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## Protecting Diversity in the Ivory Tower with Liability Rules

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# Protecting Diversity in the Ivory Tower with Liability Rules

Ting Wang\*

Abstract

The two sides of the debate over race-based affirmative action in higher education tell two distinct stories – one of diversity’s benefits and the other of affirmative action’s burdens. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court found the benefits to be so compelling to society that they were deemed to outweigh the burdens. Voters in Michigan and other states found otherwise and the Court in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. — (2014) upheld their right to ban race-conscious admissions. Paradoxically, since the use of race as a “plus factor” by selective universities to admit a few underrepresented minority applicants makes possible a diverse learning environment that benefits all students on campus, the beneficiaries should far outnumber and outvote the few applicants who are displaced. But because those actually burdened are not known, the number of imagined victims is easily inflated in the mind of electorate. In highlighting this and other shortcomings of the *Grutter* regime, this article proposes that if the benefits of diversity outweigh the burdens, the universities should be able to demonstrate this favorable cost-benefit ratio by accommodating the real burden-bearers.

Accommodation could come in the form of direct compensation for the displaced students or indirect burden-shifting – getting others to give up their seats. Shifting the

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burden to those who are more willing to bear it can lower the cost of settlement. In-kind benefits and gifts could be used instead of monetary compensation. Addressing the displacement burden would reduce much of the grievances against racial preferences in admissions, and reveal to the public how little affirmative action affects the vast majority of applicants. Of course, it would impose costs on the university, but the willingness of universities to take on these costs also demonstrates their commitment to the benefits of diversity. A skeptical Court in *Fisher v. University of Texas*, 570 U.S. — (2013) remanded for lower courts to determine whether race-conscious admissions are still necessary when the university was already achieving on-campus diversity through race-neutral means. Accommodation could provide a convincing showing that the extra benefits from using the race-plus factor are indeed worth the costs.

Lastly, accommodation would give universities a much stronger incentive to address the academic achievement gap across racial groups, which makes affirmative action necessary in the first place. *Grutter* permits the use of race in admissions for 25 years to eliminate this gap. But scant evidence of progress over the past decade raises concerns that the universities are perpetuating the gap by holding students of different racial groups to different standards. If accommodation is required, universities would find it in their interest to encourage those minority students who could be accepted with the help of the race-plus factor to improve their academic credentials further so they could be admitted without triggering the need to accommodate a displaced applicant. Only then will the gap start to narrow and lead to the realization of *Grutter*'s goal – achieving diversity without resorting to race-conscious means.

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## I. Introduction

Ten years after *Grutter v. Bollinger* endorsed the University of Michigan Law School's race-conscious admissions program with a 25-year operating license, the same dispute returned to the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action* after Michigan's voters approved a state constitutional ban of racial preferences.<sup>1</sup> The High Court, in affirming the right of the electorate to effectively reverse itself, has cleared the way for more states to overturn *Grutter* via the political process.<sup>2</sup> For supporters of affirmative action who had won the proverbial battle but are now losing the war, this turnabout is both paradoxical and predictable.

It is paradoxical because affirmative action in higher education should be a consistent political winner. When selective colleges and universities ("schools") consider the race of a few of underrepresented minority applicants as a "plus factor" to accept them, they create diverse learning environments that benefit all students on their campuses. The *Grutter* Court agreed with *amici* that graduates of these schools go on to contribute to society as better citizens, professionals, and ultimately, leaders in a diverse, inclusive and united country.<sup>3</sup> Hence, the educational benefits of diversity were held to be compelling to the government, and could justify, at least for a time, race-conscious means to achieve diversity. Using racial preferences to admit a few minority applicants also displaces an equally few if not fewer number of other applicants who would have been accepted had the admissions policy been "race-neutral." These rejected applicants, who bear the true displacement burden of affirmative action, are far outnumbered by the beneficiaries of diversity. When the numbers are such, affirmative action's supporters ought to consistently outvote its opponents.<sup>4</sup> In Michigan, the three counties with state

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1. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2. For states that have already banned affirmative action in public higher education, see *infra* Table 1 and note 22. For states that may be planning anti-affirmative action ballot initiatives, see *infra* note 272.

3. *Grutter*, 539 U.S. at 331-32.

4. See *infra* Part III.B.2.

universities expressly targeted by the proposed constitutional ban all voted against the ban.<sup>5</sup>

The turnout is predictable because of a common misperception about the impact of admissions preferences. Selective schools reject far more applicants than they admit but those actually displaced by racial preferences constitute only a small fraction of the rejected applicant pool. Since these real cost-bearers are not identified, many more rejected applicants (and their parents and sympathizers) will blame or resent affirmative action.<sup>6</sup> As the competition to gain admission to selective schools increases, so does misplaced resentment against race-conscious admissions policies. Those who do not get to participate in the diverse learning environment are also less likely to believe the benefits of diversity. Thus when the perceived cost of the program is inflated and its benefits are undervalued, the otherwise favorable cost-benefit balance is subverted and the public will vote to ban, as all 80 of Michigan's other counties did.<sup>7</sup>

To counter this dynamic, this article proposes that schools should accommodate the few who are really displaced to dispel the misplaced resentment of the many. Only then could the public understand that rather than a social engineering project of mythic proportions, affirmative action has always been a limited, marginal remedy used by some selective schools to create racially-diverse campuses that help far more than burden. The rule-maker, whether a judge, legislator or voter, can modify the current *Grutter* regime by requiring that schools "internalize" the burdens they create from using race in admissions. A school can internalize the burden by accommodating those who are displaced or other applicants who agree to take on the burden. Accommodation, which can be monetary, gift-oriented or in-kind, induces the displaced applicants or other eligible applicants to give up their claim to a seat for a race-plus admit.

So long as a school can certify that it has accounted for the burdens from each use of the race-plus factor, its admissions

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5. See *infra* note 55.

6. See *infra* Part III.B.2.

7. See *infra* note 55.

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program should be deemed “narrowly tailored” to satisfy the Court’s strict scrutiny standard. Such a regime would be simpler for judges to review than any test that relies on the schools’ “complex educational judgments” which have confounded the courts.<sup>8</sup> Furthermore, accommodation would demonstrate that no one is made worse off in the course of creating a racially-diverse campus, so the public could be assured that the benefits of diversity do indeed outweigh the burdens.

Schools have been reluctant to identify the applicants they displace because (1) they have not had to, (2) they fear litigation, (3) they do not know how to settle with these individuals, and (4) it might be costly. This article asserts that the schools should settle when the cost of not settling is higher.<sup>9</sup> Faced with outright bans across the country, schools can no longer ignore the displacement impact of their admissions policies. In exchange for taking on the burden of admissions prices, schools would be shielded from liability for their race-conscious admissions decisions. The switch from absolute to conditional legal protection for affirmative action allows for more flexible accommodation mechanisms based on liability rules, which are more adept at drawing out private valuations and lowering settlement costs.<sup>10</sup> The actual burden on the displaced is believed to be light, and the settlement mechanism can cost-shift and allow others to take on the burden for less. If compensatory transactions raise moral concerns about commodifying admissions, accommodation could be arranged through gifts in accord with the concept of market-inalienability.<sup>11</sup>

The accommodation requirement would prompt schools to do more about the academic achievement gap across racial groups, the real cause for the need to use race in admissions. The Court in *Grutter* recognized this problem and required schools to use the race-plus factor not only to overcome the gap but to narrow it. Over the past decade, however, the

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8. *Grutter*, 539 U.S. at 328. For a discussion of the remand in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), see *infra* Part IV.B.

9. For Michelman’s efficiency model, see *infra* Part IV.D.

10. For Calabresi and Malamed’s liability rules, see *infra* Part V.A.

11. For Radin’s market-inalienability rules, see *infra* Part V.C.

achievement gap has remained virtually unchanged.<sup>12</sup> The lack of progress shows that the schools are not prepared for *Grutter*'s sunset, and may be vulnerable to criticism that they are helping to perpetuate the achievement gap by holding applicants of different racial groups to different standards.<sup>13</sup> Once the schools begin to internalize the burden, they will have much greater incentive to expand the pipeline of minority students who can be admitted without the help of race as a plus factor.<sup>14</sup> When schools can achieve diversity entirely through such applicants, they would no longer need to accommodate anyone, and the accommodation requirement proposed here will obviate itself.

This article is composed of six parts. The political backlash against affirmative action in higher education (discussed in Part I) is aggravated by several shortcomings in the *Grutter* regime (identified in Part II). In Part III, the benefits of diversity and burdens of affirmative action are examined in turn and then analyzed together using a cost-benefit analysis that also considers the cost of ignoring the problem of inflated burdens. Part IV explains the paradigm shift proposed in this article from the standpoint of liability rules, constitutional jurisprudence and the critique of market inalienability. Part V outlines various designs for the accommodation mechanism that schools could choose from and customize. Part VI assesses the impact of accommodation on schools, students, and society.

## II. Political Backlash

In the decade since the nine Justices decided *Grutter v. Bollinger*, more than nine million citizens have cast their own votes on the constitutionality of race-based affirmative action.<sup>15</sup> State actions permitted by the Federal Constitution can nevertheless be banned by state constitutions and laws.<sup>16</sup> From 2003 to 2012, four states – Michigan, Nebraska, Arizona and

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12. *See infra* Part III.B.3.

13. *See infra* Part III.B.4.

14. *See infra* Part VII.A.

15. *See infra* Table 1 and note 22.

16. "Grutter never said, or even hinted, that state universities must do what they narrowly may do." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 249 (6th Cir. 2006).

Oklahoma – through voter initiatives, amended their state constitutions to bar race-based admissions preferences at state universities, joining California and Washington whose electorates had approved earlier bans.<sup>17</sup> In 2014, the Supreme Court upheld the right of voters to do so in *Schuette*, effectively foreclosing further court challenges against such enactments by affirmative action’s supporters.<sup>18</sup> Counting New Hampshire, where the state legislature passed a statutory ban in 2011,<sup>19</sup> and Florida, where racial preferences in admissions were ended via executive order,<sup>20</sup> more than a quarter of the country now lives in states that have ended affirmative action through the political process.<sup>21</sup>

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17. See *infra* Table 1 and note 22.

18. *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012), *rev'd*, *Schuette v. Coal. to Defend Affirmative Action*, 132 S. Ct. 1623 (2014).

19. H.B. 623, 2011 Gen. Ct., 162nd Sess. (N.H. 2011) (became effective on Jan. 1, 2012).

20. Fla. Exec. Order No. 99-281 (1999).

21. Based on a tally of the 2010 U.S. Census figures. *2010 Census Data*, U.S. CENSUS 2010, <http://www.census.gov/2010census/data/> (last visited May 31, 2015).

Table 1: Anti-Affirmative Action Initiatives Decided by Voters<sup>22</sup>

<i>State</i>	<i>Year</i>	<i>Initiative</i>	<i>Votes For</i>	<i>Pct.</i>	<i>Votes Against</i>	<i>Pct.</i>	<i>Enactment, if any</i>
California	1995	Proposition 209	5,268,462	54.6%	4,388,733	45.4%	CAL. CONST. Art. 1, § 31
Washington	1998	Initiative 200	1,099,410	58.2%	788,930	41.8%	WASH. REV. CODE § 49.60.400 (1999).
Michigan	2006	Proposal 2	2,141,010	57.9%	1,555,691	42.1%	MICH. CONST. Art. 1, § 26.
Colorado	2008	Amendment 46	1,102,046	49.2%	1,138,134	50.8%	-
Nebraska	2008	Initiative 424	404,766	57.6%	298,401	42.4%	NEB. CONST. Art 1, § 30.
Arizona	2010	Proposition 107	952,086	59.5%	647,713	40.5%	ARIZ. CONST. Art. 2, § 36
Oklahoma	2012	State Question 759	745,854	59.2%	514,163	40.8%	OKLA. CONST. Art. 2, §36

Far from settling, even temporarily, the great affirmative action debate, *Grutter* has merely pushed it from the judicial to the political arena.<sup>23</sup> With the change of venue, affirmative

22. For sources of voting results, see *State of Arizona Official Canvass 1*, ARIZ. SEC'Y OF STATE (2010), available at <http://www.azsos.gov/election/2010/General/Canvass2010GE.pdf>; SUPPLEMENT TO THE STATEMENT OF VOTE 34-36, CAL. SEC'Y OF STATE (1996), available at <https://www.sos.ca.gov/elections/sov/1996-general/ssov/ssov-complete.pdf>; OFFICIAL PUBLICATION OF THE ABSTRACT OF VOTE CAST FOR THE 2008 PRIMARY 2008 GENERAL 137, COLO. SEC'Y OF STATE (2008), available at [http://www.sos.state.co.us/pubs/elections/Results/2008/2008\\_Abstract.pdf](http://www.sos.state.co.us/pubs/elections/Results/2008/2008_Abstract.pdf); *November 7, 2006 Election Results, State Proposal – 06-2: Constitutional Amendment to Ban Affirmative Action Programs*, MICH. SEC'Y OF STATE (2006) [hereinafter *Michigan 2006 Results*], <http://miboe CFR.nicusa.com/election/results/06GEN/90000002.html> (last visited Mar. 15, 2015); *November 6, 2012 Official Results: Federal, State, Legislative and Judicial Races*, OKLA. STATE ELECTION BD. (2012), available at [http://www.ok.gov/elections/support/12gen\\_seb.html](http://www.ok.gov/elections/support/12gen_seb.html) (last visited Mar. 15, 2015); *November 3, 1998 General Election Results*, WASH. SEC'Y OF STATE (1998), [http://www.sos.wa.gov/elections/results\\_report.aspx?e=10&c=&c2=&t=&t2=&p=&p2=&y=](http://www.sos.wa.gov/elections/results_report.aspx?e=10&c=&c2=&t=&t2=&p=&p2=&y=) (last visited Mar. 15, 2015).

23. See, e.g., EndRacePreferences, *Opposition Member Harasses and*

action's opponents have seized on the promise of race-blind equality and adopted the rhetoric of the Civil Rights Movement.<sup>24</sup> Affirmative action's supporters have fought back vigorously through litigation and political mobilization,<sup>25</sup> but have only slowed the advance of the "civil rights initiatives." They have kept the question off the ballot in several states,<sup>26</sup> and narrowly defeated Colorado's Amendment 46 in 2008.<sup>27</sup> But efforts to turn the tide, to have the public endorse affirmative action, have been unsuccessful. A counter-initiative in Colorado failed to gather enough signatures in 2008.<sup>28</sup> An upswell of

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*Intimidates OkCRI Circulator*, YOUTUBE (uploaded Nov. 14, 2007), <https://www.youtube.com/watch?v=Csr2rnWvn94> (supporters and opponents of affirmative action arguing in the parking lot of Tulsa grocery store).

24. See ARIZONA BALLOT PROPOSITION GUIDE: ARGUMENTS "FOR" PROPOSITION 107 34, ARIZ. SEC'Y OF STATE (2010) [hereinafter ARGUMENTS "FOR" PROPOSITION 107], available at [apps.azsos.gov/election/2010/info/PubPamphlet/english/prop107.pdf](http://apps.azsos.gov/election/2010/info/PubPamphlet/english/prop107.pdf) (statement by Steve Montenegro, State Representative, Litchfield Park, invoking the words of the Rev. Martin Luther King, Jr.); NOVEMBER GENERAL ELECTION PUBLICITY PAMPHLET, ARIZ. SEC'Y OF STATE (2010), [http://apps.azsos.gov/election/2010/Info/Misc\\_Info.htm](http://apps.azsos.gov/election/2010/Info/Misc_Info.htm) (last visited Mar. 15, 2015); INFORMATIONAL PAMPHLET: ARGUMENTS FOR AND AGAINST INITIATIVE 424, NEB. SEC'Y OF STATE (2008), available at <http://www.sos.ne.gov/elec/2008/pdf/pamphlet%20424.pdf> ("This constitutional amendment mirrors the landmark 1964 Civil Rights Act and advances true equality and fairness by prohibiting discrimination and preferential treatment based on race, gender, and color.").

25. See, e.g., Melissa Hart, *The State-by-State Assault on Equal Opportunity*, AM. CONST. SOC'Y FOR L. & POL'Y 1, 10-13 (Sept. 2008), available at [http://www.acslaw.org/sites/default/files/Hart\\_issue\\_brief.pdf](http://www.acslaw.org/sites/default/files/Hart_issue_brief.pdf); Jessica Larson & Stephen Menendian, *Anti-Affirmative Action Ballot Initiatives*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY 1, 3-12 (Dec. 2008), available at [http://www.kirwaninstitute.osu.edu/reports/2008/12\\_2008\\_AntiAffirmativeActionBallotInitiatives.pdf](http://www.kirwaninstitute.osu.edu/reports/2008/12_2008_AntiAffirmativeActionBallotInitiatives.pdf); see also Valerie Richardson, *Colorado Takes Aim at Race, Sex Preferences*, WASH. TIMES (Apr. 24, 2007), <http://www.washingtontimes.com/news/2007/apr/24/20070424-121644-1418r/?page=all>; Naomi Zeveloff, *Affirmative Attack: Colorado Diversity Programs Targeted Again*, COLO. SPRINGS INDEP. (May 3, 2007), <http://www.csindy.com/coloradosprings/affirmative-attack/Content?oid=1138314>.

26. Hart *supra* note 25, at 10-11; Larson & Menendian, *supra* note 25, at 3-7.

27. See Colleen Slevin, *Colorado Voters Reject Affirmative Action Ban*, ASPEN TIMES (Nov. 7, 2008), <http://www.aspentimes.com/article/20081107/NEWS/811079959>.

28. Hart *supra* note 25, at 11-12 (discussing Colorado Initiative 82).

Asian-American opposition in the spring of 2014 halted a California State Senate proposal to ask voters to reinstate race-conscious admissions.<sup>29</sup>

The involvement of more people, resources and passion has not brought greater clarity to this controversy. Despite overwhelming *amici* support for diversity in higher education, which persuaded the *Grutter* majority that race-conscious admissions benefits society as a whole, the supporters cannot show that the benefits of diversity outweigh the burdens of affirmative action. Though very few applicants are actually displaced by the race-plus preference, there are no publicly available figures, and the fear of being harmed is easily inflated in the mind of the public,<sup>30</sup> especially as acceptance rates at selective schools fall into the single digits<sup>31</sup> and opponents make personal appeals about being wronged by race-based preferences.<sup>32</sup>

To understand the causes of the political backlash against *Grutter*, we must begin with the opinion itself.

### III. *Grutter*'s Legacy

#### A. *What Grutter Decided*

*Grutter* is commonly thought of as a narrowly decided 5-4 opinion, but it could also be read as a three-part ruling with support from five, six and seven Justices. The central doctrinal feature of *Grutter* is the Court's recognition that the benefits of

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29. Katy Murphy, *California Asian-Americans Show Strength in Blocking Affirmative Action Revival*, SAN JOSE MERCURY NEWS (Mar. 17, 2014, 6:07 PM), [http://www.mercurynews.com/education/ci\\_25363174/california-asian-americans-show-strength-blocking-affirmative-action?source=pkg](http://www.mercurynews.com/education/ci_25363174/california-asian-americans-show-strength-blocking-affirmative-action?source=pkg).

30. See *infra* Part III.B.2 for an illustration of the actual extent of displacement at the Michigan Law School in *Grutter* and explanation of the inflated burden.

31. Twelve colleges and universities rejected more than ninety percent of their applicants during the fall 2013 admissions cycle. *Best College Rankings and Lists: Top 100 – Lowest Acceptance Rates*, U.S. NEWS & WORLD REPORTS, <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/lowest-acceptance-rate?src=stats> (last visited Mar. 15, 2015).

32. See, e.g., ARGUMENTS “FOR” PROPOSITION 107, *supra* note 24, at 35, 37 (statements by Jennifer Gratz of Sacramento, California and Frank Ricci of Wallingford, Connecticut).

diversity in higher education are compelling to the government and could justify racial preferences in admissions. This position actually drew the support of six Justices, the five who signed Justice O'Connor's majority opinion and Justice Kennedy, who dissented on other grounds.<sup>33</sup> They were persuaded that diversity in higher education helps foster a more cohesive country, especially in the training of future leaders<sup>34</sup> and reaffirmed Justice Powell's single-vote endorsement of the diversity rationale in *Bakke*.<sup>35</sup>

The main operative feature of *Grutter*, also the narrowest part of the holding, focuses on how schools may use race to achieve diversity. With quotas already banned by *Bakke* and extra points in admissions formulas struck down in *Gratz*, the five Justices of the O'Connor majority settled on using race as a "plus factor" in a school's individualized review of applications as the only permissible racial preference.<sup>36</sup> The concept of individualized or holistic review had also been endorsed by Justice Powell in *Bakke*, who praised the admissions program of Harvard College ("Harvard Plan") for considering applicants individually, as opposed to data points in formulas, and looking for personal qualities "that may contribute to educational

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33. *Grutter v. Bollinger*, 539 U.S. 306, 392-93, 395 (2003) (Kennedy, J., dissenting) ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity . . .").

34. *Id.* at 308, 342, 332 ("Universities . . . represent the training ground for a large number of the Nation's leaders . . . [N]othing less than 'the nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.")

35. Justice Powell, whose opinion bridged a pair of opposing four-justice voting blocks and became the ruling of the Court, was the only Justice in *Bakke* to mention the diversity rationale. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-14 (1978). Justice Powell had characterized the government as holding "a *substantial* interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 322-23 (emphasis added). *Grutter* upgraded this interest to compelling status. *Grutter*, 539 U.S. at 325. Justice Kennedy agreed. *Grutter*, 539 U.S. at 325 (Kennedy, J., dissenting) ("[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions.")

36. See *Gratz v. Bollinger*, 539 U.S. 244, 295-97 (2003); *Grutter*, 539 U.S. at 325, 328.

pluralism.”<sup>37</sup> According to the Harvard Plan, when two equally admissible applicants are compared as individuals, the race of the minority applicant might be deemed a plus that “may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other.”<sup>38</sup>

To Justice Powell’s explanation of individualized admissions review, the O’Connor majority added the concept of “**critical mass**,” defined more or less as the “meaningful numbers” of underrepresented minority students that a school needs to enroll to produce the kind of educational benefits that the government finds compelling.<sup>39</sup> Rejected applicants are not unduly harmed by the race-based preferences, Justice O’Connor concluded, citing Justice Powell, who had reasoned that since these applicants were also reviewed individually for their potential to contribute to diversity on campus, they would “have no basis to complain of unequal treatment.”<sup>40</sup> In effect, the O’Connor majority found individualized review, as opposed to quotas or formulas, to have reduced the impact of race on applicants of non-favored races sufficiently that whatever burdens they may complain of are far outweighed by the important benefits that diversity provides.<sup>41</sup>

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37. See *Bakke*, 438 U.S. at 316 (listing qualifications valued by the Harvard Plan: “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”); cf. *Grutter*, 539 U.S. at 314-15 (“Law School looks for individuals [who can contribute] in diverse ways to the well-being others.” The admissions policy assesses applicants for their “potential ‘to contribute to the learning of those around them . . . policy 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.’”).

38. *Bakke*, 438 U.S. at 323. Similarly, *Grutter* permits schools to “consider race or ethnicity only as a ‘plus’ in a particular applicant’s file . . . [along with] all [other] pertinent elements of diversity . . . of the particular qualifications of each applicant . . . although not necessarily according them the same weight.” *Grutter*, 539 U.S. at 334. This race-plus factor could be “outcome determinative” to the extent that the “plus” given to “the race of an applicant may tip the balance in [favor of his admission].” *Id.* at 339.

39. *Grutter*, 539 U.S. at 316.

40. *Id.* at 441 (citing *Bakke*, 438 U.S. at 318).

41. “To be narrowly tailored, a race-conscious admissions program must not ‘unduly burden individuals who are not members of the favored racial and ethnic groups.’” *Grutter*, 539 U.S. at 341 (emphasis added) (citing *Metro Broad. Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O’Connor, J., dissenting)). Justice

Justice Kennedy differed from the majority not so much in how individualized review is designed to work – he lauded the race-conscious admissions programs of the “Little Ivy League” liberal arts colleges – but expressed doubts about how race was actually being used by the Michigan Law School.<sup>42</sup> He noted that the enrollment of underrepresented minority students fluctuated very slightly from year to year and that the admissions office actively tracked the number of minority applicants accepted on a daily basis.<sup>43</sup> To him, these were signs that the school was trying to fulfill quasi-quota targets.<sup>44</sup> The degree to which race-conscious admissions programs ought to be scrutinized by the courts remains a point of controversy in *Fisher* whose opinion was written by Justice Kennedy.<sup>45</sup>

The part of the *Grutter* ruling that received the broadest support is the durational limit on the use of race in admissions.<sup>46</sup> Having extolled the virtues of diversity, Justice O’Connor nevertheless reaffirmed the “core purpose of the Equal Protection Clause of the Fourteenth Amendment” to “do away with all governmentally imposed discrimination based on race” and made clear that the use of race in admissions cannot continue indefinitely.<sup>47</sup> She urged schools to search actively for

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O’Connor then concluded, “[w]e agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program *does not unduly harm nonminority applicants.*” *Id.* (emphasis added). See also *infra* Part V.C. for further discussion of the burden and *infra* Part V.B. on the Court’s balancing of the benefits and burdens through the strict scrutiny test.

42. *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting).

43. *Id.* (noting that, in contrast, the liberal arts colleges did “not keep ongoing tallies of racial or ethnic composition of their entering students.”).

44. *Id.* (“The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself. . . . The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School.”).

45. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013); see *infra* Part IV.B.

46. On this point, Justice O’Connor directly rebutted the Sixth Circuit, which declined to impose a durational requirement and was satisfied that “the Law School intends to consider race and ethnicity to achieve a diverse and robust student body only until it becomes possible to enroll a ‘critical mass’ of under-represented minority students through race-neutral means.” *Grutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002).

47. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

race-neutral means to achieve campus diversity so they could terminate their race-conscious admissions programs “as soon as practicable.”<sup>48</sup> She expressed “hope” that efforts to improve education of underrepresented minority students will narrow the “achievement gap” so that race-conscious measures will no longer be necessary in 25 years’ time.<sup>49</sup> This sunset clause drew concurrences from Justices Thomas and Scalia.<sup>50</sup>

Hence, *Grutter* marks the beginning of a transition in American higher education from race-conscious to race-neutral or race-blind means to achieve campus diversity. The Court realized that the need to use race in admissions arises from the achievement gap, which leaves a shortage of competitive underrepresented minority applicants for selective schools to assemble critical masses via race-neutral or race-blind methods, so the success of the transition turns on efforts to narrow the achievement gap. To this end, Justice O’Connor held that race-conscious admissions programs approved in *Grutter* (the “Grutter regime”) must not only produce campus diversity but must also eliminate the achievement gap itself. The “acid test” for race-conscious admissions programs, she noted, “will be their efficacy in eliminating the need for any racial or ethnic preferences at all.”<sup>51</sup>

### B. *Grutter’s Shortcomings*

*Grutter* gave race-conscious admissions policy a considerable judicial lease, but the ballot box backlash against affirmative action is undermining the regime well before the sunset period has elapsed. Though the reasons for the backlash

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48. *Id.* at 343. The Supreme Court was more forceful about this requirement than the Sixth Circuit, which was content to accept that the “admissions policy is ‘sensit[ive] to the possibility that [it] might someday have satisfied its purpose.’” *Grutter*, 288 F.3d at 752.

49. *Grutter*, 539 U.S. at 310 (“The court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

50. *See id.* at 349 (Thomas, J., concurring in part, dissenting in judgment); *id.* at 347 (Scalia, J., concurring); *see also id.* at 344 (Ginsberg, J., concurring).

51. *Grutter*, 539 U.S. at 343 (quoting Nathaniel Nathanson & Casimir J. Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 CHI. B. REC. 282, 293 (May–June 1977)).

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are manifold, several flaws in the *Grutter* regime itself are contributing to its demise. The *Grutter* regime obscures the true benefit-balance of diversity programs, leaving doubters unconvinced of diversity's benefits, and supporters deprived of facts to dispel public misconceptions. The regime provides no way to track the transition toward the race-neutral future it mandates and may in fact be creating headwinds against the transition. Any reforms to the regime must address these flaws.

### 1. A Polarized Debate

For decades, supporters of affirmative action have touted the benefits of diversity while skeptics complained about the unfairness of displacement by racial preferences. This division in the debate is reinforced by the way race-conscious admissions programs keep the two sides from seeing each other's claims. Diversity is an experienced good; one has to experience the diverse learning environment to appreciate its benefits. Students in this environment are surrounded by fellow beneficiaries and express strong support for affirmative action. In a 1999 Gallup survey, 91% of students at the Michigan Law School reported diversity as having a positive impact on their educational experience.<sup>52</sup> These students, however, are less likely to consider the grievances felt by those who think they were harmed by admissions preferences because those individuals have been rejected out of view.<sup>53</sup>

The rejected applicants who do not get to partake in the diverse learning environment are less likely to believe the benefits. They are more likely to complain about the unfairness of getting displaced. This difference in perspective is neatly encapsulated in the case of Patrick Hamacher and his girlfriend, Kathleen Hadden. Hamacher, who is white, was rejected by the University of Michigan and became a co-plaintiff in *Gratz*.

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52. See Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143, 160-61 (Gary Orfield & Michal Kurlaender eds., 2001). The survey interviewed 81% of the students at Michigan Law School and Harvard Law School. *Id.* at 154.

53. Transcript of Oral Argument at 51, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (Justice Scalia noting that those particular Michigan Law School students had already been admitted).

Hadden, who is also white, disagrees with his lawsuit because she attended the University and feels the racially-diverse learning environment enriched her educational experience.<sup>54</sup> The difference in perception is also reflected in voting patterns on Proposal 2, which prevailed in 80 of Michigan's 83 counties.<sup>55</sup> The three counties that had majority "no" votes happen to be home to the three universities, Michigan, Michigan State and Wayne State, which Proposal 2 expressly targeted. Wayne County, home to Detroit, had a population that was just over 40% black, but the other two counties, Ingham and Washtenaw, were over three-quarters white.<sup>56</sup> Their votes reflect the concentration of diversity's beneficiaries in and around the campuses where the benefits are created and most keenly felt.<sup>57</sup>

The *Grutter* majority was persuaded by the beneficiaries, and allowed the benefits that flow from student body diversity to override the burdens cited by the opponents, who were infuriated by the ruling and unconvinced of its conclusions.<sup>58</sup> Despite calls for dialogue, the two sides entrenched in their fixed positions continue to talk past each other.<sup>59</sup> As hundreds of

54. Jacques Steinberg, *3 Look to College Suit to Show Their Merits*, N.Y. TIMES (Feb. 23, 2003), <http://www.nytimes.com/2003/02/23/us/3-look-to-college-suit-to-show-their-merits.html>.

55. See the following table:

Table A: Proposal 2 results – five counties with the highest percentage of "No" votes.

County	"Yes" votes	"No" Votes	"Yes" pct.	"No" pct.
Wayne	254,545	367,716	40.9%	59.1%
Washtenaw	55,796	75,427	42.5%	57.5%
Ingham	49,539	53,235	48.2%	51.8%
Kalamazoo	48,504	43,489	52.7%	47.3%
Isabella	9,852	8,543	53.6%	46.4%

*Michigan 2006 Results*, *supra* note 22.

56. See *Estimated Population of Michigan by Age, Race and Sex: 2000-2008*, MICH. DEP'T TECH., MGMT. & BUDGET [hereinafter *Michigan Population*], [http://www.michigan.gov/cgi/0,4548,7-158-54534\\_51713\\_51714-214745--,00.html](http://www.michigan.gov/cgi/0,4548,7-158-54534_51713_51714-214745--,00.html) (last visited Apr. 6, 2015).

57. The two counties with the next highest proportions of votes against Proposal 2, Kalamazoo and Isabella, are home to Western Michigan University and Central Michigan University, respectively. See Table A, *supra* note 55. Both counties had populations over 80% white. See *Michigan Population*, *supra* note 56.

58. See *infra* Parts III.B.2, IV.C.

59. See, e.g., Rachel L. Swarns, *Delicate Obama Path on Class and Race Preferences*, N.Y. TIMES (Aug. 3, 2008),

thousands go through the ordeal of applying to college and graduate school each year, fresh recruits are added to each side of this polarizing controversy.

The benefits of diversity have broad cross-racial appeal, but racial preferences are divisive. In a nationwide survey of over 1,800 high school juniors conducted in May of 2004, 82% considered racial preferences to be unfair and 78% said using race, ethnicity and religious background as admissions factors affects the way non-minority students feel about minority students.<sup>60</sup> But two-thirds felt they benefited from diversity in high school, and 70% said it was important to have a diverse environment at the college they attend.<sup>61</sup> In other words, the majority of those surveyed wants the benefits of diversity but is concerned about the burdens of racial preferences.<sup>62</sup>

The fear and disappointment of rejection along with perceived unfairness of racial preferences can create potent political opposition to affirmative action. Younger generations of voters with fresh memories of their own experience with admissions in higher education are more likely to oppose affirmative action. A national poll conducted in 2003 found young people between ages 18 and 27 opposed affirmative action by a much greater margin, 67% against to 22% in favor, than those over age 65, whose opposition to affirmative action ran 45% to 34%.<sup>63</sup> Unwilling to wait for *Grutter* to sunset, the

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[http://www.nytimes.com/2008/08/03/us/politics/03affirmative.html?pagewanted=1&\\_r=0](http://www.nytimes.com/2008/08/03/us/politics/03affirmative.html?pagewanted=1&_r=0) (John Payton, director of the NAACP Legal Defense and Education Fund, calling for a thoughtful national conversation about race and class).

60. Laura Kujawski, *Students Value Diversity in High School and College*, PNNONLINE (Sept. 22, 2004), [http://www.amren.com/news/2004/09/students\\_value/](http://www.amren.com/news/2004/09/students_value/) (reporting the results of the survey conducted by National Research Center for College and University Admissions).

61. *Id.*

62. In a survey of medical students at Harvard University and the University of San Francisco, 86% reported that diversity had enhanced their learning experience, but only 57% expressed support for affirmative action. Dean K. Whitla et al., *Educational Benefits of Diversity in Medical School: A Survey of Students*, 78 ACAD. MED. 460, 466 (2003).

63. David Savage, *Bush's Opposition to Racial Preferences Gets Big Support*, L.A. TIMES, Feb. 6, 2003, at 16. In April 2014, a survey by MTV of 14-24 year-old millennials' found significant majorities of both young white people (74%) and people of color (65%) opposed preferential treatment given to one race over another, regardless of historical inequalities. MTV STRATEGIC

INSIGHTS & DAVID BINDER RES., BIAS SURVEY SUMMARY 4 (2014), available at [http://cdn.lookdifferent.org/content/studies/000/000/001/DBR\\_MTV\\_Bias\\_Survey\\_Executive\\_Summary.pdf?1398858309](http://cdn.lookdifferent.org/content/studies/000/000/001/DBR_MTV_Bias_Survey_Executive_Summary.pdf?1398858309).

Public polling of attitudes toward affirmative action is heavily influenced by how the question is phrased. Four national polls, conducted from May through June of 2013, yielded disparate results, which are compared below:

Table B: Summary of Polls and Surveys

Poll	Question	Response	Margin of Error	Sample Size
NYT-CBS	Do you favor or oppose affirmative action programs for minorities in hiring, promoting and college admissions?	Favor 53% Oppose 38%	±3%	1,022
NBC-WSJ	Now let me read you two brief statements on affirmative action programs, and ask which one comes closer to your own point of view. A: Affirmative action programs are still needed to counteract the effects of discrimination against minorities, and are a good idea as long as there are no rigid quotas. B: Affirmative action programs have gone too far in favoring minorities, and should be ended because they unfairly discriminate against whites.	A: 45% B: 45%	±3.1%	1,000
WaPo-ABC	Do you support or oppose allowing universities to consider applicants' race as a factor in deciding which students to admit?	Support 22% Oppose 76%	±3.5%	≈1,000
PRRI	In order to make up for past discrimination, do you favor or oppose programs which make special efforts to help blacks and other minorities get ahead? Do you think blacks and other minorities should receive preference in college admissions to make up for past inequalities, or not?	Favor 68% Oppose 24%  Yes 29% No 64%	±3.1%	1,000

PUB. RELIGION RES. INST., PRRI RELIGION AND POLITICS TRACKING POLL (2013), available at <http://publicreligion.org/site/wp-content/uploads/2013/05/May-Religion-Politics-Topline1.pdf>; *America's Views on the Issues*, N.Y. TIMES, [http://www.nytimes.com/interactive/2013/06/06/us/new-york-times-cbs-news-poll-june-2013.html?\\_r=1&](http://www.nytimes.com/interactive/2013/06/06/us/new-york-times-cbs-news-poll-june-2013.html?_r=1&) (last updated June 6, 2013); Domenico Montanaro, *NBC News/WSJ Poll: Affirmative Action Support at Historic Low*, NBC NEWS

opponents have found success taking their grievance-oriented message directly to the electorate.<sup>64</sup> In this regard, they have been aided by a powerful but misplaced force, the “false burden-bearer” effect.

## 2. False Victim Effect

According to a 1995 California poll that found strong public support for banning race-based preferences (71.7% in favor versus 21.6% against), more than half of the respondents said they personally knew someone who was hurt by affirmative action, and nearly three-fifths said they did not know anyone who was helped.<sup>65</sup> Proposition 209 was approved the following year. The public’s perception is distorted by the lack of accurate information about affirmative action, whose adverse impact is often greatly overstated.<sup>66</sup>

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(June 11, 2013 4:41 AM), [http://firstread.nbcnews.com/\\_news/2013/06/11/18885926-nbc-news-wsj-poll-affirmative-action-support-at-historic-low](http://firstread.nbcnews.com/_news/2013/06/11/18885926-nbc-news-wsj-poll-affirmative-action-support-at-historic-low); *Post-ABC Poll: Same-Sex Marriage and Affirmative Action*, WASH. POST (June 11, 2013), [http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/06/11/National-Politics/Polling/question\\_11128.xml?uuid=-Z5dxtKIEeKzojv16ze50A](http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/06/11/National-Politics/Polling/question_11128.xml?uuid=-Z5dxtKIEeKzojv16ze50A). In these polls, public support for affirmative action tends to be stronger when the program is described as broadly helping minorities, as shown in the *New York Times*/CBS News (“NYT-CBS”) poll. The NBC News/*Wall Street Journal* (“NBC-WSJ”) poll, which shows an even split over continuing or ending affirmative action, found support for continuing it at a historic low. The *Washington Post*/ABC (“WaPo-ABC”) poll, which specifically asked about universities’ consideration of race in the admission process, drew majority opposition from whites, blacks, and Hispanics. The dichotomy in attitude toward helping minorities “get ahead” and giving race-based preferences in admissions is vividly captured in the Public Religion Research Institute (“PRRI”) poll, which found 68% supporting the former and 64% opposing the latter (including 57% who had supported the first question). This disparity is also reflected in other polls regarding affirmative action over the past decade. In short, the public appears to be much more sensitive about race-based preferences in admissions than other types of affirmative action programs.

64. Two weeks after the Supreme Court released the *Gratz* and *Grutter* decisions in June 2003, Jennifer Gratz and Barbara Grutter launched the Michigan Civil Rights Initiative. See Ward Connerly, *Taking it to Michigan*, NAT’L REV. (July 8, 2003), <http://www.nationalreview.com/articles/207428/taking-it-michigan/ward-connerly>.

65. NICOLAS LEMANN, *THE BIG TEST: SECRET HISTORY OF THE AMERICAN MERITOCRACY* 294 (1999).

66. When asked how often affirmative action programs that are designed

As an initial matter, race plays no role in the admissions outcomes at over 60% of America's colleges.<sup>67</sup> A 2003 survey of chief admission officers found that while 68% of schools were guided by mission statements that encourage racial diversity, only one-third actually considered race or ethnicity as a factor in admissions.<sup>68</sup> Only at the highly selective schools, which reject a significant portion of their applicants, could racial-preferences be used to displace or "hurt" certain applicants from non-favored groups.<sup>69</sup>

Some of the most selective and prestigious schools may consider race but need not actually use it as a plus factor because they can achieve on-campus diversity entirely through underrepresented minority applicants who have sufficiently strong credentials to be accepted without the extra boost.<sup>70</sup> These students (the "**unassisted minority admits**") are among the most sought after in American higher education. Due to the achievement gap, however, there is a shortage of such applicants, so many selective schools must resort to the race-plus factor to admit other underrepresented minority students (the "**race-plus admits**") to assemble what they consider to be

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to help women and minorities get better jobs and education "end up depriving someone else of their rights[.]" 34% of respondents said "almost always" or "quite a lot[.]" 47% said "occasionally" and 9% said "almost never." See Savage, *supra* note 63.

67. See Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 OHIO ST. L.J. 971, 977-78 (1998) ("At the least selective 60 percent of colleges, being black or Hispanic had little effect on an applicant's chances of admissions."); see also Dennis J. Shields, *Some Observations about Grutter*, JURIST ONLINE SYMP. (Sept. 5, 2003), available at [www.jurist.org/forum/symposium-aa/](http://www.jurist.org/forum/symposium-aa/).

68. NAT'L ASS'N FOR COLLEGE ADMISSION COUNSELING, DIVERSITY AND COLLEGE ADMISSION IN 2003: A SURVEY REPORT XI (2003), available at <http://www.nacacnet.org/issues-action/policy/Documents/Diversity%20Report%20Web.pdf>.

69. See Kane, *supra* note 67, at 971 (noting that only schools in the top one-fifth in academic selectivity deny significant proportions of their applicants); see also NAT'L ASS'N FOR COLLEGE ADMISSION COUNSELING, *supra* note 68, at 12 (Among schools "perceived as more selective in the admission process[.]" about half reported considering race as a factor.).

70. In *Grutter*, Justice Kennedy noted the same in his dissent: "About 80% to 85% of the places in the entering class are given to applicants in the upper range of Law School Admissions Test scores and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity." *Grutter v. Bollinger*, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting).

meaningful minority representation on campus.<sup>71</sup> Currently, there is virtually no publicly available information about the extent to which schools rely on the race-plus factor to achieve their desired level of campus diversity.<sup>72</sup>

What is not in doubt is that at schools where affirmative action is instituted, race-plus admits are relatively few in number compared to the rest of the applicant pool. Consider the Michigan Law School, which accepted 1,249 applicants including 170 underrepresented minority students to fill about 400 spaces in the incoming class in 2000.<sup>73</sup> According to the expert testimony for the Law School at trial in *Grutter*, if race had not been considered, the school could only have admitted 46 underrepresented minority applicants, which means the remaining 124 (out of the 170) were race-plus admits.<sup>74</sup> Among the former, 16 enrolled and among the latter, 42 did.<sup>75</sup> Thus, only 124 out of 3,432 applicants overall actually received the race-plus boost (a mere 3.6%), and the 42 matriculants among them more than tripled the underrepresented minority student presence (from 16 to 58).

Diversity comes at the expense of those applicants of non-favored groups who, in the absence of racial preferences, would

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71. According to Michigan Law School's former Director of Admissions, Allan Stillwagon, about half of the minority applicants admitted in the 1989-90 application cycle were chosen based on "the numbers" – meaning their LSAT score and undergraduate grade point average, as well as other interesting qualities – and the other half were chosen through the race-conscious admissions policy adopted to increase minority enrollment. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 830 (E.D. Mich. 2001). Thus, half of the admitted minority students were unassisted minority whose admission did not require racial preferences and did not displace anyone else on the basis of race. *Id.*

72. *Grutter*, 539 U.S. at 319-20, 333 (recognizing the need for a "critical mass" of minorities on campus to realize the educational benefits of a diverse student body).

73. *Id.* at 383-85 (Rehnquist, C.J., dissenting); *Grutter*, 137 F. Supp. 2d at 839 (summarizing the testimony of Dr. Stephen Raudenbush, the law school expert). The Law School enrolled 399 first year JD students in the fall of 2000. *The University of Michigan - Ann Arbor Graduate-Professional Enrollment by Class Level and Gender for Term 1310 (Fall 2000)*, OFFICE OF THE REGISTRAR, UNIV. OF MICH. (2001), available at [www.ro.umich.edu/report/00fa113.pdf](http://www.ro.umich.edu/report/00fa113.pdf).

74. *Grutter*, 137 F. Supp. 2d at 839 (summarizing the testimony of Dr. Stephen Raudenbush, the law school expert).

75. *Grutter*, 539 U.S. at 320 (referring to Dr. Raudenbush's testimony).

have been admitted.<sup>76</sup> Only these displaced applicants (the “**would-be admits**”) can legitimately claim to have been burdened by affirmative action in admissions.<sup>77</sup> The Law School estimates that had race not been a factor, only about 80 other applicants would have been accepted.<sup>78</sup> It may seem odd that the acceptance of 124 race-plus admits would displace only 80 applicants from non-favored groups. This is so because underrepresented minority applicants tend to have more schools to choose from and have lower admissions yield than the average applicant.<sup>79</sup> If the Law School could not consider race, it would have needed to accept about 80 non-minority applicants to fill those 42 spaces. Those 80 rejected applicants bore the entire displacement burden of affirmative action at the Michigan Law School in 2000. Their rejection allowed about 400 incoming students at the Law School to partake in a diverse learning environment.<sup>80</sup>

With 91% of the Law School’s students reporting favorably about diversity in the Gallup survey, we can deduce the number of self-reported beneficiaries to be about 360. By this count, the actual beneficiaries were four and a half times as numerous as the actual burden-bearers (360:80).<sup>81</sup> The 80 or so would-be admits comprised just 3.7% of the 2,183 applicants rejected by

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76. William Bowen and Derek Bok call the assisted minority admitted students “retrospectively rejected” admits. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 18 (1999); see also Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002).

77. The displacement burden discussed in this article is distinct from other burdens, such as the burdens of stigmatization and mismatch, which are felt by the underrepresented minority students. See *infra* note 167.

78. Transcript of Oral Argument at 53, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

79. See *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 831 (E.D. Mich. 2000) (noting that most competitive underrepresented minority applicants are also highly recruited by other selective schools); Liu, *supra* note 76, at 1075, 1106 (discussing data from Bowen and Bok’s study).

80. In the early 2000s, the Michigan Law School enrolled about 400 JD students each year. See *Enrollment Reports - 113: Graduate-Professional Enrollment by School or College, Class Level and Gender*, OFFICE OF THE REGISTRAR, UNIV. OF MICH., <http://ro.umich.edu/enrollment/enrollment.php?limit=none#r113> (last visited May 31, 2015).

81. See Orfield & Whitla, *supra* note 52, at 160.

the Law School, which means the overwhelming majority of the rejected applicants was not affected by affirmative action.<sup>82</sup> They would not have been admitted even if the admissions review process had been race-blind since those 42 places would have been filled by the would-be admits ahead of them.

Yet many rejected applicants are unaware of this fact because Michigan Law School, like all other schools with the *Grutter* regime, does not distinguish the would-be admits from other rejected applicants.<sup>83</sup> Many in the latter group also have superior applicant credentials than some of the race-plus admits and could reasonably believe that their admissions outcomes were adversely affected by affirmative action.<sup>84</sup> Since they would not have been admitted irrespective of racial preferences, their belief of having been burdened is misguided and they are the “**false burden-bearers.**”

The false burden-bearers among the 2,183 rejected applicants could easily outnumber the 360 actual beneficiaries and even invert the favorable ratio of beneficiaries to would-be admits. The misplaced belief of being harmed by racial preferences (the “**false victim effect**”) helps to account for why anti-affirmative action initiatives receive strong voter support.<sup>85</sup> The growth of applications at selective schools can exacerbate the false victim effect even as the underlying scale of the race-conscious admissions program remains unchanged. From 1997 to 2005, the number of applications Michigan Law School received grew from 3,429 to 5,523,<sup>86</sup> and the number of rejected

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82. See Liu, *supra* note 76, at 1095.

83. Goodwin Liu refers to this reaction as legitimizing “the instinct – against all odds – to blame affirmative action.” See *id.* at 1060.

84. In response to arguments that there is “overwhelming support by the students at Harvard and University of Michigan’s Law Schools for maintaining the diversity program,” Justice Scalia noted that the people to talk to are “the high school seniors who have seen . . . people visibly less qualified than they are get into prestigious institutions where they are rejected. If you think that is not creating resentment, you are just wrong.” See Transcript of Oral Argument at 51-52, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

85. See Liu, *supra* note 76, at 1050 (“Claims of displacement tend to inflate the degree of racial conflict inherent in race-conscious admissions, thereby heightening the pressure to be ‘for’ or ‘against’ affirmative action.”).

86. For the University of Michigan Law School’s Admissions page from March 8, 2005, see *Admissions: About the School*, U. MICH. L. SCH., <http://web.archive.org/web/20050308020909/http://www.law.umich.edu/prospectivestudents/admissions/index.htm> (last visited Apr. 7, 2015).

applicants doubled to 4,400.<sup>87</sup> The number of false-burden bearers can rise sharply, irrespective of how many applicants are actually displaced.<sup>88</sup>

Thomas Kane calls the false victim effect the “perceived cost” of affirmative action.<sup>89</sup> Writing in 1998, he predicted that when the “pedagogical benefits racial diversity produced on campus are being compared with a perceived cost that is likely to be exaggerated . . . the political process is likely to underprovide diversity on campus.”<sup>90</sup> If the public had a more accurate accounting of the beneficiaries and actual burden-bearers, then diversity through affirmative action ought to be a consistent electoral winner rather than a political liability.

Supporters of affirmative action, in their effort to explain the unlikelihood of being burdened by race-based preferences, have unwittingly contributed to the false victim effect. Derek Bok points out that empty handicap spaces in a crowded parking lot may tempt drivers, but without the handicap sign, the spaces would not be empty.<sup>91</sup> Similarly, he reasons, the chance that a typical rejected applicant of getting admitted to the seat taken by a race-plus admit is “vanishingly small” because there are many other even more competitive rejected applicants. In her dissent in *Gratz*, Justice Ginsberg cites Goodwin Liu who explains that race-conscious programs do not “unduly constrict” admissions opportunities for students of non-favored groups, because at selective schools “where applicants greatly

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87. *Grutter v. Bollinger*, 539 U.S. 306, 383-85 tbl. 1-3 (2003) (Kennedy, J., dissenting).

88. At Michigan Law School, as with most selective schools, the size of the enrolled class and the critical mass of minority students therein fluctuate slightly from year to year so the ratio of actual beneficiaries to burden-bearers (would-be admits) should also remain stable. For annual Law School enrollment data, see *supra* note 80. For ethnicity data, see *Ethnicity Reports - 836G: Graduate Enrollment by School or College, Ethnicity, Class Level and Gender with Rackham Students Assigned According to Field of Specialization*, OFFICE OF THE REGISTRAR, UNIV. OF MICH., available at <http://ro.umich.edu/enrollment/ethnicity.php?limit=none#r836G> (last visited May 31, 2015). See also *id.*

89. Kane, *supra* note 67, at 993.

90. *Id.*

91. On Air Interview with Derek Bok, Harvard Univ., on PBS Frontline: Secrets of the SATs (1999), available at <http://www.pbs.org/wgbh/pages/frontline/shows/sats/interviews/bok.html> (last visited Apr. 26, 2015).

outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.”<sup>92</sup> Such characterizations attempt to reduce the magnitude of the burden through probabilistic terms but also spread the burden much more widely.

When Bok and William Bowen say the elimination of affirmative action would increase the chances of white students to gain admission very slightly, from 25% to 26.5%, they imply that every applicant of a non-favored race is in fact burdened by racial preferences, but only by a little.<sup>93</sup> This argument supports the *Grutter* majority’s view that the *Grutter* regime “does not unduly harm nonminority applicants,” but is unlikely to persuade to disappointed applicants and their sympathizers.<sup>94</sup>

For the actually displaced, the impact of race-plus preference on their odds of admission was not 1.5% but 100%. Even Liu’s careful study concludes that there are applicants who are in fact displaced by affirmative action and can legitimately claim to have been burdened.<sup>95</sup> Since these would-be admits are not known, a much larger set of the rejected pool can claim to be harmed.<sup>96</sup> Hence, the more broadly the burden of affirmative

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92. See *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsberg, J., dissenting); see also *Grutter v. Bollinger*, 288 F.3d 732, 768 (6th Cir. 2002) (Clay, J., concurring) (discussing Goodwin Liu’s study and concluding that “the Barbara Grutters of our society’ have no reason to claim that anything has been ‘taken’ from them by virtue of the law school’s admission policy.”); Liu, *supra* note 76, at 1049.

93. Cf. Transcript of Oral Argument at 54, *Grutter v. Bollinger*, 539 U.S. 306 (2003), (No. 02-241) (counsel for respondents indicating that eliminating racial preferences would have increased the chance of other applicant admissions by approximately five percent).

94. See *id.* at 53 (counsel for respondents describing the displacement effect of affirmative action as “a very small and diffuse burden.”); BOWEN & BOK, *supra* note 76, at 26, 36.

95. Liu, *supra* note 76, at 1050, 1092.

96. In making this appeal against affirmative action, Roger Clegg casts the burdens of race-based preferences broadly:

Considering [that] over 3,500 individual nonblack students were rejected [at four public university medical schools over a two-year period] despite having better MCAT scores and undergraduate grades than the median black students accepted. Multiply this by the number of medical schools in

action is said to be distributed, the greater numbers of no votes will be drawn against affirmative action on Election Day. For supporters of affirmative action, it is preferable to confine the burden-bearers to their actual numbers than to inflate the false burden effect.<sup>97</sup>

### 3. Lack of Progress Toward the Narrowing of the Achievement Gap

*Grutter* calls for reducing and eventually eliminating the need for affirmative action in admissions, but made no effort to monitor progress on this front or assess the efficacy of the schools' efforts toward this goal. More than a decade onward, the schools have disclosed scarcely little about how their programs are working and the public sees few signs of progress in achievement gap.

The Court did not impose any oversight requirement on the schools practicing the *Grutter* program when it easily could have done so.<sup>98</sup> Having granted schools a 25-year period in which to operate conforming affirmative action programs, it would not have been onerous to require the schools to report, for example, the number of times in each application cycle the race-plus factor was used. The schools, having been shielded from legal

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the country . . . and multiply that times all the years that these preferences have been awarded — and you [have to] conclude that there have been a lot of victims of discrimination.

Roger Clegg, *Bad Medicine, Coast to Coast: What Quotas Do to Education*, NAT'L REV. ONLINE (June 14, 2001), <http://web.archive.org/web/20120924123136/http://old.nationalreview.com/contributors/clegg061401.shtml>. See also Thomas Kane, *The Long Road to Race Blindness*, SCIENCE, Oct. 24, 2003, available at [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2003\\_10\\_31/nodoi.17412015748349963458](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2003_10_31/nodoi.17412015748349963458) (“A large fraction of [rejected applicants] may well believe that they would have been accepted if Harvard had no racial preferences.”).

97. Also, a school has greater control over which applicants it accepts than which and how many applicants choose to apply.

98. Affirmative action programs designed to remedy past discrimination are generally “subject to continuing oversight” to ensure that they “work the least harm possible to other innocent persons competing for the benefit.” *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

challenges, would have little to lose by disclosing this statistic. Since schools must review each application individually, they can readily tabulate how many minority applicants they admit each year with and without the race-plus factor.

Race-plus usage figures would give the public a much better picture of the scale of affirmative action in higher education.<sup>99</sup> Actual race-plus usage statistics can help dispel the false victim effect and gauge efforts to narrow the achievement gap. Comparisons could be made across schools and over time. The absence of any such disclosure combined with indirect evidence that the achievement gap remains unchanged undermines public confidence in the ability of the *Grutter* regime to work as the Supreme Court had intended.

The gaps in college entrance exam scores across racial groups remain largely unchanged in the decade since *Grutter*. On the SAT-I reasoning test, the average scores of Native American, Hispanic and black students in 2003 were, respectively, 101, 151 and 206 points below that of white students, who averaged 1063 on the 1600-point math and verbal sections.<sup>100</sup> In 2014, those gaps were, respectively, 96, 153 and 203 points.<sup>101</sup> The absolute scores of these underrepresented minority groups show negligible improvement. In those eleven years, black students gained three points, Native American students fell by five points, and Hispanic scores fell by two points.<sup>102</sup> The only racial group to show sustained gains is Asian-American, a racial minority that is generally not considered underrepresented in higher education. Asian-American students outscored white students by 20 points on the SAT-I in 2003 and 58 points in 2014 (1121 vs. 1063).<sup>103</sup>

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99. Cf. William C. Kidder & Jay Rosner, *How the SAT Creates Built-In Headwinds: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 204-05 & nn. 310-12 (2002) (on the need for better data).

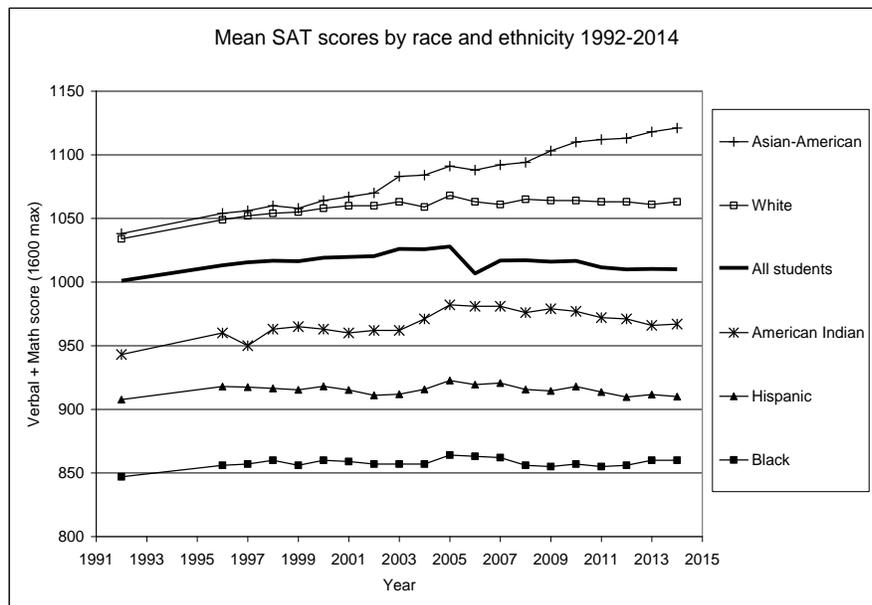
100. See *supra* Figure 1 and accompanying note.

101. *Id.*

102. *Id.*

103. *Id.*

Figure 1: SAT Reasoning & Math Scores by Race/Ethnicity (1992-2013)<sup>104</sup>

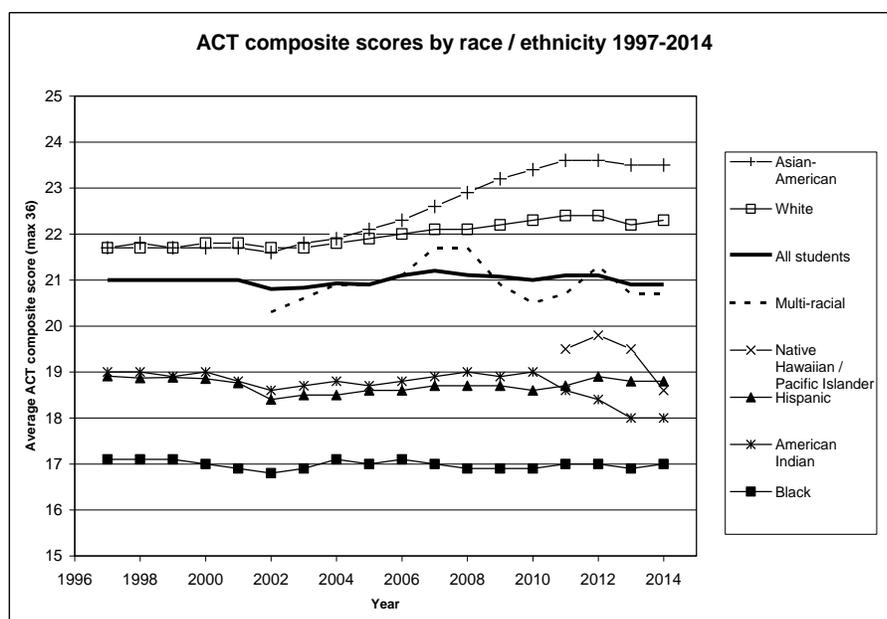


The American Achievement Test (ACT), unlike the SAT, is a more knowledge-based exam that is less susceptible to criticisms of testing bias, but the trendlines in the achievement gap are the same. In 2003, on the ACT, Native American, Hispanic and black students scored respectively, 3.0, 3.2 and 4.8 points below white students who averaged 21.7 on the 36-point

104. Source Data: COLLEGEBOARD, COLLEGE-BOUND SENIORS TOTAL GROUP PROFILE REPORT, COLLEGE BOARD (1992-2014). Explanatory notes for the SAT-I data: (a) The College Board presents Hispanic student scores in three sub-groups: Mexican-American, Puerto Rican and Other Latino and the Hispanic data points in this graph are based on weighted averages of these sub-groups. (b) This graph does not show the scores of those students categorized as “Other” or “No Response” by the College Board. (c) The noticeable dip in the mean score of all students from 2005 (1028) to 2006 (1007) was driven in large part by a sharp decline in the scores of students who declined to self-report their race/ethnicity. The percentage such test-takers rose from 7.9% in 1992 to 25.3% in 2003 and fell to 3.8% in 2013. (d) The 1992 SAT-I scores are reported based on the re-centered scale set by the College Board in 1995.

scale.<sup>105</sup> By 2014, those same gaps had widened, respectively, to 4.3, 3.5 and 5.3 points.<sup>106</sup> Over those 11 years, the ACT scores of Hispanic students rose by 0.3 points, those of black students gained one-tenth of a point, and Native American student scores fell by 0.7 points.<sup>107</sup> Asian-American students showed noticeable improvement; their mean score overtook that of white students for the first time in 2003 and improved by 1.7 points to 23.5 in 2014.<sup>108</sup>

Figure 2: ACT Composite Scores by Race/Ethnicity (1997-2014)<sup>109</sup>



105. See *infra* Figure 2 and accompanying note.

106. *Id.*

107. *Id.*

108. *Id.*

109. ACT, PROFILE REPORT – NATIONAL: SECTION I, EXECUTIVE SUMMARY (2014), available at [www.act.org/newsroom/data/2014/pdf/profile/Section1.pdf](http://www.act.org/newsroom/data/2014/pdf/profile/Section1.pdf); ACT, PROFILE REPORT – NATIONAL: SECTION I, EXECUTIVE SUMMARY (2009), available at [www.act.org/newsroom/data/2009/pdf/one.pdf](http://www.act.org/newsroom/data/2009/pdf/one.pdf); ACT, PROFILE REPORT – NATIONAL: SECTION I, EXECUTIVE SUMMARY (2007), available at <http://www.act.org/newsroom/data/2007/pdf/one.pdf>; ACT, PROFILE REPORT – NATIONAL: SECTION I, EXECUTIVE SUMMARY (2006), available at

The conspicuous score gaps at the national level are even more pronounced among applicants to selective schools. Thomas Espenshade and Alexandra Radford's study of 1997 admissions statistics from selective private schools found the race-plus boost for black applicants were equal to 310 points on the SAT-I compared to whites.<sup>110</sup> Hispanic applicants enjoy a smaller boost of 130 points while Asian-Americans had to outscore their white counterparts by an average of 140 points to have the same chance to be admitted.<sup>111</sup> A study of Duke University admissions statistics from 2001 and 2002 found Asian American students who enrolled averaged 1457 on the SAT-I, compared to 1416 for white, 1347 for Hispanic and 1275 for black students.<sup>112</sup> Asian-Americans, who are often admitted at lower rates than whites by selective schools, have begun to challenge this "race-minus" treatment.<sup>113</sup>

The depth and persistence of the achievement gap suggests that selective schools are failing the acid test.<sup>114</sup> Their race-

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<http://www.act.org/newsroom/data/2006/pdf/one.pdf>.

110. See Thomas J. Espenshade & Alexandria Walton Radford, *A New Manhattan Project*, INSIDE HIGHER ED (Nov. 12, 2009), <http://www.insidehighered.com/views/2009/11/12/radford> (providing a review on THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (1999)).

111. *Id.*

112. See Peter Arcidiacono et al., *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, IZA J. LAB. ECON. 1, 34 (2012). For a data set description, see ANITA-YVONNE BRYANT ET AL., DUKE UNIV., THE CAMPUS LIFE AND LEARNING PROJECT: A REPORT ON THE FIRST TWO COLLEGE YEARS 8 (2006).

113. See, e.g., Michael Wang, *Asian-Americans and SCA-5: Here's Why Many Oppose It*, SAN JOSE MERCURY NEWS (July 17, 2014, 10:00 AM), [http://www.mercurynews.com/opinion/ci\\_26159971/asian-americans-and-sca-5-heres-why-many](http://www.mercurynews.com/opinion/ci_26159971/asian-americans-and-sca-5-heres-why-many); Amanda Paulson, *Why Are Asian Students Suing Harvard for Affirmative Action Policies?* CHRISTIAN SCI. MONITOR (Nov. 18, 2014), <http://www.csmonitor.com/USA/Education/2014/1118/Why-are-Asian-students-suing-Harvard-for-affirmative-action-policies-video>.

114. For the persistence of score gaps on graduate school admissions tests, see AAMC, USING MCAT DATA IN MEDICAL STUDENT SELECTION 2 (2013); LSAC, LAW SCHOOL ADMISSION COUNCIL: LSAT TECHNICAL REPORT 12-03 27 (2012); SUSAN P. DALESSANDRO ET AL., LSAC, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2005–2006 THROUGH 2011–2012 TESTING YEARS (2012); *The Widening Racial Scoring Gap on Standardized Tests for Admission to Graduate School*, J. BLACKS HIGHER ED. (2006), [http://www.jbhe.com/news\\_views/51\\_graduate\\_admissions\\_test.html](http://www.jbhe.com/news_views/51_graduate_admissions_test.html) (last

conscious admissions programs have not brought about noticeable improvements in academic performance of underrepresented minority students nationally, and there is little evidence that they have become less dependent on the race-plus factor to create diversity on campus. These developments give additional motivation to affirmative action's critics, who are convincing the public that the use of race in admissions will not diminish naturally and must be voted down.<sup>115</sup>

#### 4. Implicit Race Norming Effect

The stubborn persistence of the achievement gap also fuels criticism that race-conscious admissions programs are perpetuating instead of addressing the problem. By admitting some underrepresented minority applicants at lower admissions thresholds, selective schools are said to diminish the incentive of these students to score higher. The practice of race-norming in employment or comparing and evaluating job candidates only among members of that candidate's racial group is prohibited by the Civil Rights Act of 1990.<sup>116</sup> What many selective schools have apparently done is to admit a nearly-fixed quantum of top applicants from each race, irrespective of whether some of the top applicants of one race or ethnic group are competitive with the rejected candidates of another group.<sup>117</sup> Justice Thomas, in

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visited May 31, 2015).

115. See David Savage, *Affirmative Action Case Splits Asian Americans*, L.A. TIMES, Mar. 30, 2003, <http://articles.latimes.com/2003/mar/30/nation/na-affirm30>; Scott Jaschik, *Too Asian?*, INSIDE HIGHER ED. (Oct. 10, 2006), <https://www.insidehighered.com/news/2006/10/10/asian>.

116. 42 U.S.C. § 2000e-2(l) (2012) (prohibiting the "use [of] different cutoffs scores for . . . employment related tests on the basis of race, color, religion, sex, or national origin.").

117. Chief Justice Rehnquist, in his *Grutter* dissent, observed that applicants of different racial groups who had similar grades and test scores were admitted at different rates. *Grutter v. Bollinger*, 539 U.S. 306, 382 (2003) (Rehnquist, C.J., dissenting). The notable gains in Asian American test scores in the face of overall score stagnation over the past decade and the "race-minus factor" of 140 points that Asian American applicants reportedly face at certain selective schools also support the implicit race-norming hypothesis. When Asian American applicants are compared against each other by the admissions committees, they are pressed to outscore members of their own racial group and driven to improve their academic credentials irrespective of how their non-Asian peers perform. See Ethan Bonner, *Asian-Americans in the Argument*,

his dissent, explains how the practice can dent incentives for higher minority achievement and allow different groups to settle into different score thresholds:

An applicant's LSAT score can improve dramatically with preparation, but such preparation [carry] a cost, and there must be sufficient benefits attached to an improved score to justify additional study. Whites scoring between 163 and 167 on the LSAT are routinely rejected by the [Michigan] Law School, and thus whites aspiring to admission at the Law School have every incentive to improve their score to levels above that range. [Noting that in 2000, 209 out of 422 whites were rejected in this range.] Blacks, on the other hand, were nearly guaranteed admission if they score above 155. [Noting that in 2000, 63 out of 77 black applicants were accepted with LSAT scores above 155.] As admission prospects approach certainty, there is no incentive for the black applicant to continue to prepare for the LSAT once he is reasonably assured of achieving the requisite score.<sup>118</sup>

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N.Y. TIMES (Nov. 1, 2012), [http://www.nytimes.com/2012/11/04/education/edlife/affirmative-action-a-complicated-issue-for-asian-americans.html?\\_r=0](http://www.nytimes.com/2012/11/04/education/edlife/affirmative-action-a-complicated-issue-for-asian-americans.html?_r=0) (quoting a former admissions officer at Wesleyan, Brown and Columbia: "The bar is different for every group.") For example, a score of 600 on the SAT-I math section ranks at the 75th percentile among all test-takers and would place at the 94th percentile among black students, 91th among Mexican-Americans, 90th among Puerto Ricans, 89th among other Hispanics, 85th among Native Americans, and 71st among whites, but only 46th among Asian-Americans. See COLLEGE BOARD, SAT PERCENTILE RANKS 2014 COLLEGE-BOUND SENIORS -- CRITICAL READING, MATHEMATICS, AND WRITING PERCENTILE RANKS (2014), available at <https://secure-media.collegeboard.org/digitalServices/pdf/sat/sat-percentile-ranks-crit-reading-math-writing-2014.pdf>; COLLEGE BOARD, SAT PERCENTILE RANKS FOR 2014 COLLEGE-BOUND SENIORS: CRITICAL READING, MATHEMATICS, AND WRITING PERCENTILE RANKS BY GENDER AND ETHNIC GROUPS (2014), available at <https://secure-media.collegeboard.org/digitalServices/pdf/sat/sat-percentile-ranks-gender-ethnicity-2014.pdf>. Thus, when a score that is better than three-quarters of the field is nevertheless below the median for one racial group, race norming can create uneven incentives for individuals, and lead to greater disparity in outcomes across racial groups.

118. *Grutter*, 539 U.S. at 377 (Thomas, J., dissenting).

Justice Thomas qualifies his statement somewhat by noting that it is uncertain whether the test-taker's behavior is responsive to admissions policies, but his point holds a degree of intuitive appeal and may draw on anecdotal support.<sup>119</sup>

The very notable shortage of high scoring black students on admissions tests is difficult to explain with historical or socio-economic factors. In 2003, some 1,877 black students scored 1300 or higher on the SAT-I, accounting for just 1.5% of all black students who took the test.<sup>120</sup> This ratio is well below the 10% of all scores above 1300, achieved by 148,024 test takers.<sup>121</sup> Out of the 13,897 who scored above 1500, only 72 were black students.<sup>122</sup> The 192 black students with 1450 or better SAT scores could comprise the critical mass at just one selective school.<sup>123</sup>

Given the scarcity of high scoring black students, selective colleges must inevitably admit others with lower scores, who still rank near the top of the black applicant pool. With their chances for admission already very high, the students of this second tier have few reasons to improve their credentials further. After all, there is no difference in admissions outcome between a race-plus admit and an unassisted minority admit. Both get in. The regime upheld in *Grutter* presents no incentives for schools to convert the former into the latter.

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119. At the *Grutter* trial, Jay Rosner, a director of the Princeton Review Foundation, testified that minorities are often unaware of the benefits of test preparation services and enroll in much smaller numbers than whites. Rosner had trouble filling a 15-seat LSAT preparation course at Howard University, a predominantly black institution, even though the course fee was discounted from the customary \$1,000 to \$200. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 861 (E.D. Mich. 2001).

120. Michael Dobbs, *At Colleges, an Affirmative Reaction: After Rulings, Recruiters Take a More Inclusive Approach to Diversity*, WASH. POST, Nov. 15, 2003, at A01.

121. *Id.*

122. *Id.*

123. When *Grutter* was decided in 2003, Harvard College, whose admissions plan had been so influential to Justice Powell, accepted 200 black students into its Class of 2007. See *Class of '07 Selected from Pool of Over 20,000: Considered the Most Competitive in Harvard's History*, HARV. GAZETTE (Apr. 3, 2003), <http://news.harvard.edu/gazette/2003/04.03/01-admissions.html>.

Whether the lack of incentives to boost minority high scores actually perpetuates the achievement gap is often lost in the fray of the public political debate. On the eve of Proposal 2 vote in Michigan, the Center for Equal Opportunity, an anti-affirmative action organization, reported that the median SAT-I scores of black students admitted to the University of Michigan's main undergraduate college in 2005 was 1160, compared to 1260 for Hispanics, 1350 for whites and 1400 for Asian-Americans.<sup>124</sup> As with other contested issues in this debate, the shift in venue from litigation to political referendum has effectively reversed the burden of proof. Instead of opponents of affirmative action having to prove their doubts in a court of law, supporters must work to disprove or dispel the doubt in the public mind. The current *Grutter* regime is poorly designed to respond to the charge of race-norming.

C. *Addressing Grutter's Shortcomings*

Affirmative action's supporters can ill-afford to stand behind *Grutter* and ignore the opponents' reasoned and unreasoned criticism. They must address *Grutter's* weaknesses and modify the regime to save it from the onslaught of ballot initiatives and renewed litigation. They must put forward a stronger and more convincing showing of diversity's benefits to the broader public. They can no longer dismiss the grievances of those claiming to be burdened by affirmative action, but should seek to accommodate those actually burdened. Just as a distinction should be made between real and false burden-bearers, so too should the unassisted minority admits be distinguished from the race-plus admits. The admissions process should provide incentives for the latter to improve their credentials and join the ranks of the former. Only then can a race-conscious admissions system begin to satisfy the acid test of the *Grutter* majority and work to narrow the achievement gap. As increasing numbers of minority applicants become competitive with the rest of the admitted applicant pool, the practice of race norming will disappear.

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124. Scott Jaschik, *New Salvos on Affirmative Action*, INSIDE HIGHER ED. (Oct. 17, 2006), <http://www.insidehighered.com/news/2006/10/17/mich>.

Two keys are critical to correcting the flaws of Grutter. The first is disclosure of the frequency of race-plus usage, which would reveal the limited scale of race-based admissions preferences and provide a means for public oversight.<sup>125</sup> The second is a workable mechanism that can be used to accommodate the would-be admits or otherwise address their concerns. When the public is informed of the true extent of affirmative action in higher education and is assured that those actually burdened by the race-based preferences are accommodated, the false burden-bearer effect will dissipate.

Disclosing race-plus statistics is relatively straightforward, but accommodating the burden-bearers requires a closer accounting of the benefits of diversity against the burdens of affirmative action. *Grutter's* rough cost-benefit analysis, which broadly endorsed the claimed benefits of diversity and generally dismissed the burdens complained by the critics, is plainly inadequate. It inflamed the critics and deprived supporters of the proof they need in the political arena.

#### IV. Benefits and Burdens

##### A. Benefits

According to various social science studies, students who interact in and outside the classroom with peers of diverse backgrounds show greater active thinking, intellectual growth and respect for group differences than those who do not.<sup>126</sup>

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125. See Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 580 (2007) (calling for greater transparency in the way affirmative action programs operate so the public is better informed).

126. See EMILY J. SHAW, COLLEGEBOARD, RESEARCH REPORT NO. 2005-4: RESEARCHING THE EDUCATIONAL BENEFITS OF DIVERSITY 7, 11 (2005), available at <https://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-2005-4-researching-educational-benefits-diversity.pdf>. A survey of undergraduates at 349 institutions found that students at liberal arts colleges are more likely to engage in diversity-related activities, and that these students were also more likely to take on greater academic challenges, engage in collaborative learning activities, and report greater personal growth and satisfaction in their college experience. *Id.* at 10-11(study of 1,258 engineering students finding students in racially-diverse classrooms reported slightly higher but significant gains in their group-problem solving abilities); see also Paul D. Umbach & George D. Kuh, *Student Experiences with Diversity at*

These can habits help prepare them to live, work, and lead in a diverse and multifaceted world.<sup>127</sup> The *Grutter* majority agreed that these benefits then redound to the greater good of the country, but Justices Scalia and Thomas were among those unconvinced and critical of the majority's deferential acceptance of the Law School and *amici's* description of diversity's benefits.

To Justice Scalia, the benefits are akin to kindergarten lessons in getting along, which are unworthy of special government endorsement.<sup>128</sup> For many young Americans, however, college or graduate school is their first opportunity to have meaningful interactions with members of another race or ethnicity.<sup>129</sup> Justice Thomas ridicules elite schools for following a "faddish slogan of the cognoscenti" to achieve a certain classroom "aesthetic" with students of different color.<sup>130</sup> He is partially right – the mere diversity of students on campus, or "structural diversity," is necessary but not sufficient to create educational benefits.<sup>131</sup> There needs to be meaningful interaction among students and engagement by faculty to expand educational possibilities, stimulate critical thinking, and increase awareness of biases.<sup>132</sup> Only then could campus diversity begin to advance the students' cognitive and personal

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*Liberal Arts Colleges: Another Claim for Distinctiveness*, 77 J. HIGHER EDUC. 169 (2006).

127. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) ("Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."); *id.* at 331 ("high-ranking retired officers and civilian leaders of the United States military assert that . . . a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.'" (citing Brief for Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516))).

128. *Id.* at 347 (Scalia, J., concurring in part and dissenting in judgment).

129. The survey of Harvard and University of San Francisco medical students found that half did not have any meaningful contact with members of another race prior to college, but two-thirds did during college and 85% did in medical school. See Whitla et al., *supra* note 62, at 460.

130. *Grutter*, 539 U.S. at 350, 354 (Thomas, J., concurring in part and dissenting in judgment).

131. See SHAW, *supra* note 126, at 4.

132. See Matthew J. Mayhew & Heidi E. Grunwald, *Factors Contributing to Faculty Incorporation of Diversity-Related Course Content*, 77 J. HIGHER EDUC. 148 (2006) (examining how 336 faculty members incorporated diversity-related content into their teaching).

growth and generate the kind of educational benefits that the *Grutter* majority found valuable.

The litany studies offers glimpses of diversity at work, but there is no demonstration that every school with student body diversity is realizing diversity's education potential.<sup>133</sup> The difficulty in assessing how much educational benefits are being produced prevents meaningful comparisons of race-conscious and race-neutral means to achieve diversity, the central conundrum in *Fisher*.

### B. *Race Neutral Alternatives and Fisher*

For any affirmative action program to withstand judicial scrutiny, a state actor must show that the program is necessary to achieve the government's compelling interest.<sup>134</sup> Necessity is determined by comparing how well a race-neutral program would perform to meet the same interest.<sup>135</sup> The *Grutter* majority required schools to consider race-neutral means to generate the educational benefits of diversity, but was satisfied that none could do so "about as well" as Michigan Law School's holistic review with the race-plus factor.<sup>136</sup> The Court considered this issue again ten years later in *Fisher*, and tightened the standard by requiring the schools to show that no "workable race-neutral alternatives" exist.<sup>137</sup>

Among the most commonly considered race-neutral alternatives are socio-economic affirmative action and the so-called percent plans.<sup>138</sup> The former, which provides preferences

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133. Some within elite academic institutions are skeptical of the benefits of diversity. See, e.g., Randall Kennedy, *Affirmative Reaction*, AM. PROSPECT, (Feb. 19, 2003), <http://www.prospect.org/article/affirmative-reaction> (noting that many who defend affirmative action for the sake of diversity are actually motivated by their commitment to social justice and would do so "even if social science demonstrated unconvertible that diversity (or its absence) has no effect (or even a negative effect) on the learning environment.").

134. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2413 (2013); *Grutter*, 539 U.S. at 326; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978).

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

136. *Grutter*, 539 U.S. at 339 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).

137. *Fisher*, 133 S. Ct. at 2414.

138. See, e.g., RICHARD D. KAHLENBERG & HALLEY POTTER, CENTURY FOUND., A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED

on the basis of family income instead of race, has attracted growing public interest in recent years, but remains unproven as a stand-alone alternative because the achievement gap extends to lower income levels.<sup>139</sup> The latter has been implemented in Florida, Texas and California, and guarantees students who graduate in the top *n* percent of their high school class admission to their state's flagship universities.<sup>140</sup> The *Grutter* majority was persuaded that the "percent plans" could not produce the same quality of educational benefits because they constrained the schools' academic selectivity or its ability to choose students for their potential to contribute to campus

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ALTERNATIVES TO RACIAL PREFERENCES 11-25 (2012), *available at* <https://tcf.org/assets/downloads/tcf-abaa.pdf>; Richard D. Kahlenberg, *A New Affirmative Action Based On Class: Column, Supreme Court Ruling Opens Door to More Appropriate Approach*, USA TODAY (June 25, 2013), <http://www.usatoday.com/story/opinion/2013/06/24/richard-kahlenberg-on-court-and-affirmative-action/2452375/>.

139. Whites and Asian-Americans from lower income brackets have on average outscored black test-takers from the highest income brackets. *See* JBHE Found., Inc., *News and Views: Why Family Income Differences Don't Explain the Racial Gap in SAT Scores*, 20 J. BLACKS HIGHER EDUC. 6 (1998); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Deal*, 84 CAL. L. REV. 953, 989-90 (1996). In order to admit sufficient minority students under a race-blind class-conscious system to achieve existing "critical mass" levels, many schools would have to subject many more seats in the admitted class to low-income preferences. *See* Kane, *supra* note 67, at 992. Kane found that blacks and Hispanics constituted only one out of every six high-scoring, low-income students, and so every race-plus preference replaced by "low-income plus" preference will, on average, yield one-sixth of a minority student. *Id.* To maintain critical mass levels of minority students, a school would have to expand the number of seats subject to the plus-factor by a factor of six. *Id.* While this change may help low-income students overall, it will displace large numbers of high-scoring, highly competitive middle and upper middle-class students, minorities among them. Thus, the crux of the matter remains the dearth of competitive underrepresented minority applicants. Until their numbers grow sufficiently, schools will have difficulty finding any race-neutral category in which they are, but not a small minority. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 1-2 (1997) (concluding that using racial-neutral proxies, such as socioeconomic status, would not yield meaningfully diverse classes).

140. For the development of percent plans in Texas, Florida, and California, see *Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity*, U.S. DEP'T OF EDUC. (Mar. 2003), [http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html#\\_ftn63](http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html#_ftn63).

diversity.<sup>141</sup> The Justices urged schools to continue searching for racial-neutral alternatives in preparation of affirmative action's eventual sunset, but left for the schools to decide when they were ready to switch.<sup>142</sup>

In Texas, where affirmative action was banned in 1995 by the Fifth Circuit in *Hopwood* and the state legislature enacted the Top 10% Law in 1997, *Grutter* allowed schools to reinstitute race-conscious admissions policies.<sup>143</sup> The University of Texas at Austin ("UT-Austin") added a race-conscious track with holistic individualized review modeled on *Grutter* to complement its race-neutral percent plan track for undergraduate admissions.<sup>144</sup> By 2008, the race-neutral track accounted for 81% of all Texas high school graduates enrolled in the freshman class, with the remaining 19.1% admitted through the race-conscious track.<sup>145</sup>

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141. *Grutter*, 539 U.S. at 340. Justice Thomas equated selectivity with elitism. *Id.* at 355-56. At UT-Austin, with the percent plan filling up to 86% of the incoming class, the school was left with limited room to select other students who were deemed vital to the education mission, including athletes. Scott Jaschik, *Texas Limits '10%' Admissions*, INSIDE HIGHER ED. (June 1, 2009), <http://www.insidehighered.com/news/2009/06/01/texas>. In order to give schools greater selectivity, the state legislature modified the law in 2009 to cap enrollment based on the percent plan to 75% of in-state freshman. See Jennifer R. Lloyd, *UT Changes Admissions Guidelines For Top Students*, HOUS. CHRON. (Oct. 30, 2012), <http://www.chron.com/news/houston-texas/houston/article/UT-changes-admissions-guidelines-for-top-students-3994871.php>.

142. *Grutter*, 539 U.S. at 342-43 ("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.") (internal quotation marks omitted).

143. See TEX. EDUC. CODE ANN. § 51.803 (West 2013) (commonly known as the "Top Ten Percent Rule"); *Hopwood v. Texas*, 78 F.3d 932, 938 (5th Cir. 1996). Some schools, including Texas A&M at College Station and the University of Georgia, declined to reinstitute race-conscious admissions. Nancy G. McDuff & Halley Potter, *Ensuring Diversity under Race-Neutral Admissions at the University of Georgia in THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS* 124 (Richard D. Kahlenberg ed.) (2014); Ron Nissimov, *A&M Defies Trend, Will Drop Race as Admissions Factor*, HOUS. CHRON. (Dec. 4, 2003), <http://www.freerepublic.com/focus/f-news/1033586/posts>.

144. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 224-25 (5th Cir. 2011).

145. UNIV. TEX. AT AUSTIN, TOP 10%: REPORT 11 8-9, TBL. 2, 2B (2008), available at [www.utexas.edu/student/admissions/research/HB588-Report11.pdf](http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf).

The *Fisher* plaintiffs challenged the necessity of UT-Austin's race-conscious review in the second track. Since minority enrollment at UT-Austin under the percent plan had rebounded to pre-*Hopwood* levels, they contend that no further race-based preferences are needed to satisfy the government's compelling interest in diversity.<sup>146</sup> In the first appeal to the Fifth Circuit, UT-Austin asserted that the underrepresented minority students admitted through the race-neutral track were unevenly distributed among the school's several colleges such that a large proportion of medium and small sized classes had few or no minority students, and some minority students felt isolated.<sup>147</sup> Judge Higginbotham, writing for the panel that upheld the school's policy, agreed that only with the selectivity afforded by the race-conscious track could UT-Austin assemble the kind of campus diversity that could deliver something closer to the "full educational benefits of diversity."<sup>148</sup>

By a 9-7 vote, the Fifth Circuit declined to rehear the case *en banc*.<sup>149</sup> In her dissent, Judge Jones criticized the panel for allowing the school to justify its policy based on minority student presence at the classroom level.<sup>150</sup> Such a ruling rests on factual conditions that change from one semester to the next, and provides no standard to determine when the changes in classroom composition would warrant a different outcome.<sup>151</sup> Moreover, on a racially-diverse campus, student interactions

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146. *Fisher*, 631 F.3d at 242. Under the race-neutral percent plan, enrollment of underrepresented minority students eventually reached one-fifth of the class at UT-Austin, returning to or, for some groups, exceeding pre-*Hopwood* levels. *Id.* at 242-43.

147. *Id.* at 241 ("... although overall enrollment of minority students at UT rose significantly between 1996 and 2002, the Fall 2002 schedule contained more classes with zero or one African American or Hispanic students than had the Fall 1996 Schedule"); *id.* at 240 (comparing higher enrollment of Hispanic and black students at the Colleges for Social Work and Education to the College of Business Administration).

148. *Id.* at 245.

149. *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 303 (5th Cir. 2012).

150. *Id.* at 307 (Jones, J., dissenting) ("Will classroom diversity 'suffer' in areas like applied math, kinesiology, chemistry, Farsi, or hundreds of other subjects if, by chance, few or no students of a certain race are enrolled?").

151. The panel acknowledged that UT-Austin's race-conscious admissions track cannot be "blessed ... in perpetuity" and compared the situation to voter redistricting cases, which the court must periodically revisit. *Fisher*, 631 F.3d at 246.

and learning opportunities are not confined to the classroom, so the absence of minority students in certain classes should not necessarily mean that the government's interest is frustrated.<sup>152</sup>

The Supreme Court, by a 6-2 margin, vacated the judgment and remanded.<sup>153</sup> Justice Kennedy, who authored the opinion, faults the Fifth Circuit for too readily deferring to UT-Austin's claim of having considered race-neutral alternatives, and ordered a more stringent "assess[ment] of whether [UT-Austin] has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."<sup>154</sup> Justice Kennedy appears to wish for the lower court to delve deeply into the mechanics of the admissions process, as he had in *Grutter*, to make sure that what is supposed to be an open-minded evaluation of each applicant's diversity contribution potential does not devolve into an exercise of racial group balancing to hit pre-determined critical mass targets.<sup>155</sup>

On remand, the same Fifth Circuit panel, by a 2-1 margin, ruled against further evidence gathering and reaffirmed its earlier conclusion with slightly different interpretation of the same record.<sup>156</sup> This time, Judge Higginbotham focused on the rigidity of the race-neutral percent plan, which relies on *de facto* racial segregation in Texas high schools to achieve diversity and excludes talented students who are ranked just outside the

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152. Consider the explanation of counsel in *Gratz* regarding the interaction that takes place at the University of Michigan's undergraduate college:

[o]n campus, these 18-year olds [(freshmen)] interact with students very different from themselves in all sorts of ways, not just race, not just ethnicity, but in all sorts of ways. Students, I think as we know, learn a tremendous amount from each other. Their education is much more than the classroom. It's in the dorm, it's in the dining halls, it's in the coffee houses. It's in the daytime. It's in the nighttime. It's all the time.

Transcript of Oral Argument at 28, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-242).

153. *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013).

154. *Id.* at 2421.

155. See *supra* note 42 and accompanying text.

156. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014), *reh'g denied*, 771 F.3d 274 (5th Cir. 2014).

percent cut-off.<sup>157</sup> The race-conscious track with holistic review, he concludes, is necessary for UT-Austin to “patch[] the holes” left by the mechanical percent plan to “achieve diversity that contributes to its mission.”<sup>158</sup> The fact that relatively few underrepresented minority students are admitted through the race-conscious track, in his view, indicates the selection standards are competitive, rigorous, and tailored to find the most qualified.<sup>159</sup>

Judge Garza, in his dissent, faults UT-Austin for failing to explain how the means (the race-conscious track used to assemble a critical mass of underrepresented minority students) contributes to the ends (“obtaining the educational benefits of diversity.”)<sup>160</sup> UT-Austin does not define critical mass in a manner that permits meaningful judicial review, he points out, and the school does not assess whether the diversity within the large portion of the incoming class admitted through the percent plan satisfies critical mass before engaging in race-conscious review.<sup>161</sup> Hence, there is no way for an outside adjudicator to determine whether the race-neutral track alone would be sufficient to produce the kind of educational benefits that the state finds compelling.<sup>162</sup>

The relationship between “critical mass” and the “educational benefits” is circular, because *Grutter* allows for

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157. *Id.* at 650-54. In *Gratz*, Justice Ginsberg also criticized the percent plans for relying “on continued racial segregation at the secondary school level[,]” creating perverse incentives for “parents to keep their children in low-performing segregated schools” and discouraging students “from taking challenging classes that might lower their grade point averages.” *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsberg, J., dissenting); see Julie B. Cullen et al., *Jockeying for Position: Strategic High School Choice Under Texas’ Top Ten Percent Plan* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 16,663), available at <http://www.nber.org/papers/w16663> (evidence of Texas students strategically “trading down” to enroll in less rigorous high schools to improve their chances of admission via the percent plan).

158. *Fisher*, 758 F.3d at 657.

159. *Id.* at 656 (arguing that “holistic review’s low production of numbers is its strength, not its weakness.”).

160. *Id.* at 662.

161. *Id.* at 669 (Garza, J., dissenting).

162. Nor does the school explain how applicants are reviewed for their contribution to this critical mass. *Id.*; see also *Fisher v. Univ. of Tex. at Austin*, 771 F.3d 274 (5th Cir. 2014) (denying rehearing en banc) (Garza, J., dissenting).

“critical mass [to be] defined by reference to the educational benefits that diversity is designed to produce.”<sup>163</sup> In essence, UT-Austin can use its output, the educational benefits, to justify its input, critical mass achieved through race-conscious means. Since the output cannot be measured or approximated, the input needed to produce a given level of output also cannot be specified. Thus, the benefits generated by the class assembled through the race-neutral track alone and the additional benefits gained from diversity supplemented from the race-conscious track cannot be compared; the necessity of the latter is nearly impossible to prove. *Fisher* will almost certainly return to the Supreme Court, where the Justices may remand again for more facts – perhaps forcing UT-Austin to disclose how it determines critical mass and the details of how applicants are assessed in its multi-factor holistic evaluation. But even so, judges would still have trouble second-guessing the school’s assessment that the race-conscious track produces more benefits than the race-neutral track alone.<sup>164</sup>

Instead of further scrutiny of the school’s educational policies, the analysis could be simplified by looking not only at the benefits but also at the costs. When the benefit of something is hard to assess, it is often easier to ask whether it’s worth the costs. *Grutter* itself uses a cost-benefit analysis, albeit a crude one, to conclude that the educational benefits to diversity outweigh the burdens on applicants. It would be more straightforward to require UT-Austin to show that the extra benefits created by the race-conscious track outweigh the burdens imposed on the would-be admits who are displaced along this track. So long as this relative inequality holds true, courts need not be concerned about whether critical mass has been attained or whether the “full” benefits of diversity has been realized. Instead, the school must account for the cost, if any, of getting the critical mass it desires.

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

164. As Justice Douglas noted in *DeFunis v. Odegaard*, “[c]ourts are not educators [and] their expertise [in educational policy] is limited.” 416 U.S. 312, 344 (1974) (Douglas, J., dissenting).

C. *Burdens*

The controversy over affirmative action in admissions exists not because of differing opinions about the educational benefits of diversity, but because racial preferences benefit some applicants at the expense of others. From *DeFunis* to *Fisher*, virtually every lawsuit challenging affirmative action in higher education has been brought by a rejected applicant claiming to have been harmed.<sup>165</sup> Never has a plaintiff been an admitted student who complained that the benefits of campus diversity were inadequate.<sup>166</sup> While the burden of displacement drives lawsuits, courts have been preoccupied with the burden of unequal treatment, a legal construct that may have outlived its usefulness.<sup>167</sup>

The denial of equal treatment on the basis of race, also known as the “inability to compete on an equal footing,” arises from the quota context “[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain

165. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Grutter*, 539 U.S. at 306; *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Lesage v. Texas*, 528 U.S. 18 (1999); *DeFunis*, 416 U.S. at 312; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Smith v. Univ. of Wash.*, 392 F.3d 367 (9th Cir. 2004); *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262 (11th Cir. 2001); *Hopwood v. Texas*, 78 F.3d 932, 938 (5th Cir. 1996); *Henson v. Univ. of Ark.*, 519 F.2d 576 (8th Cir. 1975).

166. Other types of burdens attributed to affirmative action in higher education, which are not raised by plaintiffs and which do not contribute to the political backlash against affirmative action to the same extent as the displacement burden, are not addressed in Part III, though the paradigm shift proposed in the second half of this article works to ease at least two of these types of burdens. The first is the burden of stigmatization that race-based preferences in admissions may have on minority students of favored groups, imbuing them with an inferiority complex in their own self-conception. See, e.g., STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991); SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990); see also *infra* Part V.A. The second is the burden of mismatch on assisted minority admits, who are said to be admitted to schools that are too rigorous for their abilities and are more likely to underperform, fail or drop out. See, e.g., RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP AND WHY UNIVERSITIES WON’T ADMIT IT* (2012); Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STAN. L. REV.* 367 (2004); see also *infra* Part VII.B.

167. See Liu, *supra* note 76, at 1079-80 (quoting *Hopwood v. Texas*, 999 F. Supp. 872, 883 (W.D. Tex. 1998)).

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a benefit than it is for members of another group.”<sup>168</sup> The “imposition of the barrier” is itself the burden, “not the ultimate inability to obtain the benefit.”<sup>169</sup> So all applicants blocked by the barrier are burdened, regardless of whether they would have been admitted.<sup>170</sup> In *Bakke*, Justice Powell tried to bridge the difference between the displacement and unequal treatment burdens, by assuming the position of an actually displaced applicant and examining his treatment under the Harvard Program:

The applicant who loses out on the last available seat to another candidate receiving a “plus” on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.<sup>171</sup>

Justice Powell’s reasoning, that an applicant who got a fair review in the admissions review process cannot claim unequal treatment even if he were displaced by the race-plus factor, allows courts to prioritize the burden of unequal treatment

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168. *Ne. Fla. Chapter of the Ass’n Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 665 (1993); *see also* *Lesage*, 528 U.S. at 21.

169. *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am.*, 508 U.S. at 665.

170. Allen Bakke could not prove that he would have been admitted to the U.C. Davis Medical School had it not been for the school’s affirmative action program, which set aside 16 of 100 places in the entering class for underrepresented minority students. *Bakke*, 438 U.S. at 279. Nor could the defendant medical school prove that Bakke still would have been rejected absent the set-aside program. *Id.* at 320. Hence, Bakke could not establish standing to sue based on a displacement burden theory, and the courts, in recognizing the unequal treatment burden, gave him another basis to assert standing for the lawsuit. *Id.*

171. *Id.* at 317.

above that of displacement. If the racially-disparate treatment does not violate the Constitution's guarantee of equal protection, then any displacement that occurs as a consequence of the unequal treatment could also be dismissed as a matter of law.<sup>172</sup> This ruling gives any applicant who complains of unequal treatment standing to sue regardless of whether he or she was actually displaced, but if the court finds the preferential treatment passes constitutional muster, any complaint about displacement can be ignored.<sup>173</sup>

The *Grutter* majority followed this path.<sup>174</sup> After deciding that the benefits of diversity were compelling to the government and noting that Michigan Law School's admissions program provided for holistic review along the same lines of the Harvard Program, Justice O'Connor dispensed with concerns about burdens by citing Justice Powell.<sup>175</sup> In the Court's view, so long as the plaintiff got a fair shake in the admissions process, he or she would have no basis to complain. Hence, the conclusion that Michigan Law School's "race-conscious admissions program does not unduly harm nonminority applicants."<sup>176</sup>

Analyzing and disposing the burden question entirely through the lens of unequal treatment is problematic for at least three reasons. First, by ignoring the displacement burden, the analysis does not address the grievances that motivate the plaintiffs and their sympathizers, and make it more difficult for them to accept the rationale of the case. Second, the unequal treatment burden casts all applicants of non-favored racial groups as bearing the burden and fuels the false victim effect.<sup>177</sup> Third, the analysis no longer describes the reality of the racially-disparate treatment in the race-plus context.

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172. *Id.* at 316-18, 321.

173. *Lesage v. Texas*, 528 U.S. 18, 20 (1999) (permitting a plaintiff to seek injunctive relief against "an ongoing race-conscious program" without having to "affirmatively establish that he would receive the benefit in question if race were not considered" because "[t]he relevant injury in such cases is the inability to compete on an equal footing.").

174. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) ("Petitioner clearly has standing to bring this lawsuit.").

175. *Id.* at 341.

176. *Id.*

177. *See supra* Part III.B.2 (description of how racial preferences affect admission probabilities versus outcomes).

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Having outlawed quotas and automatic point awards, the Court has cut down the barrier to compete to such an extent that the barrier is virtually gone, except for the race-plus factor.<sup>178</sup> A school treats applicants differently on the basis of their race only when it gives the race-plus boost to favor one applicant at the expense of another. Consider the following scenario from the Harvard College Program cited by Justice Powell:

The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.<sup>179</sup>

If A had superior credentials to C, and A is admitted, then A is an unassisted minority admit whose race did not help his application. If A's credentials were inferior or comparable to C's and A was given the race-plus boost over C, then A would be a race-plus admit and C, having been displaced by unequal treatment, a would-be admit. If B were admitted over C, it is possible that the admissions officer used the race-plus factor, but

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178. Transcript of Oral Argument at 53, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (counsel for respondents stating that "the record tells us . . . 95 percent of all the admissions decisions that are made each year are not affected by the consideration of race.").

179. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978).

if the school's admissions policy permits giving a preference to applicants whose parents were not well-educated, then that could be the plus factor that put B above A and C, not race. If C were admitted over A and B, the race-plus factor was not used even if the race of all three applicants were considered.

Since only those who receive the benefit of the race-plus boost are treated with a racial preference, only those displaced as a consequence can be said to have been burdened by the preference. Aside from race-plus admits and would-be admits, the rest of the applicant pool is untouched by the race-plus factor and cannot be said to have been "treated" unequally on the basis of race. When our understanding of the unequal treatment burden is updated to match the way the race-plus factor is used, the two burdens become virtually the same. Addressing the burden of affirmative action in terms of displacement would answer the complaints more directly and dispel the false burden effect.

Having clarified the burden and the burden-bearers, what then is weight of their burden? According to the Justice Scalia, the burden is onerous. "[N]onminority individuals who are deprived of a legal education . . . by reason of their skin color," he says, bear the burden of Michigan Law School's race-conscious admissions program.<sup>180</sup> According to Liu, the burden is light. He posits that the would-be admits by virtue of having just missed the cut-off for admission are strong applicants who are almost always accepted by other selective schools, and are not deprived of schooling altogether.<sup>181</sup> The weight of the displacement burden is the difference between the value of the opportunity that the displaced applicant was deprived of and his next best alternative. Liu concludes that the would-be admits are fairly content with the school that they attend, and are not the ones filing lawsuits.

However, the personal circumstances of each would-be admit is unique. Barbara Grutter's alternative was Wayne State University Law School, a Tier III law school, which did not have the health law program she sought to study, so she never attended law school. We do not know if Grutter was a would-be

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180. *Grutter*, 539 U.S. at 348 (Scalia, J., dissenting).

181. Liu, *supra* note 76, at 1093.

admit or a false-burden bearer.<sup>182</sup> Getting into a close equivalent alternative school does not preclude an applicant from feeling aggrieved. Jian Li, who filed a complaint with the U.S. Department of Education against Princeton in 2006 for race bias in admissions, had been admitted to Yale and transferred to Harvard.<sup>183</sup> The question of how to deal with private valuations of the burden will be addressed in Part V, in conjunction with accommodation mechanisms.

#### D. *Demoralization Costs*

Like other social programs that reallocate opportunities to promote net social gains, affirmative action creates burdens for some individuals, and policymakers can leave the burdens where they initially fall or compensate the burden-bearers to ensure that no one is made worse off in the course of making society better off.<sup>184</sup> To these two choices, Frank Michelman added a third: burden-bearers should be compensated only when it is more costly to ignore their burden.<sup>185</sup> In his seminal study of uncompensated property takings, Michelman explained that when individuals believe that government action has deprived them of benefits to which they have legitimate claims and leave their losses unaddressed, they and their sympathizers may feel demoralized.<sup>186</sup> He observed that demoralized property-holders will cut back on improvements to their property if they believe their property could be taken without compensation, and society

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182. Counsel for Bollinger contends that Grutter would not have been admitted under a race-neutral policy, but concedes that the issue was not litigated conclusively. Transcript of Oral Argument at 53, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

183. See, e.g., Scott Jaschik, *New Challenge to Affirmative Action*, INSIDE HIGHER ED. (Nov. 14, 2006), <http://www.insidehighered.com/news/2006/11/14/princeton>.

184. See ROBERT ELLICKSON ET AL., PERSPECTIVES ON PROPERTY LAW 65 (3d ed. 2002) (comparing Kaldor-Hicks and Pareto efficiency models); William A. Fischel & Perry Schapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of 'Just Compensation' Law*, 17 J. LEGAL. STUD. 269 (1988).

185. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1223 (1967); see also ELLICKSON ET AL., *supra* note 184, at 498.

186. See Michelman, *supra* note 185, at 1215.

would suffer from under-development of property. He called the hidden cost of uncompensated government takings **demoralization costs**.<sup>187</sup>

Getting rejected by colleges can be a demoralizing experience. As Judge Garza notes, “It is no exaggeration to say that the college application is 18 years in the making and is an unusually personal experience: the application presents a student’s best self in the hope that her sustained hard work and experience to date will be rewarded with admission.”<sup>188</sup> The preparations create great expectations, which compound the rejected applicant’s sense of disappointment.<sup>189</sup> Applicants to selective schools are unlikely to reduce their preparation even if they may be burdened by affirmative action. Most students apply with very limited advanced information about their prospects. The uncertainty of success and increasing competition (which compounds the uncertainty) induce them to over-apply, which leads to higher rates of rejections and greater demoralization and more false burden-bearers.<sup>190</sup>

Compensation is not needed, according to Michelman, if a social program distributes the burdens and benefits evenly or over time such that the current burden-bearers may see a benefit to themselves from the program in the future.<sup>191</sup> To the

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187. *Id.* at 1214.

188. *See* *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 265 (5th Cir. 2011) (Garza, J., concurring).

189. Supporters of affirmative action sometimes point to preferences for children of alumni or athletes as other deviations from purely meritocratic admissions norms, but those considerations do not trigger heightened constitutional scrutiny and do not give rise to the same kind of political backlash. *See* Transcript of Oral Argument at 53, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (colloquy between Justice Scalia and counsel for respondents, agreeing that the Constitution does not preclude the disparate treatment of oboe and flute players or the giving of legacy preferences to children of alumni); *see also Grutter*, 539 U.S. at 368 (Thomas, J., dissenting) (“The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures.”).

190. *See, e.g.,* Daniel de Vise, *For Georgetown Dean, Common Application is Part of a Larger Admissions Problem*, WASH. POST (Oct. 3, 2010 9:24 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/28/AR2010092804421.html>.

191. Michelman, *supra* note 185, at 1223 (giving Social Security and the progressive income tax as examples of programs that do not need to compensate those burdened).

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extent diversity in higher education benefits the entire society, the displaced burden-bearers should also stand to benefit. But since race and ethnicity are discrete qualities that individuals cannot readily change, the aggrieved are more likely to regard affirmative action as a continued risk to themselves and their loved ones.<sup>192</sup> Their frustration and disappointment may lay dormant but can manifest powerfully through the political process, which is “underproviding” diversity in higher education.

Under Michelman’s model, compensation should be made when it costs less to accommodate than to ignore. Based on the analysis thus far, we know the educational benefits of diversity are substantial, and the cost of ignoring the burden-bearers (both actual and false) is getting to be prohibitive (i.e. legal bans on affirmative action in eight states). The cost to accommodate includes the weight of the displacement burden itself, which compensation must offset, and transaction cost of reaching a settlement with the burden bearers. The weight of the displacement burden is not known but is believed to be light though it may vary significantly across individuals. The settlement process requires individuals to reveal their private valuations. If a low-cost method of accommodation can be devised, then accommodation should be made. Accommodation mechanisms are examined in Part V. The next part explains how the paradigm shift proposed in this article fits into the existing legal and constitutional framework, and addresses moral concerns.

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192. *See id.* at nn.92, 95-96. When Jennifer Gratz was asked why she continued to press her lawsuit after she had graduated from the University of Michigan, she pointed to the next generation:

I think that the [affirmative action] policy is wrong. I mean, I’ve watched other kids apply, I coached different sports in high school, watched those kids apply to school, and one day I’ll probably have kids of my own, and I think that people should be treated fairly and equally and not treated differently based on the color of their skin.

On Air Interview by Anderson Cooper with Jennifer Gratz, on CNN NewsNight with Aaron Brown (Dec. 2, 2002), *available at* <http://www.cnn.com/TRANSCRIPTS/0212/02/asb.00.html>.

## V. Paradigm Shift

A. *Property Rules, Liability Rules*

The legal battle over affirmative action has been waged for decades over competing entitlements to constitutional equal protection: the applicant-plaintiffs' right to race-neutral admissions review versus the school-defendants' right to consider race in admissions.<sup>193</sup> In each case, the court awarded one side's claim with what law and economic theorists call **property rule** protection.<sup>194</sup> A property rule protects a right or entitlement with absolute legal protection.<sup>195</sup> *Hopwood* and *Wooden* gave the plaintiffs' claim to race-neutral treatment this legal right of way and outlawed race-conscious admissions in the Fifth and Eleventh Circuits.<sup>196</sup> *Grutter* reversed and granted property rule protection to the schools' entitlement to use the race-plus factor for 25 years. Most laws are property rules. They provide rigid, bright-line legal protection for recognized rights.

Property rules are supposed to bring finality to disputes, but in cases where competing claims are closely-matched and pursued by highly-motivated parties, the all-or-nothing nature of property rule judgments can inflame the controversy. The battle over affirmative action is so bitter that neither side is willing to concede. The *Gratz* and *Grutter* plaintiffs, unwilling to live with the *Grutter* ruling, threw their support behind Proposal 2 and persuaded Michigan voters to write property rule protection for race-neutral admissions into the state constitution.<sup>197</sup> Pro-affirmative action groups spent the next decade trying to overturn this enactment and restore the property rule of *Grutter* until the High Court halted their efforts in *Schuette*.

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193. See cases cited *supra* note 165.

194. See ELLICKSON ET AL., *supra* note 184, at 235-38; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

195. Carol M. Rose, *The Shadow of the Cathedral*, 106 YALE L.J. 2175, 2178-79 (1997).

196. *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262 (11th Cir. 2001); *Hopwood v. Texas*, 78 F.3d 932, 938 (5th Cir. 1996).

197. See *supra* note 64 and accompanying text (discussing how *Gratz* and *Grutter* launched the Michigan Civil Rights Initiative).

Guido Calabresi and Douglas Melamed introduced **liability rules** as the alternative to property rules to help the rule-maker who is unable or unwilling to declare one side the absolute winner over the other.<sup>198</sup> A liability rule splits the decision of which side should receive the law's backing into two parts—the legal entitlement and the option to transfer it to the other side for a price. For example, a court may initially award the legal right of way to Party A, but subject this right to an option given to Party B. Party B, by exercising the option and paying Party A a price, can obtain the law's protection for its entitlement to which Party A must then yield. Party B's payment helps to cushion Party A's loss. By giving something to both sides, liability rules reduce the likelihood that the parties will continue their conflict.

Liability rules give rule-makers greater flexibility in devising more balanced remedies. Calabresi and Melamed introduced liability rules using **call options**, the option to purchase/acquire. In the example above, Party B's call option allows him to acquire the legal right of way from Party A.<sup>199</sup> Liability rules can also use **put options**, the option to sell/convey.<sup>200</sup> Party A might receive both the legal right of way and the option to convey it to Party B for a price. Party A decides whether to keep the right or to sell it. Liability rules test how much the parties value their claims by giving them choices between the right and some sort of compensation, so the right that is valued more gets the legal protection.

Altogether, the property and liability rules form a menu of six basic ways for the rule-maker to devise legal remedies for any dispute involving two parties.<sup>201</sup> Not every rule is applicable

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198. See Calabresi & Melamed, *supra* note 194, at 1006-09; see also ELLICKSON ET AL., *supra* note 184, at 235-38.

199. Party B's call option imposes a corresponding obligation on Party A to sell or surrender the legal entitlement when the option is exercised. See Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822, 854-56 (1993).

200. See Ian Ayres, *Protecting Property Rights With Puts*, 32 VAL. U. L. REV. 793, 797-800 (1998); see also Ian Ayres & Jack M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1996).

201. See Ian Ayres and Paul Goldbart, *Optimal Delegation and Decoupling in the Design of Liability Rules*, 100 MICH. L. REV. 1, 10 (2001)

in every situation, but the menu can help the ruler-maker rearrange and evaluate competing claims in creative ways to arrive at the optimal outcome. Table 2 lays out how the six basic rules would apply to a dispute between a school and a would-be admit. The would-be admits are currently not known but they could be readily identified by the admissions offices, which maintain waiting lists and can most definitely use their individualized review of applications to determine which applicants would have been accepted.<sup>202</sup> Schools have been reluctant to identify the would-be admits out of fear of litigation, but may be willing to do so as part of an accommodation arrangement that would shield them from liability.<sup>203</sup>

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(showing “that there are an infinite number of rules . . . that produce identical entitlement allocations, but which affect how the disputants divide the entitlement’s value.”).

202. Two of the accommodation mechanisms discussed below do not require schools to inform the would-be admits. *See* discussion *infra* Part VI.

203. Liability rules that clearly divide legal entitlements provide incentives for parties to reveal private information. *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 *YALE L.J.* 1027 (1995).

Table 2: Settlement Outcomes under the Six Basic Rules<sup>204</sup>

Rule No.	Rule Type	School's rights, options and obligations	Would-be admit's rights, options and obligations
Rule 1	Property	Right to use the race-plus factor.	Obligation to accept denial of admission.
Rule 3	Property	Obligation to accept the would-be admit.	Right to be admitted with race-neutral review.
Rule 2	Liability Call Option	Obligation to accept the would-be admit and option to acquire her right (i.e. pay her to be denied). If the school exercises the option, it may then use the race-plus factor.	Right to be admitted subject to the school's option, which if exercised, would obligate her to accept compensation for the denial of admission.
Rule 4	Liability Call Option	Right to use the race-plus factor subject to the would-be admit's option, which if exercised, would obligate the school to accept her. Her payment would compensate the school for loss of diversity.	Obligation to accept denial of admission and option to acquire the school's right (i.e. pay the school to accept her). If she exercises the option, she would gain admission.
Rule 5	Liability Put Option	Obligation to accept the would-be admit unless she exercises her option, which would obligate the school to acquire her right (i.e. pay her to be denied) and allow the school to use the race-plus factor.	Right to be admitted and option to convey this right to the school. If she exercises the option, she would accept compensation to forego admission.
Rule 6	Liability Put Option	Right to use the race-plus factor and the option to convey this right to the would-be admit (i.e. have her pay the school to accept her). If the school exercises the option, it would receive compensation from her for the loss of diversity.	Obligation to accept denial of admission unless the school exercises its option, which would obligate her to acquire the school's right and gain admission.

The property rules (Rules 1 & 3) are already familiar. The ruling majorities in *Bakke*, *Grutter* and *Fisher* and Colorado voters in 2008 adopted Rule 1 to preserve affirmative action. Its direct opposite, Rule 3, has been endorsed by judges in several lower court decisions, voters in the other state ballot initiatives, Governor Jeb Bush in Florida, and the New Hampshire

204. The rules are numbered based on the convention set forth in Ayres & Goldbart, *supra* note 201, at 5-6.

legislature. After *Grutter* sunsets in 2028, Rule 3 would become the law of the land.

Three of the four liability rules have real world analogues. The forced-buyout concept of Rule 2 resembles the proposed admissions arrangement at issue in *Missouri ex rel. Gaines v. Canada*.<sup>205</sup> In that pre-*Brown v. Board* case, the Supreme Court rejected Missouri's attempt to satisfy the requirement of "separate but equal" by offering to pay black students to attend out-of-state law schools to preserve segregation at an in-state law school. The difference here is that this Rule 2 seeks to promote racial diversity instead of racial segregation.<sup>206</sup>

Rule 4 describes the widespread if not unwritten practice in higher education of wealthy patrons making large donations to selective schools to reserve seats therein for their relatives or designees.<sup>207</sup> In these "buy-in" transactions, the school usually sets high prices to benefit from the patrons' high valuation of a place in the admitted class. The donations can benefit the entire campus, but admitting privileged applicants in this way also displaces other applicants. Unlike affirmative action, disparate treatment on the basis of donations is not constitutionally suspect. Rule 4 discriminates on the ability to pay. Since schools with affirmative action programs tend to possess greater resources than the typical applicant, and since diversity is presumed to be generating benefits for the school, it seems unfair to ask the would-be burden-bearers to buy out the would-be beneficiaries.

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205. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 342-43 (1938).

206. Transcript of Oral Argument at 36, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241). Counsel for respondent stating:

[T]here is certainly a major difference between an educational policy that is motivated by an intent to exclude people based on racial animus and one like the Law School's policy and the Harvard Plan, which is designed to include students of all races, so that the education of all students will be enriched as a result.

*Id.*

207. See, e.g., Daniel Golden, *How Much Does It Cost To Buy Admission?*, WALL ST. J. (Mar. 26, 2003), <http://www.wsj.com/articles/SB1047409881995483800>.

Airlines routinely use a Rule 5 arrangement to resolve the problem of overbooked flights – by giving all passengers the right to stay on the overbooked flight and an option for a seat on a later flight plus a complementary ticket. Passengers who do not mind departing later and want the free ticket will exercise the option. No passenger is left aggrieved. By giving the passenger both the initial right to fly and a put option, Rule 5 ensures that the passengers cannot be under-compensated.<sup>208</sup> Rule 6 also has a put option but it is unnecessary to double-protect the school. Since a school that favors diversity will not exercise its option and will keep its right to use race-plus factor, Rule 6 turns into Rule 1.

Out of the four rules above, Rules 2 and 5 hold the most intuitive appeal because they require the beneficiary to compensate the burden-bearer, even though the two rules would assign the initial right as well as the corresponding options to opposite sides. In theory, when the cost of bargaining between parties is low, the parties will arrive at the same optimal outcome regardless of which rule is chosen.<sup>209</sup> In this situation, the cost of bargaining between one school and numerous would-be admits could be significant and our aim is to simplify the bargaining process to lower the settlement cost. The price on the options can have a strong impact on the bargaining process, and will be addressed in Part VI.

## B. *Constitutional Implications*

Affirmative rights in the Constitution are thought of as “inalienable” – so inviolable that they cannot be waived or alienated by the individual – and generally protected by property rules.<sup>210</sup> A notable exception is the Fifth Amendment’s

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208. Ayres, *Protecting Property Rights with Puts*, *supra* note 200, at 805.

209. Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 722 (1996) (explaining the Coase Theorem).

210. See Daniel A. Farber, *Afterword: Property and Free Speech*, 93 NW. U. L. REV. 1239, 1253 (1999); Thomas Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 NW. U. L. REV. 1143, 1152-53 (1999). Calabresi and Melamed describe certain entitlements to be inalienable not in terms of constitutional rules, but as the result of paternal or moral norms. Calabresi & Melamed,

Takings Clause, which requires just compensation for government takings of private property.<sup>211</sup> The Takings Clause is a classic liability rule, which gives the government the option to take property but requires compensation for the property owner. It compels the government to weigh the public benefit of the taking against the cost of compensation. Calabresi says the Fourteenth Amendment's Equal Protection Clause can be thought of in the same way as the Takings Clause.<sup>212</sup> The transfer of resources and opportunities to members of disadvantaged groups from individuals of non-favored groups constitutes takings, he argues, for which compensation ought to be paid because affirmative action as a policy vehicle to promote substantive equality cannot be justified by intent alone.<sup>213</sup> Without compensation, "we often don't know whether the taking is worthwhile," and "the less we charge those who benefit from it, the easier it is [for them] to say [']we want the [benefit'],'" he cautions.<sup>214</sup> Hence, affirmative action programs should pass a "burden internalization test" by compensating those burdened to ensure the benefits created are indeed worth the redistribution.<sup>215</sup> Calabresi's concept of **burden internalization** is drawn from Justice Scalia, who presumes society is usually reluctant to pay for programs that benefit the many at the expense of the few.<sup>216</sup>

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*supra* note 194, at 1111-15.

211. U.S. CONST. amend. V.

212. Guido Calabresi, Senior Judge U.S. Court of Appeals for the Second Circuit, Philip A. Hart Memorial Lecture at the Georgetown University Law Center, Thoughts on Equality in the American Constitution (Mar. 23, 2004), available at <http://web.law.columbia.edu/sites/default/files/microsites/law-theory-workshop/files/GCalabresi.pdf>.

213. *Id.* Cf. Justice Oliver W. Holmes's reminder not to "forget[] that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way of paying for the change." Penn. Coal Co. v. Mahon. 260 U.S. 393, 416 (1922).

214. Calabresi, Thoughts on Equality in the American Constitution, *supra* note 212, at 9.

215. Calabresi asks, "Affirmative Action: who pays? Is giving a poor black a job in the South something that a poor white steel worker in the South pays? Or is it you and me? Very different. I think we have to give the poor black steel worker a job. But it's very easy to say that, if we are not the ones paying for it." *Id.* at 11.

216. *Id.* (citing *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990)). Justice Scalia reasons that the Equal Protection Clause "requires the

Burden internalization goes to the heart of this article's argument and is the breakthrough that can calm the controversy over affirmative action in higher education and preserve the benefits of diversity. Contrary to Justice Scalia's presumption, diversity's benefits do in many if not most schools outweigh the costs to the would-be admits, which should make burden internalization attractive to supporters of affirmative action, because it would offer a much stronger proof of diversity's merits and a stronger defense of race-conscious admissions, both in the courtroom and forum of public opinion.

Constitutional law scholars are skeptical of efforts to replace property with liability rule protection for constitutional rights.<sup>217</sup> But their criticism of this approach is betrayed by the reality that cost-benefit analysis has already crept into the heart of equal protection jurisprudence. Even before *Grutter*, the Supreme Court was already taking the equal protection down this path by converting the strict scrutiny review standard from a most exacting constitutional inquiry into a cost-benefit analysis that balances interests of the state against purportedly inviolable rights of the individual.<sup>218</sup> Indeed, the strict scrutiny test itself, with an interest prong and a tailoring prong, has cost-benefit balancing embedded in its structure. In each of *Bakke*, *Gratz* and *Grutter*, the Justices used the interest prong to assess the benefits created by state action, and then used the tailoring prong to reduce the perceived burden on individuals of members of non-favored groups.<sup>219</sup>

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democratic majority to accept for themselves and their loved ones that which they impose on you and me." *Id.* (Scalia J., concurring). Calabresi says "*we* must bear the burden, if we would [put the burden] on *them*." Calabresi, Thoughts on Equality in the American Constitution, *supra* note 212, at 10 (emphasis added). *See also* Michelman, *supra* note 185, at 1169.

217. *See e.g.*, AKHIL R. AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES nn. 112 & 115 (1997) (contending that states are permitted to "treat violations of sacred constitutional rights as merely the cost of doing business.").

218. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997).

219. In *Grutter*, counsel for respondents urged the Court to weigh the burdens against the benefits. Transcript of Oral Argument at 53, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) ("[The burden of affirmative action] is certainly something that the Court has to pay attention to, but this is extremely limited in scope and relative to the benefits to students of all races and to our Nation. It has to be weighed in the balance."). *See also* Liu, *supra* note 76, at 1061.

The standard handed down from the affirmative action cases, however, is difficult for lower courts to apply because the precedents do not demand from the litigants (especially the schools) the kind of evidence that would enable a judge to enter into cost-benefit formula and arrive at a clear answer. Instead, judges must compare qualitative descriptions of an educational benefit versus complaints about the necessity of racially-disparate treatment. Reasonable judges look at the same information and come down on different sides.<sup>220</sup> The Supreme Court's instruction in *Fisher* to be less deferential to the schools has not yielded a clearer ruling on remand.<sup>221</sup>

The cost-benefit analysis utilized in the strict scrutiny test could be fine-tuned by adding a requirement that such schools internalize the burden. Schools that use the race-plus factor should account for and accommodate those displaced by their race-based admissions preferences. Such a requirement would induce the parties to disclose more information, which would help to demonstrate more precisely the actual cost-benefit balance of the program.

### C. *Market-Inalienability: Moral Concern and Justification*

In proposing to have the beneficiaries accommodate the burden-bearers, this article makes *Grutter's* cost-benefit analysis explicit and may invite objections on moral grounds. Put plainly, some may feel that *seats in universities should not be bought and sold*. The prospect of compensating displaced applicants and potentially monetizing their burden may strike some as unseemly even if the objective is to save affirmative action from misguided political backlash. Objections on moral and humanistic grounds can be evaluated and addressed using Margaret Radin's framework of market-inalienability.<sup>222</sup> The

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220. See *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011) (9-7 vote denying petition for rehearing en banc); *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc panel divided 5-4); *Hopwood v. Texas*, 84 F.3d 720 (5th Cir. 1996) (per curiam) (8-7 vote denying petition for rehearing en banc); cf. *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012) (en banc panel divided 8-7).

221. See *supra* Part IV.B. discussion of *Fisher*.

222. Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

framework is useful not only to critique the proposal but also demonstrates the value of the diversity rationale and provides a moral justification for the proposal.

In its simple form, the market-inalienability framework holds that some things can be given but not sold,<sup>223</sup> because the buying and selling of things or even the discussion of things in terms of their buying and selling have a tendency to commodify the thing being transacted or discussed in terms of transactions.<sup>224</sup> When things are commodified, they are made fungible, and when a thing that is near and dear to human personhood, such as human organs or babies, is rendered fungible, the result is “an inferior conception of human flourishing.”<sup>225</sup> To avoid this diminished sense of humanity, it is necessary to prohibit the sale of certain things, which could otherwise be transferred through gifts, such as the adoption of children and donation of organs. Hence, “market-inalienability” emphasizes the idea that certain things cannot be alienated through transactions in the marketplace even though they may be alienated as gifts on non-economic terms.<sup>226</sup>

The type of accommodation proposed in this article is purely compensatory. To the extent the accommodation is monetized (it need not be) and takes the form of a school’s “purchase” and the would-be admit’s “sale” of her entitlement to race-neutral admissions review, the transaction is confined to the two parties.<sup>227</sup> Such a bilateral compensatory transaction cannot spread to other parties. No “market” could form nor could any of the other outward trappings of commodification such as “supply and demand pricing, brokerage and arbitrage, advertising and marketing, stockpiling, speculation, and valuation in terms of the opportunity cost of production” materialize.<sup>228</sup> The would-be admit can only be compensated by

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223. *Id.* at 1850.

224. *Id.* at 1836, 1871-72.

225. *Id.* at 1885-86.

226. *Id.* at 1850, 1853.

227. Radin considers “[s]ales caused by official monetization of nonmonetary interests” including “compensation in tort” to be a “narrow” form of commodification, but does not object to monetization of tort harms. *Id.* at 1859 n.43. Compensatory transactions are inherently limited in scope, deeply grounded in the law and cannot be readily commodified.

228. *Id.* at 1855.

the school that burdened her, and she cannot sell or assign her entitlement to anyone else. The school remains in firm control of which students may have access to the admitted class because the school determines who receives the race-plus factor and who is burdened.

Radin is also concerned by the use of market rhetoric to describe social interactions that do not involve buying and selling as if they were transactions, because market rhetoric, in turn, can cause people to use market methodologies, such as monetary cost-benefit analysis, to evaluate those social interactions.<sup>229</sup> Once the social interactions are understood through market vernacular, there is a tendency to reach for market mechanisms to regulate the interactions.<sup>230</sup> Since market mechanisms often ignore human interests that are not “readily monetizable[,]” those interests can be unintentionally diminished when liability rules take hold.<sup>231</sup> This article uses the rhetoric of “benefits” and “burdens” to describe impact of affirmative action in higher education, but does so to clarify the cost-benefit analysis that the Supreme Court is already applying to the subject matter. Whereas Radin’s framework is oriented against theories of universal commodification that call for “unrestricted choice for *individuals* to maximize *individual gains* from trade,” the accommodation proposal in this article is intended to maximize *collective benefits* to society or at least to preserve society’s choice to pursue a course toward greater progress, equality and, as we shall see, human flourishing.<sup>232</sup>

On a deeper level, Radin’s promotion of human flourishing, which is based on her conception of personhood, directly supports the diversity rationale and provides a more fundamental justification for the proposal to accommodate. Radin describes personhood as consisting of three overlapping aspects – (1) freedom, (2) identity and (3) contextuality – and human flourishing requires satisfactory contributions to personhood in each of these three aspects.<sup>233</sup>

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229. *Id.* at 1859.

230. *Id.* at 1836, 1878.

231. *Id.* at 1878.

232. *Id.* at 1860-61.

233. *Id.* at 1804, 1861.

**Identity** “focuses on the integrity and continuity of the self required for individuation.”<sup>234</sup> Rather than a static concept, identity is a process cultivated through “personal individuation” and “self-development.”<sup>235</sup> Individuation, or the formation of self-identity, occurs not in a vacuum but through interactions with one’s surroundings or **contextuality**, which “focuses on the necessity of self-constitution in relation to the environment of things and other people.”<sup>236</sup> In other words, “to be differentiated human persons, unique individuals, we must have relationships with the social and natural world.”<sup>237</sup> **Freedom**, as “the will, or the power to choose for oneself”<sup>238</sup> is the ability of the individual to “self-develop in accordance to one’s will in relation to one’s environment and other people.”<sup>239</sup> This term should not be understood in the narrow sense of individuals choosing their identities, but having the kind of nurturing environment in which they have the ability to “will certain interactions [that are] integral to self-development.”<sup>240</sup> Radin describes freedom as “a positive commitment to act so as to create and maintain particular contexts of environment and community.”<sup>241</sup> The guarantee of freedom, as it is understood this way, is not so much a refrain from interfering with individual will, as it is an affirmative duty to create that environment which is conducive to self-development.<sup>242</sup>

Radin’s model of personhood in which individual identity is cultivated in a conducive environment echoes the diversity

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234. *Id.* at 1904 (“In order to have a unique individual identity, we must have selves that are integrated and continuous over time.”).

235. *Id.* at 1905 (“Contextuality means that physical and social contexts are integral to personal individuation, to self-development.”).

236. *Id.* at 1904, 1906. (“One’s surroundings – both people and things – can become part of who one is, of the self.”).

237. *Id.* at 1904.

238. *Id.* (“In order to be autonomous individuals, we must at least be able to act for ourselves through free will in relation to the environment of things and other people.”).

239. *Id.* at 1905.

240. *Id.*

241. *Id.*

242. *Id.* (Hence, “a positive view of freedom, in which the self-development of the individual is linked to pursuit of proper social development, and in which proper self-development, as a requirement of personhood, could in principle sometimes take precedence over one’s momentary desires or preferences.”).

rationale, which calls for a campus environment that is dynamic, varied and free, that is stimulating and yet respectful of the formation of each student's identity. In a less-varied environment, individuals may not appreciate the other possibilities against which they can reflect their self-awareness and enhance their self-understanding and thus be limited in their self-development. In a more conforming environment, they may not be able to explore or choose a particular self-identity. The affirmative commitment to creating and maintaining an environment conducive to self-development that Radin calls for, is the same commitment that the Supreme Court made in *Grutter* to preserve diversity in higher education.

In creating that diverse learning environment, schools bring together students not only of different race and ethnicities but also from varied geographic, social and economic backgrounds, having different talents, interests and conceptions of the world, and place them in one setting where intense self-development occurs. In this setting, students may learn (or are more likely to realize) that despite their differences in appearance, background and prior beliefs, that they share much more than their differences would suggest, that they are united by a common curiosity to learn, by the ways in which they have learned to understand and engage in each other's differences, by their common enthusiasm for the life ahead, and simply by their experience of living and learning together. From this setting, they carry these shared experiences with them for the rest of their lives to all the places they venture and draw on them to engage in the people they meet and the ideas they encounter, and perhaps, use those experiences to shape the new settings over which they may exert influence.<sup>243</sup>

In many respects, the diverse setting created on campus reflects an idealized view of America and the world. It is a setting that is not readily found in the environments in which most of the students are raised. This is what makes diversity in higher education so special and so appealing to those who have experienced it. It represents an ideal concept of what the country and the world could and should be. It is rooted in the

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243. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003) (regarding the importance of diversity in the training of leaders).

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self-conception of the U.S. national identity, whether *e pluribus unum* or the quest for “a more perfect Union.”<sup>244</sup> Having a united but diverse society depends on people whose self-identities are comfortable with the diversity of their country and world.

Now having understood Radin’s conception of personhood and its support for the diversity rationale, consider the impact of affirmative action on personhood. *Grutter’s* requirement for individualized review of applications pays due respect to the uniqueness of individual applicants, but its acceptance of critical mass transforms the same individual applicants into seemingly fungible equivalents along racial and ethnic lines. When a school publishes statistics of the racial and ethnic composition of the admitted class, all members in that class are instantly de-individualized and sorted along group lines. A common defense of critical mass, that more than a few underrepresented minority students are need to be present on campus to avoid any one from being regarded as a “token minority” whose beliefs and behavior might be erroneously stereotyped to represent his or her entire racial or ethnic group, is itself couched in terms of avoiding fungibility.<sup>245</sup> But the notion that applicants should be made fungible on the basis of their race so that some of the admitted students could be perceived as not fungible seems to be an unsatisfactory promotion of personhood. Race and ethnicity, which are determined by an individual’s internal genetic and cultural make-up on the one hand, and society’s external constructs of race and ethnicity on the other, cannot be readily altered by the individual. Society’s external constructs are in turn influenced by the “rhetoric of race-conscious admissions,” which has an adverse impact on personhood.

Consider Natasha Scott, a typical senior at a magnet high school in suburban Maryland applying to college in the fall of 2010.<sup>246</sup> Her mother is Asian, her father is black, and she

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244. U.S. CONST. pmb1.

245. *Grutter*, 539 U.S. at 320 (“Racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”).

246. Susan Saulny & Jacques Steinberg, *On College Forms, A Question of Race, or Races, can Perplex*, N.Y. TIMES (June 13, 2011), [http://www.nytimes.com/2011/06/14/us/14admissions.html?\\_r=0](http://www.nytimes.com/2011/06/14/us/14admissions.html?_r=0).

identified herself as of both races in high school. But when she applied to college, she wondered how to answer the question about race on the applications and sought advice anonymously from an online bulletin board for applicants, parents and advisors:

I just realized that my race is something I have to think about, . . . It pains me to say this, but putting down black might help my admissions chances and putting down Asian might hurt it.<sup>247</sup>

Every web commenter advised her to put down only African-American as did her mother. She followed their advice and was admitted to a prestigious school, but admits feeling guilty about “denying a part of [her]self to look like a more appealing college candidate.”<sup>248</sup> Scott was forced to internalize the rhetoric of race-conscious admissions and deny part of her identity on her application. In so doing, she had to break the integrity and continuity of her self-identity, which diminished the identity aspect of her personhood. Scott’s dilemma is felt by many applicants, but whereas Scott seemingly had a choice, most do not.<sup>249</sup> This dilemma weighs on the applicants’ sense personhood and leads to an inferior sense of human flourishing.

Note too, the impact that those surrounding Scott had on her decision – the perception of her mother and the commenters that putting down a non-favored race would hurt her chances. This is an example of a less tolerant contextuality working against the will of individuals to choose the course of their self-development. In the case of Scott, the alteration to her self-identity was perhaps temporary. Once in the tolerant contextuality of college, she could identify herself inwardly and

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247. *Id.*

248. *Id.*

249. Some Asian-American applicants leave blank the race box or check “white” to avoid what they believe to be higher hurdles facing Asian-American applicants at selective schools. Jesse Washington, *Some Asians’ College Strategy: Don’t Check ‘Asian’*, A.P. (Dec. 3, 2011), <http://news.yahoo.com/asians-college-strategy-dont-check-asian-174442977.html>. See also Scott Jaschik, *Is It Bias? Is It Legal?* INSIDE HIGHER ED. (Feb. 3, 2012), <http://www.insidehighered.com/news/2012/02/03/federal-probe-raises-new-questions-discrimination-against-asian-american-applicants>.

outwardly as mixed race again. Even as affirmative action is helping to foster an ideal setting for learning on-campus, the rhetoric of race-conscious admissions is creating a more racially-charged and less tolerant contextuality just outside the gates. To gain admission to the more ideal setting inside the ivory tower, where personhood could develop in freedom, must applicants make uncomfortable compromises with their identity while they are still on the outside looking in? With the political backlash against affirmative action eroding the very commitment to create the diverse learning environment (Radin's freedom), we can conclude that the *Grutter* regime is undermining all three aspects of personhood.

Thus, we are confronted by the trade-off between the promotion of personhood within the diverse learning environment and the impingements on personhood by the rhetoric of race-conscious admissions. Radin's framework is flexible enough to recognize that in a "nonideal" world, certain forms of "partial commodification" may be justified if they can facilitate, not hinder, the eventual realization of a more "ideal world."<sup>250</sup> The quest to reach the "ideal world," which she describes as the "transition dilemma for social progress" coheres with the *Grutter* majority's desire to move toward race-neutrality over the sunset period.<sup>251</sup> The proposal in this article to modify the *Grutter* regime with the accommodation requirement uses partial commodification to preserve diversity in the present and facilitate the transition toward race-neutrality in the not-too-distant future.<sup>252</sup> Gifts, which

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250. See Radin, *supra* note 222, at 1903, 1924.

251. *Id.* at 1915 & n.238. Radin could be speaking for the Court in *Grutter* when she says: "We cannot make progress toward the noncommodification that might exist under ideal conditions of equality and freedom by trying to maintain noncommodification now under historically determined conditions of inequality . . ." *Id.* at 1906.

252. Radin's only caveat against using partial commodification to ease the transition is the risk that commodification rhetoric in the interim will make the realization of the ideal eventuality less likely. *Id.* at 1915. The proposal here may involve limited compensatory transactions that are not susceptible to marketization. Any harm to the personhood of applicants from liability rules (i.e., partial commodification) is outweighed by the harm caused by the current race-conscious admissions regime. *Id.*

strengthen social relationships and reinforce personhood, can also be used in accommodation.<sup>253</sup>

## VI. Accommodation Mechanisms

We now know that it is preferable to settle with the real burden-bearers of affirmative action when the cost of not settling is higher. We have also identified at least two promising accommodation mechanisms (Rules 2 & 5) from the menu of standard remedies that could redress the would-be admits and ease the political backlash. What are missing is the price, if any, and the logistics of arranging the settlement.

According to Liu's negligible burden hypothesis, the would-be admits are not appreciably burdened by their displacement because they have nearly as good if not better alternative schools to attend.<sup>254</sup> If that were true, a token sum may satisfy their burden. In *Hopwood*, the district court ordered UT-Austin and its law school to pay a dollar to each of the plaintiffs.<sup>255</sup> Nominal compensation could also come in the form of a gift card from the campus store or honorary affiliation with the school. Or it could be admissions-related such as guaranteed acceptance if the would-be admit were to re-apply as a transfer student or even a plus-factor preference on any applications to graduate schools at the same institution.

If there is concern that a low price on the school's call option (Rule 2) might undercompensate the would-be admit, the rule-maker can vest the put option with her (Rule 5) so she can reject the settlement offer and force the school to admit her. With Rule 5, she can never be undercompensated. If many would-be admits did so, the school might have too many matriculating students, a problem they regularly resolve by offering deferrals to the incoming class. Regardless of what the would-be admits decide, the school can certify that no one is burdened by its use of race. An option price that is set too high may give a windfall to the would-be admits and force schools to expend greater

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253. *Id.* at 1908.

254. *See* Liu, *supra* note 76, at 1093.

255. *Hopwood v. Texas*, 999 F. Supp. 872, 923-24 (W.D. Tex. 1998), *rev'd on other grounds*, 236 F.3d 256 (5th Cir. 2000).

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resources than necessary to achieve diversity. The rule-maker can withdraw from price setting altogether, and allow the school to determine the price on the would-be admit's option. Each school can develop its own package of incentives to persuade the would-be admits to go elsewhere.<sup>256</sup>

Schools could also look for other students in the admitted class who are willing to give up their seat for the race-plus admits for a lower price. Suppose a school accepted 124 race-plus admits and must internalize the burden of displacement. Instead of reaching out to the would-be admits, the school could invite members of the admitted class to take on that burden and attend another school in exchange for compensation. Since many admitted students may prefer other schools that also accepted them, they may value a seat at this school less than the would-be admits, and would gladly accept a lower buy-out offer. Once a sufficient number of respondents had accepted the offer and agreed to be displaced, the school could then certify that it has internalized the burden of its race-based admissions preferences.<sup>257</sup> The number of students who must accept this offer for the school to internalize the burden should be equal to the number of would-be admits, which as we have seen is the number of applicants that the school expects that it would have to admit to fill the seats that otherwise went to the race-plus admits.

The accommodation mechanism could also operate with gifts, as per Radin's model, instead of cash, goods or opportunities of value. A school could appeal to its applicants to consider the greater good of diversity in higher education and ask them to taken on the burden of displacement without any material inducement. This offer could be made, as in the example above, to students in the admitted class who are still deciding between schools. It could also be made at an earlier stage in the admission process.

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256. A school could bargain with each would-be admit individually and reach different settlement amounts. Such an approach would be very narrowly tailored; but for the ease of administration, it would be more practicable for the school to set one price for all of its would-be admits.

257. Unassisted minority admits are just as eligible to accept the buy-out offer but race-plus admits are not.

A school could ask for volunteers among its applicants to step forward and allow themselves to be rejected so that underrepresented minority applicants could be admitted with the race-plus factor in their place. In every admission cycle, some applicants will withdraw their applications from one or more schools for various reasons. Many do so because they have already received more attractive offers or scholarships from other institutions. This voluntary burden acceptance approach targets these applicants by asking them to consider waiving their right to race-neutral treatment and consenting to be used to be burdened with rejection.<sup>258</sup> If an applicant agrees to be designated a “voluntary burden-bearer,” the school must then determine if this volunteer would have been admitted. If the volunteer was going to be admitted, then the school can fill the vacated seat in the admitted class with a race-plus admit.

To give to a cause, a donor must believe in the cause. This altruistic form of burden-internalization tests the willingness of applicants, who may attend other schools with diverse campuses, to make a symbolic gesture in support of diversity in higher education. Having voluntary burden-bearers step forward and cover the cost of affirmative action would be a powerful demonstration of the beneficiaries’ commitment to diversity.

Each of the mechanisms described above would incur fairly low settlement costs (at least lower than demoralization costs to justify settlement under Michelman’s model). They also satisfy Calabresi’s call for burden internalization. Other mechanisms can be devised along the same lines so long as they meet the foregoing conditions.<sup>259</sup> A school operating a race-conscious admissions program should make annual certifications that it has offset any displacement effect of its race-conscious admissions decisions by accommodating those who would have been displaced or finding qualified burden bearers to take on

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258. These applicants, by virtue of the more attractive alternatives they have, are likely to be admitted if they do not inform the school of their change of intention.

259. There would be no retroactive application of the accommodation requirement as schools currently operating race-conscious admissions programs are doing so legally. See *Smith v. Univ. of Wash.*, 392 F.3d 367 (9th Cir. 2004).

those burdens. Along with this certification, the school should also report its race-plus usage during each application cycle. Disclosure of this statistic helps to inform the public of the true scale of affirmative action's impact, as well as the schools' dependence on the race-plus factor. Over time, such statistics can help track progress toward the narrowing of the achievement gap.

Greater disclosure of information about how racial preferences are used in admissions process may heighten for a time, race consciousness on campus, but revealing accurate information about race-based preferences will help disprove the false burden effect. Some may worry about the impact that the proposal may have on minority students themselves. The distinction between unassisted minority admits and race-plus admits emphasized here might make minority students more self-conscious. Schools can protect their race-plus admits by not informing them or anyone else of their status.

## VII. Effect of Burden Internalization

If the benefits of diversity significantly outweigh the burdens of affirmative action, as this author believes, the change in the type of legal protection for affirmative action (from property to liability rules) will have a limited effect on the student composition of most campuses. Most selective schools would still admit the best minority applicants they can and make the accommodation necessary to permit their continued use of the race-plus factor as they need. The actual pay-out, if any, would not be onerous. Nevertheless, the accommodation and information disclosure requirements would alter the incentive structure sustaining diversity in higher education and produce welcomed effects on how diversity programs are managed, how minority students are motivated, and how affirmative action is perceived.

### A. *Impact on Schools*

The specific impact of burden internalization will vary with each school's reliance on race-conscious measures to achieve diversity. Schools that do not consider race in admissions,

including those that use only race-neutral means to attain diversity, will be unaffected. Selective schools that can assemble critical masses of minority students entirely through unassisted minority admits can certify that while they consider race in admissions, they do not need to accommodate because they are not giving race-based preferences. Such schools will be the model under the new regime. Their reputation for not having to use race as a plus-factor will attract more high achieving minority students who do not want to be stigmatized by the suspicion that they had benefited from racial preferences. These top minority students can in turn help the schools maintain diversity costlessly. A virtuous cycle thus develops.

Other selective schools that depend on the race-plus factor would have to determine whether the resources they devote to race-conscious admissions are worth the benefits. In so doing, they must evaluate how well their diversity programs are working and compare the benefits they currently derive with that which they might obtain from race-neutral means to achieve campus diversity. Some schools may make the switch to race-neutrality if they believe any decline in educational benefits to be slight relative to the cost savings. Other schools might find it worthwhile to *increase* their use of the race-plus factor because the benefits they derive far outweigh the accommodation costs. Many schools will emulate the model schools by attracting and accepting more unassisted minority admits.<sup>260</sup>

As race-plus admits become more costly to enroll, selective schools will find it worthwhile to help convert these students into unassisted minority admits. After all, colleges and universities are better at teaching than compensating, and they have considerable unused capacity to help incubate minority youths into competitive applicants.<sup>261</sup> Resources used to accommodate could instead be spent on helping these students.

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260. Applicants from non-favored racial groups who can contribute to racial or ethnic diversity on campus will also be in greater demand. See *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003); *Regents of Univ. of Cal. v. Bakke* 438 U.S. 265, 317 (1978); see also *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J., concurring).

261. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 224 (2003) (criticizing American higher education for failing to take a more direct and active role in efforts to narrow the achievement gap in secondary education).

Admissions counseling, summer classes, and preparatory courses can all improve an applicants' credentials.<sup>262</sup> Many post-secondary schools already offer special college preparatory programs but only for paying students.<sup>263</sup> Under the new regime, schools would have a much greater incentive to work directly toward narrowing the achievement gap.<sup>264</sup>

### B. *Impact on Underrepresented Minority Students*

The premium that schools will place on unassisted minority applicants will in turn alter the achievement incentives for minority students, particularly those who are just below the race-neutral cutoff. Currently, this latter group can reliably gain admission, but as schools work to reduce accommodation costs, having slightly higher grades and test scores would suddenly become much more consequential. A better grade in Algebra II or a few points higher on the SATs may mean scholarships and offers from better schools or avoiding mandatory remedial programs that some schools might require race-plus admits to attend. Thus, modifying the *Grutter* regime by adding the accommodation requirement might provide just the type of motivation for minority students to make incremental efforts to improve their academic credentials that Justice Thomas wants, but without the harsh effect of immediately throwing them into "the cauldron of competition."<sup>265</sup> The paradigm shift would allow for a milder

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262. Cf. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION 8-10 (2011), *available at* <http://www.justice.gov/crt/about/edu/documents/guidancepost.pdf> (permitting schools to institute pipeline, outreach and mentoring programs to increase minority achievement at the high school and college level).

263. After the passage of Proposition 209, the University of California's system devoted more resources to cultivate minority students in secondary and primary education to expand the pool of competitive minority applicants. James Traub, *The Class of Prop. 209*, N.Y. TIMES (May 2, 1999), <http://www.nytimes.com/1999/05/02/magazine/the-class-of-prop-209.html?pagewanted=all&src=pm>.

264. Cf. Scott Jaschik, *Baylor Pays for SAT Gains*, INSIDE HIGHER ED (Oct. 15, 2008), <https://www.insidehighered.com/news/2008/10/15/baylor> (school gives incentives to admittees to score higher on SATs).

265. *Grutter*, 539 U.S. at 372 (Thomas, J., dissenting).

transition toward race-neutrality than what the *Grutter* dissenters demand, but would work steadily to erode affirmative action's implicit race-norming effects. Better preparation will help these minority students excel once they enroll, and reduce the concern that they will be "mismatched" with their school.<sup>266</sup>

C. *Enlisting The Support of Diversity's Beneficiaries*

Accommodation costs will vary with each school, its applicant profile and the type of accommodation mechanism adopted but even the least costly form of accommodation plus efforts to boost minority achievement will require schools to expend additional resources and manpower under the proposed regime. To cover these costs, schools can draw on the manifold beneficiaries of diversity, whose willingness to contribute can be powerful demonstration of how much they value this good.

Aside from dipping into their own budgets and endowments, schools can seek government funding, which would more broadly socialize the cost of diversity. Since the educational benefits are compelling to the government, it may be appropriate for society to pay for this public good. In this era of public budget deficits, spending cuts, and declining public appetite for affirmative action, however, public finding may be difficult to secure. Current and prospective students who have or are about to partake in the diverse learning environment created for their benefit are another source for support. Raising tuition would test their willingness (and that of their parents) to pay for diversity. Following the passage of Proposition 2009, students at UC Berkeley approved the assessment of a student fee to fund minority outreach.<sup>267</sup> Prospective and even current students, however, have not experienced the full extent of diversity's benefits and may underappreciate its value. A fee hike also tests the ability to pay more than willingness to pay. With tuition growing faster than inflation, further fee increases will make higher education even less affordable.

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266. For the mismatch effect, see SANDER & TAYLOR, *supra* note 166.

267. See *Constitution*, BRIDGES MULTICULTURAL RES. CTR., <https://callink.berkeley.edu/organization/bridgesmulticulturalresourcecenter/DocumentLibrary/View/57432> (last visited Apr. 13, 2015).

Schools can appeal to their alumni for donations of their time and money to sustain on-campus racial diversity. The broader societal benefits of diversity are spread through the graduates, and the rate of alumni donation is frequently used to measure student satisfaction.<sup>268</sup> Asking these beneficiaries to contribute to a diversity preservation fund would reveal how much graduates value their learning experience. Further afield, Corporate America has been among the most enthusiastic *amici* supporters of affirmative action.<sup>269</sup> Big businesses believe that having a workforce trained in a diverse environment is vital to their success in the global marketplace.<sup>270</sup> And where would elite law firms recruit the top-flight minority lawyers if the end to affirmative action constricted the pipeline? These wealthier beneficiaries of diversity should be tapped for support.

#### D. *Informing the Public*

If schools can accommodate those who are displaced by race-based admissions preferences (or finding volunteers to take on the burdens) and demonstrate the favorable cost-benefit balance of diversity, then affirmative action would become far less controversial. Rejected applicants who do not receive accommodation offers will realize that they would have fared no better under a race-neutral admissions scheme. Reaching this kind of understanding is particularly important as the false victim effect is likely to multiply as admissions rates fall at selective schools.

With race-plus usage reported annually, the public will be able to track higher education's progress toward the narrowing the achievement gap and compare the track record of different schools. The accommodation requirement is designed to obviate itself when schools can enroll critical masses of minority students without using race-based preferences. When this eventuality is realized, the aspirations of formal equality will

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268. See LEMANN, *supra* note 65.

269. See Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

270. See Brief of General Motors Corp., *supra* note 269, at 5.

converge with the reality of substantive equality, and thereby fulfilling the goal of colorblind equal protection while sustaining racial diversity. Individual schools may reach this juncture at different points in time. The new regime does not require the rule-maker to impose an arbitrary sunset date like *Grutter's* 300 month countdown. It is possible that the achievement gap would not narrow for a considerable period of time, perhaps even beyond 2028. There may be other racial or ethnic groups that schools may deem necessary to the on-campus diversity that may need preferences from time to time. Liability rule protection for affirmative action, with its ability to internalize the burden and ease majority resentment can better sustain diversity over the longer term.

When the public realizes how preciously few actually receive the race-plus boost, then more attention could be paid to the vast majority of disadvantaged underrepresented minority students whose needs have never been addressed by affirmative action.<sup>271</sup> The resources, energy and time spent on protracted litigation and public ballot initiatives over race in admissions could be better used to address the underlying causes of the achievement gap.<sup>272</sup>

### VIII. Conclusion

For too long the two sides of the affirmative action dispute have traded claims about the burdens of racial preferences versus the benefits of diversity. They have managed to convince rule-makers in different forums to enact opposing laws, but have

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271. See, e.g., SCHOTT FOUND. FOR PUB. EDUC., *GIVEN HALF A CHANCE: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 2* (2008) (noting that fewer than half of black male high school students in the United States graduated with their peers in the 2005-2006 school year).

272. Fisher has appealed her case a second time to the U.S. Supreme Court. Samantha Ketterer, *Fisher Requests Supreme Court Hear Case Against UT a Second Time*, DAILY TEXAN (Feb. 11, 2015) <http://www.dailytexanonline.com/2015/02/11/fisher-requests-supreme-court-hear-case-against-ut-a-second-time>. Anti-affirmative action ballot initiatives could appear in several more states including Ohio, Missouri and Utah. See John Lauerman & Janet Lorin, *Affirmative Action Ruling Challenges Colleges Seeking Diversity*, BLOOMBERG (Apr. 23, 2014), <http://www.bloomberg.com/news/2014-04-23/affirmative-action-ruling-challenges-colleges-seeking-diversity.html>.

not conclusively answered each other's claims. This article brings the various points and counterpoints under one framework of analysis. Only by breaking down the traditional fault lines can steps forward be discussed.