST. amend. XIV, § 1.

134. See *Bakke*, 438 U.S. at 417–18 (Stevens, J., concurring in the judgment in part and dissenting in part).

135. See *id.* at 284–87.

136. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 287–91 (2023) (Gorsuch, J., concurring).

137. See *id.* at 206–07.

138. See generally *id.* at 318–84 (Sotomayor, J., dissenting).

139. *Id.* at 384 n.* (Jackson, J., dissenting).

140. See *id.* at 384–94.

141. See *id.* at 406.

color-blindness.¹⁴² The dissents view original understanding as establishing an anti-subordination principle.¹⁴³ Both overstate their case. Bits and pieces of originalist materials can be construed to support either. Given the fact that original understanding could plausibly be argued to support either result, the decision turns on pragmatic, precedential, and doctrinal considerations. The case against racial preferences turns largely on developed doctrine. It is the inconsistency of racial preferences with strict scrutiny, honestly applied, that is the key to the decision. *Grutter* was inconsistent with the Court's precedent and doctrine. That precedent and doctrine were almost certainly based on the majority's conception of the original understanding of the Equal Protection Clause. However, it was the fact that the precedent and doctrine had rejected the need to provide a remedy for societal discrimination as a compelling state interest, as well as the necessity of placing a time limit on the use of racial preferences, that caused the *Grutter* analysis to be rejected.¹⁴⁴

The color-blind majority believed that the best way to address color consciousness in society was to adopt a principle that any governmental reliance on race is presumptively unconstitutional as the precedents prior to *Grutter* had held.¹⁴⁵ The dissents took the position that, since our society takes account of race, the law must do so as well.¹⁴⁶ The dissent maintained that, contrary to the majority, the Equal Protection Clause permitted color-conscious decision making by the state.¹⁴⁷

VIII. POTENTIAL NARROW READINGS

How might the *Fair Admissions* decision be interpreted by institutions that are hostile to its approach? Most institutions, on the advice of counsel, will attempt to comply with the decision. Some will read it narrowly. A few might defy it.

How might the decision be read narrowly? Some may argue that since the decision did not explicitly overrule *Grutter*, that decision remains good law and can be followed. That would be a mistake. *Brown v. Board of Education* did not explicitly overrule *Plessy v. Ferguson* either, but it announced a principle: the state could not engage in the racial discrimination sanctioned by *Plessy*.¹⁴⁸ So it is with the *Fair Admissions* case. The principle motivating the decision was that the state, in order to use racial preferences, must meet old-fashioned strict scrutiny.¹⁴⁹ As such, the Court applied the color-blind theory of equal protection and once again rejected the anti-subordination theory.¹⁵⁰

142. *See id.* at 204–07.

143. *See id.* at 327–28 (Sotomayor, J., dissenting).

144. *See id.* at 208–13.

145. *See id.* at 217–18.

146. *See id.* at 383 (Sotomayor, J., dissenting); *id.* at 407–08 (Jackson, J., dissenting).

147. *See id.* at 411 (Jackson, J., dissenting).

148. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

149. *See Fair Admissions*, 600 U.S. at 213.

150. *See supra* Part III.

Yet another narrow reading of the case is that it condemns the use of race only in college admissions, and any other explicit use of race, such as in hiring, is not covered. Once again, *Brown v. Board of Education* is instructive. As written, *Brown* was about racial segregation in public education.¹⁵¹ But it soon became apparent with the affirmance of a number of per curiam opinions extending the anti-discrimination principle to governmental areas beyond education that *Brown* stood for a broader principle.¹⁵² So it is with the *Fair Admissions* case. The principle is that when the government relies on race in any context, the color-blindness principle applies, and the state must satisfy traditional strict scrutiny.

Another narrow reading of the case focuses on the conclusion near the end of the opinion that, of course, it would not be illegal for a university to consider how race may have affected an applicant's life through "discrimination, inspiration, or otherwise."¹⁵³ Some might think that colleges may still make use of race in the admissions process by including an essay prompt on the application to the effect of: "Tell us how race has affected your life."¹⁵⁴ The Court, predicting such a response, replied that "universities may not simply establish through application essays or other means the regime we hold unlawful today 'The Constitution deals with substance, not shadows'"¹⁵⁵ So, as long as the university is using the answers to essay prompts to gather information about the specific applicant, it should be in compliance with the decision. However, if it appears that the university is using an essay prompt simply as a substitute for a group-based racial preference, that should be a violation.¹⁵⁶ One of the principles of *Fair Admissions* is that the law pertains to individual rights, not group rights. The use of race in the college admissions process may focus on how race might impact a specific applicant.¹⁵⁷ The university may not assume that race necessarily affects all minority applicants and proceed on that assumption.¹⁵⁸ The Court does not like to be ignored, as the recent decision in *New York State Rifle & Pistol Ass'n v. Bruen* illustrates.¹⁵⁹ In *District of*

151. The unanimous majority in *Brown*, early in its opinion, included its famous ode to the importance of education in modern society. *See Brown*, 347 U.S. at 493–94. It summarized its holding as follows: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* at 495. Later in its opinion, the Court continued to emphasize that its decision was about racial segregation in public education. *See id.*

152. *See, e.g.,* *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956) (effectively extending *Brown*'s holding to public city buses, overruling *Plessy v. Ferguson*), *aff'd per curiam*, 352 U.S. 903 (1956); *Dawson v. Mayor & City Council of Baltimore City*, 220 F.2d 386, 388 (4th Cir. 1955) (extending *Brown* to public beaches and bath houses), *aff'd per curiam*, 350 U.S. 877 (1955); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam) (effectively extending *Brown* to segregated public golf courses); *New Orleans City Park Imp. Ass'n v. Detiege*, 252 F.2d 122, 123 (5th Cir. 1958) (extending *Brown* to segregated public parks), *aff'd per curiam*, 358 U.S. 54 (1958).

153. *Fair Admissions*, 600 U.S. at 230.

154. *See id.* at 230–31.

155. *Id.* at 230 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

156. *See id.*

157. *See id.* at 230–31.

158. *See id.*

159. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

Columbia v. Heller, the Court held that an absolute prohibition of handguns used for self-defense in the home violated the Second Amendment.¹⁶⁰ One could read *Heller* to say that the right to possess a gun for self-defense was a fundamental right. A potential violation of this fundamental right by gun control legislation would ordinarily require that the legislation satisfy strict scrutiny.¹⁶¹ However, in a dissenting opinion, Justice Breyer argued that courts should apply an interest balancing inquiry to challenges of gun control legislation.¹⁶² Many lower courts followed Justice Breyer's lead by upholding gun control legislation that would have been invalidated under strict scrutiny.¹⁶³ Finally, in *Bruen*, the Court had had enough. In invalidating the New York gun control law, the Court applied a strict historical test.¹⁶⁴ The Court did not apply strict scrutiny, presumably assuming that, as in *Grutter* where the Court applied strict scrutiny in a disingenuous manner, the lower courts were in need of a standard that could not be easily evaded.¹⁶⁵ *Bruen* suggests that the Court has little patience with evasion by parties and lower courts. If the Court is serious about a decision, as it appears to be with the *Fair Admissions* case, it recognizes that it will need to follow up the decision with subsequent cases in which it invalidates attempts at evasion. This was the case with *Brown v. Board of Education*, where the Court invalidated several attempts to undermine the initial decision.¹⁶⁶

IX. WHY DIDN'T THE COURT EXPLICITLY OVERRULE *GRUTTER*?

Why didn't the Court explicitly overrule *Grutter*? As a practical matter, it rendered *Grutter* a nullity, but it failed to explicitly overrule the case. We can only speculate as to why; however, there may be several explanations.

160. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

161. *See id.* at 688 (Breyer, J., dissenting).

162. *Id.* at 689.

163. *See, e.g.,* *Worman v. Healy*, 922 F.3d 26, 41 (1st Cir. 2019) (applying intermediate scrutiny to uphold a Massachusetts restriction on assault weapons), *abrogated by Bruen*, 597 U.S. 1; *Justice v. Town of Cicero*, 577 F.3d 768, 771 (7th Cir. 2009) (upholding an ordinance requiring the registration of all firearms); *Silvester v. Harris*, 843 F.3d 816, 829 (9th Cir. 2016) (applying intermediate scrutiny to uphold a waiting period for the purchase of firearms), *abrogated by Baird v. Bonta*, 81 F.4th 1036 (9th Cir. 2023); *Aposhian v. Garland*, No. 2:19-cv-00037, 2023 WL 6377561, at *17 (D. Utah Sept. 29, 2023) (upholding ATF regulation banning bump stocks under *Chevron*); *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (applying intermediate scrutiny to uphold a Maryland ban on ownership of assault weapons), *abrogated by Bruen*, 597 U.S. 1. Laws imposing an age limit on the purchase or transfer of firearms may also be invalidated. *See Fraser v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 3:22-cv-410, 2023 WL 3355339, at *14–25 (E.D. Va. May 10, 2023).

164. *See Bruen*, 597 U.S. at 19.

165. *See id.* at 23–26.

166. *See, e.g.,* *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (holding that the state may not ignore federal court mandates requiring desegregation of public schools); *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 233–34 (1964) (holding that the school district could not close its public schools to avoid a desegregation order and fund private segregated schools); *Goss v. Bd. of Educ.*, 373 U.S. 683, 688–89 (1963) (finding that the minority-to-majority transfer program, to the extent that it undermined a desegregation order, was illegal); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 441–42 (1968) (holding that a freedom of choice plan was inconsistent with the obligation to desegregate).

Chief Justice Roberts seemed to be the primary force behind reconsidering *Grutter*. As noted earlier, the color-blind theory of race and equal protection seemed to be very important to him.¹⁶⁷ And he wrote the majority opinion in the *Fair Admissions* case.¹⁶⁸ Chief Justice Roberts does not like to overrule precedent—that much was clear from his concurrence in *Dobbs v. Jackson Women's Health Organization*.¹⁶⁹ and was indicated by the opinion of Justice Kennedy in *Schuette v. Coalition to Defend Affirmative Action*, which Chief Justice Roberts joined.¹⁷⁰ He has shown his preference for distinguishing a precedent on particular grounds rather than overruling it.¹⁷¹ That may be explanation enough.

Beyond that, however, the *Fair Admissions* majority may have resisted overruling *Grutter* given that the majority could make good use of it. It noted that Justice O'Connor, in her *Grutter* opinion, emphasized that there must be a logical stopping point for the use of race in a university's admissions.¹⁷² It then noted that Harvard and UNC had no end point in sight.¹⁷³ Rather, the explicit use of race could simply go on and on.¹⁷⁴ So the majority could argue, as it seemed to, that even if *Grutter* remained good law, Harvard and UNC did not comply with it.

Yet another reason why the Court chose not to explicitly overrule *Grutter* is that perhaps doing so would be indefensible under the four criteria for overruling precedent emphasized in the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁷⁵ along with the two criteria added by Justice Alito's opinion in *Dobbs*.¹⁷⁶ There was a reliance interest in that many private, selective colleges utilized race in admissions in a way which the Court had approved of in *Grutter* and as Justice Powell had suggested in *Bakke*.¹⁷⁷ On the other hand, each admissions year represents a new beginning, so it should not be that difficult to adjust to new constitutional constraints. Arguably, *Grutter* was out of sync with the color-blind theory sustained by numerous precedents and constituted incorrect application of strict scrutiny. This might be evidence that *Grutter* was incorrectly decided but might not require that it should be overruled.

167. See *supra* notes 64–66 and accompanying text.

168. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

169. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 353–54 (2022) (Roberts, C.J., concurring).

170. See *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 306–08 (2014).

171. See, e.g., *Dobbs*, 597 U.S. at 353–54 (Roberts, C.J., concurring).

172. See *Fair Admissions*, 600 U.S. at 213.

173. *Id.* at 224–25.

174. See *id.*

175. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854, 860–61 (1992).

176. See *Dobbs*, 597 U.S. at 268. Justice Sotomayor emphasized this in her *Fair Admissions* dissent. See *Fair Admissions*, 600 U.S. at 352–54 (Sotomayor, J., dissenting).

177. See Drew DeSilver, *Private, Selective Colleges are Most Likely to Use Race, Ethnicity as a Factor in Admissions Decisions*, PEW RSCH. CTR. (July 14, 2023), <https://www.pewresearch.org/short-reads/2023/07/14/private-selective-colleges-are-most-likely-to-use-race-ethnicity-as-a-factor-in-admissions-decisions> [<https://perma.cc/2ZM2-U69C>]; see also Bloom, Hopwood, *supra* note 1, at 59–60.

X. WHY DO COLLEGES INSIST ON TAKING ACCOUNT OF RACE IN THE ADMISSIONS PROCESS?

Why do most colleges choose to take account of race in the admissions process? This is speculative, but the following observations are based on forty-five years of teaching at a major university as well as what one hears about increasing the number of underrepresented minorities in the student body. Individual faculty members are not familiar with the precedents. They fail to recognize that providing a remedy for societal discrimination is legally forbidden or that the employment of racial preferences must have a logical stopping point. Presumably, the university attorneys who provide counsel on the construction of university admissions programs understand this.

Why don't universities simply rely on traditional criteria, i.e., grades, class rank, test scores, letters recommendation, application essays, proven leadership capacity, special talents, work experience, courses taken, and strength of the high school?¹⁷⁸ Given pervasive grade inflation,¹⁷⁹ there must be a common comparator or benchmark. That turns out to be standardized test scores. As Justice Thomas noted in his *Grutter* dissent, African-Americans have, on average, lower test scores than White or Asian-American applicants.¹⁸⁰ So if racial diversity is to be achieved, race must be taken into account.¹⁸¹ In his opinion in *Bakke*, Justice Powell popularized the diversity theory, relying on the Harvard plan.¹⁸² From *Bakke* on, and perhaps before, it was argued that viewpoint and experiential diversity yielded academic benefits.¹⁸³ For academics, diversity means racial diversity and racial means African-Americans.

Under *Grutter*, African-Americans who scored lower on timed standardized tests tend to be admitted. After *Fair Admissions*, it will be far more difficult for these students. If African-Americans do more poorly on timed standardized tests, then one solution is to completely eliminate test scores from the admissions process. That would contribute toward achieving racial diversity. But that would not happen. Many schools have made

178. Racial preferences seem to have the greatest impact at highly selective elite schools, while only having a slight impact at non-selective schools. See generally THOMAS J. KANE & WILLIAM T. DICKENS, RACIAL AND ETHNIC PREFERENCE IN COLLEGE ADMISSIONS (1996); DeSilver, *supra* note 177.

179. See, e.g., Frederick Hess, *Grade Inflation is Not a Victimless Crime*, FORBES (Sept. 5, 2023, 6:00 AM), <https://www.forbes.com/sites/frederickhess/2023/09/05/grade-inflation-is-not-a-victimless-crime> [<https://perma.cc/G6GX-YJV6>].

180. See *Grutter v. Bollinger*, 539 U.S. 306, 368–70 (2003) (Thomas, J., concurring in part and dissenting in part); see also Bloom, *Grutter*, *supra* note 1, at 488.

181. See generally Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *What the Students for Fair Admissions Cases Reveal About Racial Preferences*, IZA DISCUSSION PAPERS, No. 15240, Apr. 2022 (providing a detailed analysis of the data made publicly available in the Student for Fair Admission litigations).

182. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (Powell, J., announcing the judgment of the Court).

183. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 364–65 (2023) (Sotomayor, J., dissenting).

the submission of test scores optional.¹⁸⁴ Despite constant grumbling about reliance or over-reliance on test scores, academics consider them important indicators of academic ability.¹⁸⁵ Note that the most prestigious colleges have the highest average test scores.¹⁸⁶

Do academics truly believe in diversity theory, or do they simply accept it as the manner by which Justice Powell in *Bakke* and Justice O'Connor in *Grutter* held that it was the only way in which they could constitutionally achieve racial diversity?¹⁸⁷ If so, academics may treasure those aspects of diversity that they agree with—the ability to admit more minority students with lower academic indicators—and ignore those aspects that they disapprove of—the necessity of a logical stopping point as well as the exclusion of any reliance on societal discrimination.

Maybe some academics believe that racial diversity does contribute to the educational process, but there is reason to believe that the driving force for a significant number of academics is the achievement of racial balance or proportionality,¹⁸⁸ both of which have long been considered by the Court as unconstitutional goals.¹⁸⁹ There are two aspects to racial proportionality. The first might be characterized as racial proportionality for its own sake. This is supported by the consistent academic interest in preferring members

184. See Hannah Muniz, *Test-Optional Colleges: Complete List of 900+ Schools*, PREP-SCHOLAR, <https://blog.prepscholar.com/test-optional-colleges-list> [<https://perma.cc/Y8LP-KK7Y>]. The switch to optional submission of test scores was furthered during the Pandemic. See Kayla Jimenez, *SAT, ACT Testing Requirements Paused During Pandemic Are Now Permanently Optional at Some Colleges*, USA TODAY (Mar. 22, 2023, 5:19 PM), <https://www.usatoday.com/story/news/education/2023/03/02/sat-act-test-optional-policies-covid-become-permanent/11385454002> [<https://perma.cc/678B-2KWC>].

185. See generally Laghima Pal, *Too Much Emphasis On Standardized Tests Can Hurt Creativity and Critical Thinking*, PENN LIVE (May 30, 2023), <https://www.pennlive.com/opinion/2023/05/too-much-emphasis-on-standardized-tests-can-hurt-creativity-and-critical-thinking-opinion.html> [<https://perma.cc/A68W-GBFX>]; Anthony M. Rapps, *Let the Seuss Loose: The Limitations of Standardized Testing* (Jan. 2017) (Capstone Abstract, Rutgers University); *Why Colleges Are Reconsidering Their Reliance on Standardized Tests for Admission*, PBS NEWS HOUR (Nov. 5, 2019, 6:30 PM), <https://www.pbs.org/newshour/show/why-colleges-are-reconsidering-their-reliance-on-standardized-tests-for-admission> [<https://perma.cc/3FHS-JDAC>]; Valerie Strauss, *It Looks Like the Beginning of the End of America's Obsession with Student Standardized Tests*, WASH. POST (June 21, 2020, 6:00 AM), <https://www.washingtonpost.com/education/2020/06/21/it-looks-like-beginning-end-americas-obsession-with-student-standardized-tests/> [<https://perma.cc/67L5-E3UT>].

186. See *Best National University Rankings*, U.S. NEWS & WORLD REP. (2024), <https://www.usnews.com/best-colleges/rankings/national-universities> [<https://perma.cc/X5Q5-FVAN>]; Emmie Martin, Tanza Loudonback & Alexa Pipia, *The 22 Colleges That Have Students with the Highest SAT Scores*, BUS. INSIDER (Aug. 25, 2016, 8:00 AM), <https://www.businessinsider.com/colleges-that-accept-students-with-the-highest-sat-scores-2016-8> [<https://perma.cc/V427-U2YU>].

187. Justice Kennedy noted this possibility in his *Grutter* dissent. See *Grutter v. Bollinger*, 539 U.S. 306, 393–94 (2003) (Kennedy, J., dissenting); see also Bloom, *Grutter*, *supra* note 1, at 503; Bloom, Hopwood, *supra* note 1, at 67.

188. See George C. Leef, *College Admissions Preferences Are Not Justified*, CATO INST.: 42 REGUL. 2 (2019). Leef writes that the reason for racial preferences in college admissions is because college officials “want specific proportions of students that ‘represent’ certain racial or ethnic groups.” *Id.* at 3.

189. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., announcing the judgment of the Court); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507–11 (1989).

of minority groups who are underrepresented in the student body.¹⁹⁰ However, underrepresentation is a comparative term. It assumes a baseline of proper representation. What is that baseline? Is it the applicant pool? Or national demographic statistics? Or state or city demographic statistics? An emphasis on preferring underrepresented minorities inevitably leads to racial proportionality, which has been considered unconstitutional at least since *Bakke*.¹⁹¹ Some academics may note that we live in a multi-racial nation and every aspect of that nation, including the universities, should reflect the multi-racial character of the nation at large. Otherwise, we are incurably racist. Academics may make this argument to feel better about themselves—to be able to look in the mirror and ensure themselves that they are not racists.¹⁹²

There is another aspect of racial proportionality that Justice O'Connor touched on in *Grutter*. It is well-recognized that the training students receive through a college education may, in turn, provide the gateway to success in life.¹⁹³ Because the *Grutter* Court recognized that achieving racial proportionality is an illegal goal, it characterized this as an aspect of diversity.¹⁹⁴ Another aspect of this theory is building an African-American middle class.¹⁹⁵ However, there already was an African-American middle class.¹⁹⁶ It developed quite apart from racial preferences by universities. But academics do not realize this. They tend to accept the stereotype that African-Americans are poor people living in tenements, and only with the aid of racial preferences by well-meaning academics can they move up into the middle class.¹⁹⁷

Under the theory that Justice O'Connor expounded in *Grutter*, opportunity must be available to all regardless of race. Admission to selective universities and colleges is competitive. There are more applicants than available seats in the class.¹⁹⁸ Thus a school must have criteria for making the selection. Certainly, if a university discriminated by race against

190. See generally Connor Maxwell & Sara Garcia, *5 Reasons to Support Affirmative Action in College Admissions*, CTR. FOR AM. PROGRESS (Oct. 1, 2019), <https://www.american-progress.org/article/5-reasons-support-affirmative-action-college-admissions> [https://perma.cc/N4JH-CUJV]; Bloom, *Grutter*, *supra* note 1, at 500.

191. See *Bakke*, 438 U.S. at 307.

192. See Leef, *supra* note 188, at 3 (“One of the things [college leaders] like is the feeling that they’re doing their part to right some of the world’s wrongs . . .”); see also Bloom, *Grutter*, *supra* note 1, at 506.

193. See *Grutter v. Bollinger*, 539 U.S. 306, 330–32 (2003).

194. See *id.* at 331–32; see also Bloom, *Grutter*, *supra* note 1, at 506–07.

195. Cf. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 390–95 (2023) (Jackson, J., dissenting).

196. Cf. Christopher Pulliam, Richard V. Reeves & Ariel G. Shiro, *The Middle Class is Already Racially Diverse*, BROOKINGS (Oct. 30, 2020), <https://www.brookings.edu/articles/the-middle-class-is-already-racially-diverse> [ps://perma.cc/A98D-XWAU](https://perma.cc/A98D-XWAU); *Fair Admissions*, 600 U.S. at 284–86 (Thomas, J., concurring); Bloom, *Grutter*, *supra* note 1, at 506.

197. Cf. *Fair Admissions*, 600 U.S. at 278 (Thomas, J., concurring) (“As [Justice Jackson] sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today.”).

198. Harvard received over 60,000 applications for a class with 2,000 seats. *Fair Admissions*, 600 U.S. at 192–93. This amounts to an acceptance rate of only about 3%. See *id.*

African-Americans with respect to admission, that would be illegal under *Fair Admissions*.¹⁹⁹ Additionally, if the university has neutral, objective criteria for admission and makes an exception to these criteria to achieve racial balance or proportionality, that would—as emphasized by *Fair Admissions*—be a clear violation of the law as it stood from *Bakke*.²⁰⁰

Another theory that permeates academia flows from critical race theory. It holds that race is everything—the ultimate determiner of all things good and bad.²⁰¹ If the deck is stacked against minority students, primarily African-American students, then preferences may be required to at least give those students a chance.²⁰² Justice Thomas, in his *Fair Admissions* concurrence, takes this theory to task.²⁰³ He argued that race is not determinative of everything. To the contrary, much turns on perseverance, hard work, hardships overcome, and a variety of personal characteristics that cannot be reduced to the stereotype of race.²⁰⁴ For universities to reduce applicants to their respective races is shortsighted and inconsistent with the Constitution.

XI. WHAT CAN UNIVERSITIES DO TO ACHIEVE RACIAL DIVERSITY AFTER THE *FAIR ADMISSIONS* CASE?

What can universities do to increase the number of racial minorities following the *Fair Admissions* decision? The answer is that universities can pursue a strategy that is defensible on grounds apart from admitting students simply due to their race. For instance, the percentage plan, utilized by the University of Texas,²⁰⁵ was almost certainly adopted to increase the number of minorities admitted to the university given the number of predominately one-race high schools in the state;²⁰⁶ however, it had non-racial benefits as well. By reserving automatic admission to the university to applicants who graduated in the top 10% of their high school class, the program provided an incentive to such students to work hard. Also, the percentage plan ensures that high schools in every part of the state will be represented at the flagship public university of the state. Thus, the plan has significant non-racial benefits.²⁰⁷ The percentage plan could be altered to serve private universities as well as those that recruit applicants from multiple states, providing a constitutional alternative for all colleges nationwide.

199. *See id.* at 230–31.

200. *See id.* at 230.

201. *Cf.* Marc A. Thiessen, *The Danger of Critical Race Theory*, WASH. POST (Nov. 11, 2021, 2:47 PM), <https://www.washingtonpost.com/opinions/2021/11/11/danger-critical-race-theory/> [https://perma.cc/27VN-498L].

202. *Cf. id.* (“For advocates of [critical race theory], the only solution to systemic oppression is the ‘inversion of color power’ . . .”).

203. *See Fair Admissions*, 600 U.S. at 278–83 (Thomas, J., concurring).

204. *See id.*

205. *See Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297, 305 (2013) (describing the admissions program).

206. *See id.* at 335–36 (Ginsburg, J., dissenting).

207. *Cf.* Kate McGee, *With Race-Based Admissions No Longer an Option, States May Imitate Texas Top 10% Plan*, TEX. TRIB. (June 29, 2023), <https://www.texastribune.org/2023/06/29/texas-college-top-ten-percent-plan-supreme-court/> [https://perma.cc/RZ8X-SWEM].

On the other hand, an admissions program that provides a preference to applicants with a zip code in predominately minority neighborhoods should not survive legal challenge. Such a program would have no non-racial benefits and would be nothing more than an attempt to evade the holding of the case by using a zip code as a proxy for race.

A college could rely on essays that indicate how race affects the specific applicant, but it would need to be careful that it was not creating a broad-based racial preference.²⁰⁸

As Justice Sotomayor indicated in her dissent, a university could still focus on whether the applicant comes from a poor socioeconomic background, whether he or she would be a first-generation college student, whether the applicant is a transfer from a community college, or whether the applicant speaks multiple languages.²⁰⁹

XII. IMPACT ON OTHER LAWS

What does the *Fair Admissions* decision have to say about other governmental programs that give predominance to race? To the extent that such programs simply ban racial discrimination, there should be no effect at all. Under Title VII, unlike equal protection, a plaintiff need only show “a minimal prima facie showing by a complainant before shifting the burden onto the shoulders of the alleged-discriminator employer.”²¹⁰ Although the plaintiff is better off under Title VII, this should not be a problem. Ultimately, it involves proof of racial discrimination, which is consistent with the *Fair Admission* opinion’s prohibition of racial preferences. Title VII simply addresses how discrimination might be established.²¹¹ This is not inconsistent with explicit reliance on racial preferences in college admissions.

Under Section 2 of the Voting Rights Act, according to the Court’s precedent, the state and other governmental entities are effectively required to create as many majority-minority districts as practicable under the circumstances.²¹² The Court’s interpretation of Section 2 seems in tension with the text of the Act which bans racial proportionality.²¹³ This interpretation seems more like a racial preference and thus may be vulnerable to challenge under the color-blind theory. Nevertheless, the Court’s approach under Section 2 has co-existed with the color-blind theory for decades, and as a matter of precedent, it may be secure. In fact, in *Allen v. Milligan*, decided the very term in which the Court decided the *Fair Admissions* case, the Court held that a three-judge district court applying the Court’s traditional

208. See *supra* notes 98–99 and accompanying text.

209. *Fair Admissions*, 600 U.S. at 365 (Sotomayor, J., dissenting).

210. *Id.* at 256 (Thomas, J., concurring).

211. See *id.*

212. See *Allen v. Milligan*, 599 U.S. 1, 41–42 (2023). While the majority did not state the rule in so many words, Justice Thomas, in a perceptive dissent, concluded that was in fact what it boiled down to. See *id.* at 89–91 (Thomas, J., dissenting). In fact, the text of Section 2 does not impose an obligation to create majority-minority districts; when practicable, however, that is the way it has been interpreted by the courts. See Voting Rights Act of 1965, 52 U.S.C. § 10301.

213. See 52 U.S.C. § 10301.

analysis could conclude that a second majority African-American district seemed warranted.²¹⁴ Justice Thomas and Justice Alito dissented, arguing that the majority's approach violated the Constitution.²¹⁵ The Court subsequently reaffirmed the Alabama redistricting case.²¹⁶

There is the question of whether so-called diversity, equity, and inclusion offices (DEI), at least when operated by public institutions or educational institutions receiving federal funding, are vulnerable under the *Fair Admissions* case.²¹⁷ That will depend on how they operate. Any racial preference with respect to hiring would almost certainly fail, as has been the case under prior law. Otherwise, it will depend on the specific facts. Are DEI offices simply an attempt to employ racial preferences or are they otherwise justifiable?

XIII. CONCLUSION

The Supreme Court in the *Fair Admissions* case decided that the *Grutter* analysis was inconsistent with the original understanding, principle, precedent, and doctrine of the Equal Protection Clause. Consequently, it rejected the *Grutter* majority's conclusion that "[c]ontext matters"²¹⁸ and that, in the academic admissions setting, strict scrutiny need not be applied as strictly as in other settings. The majority believed that in this setting, as elsewhere, the color-blind principle prevailed.

214. See *Milligan*, 599 U.S. at 42.

215. *Id.* at 46 (Thomas, J., dissenting); *id.* at 95 (Alito, J., dissenting).

216. See *id.* at 42 (majority opinion).

217. There has been a great amount of writing on this topic, mostly by law firms. See, e.g., Sharon Perley Masling & Michael D. Blanchard, Harvard/UNC *Aftermath: How Boards Can Ensure Legal Compliance While Mitigating Litigation Risk*, MORGAN LEWIS (Aug. 21, 2023), <https://www.morganlewis.com/pubs/2023/08/harvard-unc-aftermath-how-boards-can-ensure-legal-compliance-while-mitigating-litigation-risk> [<https://perma.cc/ZD47-6D5V>]; Ron C. Llewellyn, Myngoc Nguyen & Sheeva Ghassemi, *The Future of Corporate DEI Programs in the Aftermath of the Supreme Court's Harvard Decision*, FENWICK (Oct. 18, 2023), <https://www.fenwick.com/insights/publications/the-future-of-corporate-dei-programs-in-the-aftermath-of-the-supreme-courts-harvard-decision> [<https://perma.cc/5DNV-XMSF>]; *Impact of U.S. Supreme Court's Affirmative Action Decision on Private Employer DEI Programs and Recommendations for Employers*, HUSCH BLACKWELL (July 31, 2023), <https://www.huschblackwell.com/newsandinsights/impact-of-us-supreme-courts-affirmative-action-decision-on-private-employer-dei-programs-and-recommendations-for-employers> [<https://perma.cc/B4MN-HNZ7>]; Travis Hinman, Laura Johnson & Robinson Bradshaw, *The Supreme Court's SFFA Decision: Impacts on Corporate DEI Initiatives*, JD SUPRA (Sept. 15, 2023), <https://www.jdsupra.com/legalnews/impacts-on-corporate-dei-initiatives-1536165> [<https://perma.cc/GCM8-R8S4>].

218. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

