Clause," 1982 Sup. Ct. Rev. 127; Sunstein, "Interest Groups in American Public Law," 38 Stan. L. Rev. 29 (1985).

Can Sunstein's approach be implemented without a return to the skeptical scrutiny of government ends akin to that of the Lochner era? Is his reading of Lee Optical persuasive? Does the civic republican position rest on a plausible understanding of American politics, or would it encourage an excessive intrusion of judicial notions of desirable policy into political reality? Don't laws often mix private and public purposes? Compare Posner, "[The] Constitutionality of Preferential Treatment of Racial Minorities," 1974 Sup. Ct. Rev. 1: "The Court's expressed view [is] that the political process is one of honestly attempting to promote efficiency or justice, or some other equally general conception of the public good. [But many] public policies are better explained as the outcome of the pure power struggle—clothed in a rhetoric of public interest that is a mere fig leaf—among narrow interest or pressure groups. [The] real 'justification' for most legislation is simply that it is a product of the constitutionally created political process of our society."

3. ***Rationality review "with bite."*** Can the Lochnerian dangers of heightened scrutiny of economic and social regulation be averted by intensified scrutiny of legislative *means* rather than ends? See 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 (1972), suggesting that more serious scrutiny under the "mere rationality" standard could be achieved by viewing equal protection "as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases." It would have the Court "less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing." See also Gunther, "Commentary," 71 Chi.-Kent L. Rev. 813 (1996).

SECTION 2. RACE DISCRIMINATION

THE UNCONSTITUTIONALITY OF RACIAL SEGREGATION

1. ***Early interpretation of the 14th Amendment.*** The Fourteenth Amendment guarantee of equal protection was expected by its framers to be enforced primarily by Congress. Recall that the Slaughter-House Cases (1872; p. 451 above) emphasized racial discrimination as the central concern of the Fourteenth Amendment. Seven years after that decision, the Court developed that theme in **Strauder v. West Virginia**, 100 U.S. 303 (1880). Strauder, an African-American defendant, was convicted of murder by a jury from which African-Americans had been excluded because of an explicit command of a state law providing that "all white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as [jurors]." Strauder unsuccessfully sought to remove his case to a federal court. The Court held that removal should have been granted and found the law unconstitutional.

Justice STRONG's majority opinion emphasized that the "common purpose" of the post-Civil War Amendments was the "securing to a race recently emancipated [all] the civil rights the superior race enjoy." He added: "[What is equal protection] but declaring, [in] regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? [That] the West Virginia statute respecting juries [is] such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, [we] apprehend no one would be heard to claim that it would not be a denial to white men of [equal protection]. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, [is] practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that [equal justice]. We do not say [that] a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. [We] are not now called upon to affirm or deny that it had other purposes."

2. ***"Separate but equal."*** Strauder applied to jury trials. In other areas of social life outside such core civic functions, equal treatment for the newly freed slaves and their descendants was harder to enforce. The Civil Rights Cases (1883; p. 856 below) barred application of civil rights laws to purely private action. "Black codes" and other devices for racial segregation arose in the South. And in areas of publicly regulated activity that were further from the core of government than jury service, the Court eventually approved segregationist laws as consistent with equal protection under the fiction of "separate but equal."

In **Plessy v. Ferguson**, 163 U.S. 537 (1896), for example, the Court sustained an 1890 Louisiana law that required "equal but separate accommodations" for "white" and "colored" railroad passengers. Plessy, the challenger, alleged that he was "seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him; and that he was entitled to every right [of] the white race." He was arrested for refusing to leave a seat in a coach for whites. Justice BROWN's majority opinion, after finding the 13th Amendment inapplicable, stated: "The object of the [14th] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws [requiring] their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored

children, which have been [upheld] even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. [Laws] forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state. [The] distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by this Court." [E.g., Strauder.]

"[It is suggested] that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. [In] determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that [this law] is unreasonable, or more obnoxious to the [14th Amendment] than the [laws] requiring separate schools for colored children, [the] constitutionality of which does not seem to have been [questioned].

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. [The argument] assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. [Legislation] is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the [Constitution] cannot put them upon the same plane."

The first Justice HARLAN dissented: "[I] deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. [It] was said in argument that the [law] does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But [every one] knows that [the law] had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches [assigned] to white persons. [The] fundamental objection, therefore, to the statute is

that it interferes with the personal freedom of citizens. The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

"[It] is, therefore, to be regretted that this high tribunal [has] reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made [in] the Dred Scott case. [The] present decision [will] encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the [people] had in view when they adopted the recent amendments of the [Constitution]. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races [are] indissolubly linked together, and the interests 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. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? [We] boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens,—our equals before the law. The thin disguise of 'equal' accommodations [will] not mislead any one, nor atone for the wrong this day done."

Justice Harlan's ringing dissent is as renowned as Justice Brown's majority opinion is infamous. But note Justice Harlan's insistence that the white race "deems itself," and is, dominant "in prestige, in achievements, in education, in wealth and in power"? Or of his prediction that "it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty"?

Justice Harlan also wrote in Plessy that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race [cannot]." Justice Harlan was not merely reporting a fact. He joined a series of decisions by the court upholding the permanent exclusion of Chinese immigrants from citizenship. See Gabriel J. Chin, "The Plessy Myth: Justice Harlan and the Chinese Cases," 82 Iowa L. Rev. 151 (1996). What do you make of Justice Harlan's views in Plessy compared to his apparent views on Chinese immigrants?

3. ***Segregation in public education.*** Led by the NAACP Legal Defense Fund and in particular by Thurgood Marshall, later Justice Marshall, legal challenges to officially mandated segregation began with efforts to show that the "separate but equal" doctrine of Plessy was

vulnerable in the context of education. A methodical and masterly litigation strategy eventually culminated in Brown v. Board of Education in 1954, holding that segregated public schools violated equal protection. The litigation strategy initially postponed challenging "separate but equal" outright, and sought to pressure segregated institutions by demanding adherence to the "equal" part of "separate but equal," challenging the lack of material equality between predominantly black and white schools. The initial challenges did not focus on K–12 but rather on the education provided for black students seeking graduate and professional school training. For the history of the litigation, see Kluger, Simple Justice (1976; reissued 2004).

The first in the sequence of school segregation cases that culminated in Brown was Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). Gaines, a black applicant, had been refused admission to the University of Missouri Law School because of his race. Missouri's defense to his suit for admission was that, pending the establishment of a black law school in the state, it would pay Gaines's tuition in an out-of-state school. Chief Justice Hughes's majority opinion concluded that the State was obligated to furnish Gaines "within its borders facilities for legal education substantially equal to those which the State there offered for persons of the white race, whether or not other Negroes sought the same opportunity." In the absence of such facilities, Gaines was entitled to be admitted to the existing state law school. In Sipuel v. Oklahoma, 332 U.S. 631 (1948), the Court reaffirmed the principles of Gaines.

Sweatt v. Painter, 339 U.S. 629 (1950), required the admission of blacks to the University of Texas Law School even though the state had recently established a law school for blacks. Chief Justice Vinson's opinion for the Court found no "substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." He added that a law school "cannot be effective in isolation from the individuals and institutions with which the law interacts," and he noted that the newly established black law school "excludes from its student body members of the racial groups which number 85% of the population of the state and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner would inevitably be dealing when he becomes a member of the Texas Bar."

McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), involved a black student who had been admitted to a state university's graduate program not offered at the state's black school, but had been required to sit in separate sections in or adjoining the classrooms, library and cafeteria facilities. Chief Justice Vinson's opinion found that the restrictions impaired the "ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession." Finally, in Brown v. Board, the Court confronted a head-on challenge to the notion of "separate but equal."

Brown v. Board of Education [Brown I]

347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

■ CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. [In] each of the cases, minors of the Negro race [seek] the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. [In most of the cases, the courts below denied relief, relying on] the so-called "separate but equal" doctrine announced by this Court in Plessy. [The] plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. [Argument] was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court. Reargument was largely devoted to the circumstances surrounding the adoption of the 14th Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education [had] advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; [and] compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the 14th Amendment relating to its intended effect on public education.

In the first cases in this Court construing the 14th Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. [Slaughter-House Cases.]

The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in [Plessy], involving not education but transportation. [In] recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Gaines; Sipuel; Sweatt; McLaurin. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in [Sweatt], the Court expressly reserved decision on the question whether [Plessy] should be held inapplicable to public education. In the instant cases, that question is directly presented. Here, unlike [Sweatt], there are findings below that the Negro and white schools involved have been equalized or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of [equal protection]. Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. In [Sweatt], this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In McLaurin, the Court [again] resorted to intangible considerations: "[the] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn [the] profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the

inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a [racially] integrated school system." Whatever may have been the extent of psychological knowledge at the time of [Plessy], this finding is amply supported by modern authority.[1] Any language in [Plessy] contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of [equal protection]. This disposition makes unnecessary any discussion whether such segregation also violates [due process]. Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of [equal protection]. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument [see Brown II, below].

THE MEANING AND IMPLICATIONS OF BROWN V. BOARD

1. ***Extension of desegregation to the federal government.*** In **Bolling v. Sharpe**, 347 U.S. 497 (1954), decided on the same day as Brown I, the Court held that racial segregation in the District of Columbia public schools violated the Due Process Clause of the Fifth Amendment. Chief Justice WARREN's opinion stated: "The Fifth Amendment [does] not contain an equal protection clause. [But] the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of

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[1] K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944). [Footnote by Chief Justice Warren; number eleven in the original.]

conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of [due process]. In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

2. ***Segregation in other public facilities.*** Soon after the 1954 decision in Brown, the Court found legally mandated segregation in public facilities unconstitutional in contexts other than education. Despite the Court's emphasis on the school context in Brown, its results in the later cases were reached in brief per curiam orders, most simply citing Brown. See, e.g., Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf courses); New Orleans City Park Improvement Association v. Detiege, 358 U.S. 54 (1958) (parks); cf. Turner v. Memphis, 369 U.S. 350 (1962) (municipal airport restaurant). Not until Johnson v. Virginia, 373 U.S. 61 (1963), reversing a contempt conviction for refusal to comply with a state judge's order to move to a section of a courtroom reserved for blacks, did the Court state: "[It] is no longer open to question that a State may not constitutionally require segregation of public facilities."

3. ***The theory of Brown v. Board.*** What are the bases and justifications for Brown? Consider the following four possible interpretations of Chief Justice Warren's oracular opinion:

a. *Color-blindness.* Race is never a permissible basis on which to distribute public benefits or burdens. Is this the implication of the famous concluding passage stating, "Separate educational facilities are inherently unequal"? Recall Justice Harlan's insistence in his Plessy dissent that "Our Constitution is color-blind."

b. *Caste.* Race is an impermissible basis for distributing public benefits and burdens when it has the social and psychological effect of stigmatizing or subordinating a racial group. Recall the passage stating that to separate black and white schoolchildren on the basis of race generates in the black children "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Under this interpretation, Brown does not prohibit all us of race, but only the imposition of racial hierarchy or caste. As Justice Harlan wrote in his Plessy dissent, "there is in this country no superior, dominant, ruling class of citizens. There is no caste here." Note that, while the caste and color-blindness views reinforce one another in Brown, the choice between them might have differing implications for the constitutionality of race-based affirmative action.

c. *White supremacy.* Segregation laws were the impermissibly tainted products of white supremacy, i.e., legislative processes in which white voters predominated and blacks were largely disenfranchised. Under this interpretation, would all-black schools be permissible if they were voluntarily created by predominantly black political bodies?

d. *Integration.* Recall Chief Justice Warren's emphasis on "the importance of education to our democratic society." Was Brown based on an

empirical supposition that integrated schools would produce better educational results for black schoolchildren? That integration is a desirable social policy that is likely to increase social welfare? That educational integration would help decrease racial separation more broadly in society?

4. ***Brown and the Court's internal drama.*** Having heard the case argued in 1952, the Court was unable to reach consensus, thought to be desirable before a decision of such moment. Four sitting justices, including Chief Justice Fred Vinson, were from segregated states, and all four of those indicated at conference that they were not prepared to strike down segregation. The Court set the case for reargument in October Term 1953. In September 1953, Vinson died, prompting Justice Frankfurter to comment, "This is the first indication I have ever had that there is a God." President Eisenhower appointed former California governor Earl Warren as Chief Justice, and Warren, who as Attorney General of California had supported the internment of Japanese-Americans during World War II, set his considerable political skills to convincing the other justices to reach a unanimous result in Brown. For the detailed story, see Kluger, Simple Justice (1977), and Klarman, From Jim Crow to Civil Rights (2004).

5. ***Brown and history.*** Do the history and "central purpose" of the Fourteenth Amendment justify the Brown decision? In the end, the Court considered the historical materials inconclusive. Was that accurate? Consider the observation that the history of the Fourteenth Amendment "rather clearly" demonstrates "that it was not expected in 1866 to apply to segregation," and therefore that "the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866." Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. L. Rev. 1 (1955). (This article grew out of Bickel's research for Justice Frankfurter as his law clerk in 1952–53.) Is the Brown opinion best explained, then, as reflecting "an awareness on the part of [the Framers of the 14th Amendment] that it was *a constitution* they were writing, which led to a choice of language capable of growth"? For further exploration of this history, compare McConnell, "Originalism and the Desegregation Decision," 81 Va. L. Rev. 947 (1995), with Klarman, "Brown, Originalism and Constitutional Theory," 81 Va. L. Rev. 1881 (1995).

6. ***Brown and sociology and psychology.*** Was the Brown Court correct to consider social science data in order to find that state-imposed segregation "generates a feeling of inferiority" and thus "has a tendency to retard the educational and mental development of Negro children"? Were empirical data central to the Court's holding? The Brown opinion's reliance on social science evidence in the famous footnote 11 has been the focus of considerable controversy. See K.B. Clark, "The Desegregation Cases," 5 Vill. L. Rev. 224 (1959); see also Stell v. Savannah-Chatham Bd. of Ed., 220 F. Supp. 667 (S.D. Ga.1963), rev'd, 333 F.2d 55 (5th Cir. 1964) (where the District Judge, after an extensive hearing to survey the social science data nearly a decade after Brown, unsuccessfully tried in effect to "reverse" Brown). Consider the comment that "I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records. [Behavioral science findings] have an uncertain expectancy of life." Cahn, "Jurisprudence," 30 NYU L. Rev. 150 (1955). Consider the comment of Justice Thomas in his concurring opinion in Jenkins v. Missouri, 515 U.S. 70

(1995): "Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. [Psychological] injury is irrelevant to the question whether [state actors] have engaged in intentional discrimination—the critical question for ascertaining violations of [equal protection]."

In Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (2007; below p. 736), Justice Thomas expressed skepticism about the educational value of school integration: "Add to the inconclusive social science the fact of black achievement in 'racially isolated' environments. [Before] *Brown,* the most prominent example of an exemplary black school was Dunbar High School. Sowell, Education: Assumptions Versus History, at 29 ('[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan'). [Dunbar] is by no means an isolated example. [Even] after *Brown,* some schools with predominantly black enrollments have achieved outstanding educational results. [There] is also evidence that black students attending historically black colleges achieve better academic results than those attending predominantly white colleges. Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling."

7. ***Brown and the social meaning of segregation.*** A prominent article shortly after Brown questioned whether the decision, however desirable its outcome, was based on neutral principles, given that segregation symmetrically affected blacks and whites alike. See Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L. Rev. 1 (1959). Charles Black, a Southerner by origin, replied that the "purpose and impact of segregation in the southern regional culture" were "matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world," and stated: "[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated 'equally,' I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. [Segregation] is historically and contemporaneously associated in a functioning complex with practices which are indisputably and grossly discriminatory." Black, "The Lawfulness of the Segregation Decisions," 69 Yale L.J. 421 (1960).

Contrast Wechsler's argument: "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved." He asked: "Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?"

8. ***A former Ku Klux Klan member as a leading voice for desegregation.*** In the run-up to the Court's decision in Brown II, the Justices of the Supreme Court were aware of the importance of the issue before the Court and hotly debated how to proceed. Justice Hugo Black, who had joined the Ku Klux Klan as a young, ambitious politician, became the unlikely leading voice for desegregation. Black's "Klan membership was a

terrible stain on his reputation and a crushing blow to a man jealous of his honor. [With] this weight upon him, Black could not let his own dishonor stand unaddressed. In the end, there was one way for Black to prove, once and for all, that he was not a racist: to vote definitively to end segregation." As a result, Black became "the strongest internal voice on the Supreme Court calling for a unilateral end to segregation." Southern reaction was so hostile to Black's desegregation vote that his son was ultimately forced to resign his law firm partnership in Alabama and move to Miami, Florida. Feldman, Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices 376, 380–81 (2010).

IMPLEMENTING BROWN V. BOARD

1. ***Brown's remedial aftermath.*** Eager to unite the Court behind a single opinion, Chief Justice Warren postponed until the 1954 Term arguments over the specific remedies that would implement school desegregation. The decision in **Brown v. Board of Education [Brown II]**, 349 U.S. 294 (1955), recognizing the possibility of resistance, allowed remedies to proceed "with all deliberate speed."

Chief Justice WARREN delivered the opinion of the Court: "These cases were decided on May 17, 1954. [Full] implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts. In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in [Brown I]. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with [Brown I]. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel,

revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases. The [cases are accordingly remanded to the lower courts] to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these [cases]."

After its promulgation of general guidelines in Brown II, the Court remained silent about implementation for several years. Enforcement of the desegregation requirement was left largely to lower court litigation and to the political arena. The decision indeed met with massive resistance, often violent, which the Court condemned in Cooper v. Aaron (1958; see p. 21 above), signing an opinion reaffirming the Brown principle in the face of official resistance in Little Rock, Arkansas. Integration of the public schools did not meaningfully accelerate until after the enactment of the Civil Rights Act of 1964, which conditioned the receipt of federal funds for education on states' compliance with desegregation. After Brown had been accepted by the other branches of the national government, the Court ruled frequently on implementation questions.

2. ***Eliminating the vestiges of de jure segregation.*** In **Green v. County School Board**, 391 U.S. 430 (1968), for the first time since Brown II, the Court issued a detailed opinion on the question of remedies. The school district argued that good faith "freedom of choice" plans adequately complied with the Brown mandate, even though, after three years of operation, no white child had chosen to attend the former black school and about 85% of the black children remained in the all-black school. The unanimous Court found the plan inadequate in complying with desegregation requirements. Justice BRENNAN's opinion emphasized that "[r]acial identification of the system's schools" remained "complete" and that "the transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about. [What] is involved here is the question whether the Board has achieved the 'racially nondiscriminatory school system' Brown II held must be effectuated. [School] boards [then] operating state-compelled dual systems [were] clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." School officials were required to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."

In rural and small town areas with no significant residential segregation, the elimination of "freedom of choice" plans and their variants and the adoption of geographic zoning largely eliminated racially identifiable schools. But in large Southern cities with substantial residential segregation—as in the North—geographic zoning alone could not substantially alter the racial composition of schools. In 1971, the Court turned to the problem of metropolitan areas in the South. **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U.S. 1 (1971), arose in the school district covering the Charlotte, North Carolina, metropolitan area.

which had been wholly segregated, de jure, at the time of Brown in 1954. In 1965, the district adopted a court-approved desegregation plan including geographic zoning and free transfers. By 1969, about half of the black students were in formerly white schools, but the remainder attended virtually all-black schools. After Green, the district court ordered the school authorities to prepare a more effective plan. Ultimately, the lower court appointed its own expert and accepted his plan, which involved some redrawing of district lines as well as some busing of elementary school students in both directions.

The Court, in a unanimous decision by Chief Justice BURGER, affirmed the district court's order. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad. [The] constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. [But] in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition." In order to produce a unitary system, courts had broad discretion to use "frank—and sometimes drastic—gerrymandering of school districts and attendance zones."

3. ***Desegregation outside the South.*** In **Keyes v. School District**, 413 U.S. 189 (1973), the Court's first decision on school desegregation in a Northern or Western district that had not had a background of state-mandated segregation, Justice BRENNAN's majority opinion purported to adhere to the de jure-de facto distinction. But he set forth criteria that would facilitate a finding of purposeful discrimination in Northern districts and that would permit court orders for district-wide remedies to rest on findings of intentional discrimination in only *part* of the district "where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial proportion of the students, schools, teachers and facilities," or where a showing of intentional segregation in one area was probative as to intentional segregation in other areas. Justice REHNQUIST was the only member of the Court in total disagreement with the majority. He concluded: "To require that a genuinely 'dual' system be disestablished, in the sense of the assignment of a child to a particular school is not made to depend on his race, is one thing. To require that school boards affirmatively undertake to achieve racial mixing in schools where such mixing is not achieved in sufficient degree by neutrally drawn boundary lines is quite obviously something else."

4. ***Limiting interdistrict remedies.*** In **Milliken v. Bradley**, 418 U.S. 717 (1974), the Court reversed lower court orders that had directed busing across district lines between the city of Detroit, where de jure segregation had been found, and suburban areas, where it had not. The 5–4 ruling concluded "that absent an inter-district violation there is no basis for an inter-district remedy." Chief Justice BURGER's majority opinion concluded: "[The] notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. [Before] the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown [that] racially discriminatory acts of the state or local school

districts, or of a single school district, have been a substantial cause of inter-district segregation. Thus an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." Justice WHITE's dissent, joined by Justices Douglas, Brennan and Marshall, objected to the Court's protection of the state from mere "undue administrative inconvenience": "[Michigan] has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts."

5. ***Limiting the federal courts' remedial powers.*** In **Missouri v. Jenkins**, 495 U.S. 33 (1990), the Court limited the power of the federal courts, in implementing desegregation, to impose fiscal burdens on states and localities. Missouri and the Kansas City, Missouri, School District were found to have operated a segregated school system. Under a desegregation plan approved by the district court, expenditures of over $450 million were necessary. Various state law provisions prevented the school district from raising taxes to finance the 25% share of desegregation costs for which the district court held it liable. The district court ordered a significant increase in the district's property tax rates, despite the state law limitations. Justice WHITE's majority opinion found that the district court's order "contravened the principles of [federal/state] comity that must govern the exercise of the [court's] equitable discretion in this area." The trial court should not have ordered the tax increase "directly," but "could have authorized or required [the district] to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented [this]."

In 1995, the Kansas City case returned to the Supreme Court once more. In **Missouri v. Jenkins**, 515 U.S. 70 (1995), the 5–4 decision of the Court held that a federal court could not order salary increases and remedial education programs on the ground that "student achievement levels were still at or below the national norms at many grade levels." Chief Justice REHNQUIST's majority opinion reiterated that "the nature and scope of the remedy are to be determined by the violation, [which] means that federal-court decrees must directly address and relate to the constitutional violation itself." He noted that, while "a mandate for significant educational improvement, both in teaching and in facilities, may have been justified originally, its indefinite extension is not." He concluded that the lower court's remedy "results in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the [Kansas City] schools that we believe it is beyond the admittedly broad discretion of the District Court."

6. ***Terminating long-standing decrees.*** At what point is it possible to say that a decree, originally entered to remedy de jure segregation, is no longer necessary? Does compliance with a decree bring judicial involvement to an end unless there is evidence of new de jure segregation? These questions came to the Court in **Board of Ed. of Oklahoma City v. Dowell**, 498 U.S. 237 (1991). Oklahoma City had at the time of Brown operated an explicitly segregated school system. In 1972 the District Court ordered system-wide busing. That plan produced substantial integration in the public schools, and in 1977 the court entered an order terminating the case and ending its jurisdiction. In part because of demographic changes that had "led to greater burdens on young black children," the school board in 1984

reintroduced a neighborhood school system for grades K–4. Challengers argued that the new plan would reinstitute segregation. The court of appeals held that the 1972 decree remained in force and imposed an "affirmative duty [not] to take any action that would impede the process of disestablishing the dual system and its effects."

The Supreme Court reversed, with Chief Justice REHNQUIST writing for the majority: "From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination. [Injunctions] entered in school desegregation cases [are] not intended to operate in perpetuity. [Dissolving] a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time recognizes that 'necessary concern for the important values of local control of public school systems' dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." Justice MARSHALL, joined by Justices Blackmun and Stevens, dissented, chastising the majority for suggesting that after 65 years of official segregation, "13 years of desegregation was enough. [The] majority's standard ignores how the stigmatic harm identified in Brown I can persist even after the State ceases actively to enforce segregation. [Our] school-desegregation jurisprudence establishes that the *effects* of past discrimination remain chargeable to the school district regardless of its lack of continued enforcement of segregation, and the remedial decree is required until those effects have been finally eliminated."

ELIMINATING OTHER VESTIGES OF SEGREGATION

1. ***Interracial cohabitation.*** Even as desegregation proceeded in public schools and other public institutions, segregation in the regulation of private relationships continued. In **McLaughlin v. Florida**, 379 U.S. 184 (1964), the Court invalidated a criminal adultery and fornication statute prohibiting cohabitation by interracial unmarried couples. Justice WHITE's majority opinion emphasized: "[We] deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the 14th Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect' and subject to the 'most rigid scrutiny,' and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose. [We] deal here with a racial classification embodied in a criminal statute. [Our] inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise. Without such justification the racial classification [here] is reduced to an invidious discrimination forbidden by [equal protection]."

2. ***Antimiscegenation statutes.*** Bans on interracial marriage persisted in most Southern states up until the following 1967 decision, aptly named Loving v. Virginia. As in Brown, Loving presented the Court with the problem of a statute that was facially symmetrical in the barrier it posed to racial integration. With which of the rationales in Brown is Loving most consistent?

in a case brought by white and Hispanic firefighers, ruled that the New Haven Fire Department had violated Title VII of the Civil Rights Act when it discarded test results because black firefighters had not performed well enough to qualify for promotions. In doing so, the Court rejected the Fire Department's defence that it chose to invalidate the results to avoid disparate impact liability. In his concurrence, Justice Scalia cited approvingly to Primus, "Equal Protection and Disparate Impact: Round Three," 117 Harv. L. Rev. 493 (2003), and argued that statutory disparate impact liability was inconsistent with the Equal Protection Clause. In particular, Justice Scalia reasoned: "If the Federal Government is prohibited from discriminating on the basis of race, [then] surely it is also prohibited from enacting laws mandating that [employers] discriminate on the basis of race. [As] the facts of these cases illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory."

Is Justice Scalia correct that statutory disparate impact liability is at odds with the Equal Protection Clause? Even if so, is Justice Kennedy's adoption of a robust causality requirement sufficient to mitigate these concerns?

AFFIRMATIVE ACTION AND RACE PREFERENCES

To what extent may racial classifications be used to aid rather than disadvantage minorities? As seen above, racial classifications disadvantaging minorities are "suspect" and are permissible only for "compelling" justifications. Is a level of scrutiny lower than "strict" appropriate when the racial objective is "benign"? Can courts adequately distinguish between benign purposes and hostile ones masquerading behind a "benign" facade? May race preferences be used to remedy the effects of past purposeful state discrimination? May they also be used to compensate for past societal injustices? May they be future-oriented? Can less-than-strict scrutiny of benign racial classifications be defended on the ground that the Fourteenth Amendment's original purpose was directed at hostile legislation subordinating a disadvantaged minority? Or does the evolution of equal protection criteria since Reconstruction warrant a broader suspicion of *all* racial classifications? Should the courts, on political process grounds, defer to any political process in which such a politically dominant racial group gives preferences to racial minorities and so disadvantages itself? For an argument for deference on this political process ground, see Ely, "The Constitutionality of Reverse Racial Discrimination," 41 U. Chi. L. Rev. 723 (1974). Should the context in which race preferences are employed matter to the constitutional analysis? The Court first faced these questions in reviewing challenges to preferential admissions programs in higher education.

Regents of Univ. of California v. Bakke

438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

[The University of California at Davis Medical School reserved 16 out of 100 places in its entering class for members of minority groups: "Blacks," "Chicanos," "Asians," and "American Indians." A separate committee was established to administer this special admissions program. This admissions procedure was challenged by Allan Bakke, a white applicant who was rejected even though applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's.]

■ JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. [The Supreme Court of California held] the special admissions program unlawful, [enjoined] petitioner from considering the race of any applicant, [and ordered Bakke's] admission. For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, [Chief Justice Burger and Justices Stewart, Rehnquist and Stevens] concur in this judgment. I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, [Justices Brennan, White, Marshall and Blackmun] concur in this judgment and join Parts I and V-C of this opinion.]

II. [Justice Powell first considered Title VI of the Civil Rights Act of 1964, which provides: "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."] [We] assume only for the purposes of this case that respondent has a right of action under Title VI. [In] view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate [equal protection].

III. A. [The parties] disagree as to the level of judicial scrutiny to be applied to the special admissions program. [Petitioner] argues that the court below erred in applying strict scrutiny [because white males] are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. [Carolene Products, fn. 4.] [These] characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

B. [Although] many of the Framers of the 14th Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," the Amendment itself was framed in universal [terms]. "[This] Court consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free

people whose institutions are founded upon the doctrine of equality.' " Petitioner urges us to adopt for the first time a more restrictive view of [equal protection] and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." The clock of our liberties, however, cannot be turned back to 1868. 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].

Once the artificial line of a "two-class theory" of the 14th Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. [The] white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals. [There] is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. [Moreover,] there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. [Second,] preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making [When classifications] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental [interest].

IV. [The] special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession"; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.

A. [If] petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

B. The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. [The] school desegregation cases [attest] to the importance of this state goal, [which is] far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past. We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. [Without] such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. [Petitioner] does not purport to have made, and is in no position to make, such findings. Its broad mission is education,

not the formulation of any legislative policy or the adjudication of particular claims of illegality.

C. [Petitioner] identifies, as another purpose of its program, improving the delivery of health care services to communities currently underserved. [There] is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal. [Petitioner] simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens.

D. The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. [Thus,] in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment[, and] must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission. An otherwise qualified medical student with a particular background [may] bring to a professional school of medicine experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity. [As] the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest.

V. A. It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. [The] diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine [diversity].

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program: "In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. [In] practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer.

Similarly, a black student can usually bring something that a white person cannot offer. In Harvard college admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. [But in] choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students."

In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. [This] kind of program treats each applicant as an individual in the admissions process. [It] has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. [A court] would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system.

B. [In] summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. [W]hen a State's distribution of benefits or imposition of burdens hinges on the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the 14th Amendment must be affirmed.

C. In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

VI. With respect to respondent's entitlement to an injunction directing his admission to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed.

■ Opinion of JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN, concurring in the judgment in part and dissenting.

[Unquestionably] a government practice or statute [which] contains "suspect classifications" is to be subjected to "strict scrutiny." [But] whites as a class [do not have] any of the "traditional indicia of [suspectness]." [Nor] has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put

the weight of government behind racial hatred and separatism—are invalid without more. On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis [standard]. Instead, a number of considerations—developed in gender discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes "must serve important governmental objectives and must be substantially related to achievement of those objectives."

First, race, like "gender-based classifications, too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." While a carefully tailored statute designed to remedy past discrimination could avoid these vices, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own.

Second, race, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside. [Such] divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or wrongdoing" and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual. Because this principle is so deeply rooted it might be supposed that it would be considered in the legislative process and weighed against the benefits of programs preferring individuals because of their race. But this is not necessarily so: The "natural consequence of our governing processes [may well be] that the most 'discrete and insular' of whites [will] be called upon to bear the immediate, direct costs of benign discrimination."

[In] sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus our review under the 14th Amendment should be strict—not " 'strict' in theory and fatal in fact," because it is stigma that causes fatality—but strict and searching [nonetheless].

Davis' articulated purpose of remedying the effects of past societal discrimination [is] sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school. [A] state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its

actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. There is no question that Davis' program is valid under this test. [Davis] had a sound basis for believing that the problem of underrepresentation of minorities was substantial and chronic and that the problem was attributable to handicaps imposed on minority applicants by past and present racial [discrimination]. Davis clearly could conclude that the serious and persistent underrepresentation of minorities in medicine [is] the result of handicaps under which minority applicants labor as a consequence of a background of deliberate, purposeful discrimination against minorities in education and in society generally, as well as in the medical [profession].

[The] second prong of our test—whether the Davis program stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives—is clearly satisfied by the Davis [program]. Bakke [was not] in any sense stamped as inferior by the Medical School's [rejection]. Moreover, there is absolutely no basis for concluding that Bakke's rejection [will] affect him throughout his life in the same way as the segregation of the Negro school children in Brown I would have affected them. [In] addition, there is simply no evidence that the Davis program discriminates intentionally or unintentionally against any minority group which it purports to benefit. The program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted. Nor can the program reasonably be regarded as stigmatizing the program's beneficiaries or their race as inferior. The Davis program does not simply advance less qualified applicants; rather it compensates applicants, whom it is uncontested are fully qualified to study medicine, for educational disadvantage which it was reasonable to conclude was a product of state-fostered discrimination. Once admitted, these students must satisfy the same degree requirements as regularly admitted students; and their performance is evaluated by the same standards by which regularly admitted students are judged. Under these circumstances, [there] is no reasonable basis to conclude that minority graduates [would] be stigmatized as inferior by the existence of such programs.

Finally, Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants. For purposes of constitutional adjudication, there is no difference between the two approaches. In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis. [That] the Harvard approach does [not] make public the extent of the preference and the precise workings of the system while the Davis program employs a specific, openly stated number, does not condemn the latter plan for purposes of 14th Amendment adjudication. It may be that the Harvard plan is more acceptable to the public than is the Davis "quota." If it is, any State [is] free to adopt it in preference to a less acceptable [alternative]. But there is no basis for preferring a particular preference program simply because in achieving the same goals that [Davis] is

pursuing, it proceeds in a manner that is not immediately apparent to the [public].

■ JUSTICE MARSHALL.

[It] 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.

■ JUSTICE BLACKMUN.

[I] yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. [At] some time, [the] United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind [us]. It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful. [That] the 14th Amendment has expanded beyond its original 1868 [conception] does not mean for me that [it] has broken away from [its] original intended purposes. Those original aims persist. [I] suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way.

■ JUSTICE STEVENS, with whom CHIEF JUSTICE BURGER and JUSTICES STEWART and REHNQUIST join, concurring in the judgment in part and dissenting in part.

If the state court was correct in its view that the University's special program was illegal, and that Bakke was therefore unlawfully excluded from the medical school because of his race, we should affirm its judgment, regardless of our views about the legality of admissions programs that are not now before the Court. [The] question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate. [Title VI contains a "crystal clear" meaning:] "Race cannot be the basis of excluding anyone from participation in a federally funded program."

BAKKE AND AMICUS BRIEFS

At the time of *Bakke*, the Justices had been debating to what extent the Court should rely on amicus briefs submitted by third parties when making decisions. "Justices Hugo Black, William J. Brennan Jr., Thurgood Marshall, and William O. Douglas [appreciated] the briefs: They [believed that the amicus briefs] kept the brethren in touch with the views and attitudes of many dozens of groups. [Black wrote in one memo] that 'most of the cases before this Court involve matters that affect far more people than the

immediate record parties. I think the public interest would be better served [by allowing for greater amicus participation.]" Justice Black's nemesis on the Court, Justice Frankfurter, however, had objected to the use of amicus briefs as allowing "the Court [to be] exploited as a soap box or as an advertising medium." Ball, The Bakke Case, 79–80 (2000). In Bakke, Black's perspective prevailed, and amicus briefs attained new importance in shaping the Court's opinion. In describing a permissible model for an affirmative action program, Justice Powell's opinion for the Court relied heavily on Harvard University's amicus brief explaining its use of racial categories as non-quota "plus factors." Id. Powell, a Virginian educated at Washington & Lee University, had earned a master of laws degree from Harvard Law School.

RACE PREFERENCES IN EMPLOYMENT AND CONTRACTING

Are the reasons for giving some deference to public officials for the use of race preferences in the education context absent in the context of government employment and contracting? Is the contribution of racial diversity to the educational mission irrelevant to the composition of work crews? To the ownership of small businesses receiving government contracts? Consider these questions in the following series of cases:

1. ***Race preferences in public employment.*** In **Wygant v. Jackson Board of Education**, 476 U.S. 267 (1986), the Court held unconstitutional a minority preference in teacher layoffs. The case arose from a collective bargaining agreement that provided that, when layoffs were required for fiscal reasons, teachers with the most seniority would be retained, "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." In consequence, some white teachers were laid off, even though they had more seniority than blacks who were retained. Some of the laid-off teachers brought an action alleging that the layoffs violated their equal protection rights. The district court dismissed the claim, holding that racial preferences need not be grounded on a finding of past purposeful discrimination but may attempt to remedy societal discrimination by providing "role models" for minority schoolchildren. The court of appeals affirmed, but the Supreme Court reversed by a 5–4 vote.

Justice POWELL's plurality opinion, joined by Chief Justice Burger and Justice Rehnquist, applied strict scrutiny, as he had in Bakke. He held that the goal of providing "minority role models" in order to overcome societal discrimination was not "compelling," stating: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination. [The] role model theory employed by the District Court has no logical stopping point. [It] allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose." Even if the layoff provision were justified by a compelling interest in remedying prior employment discrimination, the layoff provision was "not sufficiently narrowly tailored" to achieving it: "While hiring goals impose a diffuse

traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice. Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the "equal protection of the laws" the Fourteenth Amendment has promised since 1868.

[The] lead opinion uses one term, "strict scrutiny," to describe the standard of judicial review for all governmental classifications by race. [The] strict standard announced is indeed "fatal" for classifications burdening groups that have suffered discrimination in our society. [For] a classification made to hasten the day when "we are just one race," however, the lead opinion has dispelled the notion that "strict scrutiny" is "fatal in fact." [While] I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.

■ [Another dissent, by JUSTICE SOUTER, joined by JUSTICE GINSBURG and JUSTICE BREYER, is omitted].

AFFIRMATIVE ACTION AFTER CROSON AND ADARAND

1. ***Justifications for affirmative action.*** Note that Bakke approved diversity in the classroom as a compelling interest, but found the UC Davis admissions policy not narrowly tailored to such an end. Croson and Adarand, by contrast, appeared to view only remedial justifications as sufficient in the contracting context. Remedial justifications may be broad or narrow; Justice Scalia would confine permissible racial remedies to the identified victims of specific past acts of discrimination while Wygant considered (and rejected) an argument for correcting broader societal prejudice. Croson and Adarand seemed to settle somewhere in between: on remedies for identified past discrimination, but not limited to particularized victims. Was Justice Stevens correct to observe in Metro Broadcasting that forward-looking justifications are preferable to backward-looking ones? For an argument that remedial justifications are over- and underinclusive in ways that distributive or utilitarian justifications are not, see Sullivan, "The Supreme Court—1985 Term—Comment: Sins of Discrimination," 100 Harv. L. Rev. 78 (1986).

2. ***"Strict in theory but not fatal in fact."*** Gerald Gunther wrote in an oft-quoted phrase in 1972 that strict scrutiny, for example of racial classifications, is "strict in theory and fatal in fact." 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 (1972). Justice O'Connor took pains in Adarand, however, to dispel the notion that this is inevitably so, suggesting that some race-conscious measures might survive strict scrutiny in the affirmative action context, even though few laws outside of wartime (recall Korematsu) could survive such scrutiny when directed against racial minorities. Was this a signal that the Court was creating in effect a new tier of review, a kind of "strict scrutiny minus," applicable to race preferences? In the lower courts after Croson and Adarand, many race preferences were upheld under this new standard, including those in which the government had merely "passively participated" in private

discrimination. One important empirical study of federal judicial applications of strict scrutiny in the equal protection and other contexts from 1990 to 2003 suggests that "30 percent of all applications of strict scrutiny—nearly one in three—result in the challenged law being upheld," and thus concludes that "strict scrutiny is far from the inevitably deadly test imagined by the Gunther myth and more closely resembles the context-sensitive tool described by O'Connor." Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts," 59 Vand. L. Rev. 793 (2006). For an historical argument that strict scrutiny was a late arrival in racial equal protection cases in any event, having originated decades earlier in free speech cases, see Siegel, "The Origin of the Compelling State Interest Test and Strict Scrutiny," 48 Am. J. Leg. Hist. 355 (2006).

3. ***The implications of Croson and Adarand for the vitality of Bakke.*** For the 25 years following the Bakke decision, many public and private universities and colleges followed Bakke's guidance in continuing to use race preferences in admissions, but to fashion them along the Harvard rather than the UC Davis model. During that period, however, the Court reviewed with increasing strictness and skepticism race preferences in employment and contracting, as illustrated by Croson and Adarand. These cases led to speculation that race preferences in education would eventually meet the same fate. They also raised questions whether any nonremedial justifications (such as diversity) could continue to justify affirmative action.

In a pair of 2003 decisions involving equal protection challenges to the use of race preferences in admissions at the University of Michigan, however, the Court reaffirmed and elaborated upon Justice Powell's opinion for the Court in Bakke finding diversity a compelling interest justifying race preferences in the context of university admissions. Applying that standard, the Court issued split judgments, upholding the use of race preferences by the Michigan Law School on the ground that it was part of individualized review of files that was narrowly tailored to produce diversity, but invalidating the use of race preferences in Michigan undergraduate admissions on the ground that it involved too mechanical a procedure for taking race into account.

Grutter v. Bollinger

539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003).

■ JUSTICE O'CONNOR delivered the opinion of the Court, [in which JUSTICES STEVENS, SOUTER, GINSBURG, and BREYER joined].

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

I. A. The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." [The Law School's admissions policy also]

aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." By enrolling a " 'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School." The policy does not define diversity "solely in terms of racial and ethnic status."

B. Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit [alleging] that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment. [After a 15-day bench trial,] the District Court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. [Sitting] en banc, the Court of Appeals reversed.

II. A. We last addressed the use of race in public higher education over 25 years ago. In the landmark Bakke case we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. [Since] this Court's splintered decision in Bakke, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies. [Today] we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

B. [We] have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. [Strict] scrutiny is not "strict in theory, but fatal in fact." Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. [Context] matters when reviewing race-based governmental action under the Equal Protection Clause. [Not] every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

III. A. With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body."

We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since Bakke. It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. See, e.g., Croson. But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since Bakke, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. [Our] scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions. [We] have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. [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.

[The] Law School seeks to "enroll a 'critical mass' of minority students." The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. These benefits are substantial. [The] Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." [Student] body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." These benefits are not theoretical but real, as major American businesses have made clear [in their amicus briefs in support of the University] that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert [in their amicus brief] that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its princip[al] mission to provide national security." [At] present, "the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." [We] agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."

[Moreover,] universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half 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. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. 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.

B. [Even] in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, [the means] must be specifically and narrowly framed. [We] find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in Bakke, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. [The] Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.

[That] a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. [We] also find that [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. The Law School does not [limit] in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the [admissions] policy makes clear "[t]here are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." All

applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

[Petitioner] and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.

We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both. [The] United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State. The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

[To] be narrowly tailored, a race-conscious admissions program [also] must not "unduly burden individuals who are not members of the favored racial and ethnic groups." We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.

[We] are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." Accordingly, race-conscious admissions policies must be limited in time. [We] see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. [We] take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from

now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV. In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. [Affirmed.]

■ JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.

[It] is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals. As to public education, data for the years 2000–2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. And schools in predominantly minority communities lag far behind others measured by the educational resources available to them. However strong the public's desire for improved education systems may be, it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. [As] lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.

■ JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

[Unlike] a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's Grutter-Gratz split double header [see Gratz v. Bollinger, the undergraduate admissions decision, below] seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant "as an individual," and sufficiently avoids "separate admissions tracks" to fall under Grutter rather than Gratz. Some will focus on whether a university has gone beyond the bounds of a " 'good faith effort' " and has so zealously pursued its "critical mass" as to make it an unconstitutional de facto quota system, rather than merely " 'a permissible goal.' " Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in Grutter. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical Grutter-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases. The

Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

■ JUSTICE THOMAS, with whom JUSTICE SCALIA joins as to Parts I–VII, concurring in part and dissenting in part.

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority:

> "[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! [All] I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury."

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. 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 (Law School). 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."

I. [The] Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.

II. [Unlike] the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it wishes to obtain "educational benefits that flow from student body diversity." [But attaining] "diversity," whatever it means,[1] is the mechanism by which the Law School obtains educational benefits, not an end of itself. [It] is the educational benefits that are the end, or allegedly compelling state interest, not "diversity." [But the] Law School [refuses] to entertain changes to its current admissions system that might produce the same educational benefits. The Law School adamantly disclaims any race-neutral alternative that would reduce "academic selectivity." [Instead] the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution.

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[1] "[D]iversity," for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue. Because the Equal Protection Clause renders the color of one's skin constitutionally irrelevant to the Law School's mission, I refer to the Law School's interest as an "aesthetic." 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. [It] must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation [Footnote by Justice Thomas.]

III. [Under] the proper standard, there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school. [While] legal education at a public university may be good policy or otherwise laudable, it is obviously not a pressing public necessity.

IV. [The] Court never explicitly holds that the Law School's desire to retain the status quo in "academic selectivity" is itself a compelling state interest. [Therefore], the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways. With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination. [The] Court ignores the fact that other top law schools have succeeded in meeting their aesthetic demands without racial discrimination. [The] sky has not fallen at Boalt Hall at the University of California, Berkeley, for example. Prior to Proposition 209's adoption of Cal. Const., Art. 1, § 31(a), which bars the State from "grant[ing] preferential treatment . . . on the basis of race . . . in the operation of . . . public education," Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics. Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels. [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.

V. [The] rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a "true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities. The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the basis of race. So while legacy preferences can stand under the Constitution, racial discrimination cannot.[2]

VI. [I must also] contest the notion that the Law School's discrimination benefits those admitted as a result of it. [The] Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. [To] cover the tracks of the aestheticists, this cruel farce of racial discrimination must continue—in selection for the Michigan Law Review, and in hiring at law firms and for judicial clerkships—until the "beneficiaries" are no longer tolerated. While these students may graduate with law degrees, there is no evidence that they have received a qualitatively

[2] Were this Court to have the courage to forbid the use of racial discrimination in admissions, legacy preferences (and similar practices) might quickly become less popular—a possibility not lost, I am certain, on the elites (both individual and institutional) supporting the Law School in this case. [Footnote by Justice Thomas.]

better legal education (or become better lawyers) than if they had gone to a less "elite" law school for which they were better prepared.

[Beyond] the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race." "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.

■ CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.[3]

[The] Law School claims it must take the steps it does to achieve a "'critical mass'" of underrepresented minority students. But its actual program bears no relation to this asserted goal. [From] 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African-Americans, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African-Americans in order to achieve "critical mass," thereby preventing African-American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. [But] respondents offer no race-specific reasons for such disparities.

[The] Court recognizes that ["outright] racial balancing [is] patently unconstitutional." The Court concludes [that] the Law School's use of race in admissions [only] pays "'[s]ome attention to numbers.'" But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers." [From] 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups. [For] example, in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted

[3] Justice KENNEDY also filed a separate dissent, agreeing with the District Court that an inference could be drawn from the record "that the Law School's pursuit of critical mass mutated into the equivalent of a quota."

class was African-American. This correlation is striking. [The] tight correlation between the percentage of applicants and admittees of a given race [must] result from careful race based planning by the Law School. [But] this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional."

Gratz v. Bollinger

539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003).

[This case, like Grutter, involved a challenge by white students to an admissions policy of the University of Michigan, this time by the undergraduate College of Literature, Science, and the Arts (LSA). Although the college considered the challengers "qualified," they were ultimately denied admission. The college considered a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race. The college used a selection method under which every applicant from an underrepresented racial or ethnic minority group—namely, African-Americans, Hispanics, and Native Americans—was automatically awarded 20 points of the 100 needed to guarantee admission. It was undisputed that the University admitted virtually every qualified applicant from these groups. The majority opinion began by dismissing the dissenters' objections that the challengers lacked standing. Chief Justice Rehnquist proceeded:]

■ CHIEF JUSTICE REHNQUIST delivered the opinion of the Court, in which JUSTICES O'CONNOR, SCALIA, KENNEDY, and THOMAS, joined.

Petitioners argue [that] the University's use of race in undergraduate admissions violates the Fourteenth Amendment [because] this Court has only sanctioned the use of racial classifications to remedy identified discrimination, a justification on which respondents have never relied, [and that] "diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." [For] the reasons set forth today in Grutter v. Bollinger [above] the Court has rejected these arguments. [But we] find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

[Justice] Powell's opinion in Bakke 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. [The] current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review

of an application to determine whether an individual is a member of one of these minority groups. [Even if a student's] "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. At the same time, every single underrepresented minority applicant [would] automatically receive 20 points for submitting an application. Clearly, the LSA's system does not offer applicants the individualized selection process.

[We] conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.

■ JUSTICE O'CONNOR, concurring.[1]

Unlike the law school admissions policy the Court upholds today in Grutter, the procedures employed by the University of Michigan's Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. [Although] the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. 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. [The] selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class.

■ JUSTICE THOMAS, concurring.

I join the Court's opinion because I believe it correctly applies our precedents, including today's decision in Grutter v. Bollinger. For similar reasons to those given in my separate opinion in that case, however, I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.

■ JUSTICE SOUTER, dissenting.[2]

[Although] 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

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[1] Justice BREYER concurred in the judgment, and joined Justice O'Connor's concurring opinion except insofar as it joined that of the Court, and Justice Ginsburg's dissent except insofar as it found no constitutional violation.

[2] Justice STEVENS, joined by Justice Souter, filed a separate dissent on the ground that the named petitioners lacked standing. Justice Ginsburg joined Justice Souter's dissent on the merits.

record. The record does not describe a system with a quota like the one struck down in Bakke, which "insulate[d]" all nonminority candidates from competition from certain seats. [The] plan here, in contrast, lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic disadvantage, athletic ability, and quality of a personal essay. [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 characteristic, whether it be reasoning ability, writing style, running speed, or minority race.

[It] seems especially unfair to treat the candor of the admissions plan as an Achilles' heel. In contrast to the college's forthrightness in saying just what plus factor it gives for membership in an underrepresented minority, it is worth considering the character of one alternative thrown up as preferable, because supposedly not based on race. Drawing on admissions systems used at public universities in California, Florida, and Texas, the United States contends that Michigan could get student diversity in satisfaction of its compelling interest by guaranteeing admission to a fixed percentage of the top students from each high school in Michigan. While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage. It is the disadvantage of deliberate obfuscation. The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case 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.

■ JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.

[The] Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. This insistence on "consistency" would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we 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. [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. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions. [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. [Where] race is considered "for the purpose of achieving equality," no automatic proscription is in order.

[The] stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities

thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. [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.

THE MEANING AND IMPLICATIONS OF GRUTTER AND GRATZ

1. ***Bakke vs. Grutter and Gratz.*** After Grutter and Gratz, Bakke remained good law insofar as achieving diversity in higher education remained a compelling state interest sufficient to justify at least some race preferences in higher education. Was the diversity interest that was upheld in Grutter, however, the same as that upheld in Bakke? Is Grutter simply a reaffirmance of Powell's opinion in Bakke, or does it have more far-reaching implications? Did Grutter replace Bakke's emphasis on diversity in educational inputs with a new emphasis on diversity in educational outputs? Consider the view that, "[a]lthough Grutter casts itself as merely endorsing Justice Powell's opinion in Bakke, Grutter's analysis of diversity actually differs quite dramatically from Powell's. Powell conceptualizes diversity as a value intrinsic to the educational process itself [because] education was a practice of enlightenment [that] thrived on the 'robust exchange of ideas' characteristically provoked by confrontation between persons of distinct life experiences. [Grutter instead] conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership. [Grutter's] justifications for diversity thus potentially reach far more widely than do Powell's." Post, "The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law," 117 Harv. L. Rev. 4 (2003).

Other scholars agree that "Justice O'Connor championed diversity not only in the classroom but beyond. After noting that higher education 'must be accessible to all individuals regardless of race or ethnicity,' she linked education to leadership. [It] may be possible to confine [her] words to law schools or to higher education generally, but it may also be that diversity has now been writ large to include all public institutions. [The] debate has shifted from whether Bakke would be overruled to how far it should be extended." Jeffries, "Bakke Revisited," 2003 Sup. Ct. Rev. 1. If Grutter's conception of diversity "depends on minority participation in leadership for satisfaction," then it might be argued that "in Grutter, the Court endorsed a subtly, but importantly, different claim [than in Bakke]: diverse discourse on campus and its societal reverberations notwithstanding, student body diversity at a particular educational institution is sought to produce, and in fact produces, not just racial-majority leaders who are open to diverse perspectives, but actual and substantial racial diversity in the leadership ranks of important non-educational institutions." Lee, "University Dons and

Warrior Chieftains: Two Concepts of Diversity," 72 Fordham L. Rev. 2301 (2004).

2. ***The Court's rationale—epistemic, distributive, compensatory, or something else?*** Despite upholding one affirmative action program and striking down another, the Court assumed in both Grutter and Gratz that seeking diversity in higher education is a compelling state interest; Gratz simply found the undergraduate admissions program not sufficiently narrowly tailored to that goal. Why is diversity a compelling interest? Because it improves the quality of higher education? Distributes the benefits of higher education to a broader cross-section of the population? Or compensates those segments of society that have been harmed by racial discrimination in the past? Many observers see the rationale as epistemic or distributive, not compensatory: "The goal articulated in Grutter—integrating the leadership of major American institutions—does not look back to catalogue all the multifold harms of slavery and Jim Crow, and offer a remedy. Rather the opinion places us in the Here and Now, and looks to our national future. The nation needs integration of our leading institutions, not to compensate victims of past iniquities, but to serve the whole nation's present vital purposes at home and overseas. The mission, the bottom line, the production line: The military, businesses, and union leaders who offered those three briefs as amici curiae regarded the need for integration at all levels of their institutions as virtually self-evident." Karst, "The Revival of Forward-Looking Affirmative Action," 104 Colum. L. Rev. 60 (2004).

Is the desire to create a more integrated political and social leadership a cognizable interest under the Equal Protection Clause? Is such a concern in tension with the understanding that the Fourteenth Amendment "protects persons, not groups"? Consider the following view: "Both the rhetoric and the doctrine of Grutter—and Gratz—are committed to individualism as the dominant understanding of equal protection. [To] whatever degree individualism tolerates race-conscious decisionmaking, it may incorporate within itself some of the concerns with racial hierarchy that a strictly colorblind regime would reject. But even so, it is individualism rather than hierarchy that operates as the dominant meaning of equal protection." Primus, "Equal Protection and Disparate Impact: Round Three," 117 Harv. L. Rev. 493 (2003).

Others question whether the Court is truly concerned with the diversity in higher education for epistemic or distributive purposes: "If students and faculty are benefited by 'diversity' to the point that it qualifies as a compelling interest justifying discrimination that would otherwise be unconstitutional, why the lack of concern about the absence at virtually all elite institutions of a 'critical mass' of faculty who are Evangelical Protestants, devout Catholics, social conservatives, Republicans, etc.? [Few] people who shape university policy notice, much less care about, the absence of diversity of political and religious viewpoint and affiliation in institutions that allegedly prize the engagement of ideas. It is therefore difficult to credit the claim that a desire for the intellectual benefits of diversity really motivates the defense of preference schemes." George, "Gratz and Grutter: Some Hard Questions," 103 Colum. L. Rev. 1634 (2003).

But consider the countervailing view: "Critics argue that the schools are inconsistent: Diversity policy does not discount admissions criteria for members of different political, religious, and other groups. [The] reason for focusing on African Americans, however, is central to Justice O'Connor's

path-breaking perception in Grutter that there is something special and important for society, in the world outside the university, about admitting blacks. Blacks occupy a unique place in American society, with their background of slavery, state-enforced segregation, and widespread discrimination." Greenberg, "Diversity, the University, and the World Outside," 103 Colum. L. Rev. 1610 (2003). Does this reasoning convert the diversity rationale back into a compensatory one?

Justice O'Connor wrote near the end of her opinion in Grutter: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Does this suggest that there is still a compensatory underpinning to the decision? If affirmative action is compensatory in nature, then diversity in education as a compelling interest should decrease in importance over time. Does this language create a presumption of invalidity for affirmative action come the year 2028? Was it Justice O'Connor's intention to place a definitive temporal limit to affirmative action? Or was she simply stating an aspiration that affirmative action will no longer be needed two or three decades in the future? What theory of constitutional interpretation would justify introducing such a pragmatic, temporal dimension to a holding? Is a generational reevaluation of affirmative action healthy for the nation?

Some observers argue that the Court has supported affirmative action only where it has benefited the white majority: "To rest the case for affirmative action on diversity because it contributes to learning incorporates an irony. It argues that admitting blacks is good because it helps whites. Otherwise they would suffer from being alone with only white classmates." Greenberg, above. "It was diversity in the classroom, on the work floor, and in the military, not the need to address past and continuing racial barriers, that gained O'Connor's vote. Once again, blacks and Hispanics are the fortuitous beneficiaries of a ruling motivated by other interests that can and likely will change when different priorities assert themselves. [In] addition, it was a boost to a wide range of corporate and institutional entities with which she identifies." Bell, "Diversity's Distractions." 103 Colum. L. Rev. 1622 (2003).

3. ***The extent of harm to nonminority applicants.*** Are the plaintiffs in reverse-discrimination cases such as Bakke, Grutter, and Gratz justified in seeking admission to the university as relief? Isn't it probable that in many cases, even in the absence of affirmative action, their applications would have been rejected? In Bakke, there were many other white applicants who had been denied admission despite better entrance exam scores and grades than Allan Bakke. The university only stipulated that Bakke would have been admitted in the absence of affirmative action in order to ensure that the case would not be dismissed on standing grounds. If a plaintiff cannot demonstrate that he would have been admitted in the absence of an unconstitutional racial preference program, is it enough for standing for the plaintiff to claim he had the right to compete on an equal footing?

An article that predated the 2003 decisions presented a statistical model showing that a nonminority applicant's chance of being admitted under a race-neutral admissions process is not significantly greater than the same person's chance of being admitted under a race-conscious process: "[T]here is no doubt that receiving a rejection letter from a selective institution is a considerable disappointment. But the reflexive tendency to blame

affirmative action runs counter to basic reasoning and empirical evidence. In any highly selective competition where white applicants greatly outnumber minority applicants, and where multiple objective and nonobjective criteria are relevant, the average white applicant will not fare significantly worse under a selection process that is race-conscious than under a process that is race-neutral." Liu, "The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions," 100 Mich. L. Rev. 1045 (2002).

4. ***Narrow tailoring and means-ends fit.*** Given the Court's concern with creating diversity both in higher education and in the nation's leadership ranks, why did the Court uphold the law school's preference system but strike down the undergraduate program? Are the two really distinguishable? The Court treated the point system in Gratz as more problematic than the individualized file review in Grutter, despite the fact that each made determinative use of race in some cases. Are the dissenters in both cases right to ask, "How can it be constitutionally permissible to do 'through winks, nods, and disguises' what it is unconstitutional to do honestly and above board?" George, note 2 above (suggesting that "the answer offered by Justice O'Connor—that the Law School was doing something fundamentally or essentially different from what the college was doing, something free of the discriminatory element she found in the college's awarding of points—just isn't persuasive").

5. ***Race-neutral alternatives.*** Before Grutter was announced, some states that had already eliminated affirmative action programs began experimenting with "alternative action" programs: race-neutral alternatives for achieving racial diversity at universities. These plans were often a reaction to the decline in minority acceptance and enrollment after race preferences had been prohibited in a jurisdiction. Texas, for example, enacted a so-called "Ten Percent Plan" in response to the Fifth Circuit's 2000 decision in Hopwood v. Texas striking down racial preferences. The plan guaranteed admission at one of the University of Texas campuses to anyone graduating in the top ten percent of his or her high school class. This plan was designed to enhance minority enrollment at the university level based on the assumption that residential communities in Texas, and therefore Texas's high schools, are largely racially segregated de facto. Some opponents of affirmative action support this type of race-neutral program, but critics point out that it reinforces segregation and argue that admission of minorities in the top 10% of their classes reduces the number of spots available to students from other schools who placed lower relative to their classes but may have had superior overall records of achievement. Other jurisdictions have experimented with increasing the use of socioeconomic disadvantage as a basis for preference in admissions on the assumption that it would have the by-product of increasing racial diversity in admissions. For example, the University of California law schools tried class-based affirmative action after, first, the state Regents, and later, a state constitutional amendment passed by initiative forbade race preferences in public institutions. See Sander, "Experimenting with Class-Based Affirmative Action," 47 J. Legal Educ. 472, 484 (1997); Malamud, "A Response to Professor Sander," 47 J. Legal Educ. 504 (1997).

Does the Court imply in Grutter and Gratz that such a facially neutral program would be constitutional? Even if there were direct evidence that it was intended as a partial substitute for affirmative action? Why would such a facially neutral program be considered less constitutionally suspect than a

race-conscious one if it is conceded that it is racially motivated? Isn't this at odds with the Court's decisions in Washington v. Davis and Arlington Heights, which stressed that the Court will look to race-based purpose as the touchstone of equal protection scrutiny? For arguments suggesting that such race-neutral alternatives should not trigger strict scrutiny, see Forde-Mazrui, "The Constitutional Implications of Race-Neutral Affirmative Action," 88 Geo. L.J. 2331 (2000); Sullivan, "After Affirmative Action," 59 Ohio St. L.J. 1039 (1998) (concluding that race-conscious programs remain more transparent and efficient).

6. ***The role of amicus briefs.*** Over one hundred amicus briefs were filed in support of the parties in both Grutter and Gratz. In the Court's opinions, a surprising amount of attention was paid to amicus briefs, especially the arguments of a group of retired military officers and of several major corporations who argued that the Court should find a compelling interest in maintaining racial preferences. In one amicus brief, for example, a group of well-known retired senior military officers, including General Wesley Clark and former Secretary of Defense William Cohen, stated that "a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the military's ability to fulfill its principal mission to provide national security. The primary sources for the nation's officer corps are the service academies and the ROTC, the latter comprised of students already admitted to participating colleges and universities. At present, the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies." The military officials pointed to the Vietnam era and the undermining effects of a racial hierarchy on the military: "In the 1960s and 1970s, while integration increased the percentage of African Americans in the enlisted ranks, the percentage of minority officers remained extremely low, and perceptions of discrimination were pervasive. This deficiency in the officer corps and the discrimination perceived to be its cause led to low morale and heightened racial tension." Therefore, they concluded, "the government's compelling interest in promoting racial diversity in higher education is buttressed by its compelling national security interest in a cohesive military."

Is the Court justified in comparing access to leadership positions in the military to access to leadership positions in civilian society? Consider the view that "the military service academies and officer training programs are unique gate-keeping institutions insofar as they are a sufficient condition for direct entry into leadership of an important public institution—the officer corps of the nation's armed forces. [No] civilian institution of higher learning, however prestigious, can claim to be a true gate-keeper [in this sense]. There is no such thing as a State Governors' School, a U.S. Congress academy, a federal judge academy, or a corporate chief executive officer (CEO) academy, to which anyone with qualifications can apply and acceptance to which guarantees a gubernatorial mansion, a Senate or House seat, a federal judgeship, or a CEO job upon graduation." Lee, note 1 above.

American corporations expressed views similar to those in the military brief. An amicus brief filed by sixty-five of the nation's leading corporations, ranging from American Express to Xerox, argued that "[t]he existence of racial and ethnic diversity in institutions of higher education is vital to amici's efforts to hire and maintain a diverse workforce, and to employ

individuals of all backgrounds who have been educated and trained in a diverse environment. [Such] a workforce is important to amici's continued success in the global marketplace. [First,] a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives. Second, such individuals are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those consumers. Third, a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world. Fourth, individuals who have been educated in a diverse setting are likely to contribute to a positive work environment, by decreasing incidents of discrimination and stereotyping." General Motors, in an amicus brief it filed on its own, further explained how a diverse workforce enhances profitability: "Racial minorities in the United States presently wield an impressive $600 billion in annual purchasing power. Moreover, with the global expansion of many businesses and the advent of internet shopping, the customer bases of many businesses now include people from many races and diverse cultures around the world. Having high-level employees who possess cross-cultural competence is essential for a business to profit from these vast market opportunities." "Instead of finding that the consideration of diversity leads to racial tension and stigmatization," General Motors concluded, "businesses have discovered just the opposite: valuing diversity has helped their bottom line."

7. ***Education vs. hiring and procurement.*** Consider the Court's different approaches in upholding race preferences in Grutter while invalidating them in Croson and Adarand. The Court in Grutter proved that its admonition in Adarand was not just empty words—the application of strict scrutiny does not necessarily mean "fatal in fact." But why does it seem to be less "fatal" in the education context than in the hiring and procurement contexts analyzed in Croson and Adarand? Some observers do not believe the Court adequately explained the difference: "Justice O'Connor structures her argument [in Grutter] so that preparation for the world beyond graduation has the constitutional protection of being a subset of academic freedom. [But] if affirmative action in the university is constitutional because it prepares students to become military officers, public servants, members of the bar, and civic leaders, why is not affirmative action constitutional in commissioning army officers, appointing public servants, and so forth?" Greenberg, note 2 above.

Is the Court assuming that once affirmative action enhances the opportunities available to minority applicants at the university level, the playing field is therefore level in the post-university world? Is it assuming that education and contracting reflect different structural values? Consider the view that "[i]nherent in the concept of diversity-based affirmative action is a recognition of the positive educational value of race and life experience. This differs dramatically from contracting cases involving guardrails and urinals, where affirmative action has no such theory of value." Amar & Katyal, "Bakke's Fate," 43 UCLA L. Rev. 1745 (1996).

Or is the Court giving special deference to educational institutions that it does not give to employers and contractors because the university enjoys academic freedom that other institutions in society do not? Does the Court implicitly "trust" educators to use affirmative action wisely and fairly in a

way that it does not trust others? In other contexts, the Court gives special deference to university educators in allowing them to define and implement their educational mission. For example, in Board of Regents of the University of Wisconsin System v. Southworth, below, p. 1445 (2000), the Court analyzed the constitutionality under the First Amendment of a mandatory "activities fee" charged to the students by the university to promote extracurricular activities. Students who objected to some of the groups that the fee was being used to fund claimed that the University must grant them the choice not to fund such groups, as they were offensive to their personal beliefs. The Court upheld the fee, however, giving great deference to the University's determination of its own educational mission: "[The] University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends." Is composition of a student body similarly a core aspect of such academic freedom?

Must a university's "mission" be clearly defined prior to litigation in order to receive deference from the Court, or is post hoc rationalization permissible once litigation has begun? In Grutter and Gratz, the Court seems to ascribe to universities a "mission" of training their students for leadership roles in American civic society, despite the fact that many universities do not include such a goal in their mission statements. Does it matter whether such a goal is included explicitly in a university's mission statement? Compare, for example, the University of Michigan's mission statement ("The mission of the University of Michigan is to serve the people of Michigan and the world through preeminence in creating, communicating, preserving and applying knowledge, art, and academic values, and in developing leaders and citizens who will challenge the present and enrich the future.") with the mission statement of Brown University ("The mission of Brown University is to serve the community, the nation, and the world by discovering, communicating, and preserving knowledge and understanding in a spirit of free inquiry, and by educating and preparing students to discharge the offices of life with usefulness and reputation."). What if a university has no predefined "mission" at all?

8. ***Challenges to race-based admissions preferences after Grutter.*** Though Justice O'Connor predicted in Grutter that racial preferences in university admissions might no longer be necessary in 25 years, the Court granted review a mere 9 years after the decision in Grutter in a challenge to race-conscious aspects of the affirmative action admissions policy of the University of Texas at Austin. In particular, Texas had previously adopted a "Ten Percent Plan" that increased the racial diversity of its public university classes by admitting for a portion of each class the top ten percent of graduates from every Texas high school. In practical operation, the effects of residential racial segregation meant that the top ten percent of many schools were mostly minority students. In **Fisher v. University of Texas (Fisher I)**, 570 U.S. 297 (2013), Justice KENNEDY wrote an opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, Breyer, Alito and Sotomayor, declining to strike down the use of race preferences in higher education admissions under the regime established in Grutter and Gratz but remanding for closer analysis of a Texas plan for its narrow tailoring to the goal of diversity.

On remand, the Fifth Circuit (2–1) upheld the University of Texas's affirmative action plan, without sending the case to the district court for further fact-finding. Fisher appealed.

Fisher v. University of Texas at Austin et al.

576 U.S. ___, 136 S. Ct. 2198, 195 L. Ed. 2d 511 (2016).

■ JUSTICE KENNEDY delivered the opinion of the Court.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause. [Although] the University's new admissions policy was a direct result of Grutter, it is not identical to the policy this Court approved in that case. Instead, consistent with the State's legislative directive, the University continues to fill a significant majority of its class through the Top Ten Percent Plan (or Plan). Today, up to 75 percent of the places in the freshman class are filled through the Plan. As a practical matter, this 75 percent cap, which has now been fixed by statute, means that, while the Plan continues to be referenced as a "Top Ten Percent Plan," a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.

The University did adopt an approach similar to the one in *Grutter* for the remaining 25 percent or so of the incoming class. This portion of the class continues to be admitted based on a combination of their AI and PAI scores. Now, however, race is given weight as a sub-factor within the Personal Achievement Index.

[Therefore], although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a "factor of a factor of a factor" in the holistic-review calculus.

[The] University's program is *sui generis*. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in Grutter.

Despite the Top Ten Percent Plan's outsized effect on petitioner's chances of admission, she has not challenged it. For that reason, throughout this litigation, the Top Ten Percent Plan has been taken, somewhat artificially, as a given premise.

Petitioner's acceptance of the Top Ten Percent Plan complicates this Court's review. In particular, it has led to a record that is almost devoid of information about the students who secured admission to the University through the Plan. The Court thus cannot know how students admitted solely