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Awaiting the Rebirth of an Icon: Brown v. Board of Education

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AWAITING THE REBIRTH OF AN ICON: *BROWN V. BOARD OF EDUCATION*

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Where have you gone, Justice Kennedy
Our nation turns its lonely eyes to you . . .
What's that you say, Mrs. Robinson?
Justice K has left and gone away,
Hey hey hey, hey hey hey.[1]

Brown v. Board of Education:

These cases were decided on May 17, 1954.[2] The opinions of that date, declaring *the fundamental principle that racial discrimination in public education is unconstitutional*, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle.[3]

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1. SIMON & GARFUNKEL, *Mrs. Robinson*, *on* BOOKENDS (Columbia Records 1968). The lyrics of Paul Simon's song, "Mrs. Robinson," are dedicated to Associate Justice Anthony Kennedy who, over the years since he first penned his powerful dissent in *Grutter v. Bollinger*, 539 U.S. 306, 387–95 (2003), has gradually abandoned long-held principles regarding "strict scrutiny review" of the use of suspect racial classifications.

2. Brown v. Bd. of Educ., 347 U.S. 483 (1954) [hereinafter *Brown I*]. The reference to "cases" refers to the fact that the United States Supreme Court agreed to hear five separate cases presenting the same issue. The cases arose in Kansas (*Brown v. Board of Education of Topeka, Shawnee County, Kansas*), South Carolina (*Briggs v. Elliott*), Virginia (*Davis v. County School Board of Prince Edward County, Virginia*), District of Columbia (*Bolling v. Sharpe*), and Delaware (*Gebhart v. Belton*). *See, e.g.*, *Documents Related to Brown v. Board of Education*, NATIONAL ARCHIVES, https://www.archives.gov/education/lessons/brown-v-board (last updated Aug. 15, 2016).

3. Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955) (emphasis added)

I. INTRODUCTION

The premise of this article is that the "fundamental principle,"[4] set forth above and adopted over sixty years ago by the United States Supreme Court, has effectively been overruled by two interrelated twenty-first century decisions: (1) *Grutter v. Bollinger*[5] in 2003, and (2) *Fisher v. University of Texas at Austin*[6] in 2016. Following the Court's

[hereinafter *Brown II*].

4. Yale Law Professor Stephen L. Carter has written that "most philosophers still hold the view that a principle, in order to *be* a principle, must be applied universally and impartially—that is, must actually be applied to all the cases that it fits, with no exceptions for partisan considerations." STEPHEN L. CARTER, (INTEGRITY) 48 (1996).

5. 539 U.S. 306 (2003).

6. 136 S. Ct. 2198 (2016) [hereinafter *Fisher II*]. The *Fisher* case was first argued before the Supreme Court in 2012. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) [hereinafter *Fisher I*]. In the Court's initial 7–1 decision (Justice Elena Kagan took no part in the consideration of the case), the Court vacated the judgment of the Fifth Circuit Court of Appeals (which had upheld UT's

decision in *Grutter*, the University of Texas at Austin ("UT") implemented a race-conscious admissions policy virtually indistinguishable[7] from the one used by the University of Michigan Law School, the latter of which was upheld in *Grutter*.

The ultimate question posed throughout this article is whether *Brown*'s fundamental principle, which was silently cast aside by the Court in both *Grutter* and *Fisher II*, will be resurrected. This article argues that it should be, and the sooner the better.[8]

race-conscious admissions policy) and remanded the case for further consideration. *Id.* at 2414. On remand, the Fifth Circuit reaffirmed (2–1) its previous decision upholding UT's *Grutter*-like policy. *See* Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 636 (5th Cir. 2014). Petitioner again appealed. The Supreme Court accepted review and issued its second decision, *Fisher II*, on June 23, 2016. In a 4–3 decision, the Court upheld UT's *Grutter*-like policy. Playing a role in the outcome was the sudden death of Justice Antonin Scalia. It is indisputable that Justice Scalia would have voted to overturn *Grutter* and reverse the Fifth Circuit in *Fisher II*: "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." *Fisher I*, 133 S. Ct. at 2422 (Scalia, J., concurring) (quoting Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part)).

7. "UT's race-conscious admissions procedures were modeled after the program [*Grutter*] approved." Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217–18 (5th Cir. 2011). In fact, UT's counsel commenced his argument before the Supreme Court on October 10, 2012, by stating that "[UT's plan] is indistinguishable [from *Grutter*] in terms of how it operates in taking race into account." Transcript of Oral Argument at 31, *Fisher I*, 133 S. Ct. 2411 (2012) (No. 11-345). *See generally* R. Lawrence Purdy, *Fisher v. University of Texas at Austin: Grutter (Not) Revisited*, 79 MO. L. REV. 1, 2 n.7 (2014) [hereinafter *Grutter (Not) Revisited*]. *See generally* R. Lawrence Purdy, *Prelude:* Bakke *Revisited*, 7 TEX. REV. L. & POL. 313, 318–28 (2003) [hereinafter *Prelude*] (discussing in full the policy at issue in *Grutter*).

8. *Grutter* ostensibly established a time limit of twenty-five years, after which the alleged "compelling interest" approved would no longer be recognized. *Grutter*, 539 U.S. at 343. However, even though Justice Kennedy expressly recognized in *Fisher I* that "strict scrutiny" analysis demanded that race-conscious admissions policies be "limited in time," 133 S. Ct. at 2421, *Fisher II* does not contain any time limit on UT's use of its race-conscious system. Nor does *Fisher II* mention *Grutter*'s twenty-five-year deadline. The absence of any time limit in *Fisher II* suggests the Court has no intention of enforcing this particular requirement. Moreover, Justice Kennedy is guilty of misinterpreting *Grutter* when he stated that the Court in *Grutter* "approved [the Law School's] plan at issue upon concluding that it was . . . limited in time." *Fisher I*, 133 S. Ct. at 2421. It was not. *See Grutter (Not) Revisited*, *supra* note 7, at 18–20 n.95 ("[The Law School has] indicated [it] will continue to use race as a factor in admissions for as long as necessary to admit a critical mass of underrepresented minority students, and no one can predict how long that might be." (citing Grutter v. Bollinger, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001)). Similarly, during oral arguments in *Fisher II*, in direct response to a question from

First, this article will describe the "compelling interest" recognized in *Grutter* and *Fisher II*.[9] Next, this article will analyze the constitutional, statutory, and case law that preceded the outcomes in *Grutter* and *Fisher II*.[10] This article will then describe the declining use of the fundamental principle established in *Brown* and offer concluding remarks about the importance of remaining faithful to *Brown*'s fundamental principle.[11]

II. THE "COMPELLING INTEREST" RECOGNIZED IN *GRUTTER* AND *FISHER II*

In *Grutter*, the University of Michigan Law School asked the Court to recognize, "in the context of higher education, a compelling state interest in student body diversity"[12] and "the educational benefits that flow" therefrom.[13] In response, a deeply divided Court endorsed the "view that student body diversity is a compelling state interest that can justify the use of race in university admissions."[14]

But before a Court will approve the use of any government-sanctioned race-conscious policy, it demands a showing of not only a "compelling state interest" justifying the use of race,[15] but one that

the Chief Justice as to when UT's "program w[ould] be done," UT's counsel responded: "[A]s soon as we can achieve the same sufficient numbers for the educational benefits of diversity without taking race into account, we will no longer take race into account." Transcript of Oral Argument at 17, *Fisher II*, 136 S. Ct. 2198 (2015), https://www.c-span.org/video/transcript/?id=53769. Justice Kennedy apparently demanded nothing more concrete from UT in terms of a time limit than empty assurances. *See, e.g.*, *Fisher II*, 136 S. Ct. at 2210 ("Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest.").

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Parts IV and V.

12. *Grutter*, 539 U.S. at 328.

13. *Id.* at 307.

14. *Id.* at 325 ("In the wake of our fractured decision in *Bakke,* courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent . . . ."). The *Grutter* Court admittedly dodged answering this question. *Id.*

15. *See Grutter*, 539 U.S. at 326; Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989); *Grutter*, 539 U.S at 351–52 (Thomas, J., concurring in part and dissenting in part) ("A majority of the Court has validated only two circumstances where 'pressing public necessity' or a 'compelling state interest' can possibly justify racial

can be subjected to strict judicial review.[16] In addition, as Justice O'Connor herself wrote in an earlier case (and repeated in *Grutter*), "unless classifications based on race are '*strictly reserved for remedial settings*, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.'"[17] Her earlier words expressed an important limiting principle regarding the exceedingly rare judicially-permissible uses of race which, remarkably, she proceeded to thoroughly ignore in *Grutter*.

What is important to understand is that the "compelling interest" recognized by the Court in both *Grutter* and *Fisher* is not "remedial" in any meaningful sense of the word. Justice O'Connor conceded this point with an early apology in *Grutter*: "It is true that some language in [our affirmative-action] opinions might be read to suggest that *remedying* past discrimination is the only permissible justification for race-based governmental action."[18] What is undeniable is that neither the racially discriminatory policies implemented by the University of Michigan[19] nor their mirror image

discrimination by state actors. First . . . national security constitutes a 'pressing public necessity' . . . . Second, the Court has recognized as a compelling state interest a government's effort to *remedy past discrimination for which it is responsible*." (emphasis added)). Justice Thomas then delineates the contours of what constitute "pressing public necessity" and "compelling state interest" sufficient to justify the use of racially discriminatory policies. *Id.* at 351–53. Both Justice O'Connor's early expression in *Croson*, and Justice Thomas' views in *Grutter*, are fully consistent with Justice Powell's language in *Regents of the University of California v. Bakke*: "The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of *identified discrimination*." 438 U.S. 265, 307 (1978) (emphasis added).

16. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny."). And as Justice Powell previously held in *Bakke*, "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Bakke*, 438 U.S. at 291.

17. *Grutter*, 539 U.S. at 328 (quoting *Croson*, 488 U.S. at 493 (emphasis added)).

18. *Id.* at 328 (emphasis added). Bluntly illustrating the *non-remedial* nature of UT's goal was the University's argument that "the race-based component of its admissions plan is needed to admit '[t]he African-American or Hispanic child of successful professionals in Dallas." *Fisher II*, 136 S. Ct. 2198, 2216. There is nothing remotely "remedial" about a policy which has, as part of its goal, the enrollment of affluent and educationally-privileged minority students. As Justice Alito noted, "[a]ffirmative action programs were created to help *disadvantaged* students." *Id.* (emphasis in original).

19. *Grutter*, 539 U.S. at 312–17.

at UT[20] were adopted for the purpose of vindicating the legal rights of a single person who had been injured by *identifiable* racial discrimination.[21] In fact, Justice O'Connor entirely ignored Justice Powell's view in *Bakke* that without a finding of *identified* discrimination, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another."[22] Justice Powell aptly concluded, "[t]his is a step we have never approved."[23] Yet in *Grutter*, Justice O'Connor *did* approve it, cavalierly casting aside yet another principle for an entirely *non-remedial* purpose.[24]

One of the most difficult consequences presented by *Grutter*'s detour around the explicit guarantee contained in the Equal Protection Clause is this: if a *non-remedial*[25] goal can be characterized

20. *Fisher II*, 136 S. Ct. at 2205–07.

21. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978). Justice Powell explained this critical distinction in *Bakke* with his observation that the Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals *in the absence of judicial, legislative, or administration findings of constitutional or statutory violations*." *Id.* at 307 (emphasis added). Justice William Brennan, among the dissenters in *Bakke,* seemed at least partially to agree: "[T]he central meaning of today's opinions [is that] government may take race into account . . . to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies . . . ." *Id.* at 325. In other words, race may be used to ameliorate "disadvantages" that can be connected to "identified discrimination." *Id.* at 307; *cf. id.* at 326, n.1 (discussing that the use of race to achieve an integrated student body is necessitated by the lingering effects of past racial discrimination).

22. *Id.* at 309.

23. *Id.* at 310.

24. Grutter v. Bollinger, 539 U.S. 306, 328 (2003). After conceding that "some language" (*i.e.*, *her* language) in prior Supreme Court cases suggested "that remedying past discrimination is the only permissible justification for race-based governmental action," Justice O'Connor proceeded to excuse the Court's elevation of the Law School's *non-remedial* "compelling" interest on the grounds that "we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Id.* She was half correct. Besides "remedying [identified] past discrimination," the only other use of race condoned by the Court prior to *Grutter* had involved questions of national security. *See id.* at 351. Finally, Justice O'Connor went on to state that the Court had not, since *Bakke*, "directly addressed the use of race in the context of public higher education." *Id.* at 328. Justice O'Connor's statement, while technically accurate, is frustratingly blind to the Court's decisions *prior* to *Bakke*, including *Missouri ex rel. Gaines*, *Sipuel/Fisher*, *Sweatt,* and *McLaurin*. *See infra* Part III.C(1)–(3).

25. By way of a simple example, consider a government-sanctioned program

as sufficiently compelling to justify the use of a racially discriminatory policy to achieve it, and in the process cause harm to innocent third parties (as the policies upheld in both *Grutter* and *Fisher II* undeniably do), such an outcome essentially renders meaningless the Fourteenth Amendment (constitutional)[26] and Title VI (statutory)[27] protections afforded every person, and, in the process, completely undermines *Brown*'s fundamental principle.[28]

Regardless of whether a university's goal of enrolling a racially diverse class, as done by both the University of Michigan and UT through the cleverly disguised use of the phrase "critical mass,"[29] can ever be realized,[30] how can any future court meaningfully review a

that (even if presumptively created in good-faith) confiscates property owned by one innocent citizen based on his or her race and distributes it to another citizen based solely on his or her *different* race (and having nothing to do with any injury or disadvantage inflicted on the latter by the government or by any identifiable discriminatory conduct on the part of the former). Contrast that with an identical program tied to vindicating a wrong demonstrably committed against the latter by the former based on racial discrimination. The latter program would be *remedial*, while the former would be *non-remedial*.

26. U.S. CONST. amend. XIV.

27. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1964).

28. *See Brown II*, 347 U.S. 483, 493 (1954) ("[S]egregation of children in public schools solely on the basis of race . . . deprive[s] the children of the minority group of equal educational opportunities . . . .").

29. Perhaps nothing in Justice Kennedy's opinion for the Court in *Fisher II* is more incongruent with his dissent in *Grutter* than his reluctance to address UT's reliance on the term "critical mass," an issue that was front and center in *Fisher*. *See, e.g.*, Official Transcript of Oral Argument in *Fisher v. University of Texas at Austin* (Oct. 10, 2012) at 70. *See also* R. Lawrence Purdy, *The Critical Question Involves "Critical Mass,"* NAT'L ASS'N OF SCHOLARS (Sept. 30, 2013), http://www.nas.org/articles/the_critical_question_involves_critical_mass. In the end, however one wishes to characterize it, "critical mass" is a *number*, below which "critical mass" has not been achieved. Even the Dean of the University of Michigan Law School admitted to this fact. *See Prelude, supra* note 7, at 375. Thus, any school that claims it must use race to achieve "critical mass" is simply using race to achieve a certain "number" of students based on their race. This is, or until *Grutter* was, plainly forbidden. *See, e.g.*, *Bakke*, 438 U.S. 265, 307 (1978); *Grutter*, 539 U.S. at 329–30 (citing but ignoring *Bakke*'s holding). For his part, Justice Kennedy's obvious flip-flop on this issue in *Fisher II* (where the phrase "critical mass" is barely mentioned) is simply unexplainable given his agreement with Chief Justice Rehnquist in *Grutter*, that "beyond question . . . the concept of critical mass is a delusion used by the Law School . . . to achieve numerical goals indistinguishable from quotas." *Id.* at 389 (Kennedy, J., dissenting).

30. *See, e.g.*, Jeremy Ashkenas, Haryoun Park & Adam Pearce, *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/

race-conscious admissions policy if it permits the phrase "critical mass" to remain undefined? This is particularly true if the purposefully vague term is given the degree of deference conferred on universities in both *Grutter* and *Fisher II*.[31] This gives rise to several critical questions:

(1) If the educational benefit that allegedly flows from a racially diverse student body[32] truly represents a "compelling" governmental interest,[33] how could this

interactive/2017/08/24/us/affirmative-action.html; *see also* John Katzman & Steve Cohen, *Let's Agree Racial Affirmative Action Failed*, WALL ST. J. (Oct. 26, 2017), https://www.wsj.com/articles/lets-agree-racial-affirmative-action-failed1509058963?mod=djemMER.

31. *See Grutter*, 539 U.S. at 389. *Compare Fisher I*, 133 S. Ct. at 2420 (regarding Justice Kennedy's criticism in *Fisher I* of the Fifth Circuit's degree of deference to UT's decisions regarding its race-conscious policy ("strict scrutiny . . . require[s] a court to examine with care, *and not defer to*, a university's 'serious, good faith consideration of workable race-neutral alternatives'")), *with* Fisher II, 136 S. Ct. at 2214 (regarding the bended knee Justice Kennedy granted UT the second time around ("*Considerable deference is owed to a university* in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission." (emphasis added))). Justice Kennedy's decision to affirm UT's policy becomes even more puzzling in light of his concluding statement in *Fisher II*: "The Court's affirmance of [UT's] admission policy today *does not necessarily mean [UT] may rely on that same policy without refinement*," emphasizing UT's "ongoing obligation to engage in constant deliberation and continued reflection regarding its admission policies." *Fisher II*, 136 S. Ct. at 2215 (emphasis added). Such imprecise language seems entirely inconsistent with "strict scrutiny" analysis.

32. The evidence suggesting that racial diversity in a classroom provides actual, much less measurable, "educational benefits" is illusory at best. *See, e.g.*, LARRY PURDY, GETTING UNDER THE SKIN OF "DIVERSITY": SEARCHING FOR THE COLOR-BLIND IDEAL 128 (2008) (discussing several studies and analyses conducted by both proponents and opponents of race-conscious admissions systems, including a study of Michigan University alumni which directly refutes the argument that "racial diversity" is considered important to the educational experience); *see also* David A. Lehrer, *Colorblindness Succeeds in California*, WALL ST. J. (Jan. 21, 2018), https://www.wsj.com/article_email/colorblindness-succeeds-in-california-1516566501-lMyQjAxMTE4NjIzMjgyMDIyWj/; *Prelude*, *supra* note 7, at 342 n.144, 351–54 and accompanying footnotes, 378 n.308 (discussing, among others, the work of professors Stephen Cole and the late Elinor Barber). *Contra* AM. COUNCIL ON EDUC. & AM. ASS'N OF UNIV. PROFESSORS, DOES DIVERSITY MAKE A DIFFERENCE? (2000) https://www.aaup.org/NR/rdonlyres/97003B7B-055F-4318-B14A-5336321FB 742/0/DIVREP.PDF.

33. *Cf.* Defunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) (discussing the pre-*Bakke* concept of a "compelling" interest that might justify a resort to race-conscious policies). While racial discrimination may be justified in certain extreme situations, "[m]ental ability is not in that category. All races can

interest ever lose its "compelling" stature? The Court's holding in Fisher that this non-remedial interest is sufficiently compelling to permit the use of racially discriminatory admissions policies to achieve raises the following deeply troubling questions:

(2) If the educational benefit of enrolling a racially diverse student body truly is "compelling," why do we continue to provide public support for historically black colleges and universities (HBCUs) that, by their very description, are not racially diverse? The same question would apply to some of our nation's predominantly white public universities.

(3) If a "critical mass" of students with a certain racial identity is considered necessary in order to obtain concrete—and presumably critically important—educational benefits, are we to conclude that HBCUs and many predominantly white public colleges and universities are, solely because of their racial demographics, inferior educational institutions?

(4) If such institutions are inferior, shouldn't the government require, as opposed to merely permit, every government-supported educational institution to adopt policies that ensure the enrollment of a critical mass of minority students, or in the case of HBCUs, a critical mass of white students?

On a practical level, how does an admissions committee establish who qualifies as a member of a particular racial group in order to reap the benefits under a race-conscious system?[34]

compete fairly at all professional levels." *Id.*

34. This dilemma, addressed by Justice Alito in his detailed dissent in *Fisher II*, 136 S. Ct. 2198, 2229–30 (2016), was directly faced by a former law school admissions director at the University of Michigan who testified that black law students objected to a black applicant being considered for the special admissions program because "his mother was white." Stillwagon Dep. 29, Nov. 6, 1998, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (on file with the author). By that standard, our forty-fourth president, multi-racial Barack Obama, would not have met the racial requirements being imposed by black students at the Law School. *See also Fisher II*, 136 S. Ct. at 2229 (Alito, J., dissenting) ("UT does not specify what it means to be 'African-American,' 'Hispanic,' 'Asian American,' 'Native American,' or 'White.' And UT evidently labels each student as falling into only a single racial or ethnic group." (citation omitted)). Such questions raise bureaucratic horrors. *See* Cleuci De Oliveira, *Brazil's New Problem With Blackness*, FOREIGN POLICY MAGAZINE (Apr. 5, 2017), http://foreignpolicy.com/2017/04/05/brazils-new-problem-with-blackness-affirmative-action ("As [Brazil] grapples with its legacy of slavery,

Of course, none of these questions would arise if the Court in *Grutter* had remained faithful to *Brown*'s fundamental principle.[35] And had the Court done so, *Fisher* likely never would have arisen. Yet these are the very sorts of vexing and deeply divisive questions which are now presented because of *Grutter*'s regrettable deviation from *Brown*'s bedrock principle.

This brings us full circle back to the decision reached by a unanimous Court in a series of landmark rulings in 1954 and 1955.[36] *Brown* was clear and unambiguous in its language and intent. With the exception of the steps necessary "to effectuate a transition to a racially nondiscriminatory school system,"[37] the Court made clear that it would brook no excuse for, nor condone, further racial discrimination, particularly that which would hinder "admission to the public schools on a nonracial basis."[38]

Notwithstanding this clarity, and the absence of any Supreme Court decision announcing its nullification, the hypothesis of this article is that even if not explicitly overruled, *Brown*'s fundamental principle has effectively been rejected by the Court's deeply divided opinions in *Grutter* (2003)[39] and *Fisher II* (2016).[40] Thus, unless and until there is an express recommitment to that principle in a future case, *Brown*'s landmark status may be relegated to little more than a temporary footnote in our Nation's complex racial past.

Two final important introductory comments deserve mention. First, the argument for strictly adhering to *Brown*'s fundamental principle is not about ignoring our Nation's past. Indeed, it is the opposite. *Brown* should always stand as a reminder of our past; but

affirmative-action race tribunals are measuring skull shape and nose widths to determine who counts as disadvantaged.").

35. Although he did not cite to *Brown*, Justice Scalia wrote that the Court in *Grutter* should have reached "a clear constitutional holding that racial preferences in state educational institutions are impermissible. . . . The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." *Grutter*, 539 U.S. at 348–49 (Scalia, J., concurring in part and dissenting in part). His words are a perfect reflection of *Brown*'s fundamental principle. For his part, Justice Clarence Thomas penned a lengthy and majestic dissent in *Grutter*, and an equally compelling opinion in *Fisher I* (concurring in the judgment). Both paid full homage to *Brown*. *Grutter*, 539 U.S. at 349; *Fisher I*, 133 S. Ct. 2411, 2422 (2013). Justice Thomas' opinions deserve to be read in their entirety.

36. *Brown I*, 347 U.S. 483 (1954); *Brown II*, 349 U.S. 294 (1955).

37. *Brown II*, 349 U.S. at 301.

38. *Id.* at 300–301.

39. *Grutter*, 539 U.S. 306.

40. *See Fisher II*, 136 S. Ct. 2198.

similarly, it should be recognized as perhaps the single most important step our Nation has taken in terms of overcoming racial oppression and promoting racial equality. To the extent progress has occurred in that regard—and it is undeniable that progress has occurred—these achievements are in no small measure directly attributable to *Brown*. To suggest otherwise is to cast a blind eye to *Brown*'s enormous impact since its landmark decision was announced.

Second, the argument for returning to *Brown*'s fundamental principle is not one that is opposed to "affirmative action" policies. Though largely unknown, President John F. Kennedy originally coined the phrase "affirmative action" in an executive order signed within months following his inauguration.[41] In it, President Kennedy called for federal government contractors to take "affirmative action" to ensure no person was denied employment based on her or his skin color.[42] It was President Kennedy's unambiguous directive that race be *removed* rather than *added* as a factor in government employment.[43] To be clear, a return to *Brown*'s fundamental principle is perfectly consistent with "affirmative action" policies (as defined by President Kennedy) which, in the author's view, should be maintained in perpetuity.

III. HOW WE GOT HERE

Analyzing the continued relevance of *Brown*'s fundamental principle is not difficult. One begins by juxtaposing *Brown*'s language with language from two additional primary sources: (1) the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution,[44] and (2) Title VI of the Civil Rights Act of 1964.[45] This section first discusses these sources and then addresses several important Supreme Court cases dealing with race and education, with a specific focus on the conflicting positions taken by Justice Kennedy when it comes to assessing the constitutionality of race-conscious college admissions systems. Justice Kennedy, a

41. Exec. Order No. 10925, 26 Fed. R. 1977 (Mar. 6, 1961).

42. *Id.* ("[D]iscrimination because of race . . . is contrary to the Constitutional principles and policies of the United States; . . . The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin.").

43. *Id.*

44. U.S. CONST. amend. XIV.

45. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1964).

vigorous dissenter when the Court narrowly upheld the University of Michigan's heavily race-conscious system in *Grutter*, switched sides in *Fisher II* when he wrote approvingly of UT's *Grutter*-like policy.

A. The Fourteenth Amendment's Equal Protection Clause

As the oldest of these sources, the Fourteenth Amendment to the Constitution reads, in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[46] Though not explicit, there is an undeniable symmetry between the "Equal Protection Clause" of the Fourteenth Amendment and *Brown*'s fundamental principle. While the ratification of this Amendment in 1868 did not end government-sanctioned racial discrimination (which tragically persisted in the context of public school education for several generations after its adoption),[47] the plain meaning of its language eventually took root.[48] What cannot be denied is that when the Equal Protection Clause is read in concert with, and in the full context of, our Nation's history involving race, there is near perfect harmony between the Fourteenth Amendment and both the language and the principle asserted in *Brown*: the prohibition against government-sanctioned racial discrimination.[49]

46. U.S. CONST. amend. XIV, § 1.

47. Over two decades after *Plessy v. Ferguson*, 163 U.S. 537 (1896), its pernicious "separate but equal" doctrine was unanimously upheld in the context of public education in *Gong Lum v. Rice*, 275 U.S. 78 (1927). In a unanimous decision authored by Chief Justice William Howard Taft, Jr., joined by several justices considered luminaries on the Court (including Oliver W. Holmes, Jr., Louis Brandeis, and Harlan F. Stone), the Court tragically upheld the State of Mississippi's decision to classify a nine-year-old Chinese-American schoolgirl as "colored" and thereby deny her the right, not to mention the rights of all "colored" children in Mississippi, to attend a school for white children. *Id.*

48. One of the most eloquent discussions of the symmetry between the Equal Protection Clause and *Brown*'s fundamental principle is found in Justice John Marshall Harlan's memorable dissent in *Plessy*. 163 U.S. at 559. While *Plessy* did not deal directly with education, *Plessy*'s establishment of the horribly mislabeled "separate but equal" doctrine directly affected public education in large parts of the Nation for decades until it was expressly overruled by *Brown*. *Id.* Justice Harlan's dissent in *Plessy* is virtually indistinguishable from the principle announced in *Brown* almost sixty years later, as Justice Harlan wrote: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law . . . . The law regards man as man, and takes no account of his . . . color when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

49. Buttressed by its finding that racially segregated educational facilities were

B. Title VI of the Civil Rights Act of 1964

In addition to the Fourteenth Amendment, there is an even more perfect harmony between the language of Title VI of the Civil Rights Act of 1964 and *Brown*'s fundamental principle. This landmark federal statute reads: "No person in the United States shall, on the ground of race, color, or national origin, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance."[50]

Justice Powell, in *Bakke*, described "[t]he language of [Title VI], like that of the Equal Protection Clause, [a]s *majestic in its sweep*."[51] Given its clear wording and the principle it unquestionably advances, it is inconceivable how any flagship public university and, in particular, large and notable state institutions such as the University of Michigan and UT (the defendants in *Grutter* and *Fisher*, respectively), can openly engage in racially discriminatory admissions practices and, at the same time, remain in compliance with the language of this statute. Nothing in it remotely hints that its prohibitory language may be nullified in the interest of achieving a vague and, most importantly, *non-remedial* goal, to wit: achieving the purported educational benefits of "diversity."

The symmetry between the Fourteenth Amendment, *Brown*, and Title VI of the Civil Rights Act remained largely intact until, almost as an afterthought, it was naively and needlessly cracked by Justice Powell's "diversity" dicta in the Court's 1978 decision in *Bakke*.[52] That symmetry was fully shattered in the Court's 2003 ruling in *Grutter* where Justice O'Connor explicitly sanctioned the reintroduction of racially discriminatory admissions policies in the context of public school admissions for, as emphasized throughout this article, a *non-remedial* purpose.[53]

Despite a brief hiatus in 2013 following *Fisher I*,[54] Justice O'Connor's rationale in *Grutter* was disappointingly reaffirmed by

"inherently unequal," the Court in *Brown* held that "the plaintiffs and others similarly situated . . . [were] deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown I*, 347 U.S. at 495.

50. 42 U.S.C. § 2000(d) (2006).

51. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978) (emphasis added).

52. *Id. See generally Prelude*, *supra* note 7, at 359 (discussing in full the decision in *Bakke*).

53. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

54. *Fisher I*, 133 S. Ct. 2411. *See generally Grutter (Not) Revisited*, *supra* note 7

the narrowest of margins in *Fisher II*.[55] Even more disconcerting is the fact that *Grutter*'s detour from *Brown*'s fundamental principle ended up being endorsed by Justice Kennedy, one of the four justices who, after writing in vigorous opposition in *Grutter*, wrote thirteen years later in *Fisher II* to uphold a virtually identical policy.[56]

C. Other Supreme Court Cases

To understand the importance of the undiluted principle announced in *Brown*, it is helpful to briefly examine pre- and post-*Brown* Supreme Court cases which led to, or closely aligned with, the Court's eventual decree in *Brown*. The cases that follow focused directly on race and the role it played in admissions to public educational institutions with an emphasis on institutions of higher learning.[57]

1. Missouri ex rel. Gaines v. Canada[58]

Lloyd Gaines was refused admission to the University of Missouri School of Law because, as explained by the Court, "it was contrary to the constitution, laws and public policy of the State to admit a negro as a student [to] the University of Missouri."[59] Gaines challenged the University's refusal to admit him on the grounds that it "constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment."[60] Even though the state provided funds that would have allowed the petitioner to attend law school in one of the neighboring states that admitted nonresident negroes,[61] the Supreme Court held that "a privilege [that] has been created for white law students . . . is [being] denied to negroes by reason of their race."[62] The Court made clear that had

(discussing in full the decision in *Fisher I*).

55. *Fisher II*, 136 S. Ct. 2198 (2016).

56. *Compare Grutter* 539 U.S. at 387 (Kennedy, J., dissenting), *with Fisher II*, 136 S. Ct. 2198 (2013) (Kennedy, J., authoring the majority opinion).

57. One important exception is the 2007 decision in *Parents Involved In Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *see infra* Part II.C.8 (discussing public education at both the high school (Seattle, Washington) and elementary school levels (Jefferson County, Louisville, Kentucky)).

58. 305 U.S. 337 (1938).

59. *Id.* at 343.

60. *Id.* at 342.

61. *Id.* at 348–49.

62. *Id.* at 349.

Missouri, consistent with the still-prevailing "separate but equal doctrine" of *Plessy v. Ferguson*, provided Gaines facilities for legal education substantially equal to those which the state provided for white students, it might have denied Gaines' challenge.[63] However, because Missouri had no law school available for black citizens, the Court held that Gaines "was entitled to be admitted to the law school of the State University."[64] Although the Court did nothing to reverse the notion that the availability of "separate but equal" facilities likely would have defeated Gaines' challenge, the holding was nevertheless a step towards the inevitable adoption of *Brown*'s fundamental principle.

2. Sipuel v. Board of Regents of University of Oklahoma[65]

In January 1946, Ada Lois Sipuel (Fisher) applied to the University of Oklahoma School of Law, the only institution for legal education then supported and maintained by Oklahoma.[66] According to the facts, Sipuel's "application for admission was denied solely because of her color."[67] Sipuel brought a writ of mandamus seeking her admission, which was denied by Oklahoma's lower courts.[68] Citing its earlier ruling in *Missouri ex rel. Gaines*, the Supreme Court held that "[t]he State must provide [legal education] for her in conformity with the equal protection clause of the Fourteenth Amendment . . . ."[69] Like *Missouri ex rel. Gaines* before her, Sipuel's eventual success did not result in the reversal of *Plessy*'s "separate but equal" doctrine, but it, too, represented a step forward towards the eventual adoption of *Brown*'s fundamental principle.

63. *Id.* at 352.
64. *Id.*
65. 332 U.S. 631 (1948).
66. *Id.* at 632.
67. *Id.*
68. *See* Sipuel v. Bd. of Regents of the Univ. of Okla., 180 P.2d 135, 136 (Okla. 1947).
69. *Sipuel*, 332 U.S. at 632 (citing Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)). After additional court challenges by Oklahoma, Sipuel eventually was admitted and graduated from the University of Oklahoma's School of Law in August 1952. *See* Fisher v. Hurst, 333 U.S. 147 (1948). Her story is one of amazing grace and resilience in the face of the many frustrating legal setbacks she faced based on *Plessy*'s then-still-applicable "separate but equal" doctrine. *See Fisher, Ada Lois Sipuel (1924–1995)* OKLAHOMA HISTORICAL SOCIETY, http://www.okhistory.org/publications/enc/entry.php?entry=FI009 (last visited March 20, 2018).

3. Sweatt v. Painter[70] *and* McLaurin v. Oklahoma State Regents[71]

These cases involving the University of Texas Law School and the Graduate School of the University of Oklahoma, respectively, were decided the same day, June 5, 1950.[72] Heman Sweatt and George McLaurin were denied admission to their respective state universities solely because they were black.[73] At the time, both Texas and Oklahoma maintained segregated public schools in accordance with *Plessy*'s "separate but equal" doctrine.[74] After noting that *Sweatt*, *McLaurin*, *Missouri ex rel. Gaines*, and *Sipuel/Fisher* were "the only cases in this Court which present the issue of the constitutional validity of race distinctions in state-supported graduate and professional education," the Court ordered the admission of both petitioners.[75]

Sweatt and *McLaurin* were the last two cases decided by the Court before *Brown* squarely presented the issue of whether race had any legitimate role to play in the field of public school admissions.

4. Brown v. Board of Education

In each of the cases argued as part of *Brown*,[76] "minors of the Negro race . . . [were] denied admission to schools attended by white children under laws requiring or permitting segregation according to race."[77] The common legal question was whether this segregation

70. 339 U.S. 629 (1950).

71. 339 U.S. 637 (1950).

72. *See McLaurin*, 339 U.S. at 638; *Sweatt*, 339 U.S. at 631.

73. *See McLaurin*, 339 U.S. at 638; *Sweatt*, 339 U.S. at 631.

74. The Court in *Sweatt* stated that it could not "find substantial equality in the educational opportunities offered white and Negro law students by the State [of Texas]." 339 U.S. at 633. In so holding, the Court skirted the issue of whether *Plessy* remained good law. Similarly, in *McLaurin*, the Court dealt with the issue of the university's "different [*i.e.*, unequal] treatment from other students solely because of his race." 339 U.S. at 638 (including separation in the classroom, library, and cafeteria seating). The Court held that "the Fourteenth Amendment preclude[d] differences in treatment by the state based upon race." *Id.* at 642. Thus, with *Plessy* holding on by a thread, the Nation was brought two steps closer to *Brown*'s eventual adoption of the fundamental principle that "racial discrimination in public education is unconstitutional." *Brown II*, 349 U.S. 294, 298 (1955).

75. *Sweatt*, 339 U.S. at 635.

76. *See supra* note 2 for a list of these cases.

77. *Brown I*, 347 U.S. 483, 487 (1954).

based on race "deprived the plaintiffs of the equal protection of the laws under the Fourteenth Amendment."[78]

In its succinct opinion in *Brown I* (1954), the Court made clear that "[s]eparate educational facilities are inherently unequal" and did, in fact, deprive plaintiffs of the equal protection of the laws guaranteed by the Fourteenth Amendment.[79] And a year later in *Brown II* (1955), the Court unanimously reaffirmed that, from that point forward, the disparate treatment of students based on race was a violation of their individual and personal rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment.[80]

Following *Brown*, and excluding cases where race-conscious practices were upheld to remedy the racial segregation in school districts previously segregated by law,[81] the question of race-conscious admissions policies arose in only two cases prior to *Grutter* in 2003.[82] For nearly the next quarter of a century, no Supreme Court case following *Brown,* and unrelated to the efforts to remedy pre-*Brown* school segregation, addressed the use of race-conscious admissions in public education. However, in the interim between *Brown* and *Bakke*, other important public pronouncements and landmark federal civil rights legislation mirrored *Brown*'s fundamental principle. The public pronouncements emanated from such diverse voices as President John F. Kennedy and Dr. Martin Luther King, Jr. Both President Kennedy's 1961 executive order[83] and the stirring words delivered in 1963 by the churchman and American civil rights hero, Dr. King, directly addressed the need to end racial discrimination throughout the public sphere.[84]

78. *Id.*

79. *Id.* at 495.

80. See *Brown II*, 349 U.S. at 298. This undiluted principle was utterly ignored by Justice O'Connor in *Grutter* and by Justice Kennedy in *Fisher II.*

81. *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Davis v. Bd. of Sch. Comm'rs of Mobile Cty., 402 U.S. 33 (1971); Green v. Sch. Bd. of New Kent Cty., 391 U.S. 430 (1968).

82. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); DeFunis v. Odegaard, 416 U.S. 312 (1974).

83. *See* Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961) ("Establishing the President's Committee on Equal Employment Opportunity").

84. Martin Luther King, Reverend, Public Speech at the Lincoln Memorial in Washington D.C.: "I Have A Dream . . . ." (Aug. 28, 1963) ("I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."); CORRETTA SCOTT KING (ed.), THE WORDS OF MARTIN LUTHER KING, JR. 95 (1983).

5. DeFunis v. Odegaard[85]

In a per curiam opinion, the Court dismissed on technical grounds[86] petitioner Marco DeFunis Jr.'s claim that the University of Washington Law School discriminated against him on account of his race,[87] in violation of the Equal Protection Clause. Among the justices dissenting from the Court's dismissal on grounds of mootness was Justice William O. Douglas, who wrote at length about the law school's "minority admissions program."[88] This program encompassed only those applicants who voluntarily indicated on their application "that their dominant ethnic origin was either black, Chicano, American Indian, or Filipino."[89]

Justice Douglas directly addressed several important issues including whether the non-fixed percentage of minority applicants the law school sought to enroll constituted an impermissible quota.[90] With regard to the general applicability of the Equal Protection Clause in the context of DeFunis' claim, Justice Douglas observed that "[t]he clear and central purpose of the Fourteenth Amendment

85. 416 U.S. 312 (1974).

86. *DeFunis*, 416 U.S. at 350 (Brennan, J., dissenting) (noting by the time petitioner's claim reached the Supreme Court, DeFunis was set to graduate and, thus, the Court determined his claim was moot). A surprising coalition of the Court's most liberal justices dissented from the Court's action. As Justice William Brennan presciently wrote (joined by Justices William O. Douglas, Byron White, and Thurgood Marshall), "[I]n endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of . . . colleges and universities . . . . Few constitutional questions in recent history have stirred as much debate, and they will not disappear." *Id.* at 350 (Brennan, J., dissenting).

87. *Id.* at 337 (Douglas, J., dissenting) (stating petitioner is described as white).

88. *Id.* at 331 (noting the law school conceded, "by its own assessment—taking all factors into account—it admitted minority applicants who would have been rejected had they been white"); *see also Prelude*, *supra* note 7, at 315 (finding identical admission was made by the dean of the University of Michigan's Law School).

89. *DeFunis*, 416 U.S. at 320 (Douglas, J., dissenting).

90. *See id.* at 333 (noting Justice Douglas' observation, "[w]ithout becoming embroiled in a semantic debate over whether this practice constitutes a 'quota,' it is clear that, given the limitation on the total number of applicants who could be accepted, this policy did reduce the total number of places for which DeFunis could compete—solely on account of his race"). *Compare id.* at 332–33 (explaining that Justice Douglas' treatment of the proportion of minority students admitted is in sharp contrast to the position taken by Justice O'Connor in *Grutter* because the school determined 15% to 20% of the entering class to be reasonable), *with Grutter*, 539 U.S. at 342–43. The identical situation exists under the policies upheld in *Grutter* and *Fisher II*.

was to eliminate all official state sources of invidious racial discrimination in the States,"[91] and that "[t]he consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination."[92]

Interestingly, four years before Justice Powell's lone recitation of his "diversity" rationale in *Bakke*,[93] and Justice Powell's naïve and ill-informed praise for a subtly anti-Semitic admissions policy adopted by Harvard University,[94] Justice Douglas offered his own thoughts on changes to the University of Oregon Law School's admissions program.[95] Justice Douglas envisioned that these changes might offer the potential to achieve racial and ethnic diversity in "a racially neutral way."[96]

Also of interest was Justice Douglas' lack of concern over the law school's separate classification of minority applicants based on his belief that the Law School Admissions Test (LSAT) likely posed an unfair "cultural" obstacle to some of these applicants.[97] His objection

91. *DeFunis*, 416 U.S. at 334 (quoting Loving v. Virginia, 388 U.S. 1, 10 (1967)).

92. *Id.* at 333 (citations omitted).

93. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)

94. *Bakke*, 438 U.S. at 317–18. *See* Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?* 1 CARDOZO L. REV. 379, 385 (1979) ("Mr. Justice Powell legitimated an admissions process that is inherently capable of gross abuse and that . . . has in fact been deliberately manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions"); Antonin Scalia, *The Disease As Cure: In Order to Get Beyond Racism, We Must First Take Account of Race*, 1979 WASH. U. L. Q. 147, 148 (1979) ("[T]he Harvard College 'diversity admissions' program, which Mr. Justice Powell's opinion so generously praises, was designed to reduce as inconspicuously as possible the disproportionate number of New York Jewish students that a merit admissions system had produced.").

95. *DeFunis*, 416 U.S. at 320–48. The University of Oregon Law School's policy heavily relied, as most law schools still do today, on an applicant's LSAT score and undergraduate GPA. *See id.* at 340–41 (describing Justice Douglas' concept of a race-neutral policy).

96. *Id.* at 334. Justice Douglas suggested an approach where "the committee would be making decisions on the basis of individual attributes, rather than according a preference solely on the basis of race." *Id.* at 331–32. He also observed that "[t]he key to the problem is the consideration of each application in a racially neutral way." *Id.* at 334.

97. *Id.* at 335. Justice Douglas recommended that "[a]bolition of the LSAT would be a start." *Id.* at 340. Justice Alito later noted in *Fisher II* that "[a]pproximately 850 4-year-degree institutions do not require the SAT or ACT as part of the admissions process." 136 S. Ct. 2198, 2234 (2016) (Alito, J., dissenting).

to the potentially unfair use of the LSAT, however, did not convert to his approval of using race as a factor in admissions. He concluded that "[w]hatever his race, [DeFunis] had a constitutional right to have his application considered on its individual merits *in a racially neutral manner*."[98]

Notably, Justice Douglas referenced *Brown*[99] in discussing the harms that considering race can create, including a "stamp of inferiority" that may unfairly attach to the beneficiaries of race-preference programs.[100] He commenced with the observation that "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."[101] He continued, "A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and, in the end, it may produce that result despite its contrary intentions."[102]

Justice Douglas also offered a prescient but unheeded warning that arguably should have deterred both Justice Powell (in *Bakke*) and Justice O'Connor (in *Grutter*) from their adoption of "diversity" as a "compelling" state interest. He wrote:

> If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordion-like quality. . . . All races can compete fairly at all professional levels. So far as race is concerned, any state-sponsored preference to one race

98. DeFunis, 416 U.S. at 337 (Douglas, J., dissenting) (emphasis added).

99. *Id.* at 342–43 (referencing *Brown I* as being "at the heart of all our school desegregation cases").

100. *Id.* at 343.

101. *Id.* at 342.

102. *Id.* at 343. Many academic leaders, including proponents for race-conscious admissions policies, have acknowledged similar concerns. *See, e.g.*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 264–65 (1998) ("The very existence of a process that gives explicit consideration to race can raise questions about the true abilities of even the most talented minority students ('stigmatize' them, some would say) . . . . More than a few black students unquestionably suffer some degree of discomfort from being beneficiaries of the admissions process."). Bowen and Bok fully concede "these costs . . . are all too real." *Id.*

> over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.[103]

Justice Douglas' views were fully consistent with *Brown*'s fundamental principle.

Four years later, the landmark decision in *Bakke* was issued.[104] As is apparent from a close reading, nothing in the Court's eventual judgment—apart from Justice Powell's lone dicta regarding the "diversity" rationale[105]—contravened *Brown*'s fundamental principle.

6. Regents of the University of California v. Bakke[106]

Allan Bakke brought suit against the University of California-Davis Medical School, claiming it violated his rights under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 by denying him admission.[107] At the time, the school maintained a special admissions program that set aside a specific number of seats in the entering class for certain minority applicants.[108] The Superior Court of California sustained his challenge and enjoined UC-Davis from considering his race or the race of any other applicant in making admissions decisions.[109] However, it refused to order Bakke's admission to the medical school, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations.[110] The Supreme Court of California affirmed the superior court holding, but modified the trial court's judgment by directing UC-Davis to admit him.[111] The Supreme Court affirmed Bakke's personal victory in a deeply divided 5-4 ruling that produced "many opinions, no single one speaking for the Court."[112]

Justice William Brennan viewed the issue presented in *Bakke* as "[w]hether government may use race-conscious programs to redress

103. *DeFunis*, 416 U.S. at 343–44 (Douglas, J., dissenting) (emphasis added).
104. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).
105. *Id.* at 322–23.
106. 438 U.S. 265 (1978).
107. *Id.* at 277–79.
108. *Id.* at 274.
109. Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34 (Cal. 1976).
110. *Id.*
111. *Id.* at 64 (describing the holding at the California Supreme Court).
112. *Bakke*, 438 U.S. at 324–25 (1978) (Brennan, J., concurring and dissenting in part).

the continuing effects of past discrimination."[113] Justice Powell, who wrote the opinion for the Court, rejected this proposition.[114] He viewed remedying "the effects of 'societal discrimination' [as] an amorphous concept of injury that may be ageless in its reach into the past."[115] Nevertheless, *Bakke* was an important and controlling precedent for a number of reasons, most notably Justice Powell's—and the Court's—rejection of Justice Brennan's view.[116] As Justice Powell went on to explain in great detail:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other *innocent* individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . *Without such findings . . . it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.*[117]

Of course, it is precisely this sort of harm to "innocent individuals" that routinely occurs under the racially discriminatory admissions systems upheld in *Grutter* and *Fisher II*.

What unmistakably was not a part of *Bakke*, except in the mind of Justice Powell alone, was his reference to the "diversity" rationale.[118] No other justice joined the portion of Justice Powell's opinion that referenced the attainment of "a diverse student body"

113. *Id.*

114. *Id.* at 310–11. The Court's majority also rejected other claimed purposes for UC-Davis' race-conscious program, including improvement of health-care services to underserved communities and "the attainment of a diverse student body." *Id.*

115. *Id.* at 307.

116. *Id.*

117. *Id.* at 307–309 (emphasis added). In *Grutter*, Justice O'Connor acknowledged Justice Powell's rejection of "an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties 'who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.'" Grutter v. Bollinger, 539 U.S. 306, 323–24 (2003). Unfortunately, it was a principle she utterly ignored in reaching her decision in *Grutter*, abandoned for a purpose having nothing to do with a showing of any, much less *identified*, discrimination on the part of the defendant Law School. *Id. See generally Prelude*, *supra* note 7 (comparing *Grutter* and *Bakke*).

118. *Bakke*, 438 U.S. at 311–12.

as a "constitutionally permissible goal."[119] There was, however, surprising agreement between Justices Powell and Brennan when it came to using race to advance a state's "legitimate and substantial interest in ameliorating, or eliminating . . . the disabling effects of *identified* discrimination."[120] Justice Powell cited the obvious example of "the line of school desegregation cases, commencing with *Brown* . . . ."[121]

In *Bakke*, Justice Powell paid homage to the symmetry between the Fourteenth Amendment, *Brown*, and Title VI of the Civil Rights Act of 1964, a symmetry that is omnipresent throughout his lengthy opinion. However, Justice Powell's and the Court's focus was clearly on the Fourteenth Amendment—there may be no better, more detailed discussion of it than his dissertation in *Bakke*:

> The guarantees of the Fourteenth Amendment extend to all persons.[122] Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. *If both are not accorded the same protection, then it is not equal*. . . . The guarantees of equal protection . . . "*are universal in their application . . . without regard to any differences of race, of color*, . . . and the equal protection of the laws is a pledge of the protection of equal laws." Indeed, it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause that states *a principle of universal application* and is *responsive to the racial, ethnic, and cultural diversity of the Nation.*[123]

Justice Powell also cited Yale Law School Professor Alexander Bickel: "The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a

119. *Id.*

120. *Id.* at 307 (emphasis added).

121. *Id.*

122. *Id.* at 289. "[D]ecisions based on race . . . by faculties and administrations of state universities are reviewable under the Fourteenth Amendment." *Id.* at 287 (citing McLaurin v. Okla. State Regents, 339 U.S. 637 (1950)); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

123. *Bakke,* 438 U.S. at 289–93 (emphasis added) (citing, among others, Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60–63 (1955)).

generation: *discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.*"[124]

When read in its entirety, Justice Powell's decision affirming the judgment in favor of Bakke (notwithstanding his lone detour into the diversity rationale) was as powerfully consistent with *Brown*'s fundamental principle as any decision ever written.[125] It is therefore not difficult to conclude from his condemnation of using race to harm innocent individuals (and without demonstrating a need to remedy an injury due to *identified* acts of discrimination),[126] that Justice Powell would have strongly condemned the heavy role race has come to play in the admissions policies[127] approved on the basis of his dicta in *Bakke*.[128]

124. *Bakke*, 438 U.S. at 295, n.35 (emphasis added) (citing ALEXANDER M. BICKEL, THE MORALITY OF CONSENT, 133 (Yale University Press 1975)). Alexander Bickel was an active participant in *Brown* as a law clerk for the late Justice Frankfurter. *See Alexander M. Bickel Dies; Constitutional Law Expert*, N.Y. TIMES (Nov. 8, 1974), https://www.nytimes.com/1974/11/08/archives/alexander-m-bickel-dies-constitutional-law-expert-a-legal.html.

125. *See Prelude*, *supra* note 7, at 359–67 (discussing in detail Justice Powell's opinion).

126. In language that seems to directly contradict the use of race to achieve a *non-remedial* interest like that eventually approved in *Grutter*, Justice Powell wrote: "By hitching the meaning of the Equal Protection Clause to . . . transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces." *Bakke*, 438 U.S. at 298. He goes on to note that "[d]isparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them." *Id.* at 298–99.

127. *Compare Prelude*, *supra* note 7, at 371–74 (discussing Justice Powell's view of the so-called "Harvard Plan" which he suggested might be the sort of plan he would adjudge constitutional), *with Bakke*, 438 U.S. at 378 (Brennan, J., concurring in part and dissenting in part) (stating Justice Brennan found no constitutional significance between the UC-Davis "quota" and the so-called Harvard Plan: "For purposes of constitutional adjudication, there is no difference between the two approaches.").

128. One question never answered by Justice Powell, Justice O'Connor, or Justice Kennedy is this: how can the element of race ever be "weighed fairly and competitively" while at the same time preserving an applicant's "right to individualized consideration without regard to . . . race" other than for the sole purpose of achieving a number (be it one, ten, one hundred, or a "critical mass") of enrollees based solely on skin color? *Bakke*, 438 U.S. at 318 n.52. The latter, of course, is forbidden by the Constitution. *Id.* at 307 ("Preferring members of any one group for no reason other than race . . . is discrimination for its own sake. This the Constitution forbids." (citing *Brown I*, 347 U.S. 483 (1954))).

Indeed, for all his idealistic expressions and expectations, Justice Powell provides the answer for why the diversity rationale simply cannot work. And in the process, he perfectly describes what has happened because of the decisions in *Grutter* and *Fisher II*: "To hold otherwise would be to *convert a remedy heretofore reserved for violations of legal rights* into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. This is a step we have never approved."[129]

7. Grutter v. Bollinger[130]

Justice Sandra Day O'Connor began her fateful detour from *Brown*'s fundamental principle by observing that the University of Michigan Law School's race-conscious admissions policy was intended to "compl[y] with [*Bakke*] on the use of race in university admissions."[131] However, Justice O'Connor conceded, as she must, that "Justice Powell's diversity rationale [was] set forth in part of the [*Bakke*] opinion [that was] *joined by no other justice*."[132] It most certainly was not the ruling of the Court in *Bakke*, or of any court before it. As a consequence, the Court in *Grutter* essentially ignored the question of whether Justice Powell's opinion was binding

129. *Bakke*, 438 U.S. at 310 (emphasis added).

130. 539 U.S. 306 (2003).

131. *Id.* at 314 (referring to Justice Powell's "diversity rationale"). It is ironic that the University of Michigan's undergraduate admissions program was ruled unconstitutional in Gratz v. Bollinger, 539 U.S. 306 (2003), on the same day *Grutter* was issued, and emanated from the same university the *Grutter* court presumed to be acting in "good faith." *See Grutter*, 539 U.S. at 329 (citing *Bakke*, 438 U.S. at 318–19). Compare the caveat that Justice Powell set out in *Bakke*, which was not cited by Justice O'Connor: "[A] court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, *would operate it as a cover for the functional equivalent of a quota system*." *Bakke*, 438 U.S. at 318 (emphasis added). In fact, however, that is precisely how the law school's admissions policy functioned. Justice Powell also provided an accurate description of what eventually became the law school's (and UT's) policy: "No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, [white and Asian-American applicants, among others] are never afforded the chance to compete with applicants from the preferred [underrepresented minority] groups for the . . . seats [reserved to achieve a critical mass of students from the latter groups]. At the same time, the preferred applicants have the opportunity to compete for every seat in the class." *See id.* at 319–20.

132. *Grutter*, 539 U.S. at 325 (emphasis added).

precedent.[133] Instead, for the first time in our Nation's jurisprudence since announcing *Brown*'s fundamental principle, the Court anointed a *non-remedial* purpose[134] as a compelling state interest that can justify the use of race in university admissions.[135]

Justice O'Connor essentially ignored *Brown*, too. Her lone reference to *Brown* was this: "This Court has long recognized that 'education . . . is the very foundation of good citizenship.' For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."[136] One of many ironies surrounding Justice O'Connor's decision is that, had her ultimate decision in *Grutter* remained true to the language she chose to quote from *Brown*, she would have remained faithful to *Brown*'s fundamental principle. But, as she did throughout her opinion in *Grutter*, she ignored it. And, in the process, she denied the petitioner's right to equal access to this "knowledge and opportunity . . . regardless of [*her*] race."[137] It was an outcome that flies in the face of everything the Fourteenth Amendment, Title VI, and *Brown*'s fundamental principle stand for. Moreover, it was an outcome that flies in the face of arguably everything of substance Justice Powell wrote in *Bakke*.

As Justice O'Connor later describes it, "[t]he Law school has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the education benefits of a diverse student body."[138] Of course, this is akin to the very sort of policy condemned by Justice Powell in unequivocal language:

133. *Id.*

134. It is important to note that absolutely no claim of *individual* victimization by any preferred minority applicant due to present or past racial discrimination was required to qualify for the racial preference to be applicable. Indeed, much like UT's concession in *Fisher II*, even affluent and educationally-privileged underrepresented minority applicants to the University of Michigan were considered under the race-conscious admission program while poor, disadvantaged white and Asian applicants (no matter how highly qualified they may have been) were *racially* ineligible to compete for the seats devoted to achieving a "critical mass" of underrepresented minority students. *Id.* at 389 (Kennedy, J., dissenting) (describing race as outcome determinative as to these seats). Race, *and only race*, was considered when it came to enrolling a "critical mass" of these latter students. *See id.*

135. *Id.* at 325.

136. *Id.* at 331 (citing *Brown I*, 347 U.S. 483, 493 (1954)).

137. *Id.*

138. *Id.* at 333.

> If [UC-Davis]'s purpose is to assure within its student body some specified percentage [read: *critical mass*] of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race . . . is discrimination for its own sake. This the Constitution forbids.[139]

Simply saying that an institution is "preferring members of one group" to accomplish a *non-remedial* goal, such as the achievement of illusory and vague "educational benefits," does not (or should not) protect the policy against the plain meaning of the Fourteenth Amendment, Title VI, and *Brown*'s fundamental principle.[140] Yet *Grutter* and *Fisher II* each endorse precisely such an unconstitutional outcome.

Central to understanding the harm *Grutter* inflicted on *Brown* is the need to examine the shifting rationales employed by Justice Kennedy, first in his dissent in *Grutte*r, and later, as the author of the Court's opinion in *Fisher II*.[141] We begin with Justice Kennedy's vigorous dissent in *Grutter*. Despite his expressed willingness to recognize the interest being invoked by the law school,[142] virtually no justice was more strongly opposed to the outcome in *Grutter* than Justice Kennedy. In addition to his concern over the fundamental unfairness and divisiveness of race-conscious policies,[143] his legal concern was that the *Grutter* majority fundamentally misunderstood the real meaning of Justice Powell's "diversity rationale."[144] Justice Kennedy commenced his dissent with this:

> The separate opinion by Justice Powell in [*Bakke*] is based on the principle that a university admissions program may take account of race as one, non-predominant factor[145] in

139. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

140. *Brown II,* 349 U.S. at 298.

141. *See generally* Grutter v. Bollinger, 539 U.S. 306, 387–90 (2003); *Fisher II*, 136 S. Ct. 2198, 2205–15 (2016).

142. *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting) ("I reiterate my approval of giving appropriate consideration to race in this one context . . . .").

143. *Id.* at 388 ("Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.").

144. *Bakke*, 438 U.S. at 321.

145. Interestingly, neither Justice Kennedy, Justice O'Connor, nor Justice Powell in *Bakke* for that matter, explain how race can be used as a factor in

> a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. This is a unitary formulation."[146]

He goes on to observe that "[h]aving approved the use of race as a factor in the admissions process, the majority proceed[ed] to nullify the essential safeguard Justice Powell insisted upon as the precondition of the approval."[147]

However, perhaps Justice Kennedy's most critical point consisted of how the law school implemented its admissions process, as "*the concept of critical mass [was] a delusion* used by the Law School to mask its attempt to make race an automatic factor in most instances and *to achieve numerical goals indistinguishable from quotas*."[148] Justice O'Connor's bizarre dismissal of Justice Kennedy's (and Chief Justice Rehnquist's) interpretation of "critical mass" as a masked quota[149] also contravened not only the factual determination made by the trial court,[150] but common sense as well.[151]

admissions and remain a non-predominant factor and/or can be "weighed fairly and competitively." *Id.* at 318. These are statements that make little sense. Every explicit factor considered (be it an applicant's race, her standardized test scores, undergraduate grade point average, extra-curricular activities, or even her legacy or state resident status) has the potential, at some point, to be "outcome-determinative" in a particular admissions decision. Thus, whenever race plays such a role, it is a direct violation of the guarantees provided to the individual by the Fourteenth Amendment's Equal Protection Clause. *See, e.g.*, *Prelude*, *supra* note 7, at 324 n.58. That race was sometimes "outcome determinative" under the law school's policy was admitted by University officials during trial. *Grutter*, 539 U.S. at 324; *see* Trial Testimony of Michigan Law School Dean Jeffrey Lehman at 191–92 (Jan. 22, 2001), Grutter v. Bollinger, 539 U.S. 306 (2003)) (on file with author). Such an outcome contravenes virtually every word Justice Powell wrote in *Bakke*, including this: "The denial to respondent of this *right to individualized consideration without regard to his race* is the principal evil of petitioner's special admissions program." *Bakke*, 438 U.S. at 318 n.52 (emphasis added).

146. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

147. *Id.* at 388.

148. *Id.* at 389 (emphasis added). Justice Kennedy proceeds thereafter "to point out how critical mass becomes inconsistent with individual consideration." *Id.*

149. *Grutter*, 539 U.S. at 335–36 (Justice O'Connor's declaration that "critical mass" was not a euphemism used by the law school to mask a quota).

150. *See* Grutter v. Bollinger, 137 F. Supp. 2d 821, 842, 851 (E.D. Mich. 2001); *Prelude*, *supra* note 7, at 330–31.

151. *See* DeFunis v. Odegaard, 416 U.S. 312, 332–33 (1974). In a situation indistinguishable from the arguments made by the Michigan Law School in *Grutter*, Justice Douglas noted in *DeFunis* that although "a precise number of places were not set aside" and"[w]ithout becoming embroiled in a semantic debate over whether

Justice Kennedy continued in dissent with another common-sense observation: "The Law School has not demonstrated how individual consideration is, or can be, preserved at this stage of the application process given the instruction to attain what it calls critical mass."[152] And, of course, it cannot be done. Justice Kennedy then appropriately quoted Justice Powell from *Bakke*: "Whether the objective of critical mass 'is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status,' and so risks compromising individual assessment."[153]

Justice Kennedy's criticism of the law school's cynical use of "critical mass" was unrelenting.[154] But he also recognized the equally cynical use of the diversity rationale itself, observing that "[m]any academics at other law schools who are 'affirmative action's' more forthright defenders readily concede that *diversity is merely the current rationale of convenience* for a policy they prefer to justify on other grounds."[155]

Notwithstanding his strongly-worded criticisms of the Law School's program and its use of the phrase "critical mass" to disguise its desire to enroll a certain number of students solely based on their race, thirteen years later Justice Kennedy capitulated and endorsed an identical scheme in *Fisher II*.[156]

Before reaching *Fisher*, however, it is important to briefly review two other cases, the first of which was decided in 2007[157] during the interlude between *Grutter* and *Fisher*; the second came down in

this practice constitutes a 'quota,' it is clear that, given the limitation on the total number of applicants who could be accepted, this policy . . . reduce[d] the total number of places for which DeFunis could compete solely on account of his race." *Id.* There is no substantive difference between the situation in *DeFunis,* and the situation in *Grutter,* where the law school's goal of enrolling a "critical mass" of underrepresented minority students meant that the seats necessary to achieve "critical mass" were not open to competition by white and Asian-American applicants. *See Prelude*, *supra* note 7, at 321, 328–31.

152. *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

153. *Id.* at 391 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978)).

154. *Id.*

155. *Id.* at 393 (citations omitted) (emphasis added). Justice Thomas agreed, characterizing the "diversity" rationale as little more than "a faddish slogan of the cognoscenti." *Id.* at 350 (Thomas, J., concurring in part and dissenting in part).

156. *Fisher II*, 136 S. Ct. 2198 (2016).

157. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

2014,[158] a year after *Fisher I*. The first of the two cases, *Parents Involved In Community Schools v. Seattle*, did not involve the use of race in admissions in the context of higher education (it involved elementary and high school programs in Washington and Kentucky, respectively); but it was here, in this decision, where full-fledged warfare broke out between the justices as to the meaning of *Brown*.[159]

8. Parents Involved in Community Schools v. Seattle[160]

This case is a consolidation of two cases involving school districts that voluntarily adopted student assignment plans that relied upon race to determine which public schools certain children may attend.[161] The legal issue was whether a public school may choose to classify students by race and rely upon that classification in making school assignments.[162] These governmental uses of race were challenged on the grounds that they violated petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment.[163] Both systems were struck down by the Court.[164]

Chief Justice Roberts wrote the majority opinion, noting "that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past *intentional discrimination* . . . . The second . . . is the interest in *diversity in higher education* upheld in *Grutter*."[165] The Chief Justice, who was not a member of the Court when *Grutter* was decided, was perhaps being overly deferential to its precedent; but he made clear in his opinion that (*Grutter* notwithstanding) *Brown* required public school districts "to achieve a system of determining admission to the public schools *on a nonracial basis*."[166]

158. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014).
159. *See Parents Involved*, 551 U.S. 701 (2007) (including five separate opinions).
160. *Id.*
161. *Id.* at 702.
162. *Id.* at 701.
163. *Id.* at 714, 733.
164. *Id.*
165. *Id.* at 720–21 (2007) (emphasis added) (citations omitted).
166. *Id.* at 705 (citing *Brown I*, 349 U.S. 294, 300–01 (1955)). The Chief Justice also noted that "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Id.* at 732.

At this point, the battle broke out as to "which side [was] more faithful to the heritage of *Brown*."[167] In response, the Chief Justice persuasively argued that "the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer."[168] Among the facts he cited were the words of counsel for the plaintiffs who, without any equivocation, took the position that "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording education opportunities among its citizens."[169]After citing to *Brown*, the Chief Justice concluded his opinion in *Parents Involved* with words that perfectly mirror *Brown*'s fundamental principle: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[170]

Unfortunately, the Court's opinion in *Parents Involved* was horribly splintered when it came to "*Brown*'s clear message."[171] With all due respect, the problem with the dissenters' position is that they entirely ignored the arguments made by the plaintiffs in *Brown*, and paid no attention whatsoever to the actual wording of the "fundamental principle" which a unanimous Court in *Brown* announced.[172]

Standing cautiously on the sidelines, however, was Justice Kennedy. While he concurred in the result striking down "the state-mandated racial classifications . . . [as] unconstitutional," and criticized Justice Breyer's dissent as "a misuse and mistaken interpretation of our precedents,"[173] he needlessly lapsed into the mantra that has become all too pronounced on the current Court: that "race matters."[174] Justice Kennedy put it this way: "The enduring

167. *Id.* at 747.

168. *Id.*

169. *Id.*

170. *Id.* at 748.

171. *Id.* at 801 (2007) (Stevens, J., dissenting) (emphasis added) (citations omitted). Justice Stevens' dissent must rank among the more impolite dissents in Court history, with Justice Breyer's among the least faithful to precedent.

172. *See, e.g.*, *Prelude*, *supra* note 7, at 343–44 and accompanying notes; *Grutter (Not) Revisited*, *supra* note 7, at 21–24.

173. *Parents Involved*, 551 U.S. at 782–83 (Kennedy, J., concurring in part).

174. Justices Ginsburg, Breyer, and Sotomayor variously adhere to the view that "race matters." *See, e.g.*, Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1651–83 (2014) (Sotomayor, J., dissenting); *Parents Involved*, 551 U.S. at 803–68 (Breyer, J., dissenting); Gratz v. Bollinger, 539 U.S. 244, 301–02 (2003) (Ginsburg, J., dissenting). Their positions closely track that of Justice Brennan in

hope is that race should not matter; *the reality is that too often it does.*"[175] At the same time, he asserted that "[t]o make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome."[176] All of this points out his failure to, among other things, distinguish between personal and private views not endorsed by the state (which, for better or worse, are governed by the First Amendment) and state-sanctioned conduct, the latter of which most certainly is governed by the Equal Protection Clause as well as by Title VI of the Civil Rights Act of 1964.[177]

The problem which seems to elude each justice (including Justice Kennedy) who invokes the "race matters" argument is this: when our laws prohibiting racial discrimination are scrupulously enforced by the courts, they establish a standard of conduct expected from every citizen. Conversely, when they are not enforced, or are disregarded (as in *Grutter* and *Fisher II*), it creates, as Justice Kennedy once put it, "the potential to destroy confidence in the Constitution and in the idea of equality."[178]

In a similar vein, Justice Kennedy was also troublingly dismissive of Justice Harlan's "color-blind" assertion in *Plessy*.[179] He

Bakke, who wrote, "claims that law must be 'color-blind' or that . . . race is no longer relevant to public policy must be seen as aspiration rather than as . . . reality." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1978) (Brennan, J., concurring and dissenting in part). However, Justice Brennan's observations were premised on his view that "even today [in 1978] officially sanctioned discrimination is not a thing of the past." *Id.* In the author's view, the prescription for ending "officially sanctioned discrimination" wherever it exists is to vigorously enforce the guarantees *against* racial discrimination as contained in the Equal Protection Clause and Title VI, and as embodied in *Brown*'s fundamental principle.

175. *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

176. *Id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment).

177. Many state constitutional provisions and statutes also prohibit government-sanctioned racial preferences. *See, e.g.*, MICH. CONST. art. I, § 26 (2016). Adopted by Michigan's voters in 2006, in direct response to the outcome in *Grutter*, this provision provides in relevant part that Michigan's public universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race . . . ." *Id.*

178. Grutter v. Bollinger, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting).

179. *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy's dismissal of Justice Harlan's memorable dissent in *Plessy*, which many today consider to be an expression of a "universal constitutional principle," is all the more ironic when one considers Justice Kennedy once signed onto an opinion (along with Justice O'Connor and

characterized it as an "axiom [that] must command our assent," only to conclude that, "[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle."[180]

But if Justice Kennedy is right, one is forced to ask of one of our most senior and influential Supreme Court justices: "What, Your Honor, constitutes a universal constitutional principle? And if *Brown*'s 'fundamental principle' (which does nothing if not echo Justice Harlan's dissent in *Plessy*) is not 'a universal constitutional principle,' then what principle is?"

9. Schuette v. Coalition to Defend Affirmative Action[181]

Justice Kennedy's evolution from a strong protector of each person's right to equal protection under the laws without regard to race took another, albeit subtle, step backwards in 2014 in *Schuette v. Coalition to Defend Affirmative Action*.[182] *Schuette* involved a direct challenge to the University of Michigan's race-conscious policies approved in *Grutter*.[183] At issue was the language of a Michigan state constitutional amendment adopted by the voters in 2006, three years after *Grutter* was decided.[184] Among other things, it banned the use of race in admissions to Michigan's public universities.[185] Although Justice Kennedy wrote to uphold the right of a state's citizens to prohibit the use of racial preferences in public education (which, of course, is fully consistent with *Brown*'s fundamental principle), his opinion seemed to leave open the right of citizens to *enact* race preferences, which is directly at odds with *Brown*.[186] In addition, he

Justice David Souter) that referred to *Plessy* as "wrong the day it was decided." Planned Parenthood v. Casey, 505 U.S. 833, 863 (1992).

180. *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment).

181. 134 S. Ct. 1623 (2014)

182. *Id.*

183. *Id.* at 1628.

184. *Id.*

185. MICH. CONST. art. I, § 26 (2016) (providing in relevant part that Michigan's public universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race"). There are several states with similar constitutional or state statutory law provisions to Michigan. *See, e.g.*, ARIZ. CONST. art. II, § 36; CAL. CONST. art. I, § 31(a); NEB. CONST. art I, § 30; OKLA. CONST. art. II, § 36; WASH. REV. CODE § 49.60.400. All presumably are constitutional pursuant to the Court's decision in *Schuette*.

186. *See* Schuette, 134 S. Ct. at 1635; *see also* R. Lawrence Purdy, *"To Speak Openly and Candidly on the Subject of Race" Musings on Schuette v. Coalition to Defend Affirmative*

included dicta that seemingly embraced the use of race to, among other things, "transcend the stigma of past racism,"[187] an argument that would be even less exacting than the one firmly rejected by court after court—remedying the "amorphous" effects of past societal discrimination.[188] While entirely unnecessary to the holding in *Schuette*, it seemed to signal a permissible use of racial classifications entirely at odds with Justice Powell's opinion in *Bakke*.[189] If such a finding ever were countenanced by Justice Kennedy, it would contravene principles he had long extolled, at least up to and including his dissent in *Grutter*.[190]

Whatever he had in mind with his puzzling observation, such a suggestion seems nothing less than a rejection of *Brown*'s fundamental principle, in effect treating *Brown*'s non-discrimination dictate as little more than a polite suggestion rather than a constitutional mandate. This brings us to *Fisher*.

10. Fisher v. University of Texas at Austin (Fisher II)[191]

As has already been covered, this 2016 decision upholding UT's *Grutter*-like race-conscious admissions policy[192] represents, at least as of this writing, the Supreme Court's complete nullification of *Brown*'s fundamental principle. In *Fisher II*, Justice Kennedy turned his back on every word he had written about an admissions system that was modeled after and "indistinguishable" from the one he railed against in *Grutter*.[193]

In 2003, he blistered the University of Michigan Law School's use of the term "critical mass," a phrase both he and the late Chief

Action, et al., 12 U. ST. THOMAS L.J. 508 (2016).

187. *Schuette*, 134 S. Ct. at 1638.

188. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 307 (1978).

189. *See id.*

190. In a decision written by Justice Kennedy sixteen years prior to *Fisher II*, he wrote: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." Rice v. Cayetano, 528 U.S. 495, 543 (2000). There simply is no way to reconcile these words with the decision written by this same justice in *Fisher II*.

191. 136 S. Ct. 2198 (2016).

192. As the facts in *Fisher II* makes clear, the disputed *Grutter*-like portion of UT's policy affected approximately one-quarter of the entering class. The other three-quarters were admitted pursuant to a facially race-neutral plan passed by the Texas Legislature which took effect in 1998. *Id.*

193. *See Prelude*, *supra* note 7.

Justice William Rehnquist accurately characterized as a "delusion used by the Law School . . . to achieve numerical goals indistinguishable from quotas."[194] Yet in 2016, UT's equally cynical misuse of "critical mass" was undeserving of so much as a cautionary admonition from Justice Kennedy.[195]

In 2003, Justice Kennedy strongly criticized the Court in *Grutter* for misapplying Justice Powell's "unitary formulation" in *Bakke* regarding how a university might "take account of race . . . in [an admissions] system designed to consider each applicant as an individual."[196] In 2016, with the exception of a single passing parenthetical reference to the Fifth Circuit's 2014 decision,[197] Justice Kennedy neglected to mention Justice Powell or *Bakke* in the opinion.

In 2003, Justice Kennedy wrote in *Grutter* that "[t]o be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where *individual assessment is safeguarded through the entire process.*"[198] In 2016, there was not a single word from Justice Kennedy reaffirming Abigail Fisher's right to be individually judged in accordance with her rights guaranteed by the Equal Protection Clause, much less in accord with *Brown*'s unambiguous fundamental principle.[199] Instead, Justice Kennedy surrenders her rights (and the rights of thousands of future UT applicants) with a whimper, gratuitously noting that, "it remains *an enduring challenge* to our Nation's education system *to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity*" (which he characterizes as a "sensitive balance" in the very next sentence).[200]

The single-page dissent by Justice Clarence Thomas in *Fisher II* neatly summarizes why Justice Kennedy's decision is so fundamentally wrong. After signaling his agreement with Justice Samuel Alito's detailed criticism of the final outcome, Justice Thomas wrote:

194. Grutter v. Bollinger, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting).

195. The phrase "critical mass" appears only twice in the Court's opinion, without a single criticism of its use uttered by the opinion's author. *Fisher II,* 136 S. Ct. at 2210, 2211.

196. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

197. *Fisher II,* 136 S. Ct. 2198, 2214 (2016).

198. *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting) (emphasis added).

199. *See Fisher II*, 136 S. Ct. 2198 (2016).

200. *Id.*, 136 S. Ct. at 2214 (emphasis added).

> [T]he Court's decision . . . is irreconcilable with strict scrutiny, rests on pernicious assumptions about race, and departs from many of our precedents. I write separately to reaffirm that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." "The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." That constitutional imperative does not change in the face of a "faddish theor[y]" that racial discrimination may produce "educational benefits."[201] The Court was wrong to hold otherwise in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). I would overrule *Grutter* and reverse the Fifth Circuit's judgment.[202]

Since his stinging dissent in *Grutter*, and as he eloquently reaffirmed in *Fisher I*,[203] Justice Thomas has never wavered in his adherence to a "view of the Constitution [identical to] the one advanced by the plaintiffs in *Brown*."[204] With nothing more to say on the subject beyond the many pages he previously devoted in both *Grutter* and *Fisher I* to the odious use of racial classifications, he left it to Justice Alito to unwrap the details in *Fisher*. And unwrap them he did.

At the outset of Justice Alito's 51-page dissent, he provides an outline that fairly captures the "inexplicabl[e]"[205] nature of Justice Kennedy's opinion for the four-justice majority:

> *Something strange has happened since our prior decision* in [*Fisher I*]. In that decision, . . . we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied. On remand, UT failed to do what our prior decision demanded. [UT] has still not identified with any degree of

201. This is a direct reference to the *non-remedial* "compelling interest" first recognized by the Court in *Grutter*. *Grutter*, 539 U.S. at 328.

202. *Fisher II*, 136 S. Ct. at 2215 (Thomas, J., dissenting) (emphasis added) (citations omitted).

203. *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring).

204. *See, e.g.*, *id.* at 2428 ("[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." (Thomas, J., concurring)).

205. *Fisher II*, 136 S. Ct. at 2215 (Alito, J., dissenting).

> specificity the interests that its use of race and ethnicity is supposed to serve. *Its primary argument is that merely invoking "the educational benefits of diversity" is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests.*[206]

Justice Alito's first, and by far easiest, target was the ever-elusive "critical mass."[207] Whatever one says about it, the fact is, UT "never explained what this term means."[208] But as Justice Alito notes, "UT tells us that it will let the courts know when the desired end has been achieved."[209] Throughout his dissent, Justice Alito points out the inconsistency between *Fisher I* and *Fisher II*, noting that "without knowing in reasonably specific terms what critical mass is or how it can be measured," a court cannot perform "careful judicial inquiry" into the importance of the use of race.[210] After conducting a detailed exposition of UT's program, Justice Alito concludes that "[c]onsideration of race therefore pervades every aspect of UT's admissions process."[211]

Illustrating the irrational nature of *Fisher II*'s outcome is UT's bizarre claim that "it cannot provide even a single example . . . in which [the use of its race-conscious admissions policy] impacted a student's odds of admission. . . . Accordingly, UT asserts that it has no idea which students were admitted as a result of its race-conscious system and which students would have been admitted under a race-neutral process."[212] UT's claim, of course, begs the question: Why utilize a race-conscious system if no method exists to determine its

206. *Id.* (emphasis added) (citations omitted).

207. *Fisher II*, 136 S. Ct. at 2216 (Alito, J., dissenting).

208. *Id.* at 2216.

209. *Id.*; *see id.* at 2222 ("UT prefers a deliberately malleable 'we'll know it when we see it' notion of critical mass . . . In other words: Trust us."). It is as if admissions personnel at UT, like their forerunners at the University of Michigan Law School, have created a cynical board game in which two cards, one labeled "critical mass" and the other labeled "the educational benefits of diversity," are the ultimate wild cards. If you draw both, you are free to violate the express language of the Equal Protection Clause, *Brown*'s fundamental principle and Title VI of the Civil Rights Act of 1964 with impunity.

210. *Id.* at 2222; *see also id.* at 2216, 2219, 2222, 2224 (detailing Justice Alito's criticism of UT's use of "critical mass").

211. *Id.* at 2220.

212. *Id.* UT's claim notwithstanding, the Court had no problem determining that "race . . . can make a difference to whether an application is accepted or rejected." *Id.* at 2207.

effectiveness in achieving a "critical mass" of minority students? And, if UT is being honest in its assertion, how would any future court determine under strict scrutiny analysis whether UT's race-conscious program is necessary to achieve its "critical mass" goal? If UT cannot identify a single student for whom race made a difference in admission, reviewing such a system and, more importantly, justifying its continuation, become impossible. Under the best of circumstances, UT's position becomes a sort of "maybe we need to use race, but maybe we don't" argument. Nonetheless, this is precisely the argument the majority in *Fisher II* countenanced.

IV. WHERE WE ARE NOW

In the roughly thirty-eight years since *Bakke*, and during the thirteen years that elapsed between *Grutter* and *Fisher II*, what has happened to *Brown*'s fundamental principle? Despite criticism of Justice Powell's views on the potential use of race to achieve "diversity," virtually every word of his lone dicta in *Bakke* was fully consistent with *Brown*'s decree.[213]

Ironically, although Justices O'Connor and Kennedy purported to be faithful to Justice Powell's diversity rationale, neither Justice O'Connor's opinion in *Grutter* nor Justice Kennedy's opinion in *Fisher II* adhered to *Bakke*'s most important holdings. Indeed, the opinions that most closely hew to Justice Powell's enunciated principles, particularly those regarding an applicant's right to be considered under a "facially nondiscriminatory admissions policy,"[214] are Justice Thomas's and Justice Kennedy's dissents in

213. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90 (1978) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.").

214. *Id.* at 318*; see id.* at 318 n.52 (illuminating Justice Powell's description that such an admissions policy as a "right [pursuant to the Fourteenth Amendment's Equal Protection Clause] to individualized consideration without regard to . . . race").

Grutter;[215] Justice Thomas's concurrence in *Fisher I*;[216] and Justices Thomas and Alito's dissents in *Fisher II*.[217]

Given Justice Kennedy's fickle devotion to the Equal Protection Clause, and his entire rejection in *Fisher II* of *Brown*'s fundamental principle,[218] it is difficult to predict the latter's impact in future cases involving the use of race as a factor in admissions. Whether this universal principle will ever be resurrected depends, of course, upon the facts presented in the next case that inevitably will reach the Court's docket, and whether those who challenge these *non-remedial*, race-conscious admissions systems are prepared to aggressively challenge the "remarkably wrong"[219] outcomes in both *Grutter* and *Fisher II*.[220]

So here we sit, nearly sixty-four years after *Brown* announced that "racial discrimination in public education is unconstitutional,"[221] with several decisions and a handful of Supreme Court Justices categorically rejecting *Brown*'s bedrock principle. And all it takes is a handful of justices to return us to the very same "race matters" proposition that motivated the old-line segregationists.[222]

215. Grutter v. Bollinger, 539 U.S. 306, 362 (2003) (Thomas, J., concurring and dissenting in part); *id.* at 394 (Kennedy J., dissenting) (noting that the Court violated *Bakke* by "suspend[ing]" the "basic protection put in place by Justice Powell").

216. *Fisher I*, 133 S. Ct. 2411, 2424–29 (2013) (Thomas, J., concurring) (eloquently setting forth Justice Thomas' view of the Fourteenth Amendment, and in particular how it perfectly meshes with *Brown*'s fundamental principle).

217. *Fisher II*, 136 S. Ct. at 2220–21 (2016) (demonstrating Justice Alito's adherence to Justice Powell's view of the Equal Protection Clause, and quoting what once-upon-a-time seemed to be the view of Justice Kennedy as "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause").

218. *See id.* at 2210 (noting that "a university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'" (quoting *Fisher I*, 133 S. Ct. at 2419)).

219. *Fisher II*, 136 S. Ct. at 2243 (Alito, J., dissenting).

220. Note that petitioner's counsel in *Fisher* (for reasons that remain inexplicable to the author) chose not to challenge *Grutter*. *See Fisher I*, 133 S. Ct. at 2422 ("The petitioner in this case did not ask us to overrule *Grutter*'s holding that a 'compelling interest' in the educational benefits of diversity can justify racial preferences in university admissions.") (Scalia, J., concurring).

221. *Brown II*, 349 U.S. 294, 298 (1955).

222. Justice Kennedy himself offered somewhat similar counsel over a decade ago, stating, "[t]o make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part

V. CONCLUSION

The United States was born on the basis of an ideal that "all men are created equal."[223] For all its rhetorical beauty, it was an ideal that was placed for too long—in word and deed—beyond the grasp of millions of enslaved men and women. The distinction that separated the *free* from the *unfree* (and the "equal" from the "unequal") was simply the color of their skin. A bloody civil war was fought and the emancipators prevailed. But the divisions based on race were not washed away with their victory. The Thirteenth Amendment ended slavery. It did not end racism. Nor, regrettably, did the passage of the Fourteenth Amendment.[224]

Almost a century after our civil war ended, President John F. Kennedy reminded the American people that "race has no place in American life or law."[225] While President Kennedy understood the importance of passing legislation to outlaw racial discrimination, he also understood that racial animosity itself was primarily a "moral issue" and that "law alone cannot make men see right."[226] In the end, no law can dictate what we think in our minds and feel in our hearts; but the laws free men enact most certainly can dictate what our government can, and cannot, do, and importantly—perhaps most importantly—serve as a reflection of our noblest aspirations.

When it comes to the role a person's race should play in our system of public education, we have more than ample guidance. The Equal Protection Clause of the Fourteenth Amendment is our constitutional guide; Title VI of the Civil Rights Act of 1964 is our statutory guide; and the "fundamental principle" adopted by a

and concurring in the judgment).

223. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

224. The question, in part, becomes whether any law can end racism that may reside solely in the heart and mind of a truly free individual.

225. John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963) (transcript available at http://www.presidency.ucsb.edu/ws/?pid=9271). Kennedy also said, "[Our Nation] was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened." *Id.* Earlier that same year, Dr. Martin Luther King expressed a similar sentiment in his famous April 16, 1963 "Letter from a Birmingham Jail," by writing, "Injustice anywhere is a threat to justice everywhere . . . . Whatever affects one directly, affects all indirectly." Letter from Martin Luther King, Jr. entitled, "Letter from Birmingham Jail" (Apr. 16, 1963) 1, https://liberalarts.utexas.edu/coretexts/_files/resources/texts/1963_MLK_Letter_Abridged.pdf.

226. Kennedy, *supra* note 225.

unanimous Supreme Court in *Brown* is our judicial North Star. The perfectly symmetrical propositions contained within these three sources provide the just answer to the issue raised in every case discussed herein: "racial discrimination in public education is unconstitutional."[227]

In the end, *Brow*n's fundamental principle should govern every aspect of our civic lives including, most importantly, our system of public education. Achieving that goal, however, requires our highest Court to faithfully reaffirm and uphold it. Surely the Court should do that. The question is, will it?

227. *Brown II*, 349 U.S. 294, 298 (1955).