WHAT THE SUPREME COURT DID NOT HEAR IN *GRUTTER* AND *GRATZ*

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[The following is an annotated version of the remarks delivered by Cheryl I. Harris at the Drake University Constitutional Law Symposium on April 12, 2003 at Drake Law School.]

Thank you very much for coming this morning to engage in this very important conversation. I want to thank Russell also for bringing us together. I can't imagine a conference that has been so timely, although as Paul Brest was just saying, I have the feeling of having been there and done that. It is "déjà vu all over again" in terms of some of this debate.

I want to talk today about what I think the Supreme Court didn't hear in *Grutter*. Or if it did hear, heard only faintly. It might seem like after all the briefs, all the arguments, all the ink (I think there were a record number of *amicus* briefs filed in this case), that it would be difficult to argue, as I am today, that there is something that the Supreme Court didn't hear in *Grutter*. But perhaps it is an inevitable part of making history that certain stories are left untold. Historians know that the fact that some particular historical event has been examined and reexamined does not mean that no alternate readings are possible. Think, for example, of the number of books on Lincoln. Yet, every year there is another and some of them have great value.

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* B.A., Wellesley College; J.D., Northwestern University. Professor of Law, UCLA School of Law. This presentation would not have been possible without the timely and critical conference organized by my colleagues, Professor Kimberle Crenshaw and Professor Luke Charles Harris, which was entitled Defending Affirmative Action and was held at Columbia University School of Law on March 27-28, 2003. The ideas expressed in this talk were inspired by and rely upon the presentations of many of the participants there. I extend my sincere thanks and appreciation to Kim and Luke for convening the group and guiding the conversation. I also thank, in particular, Janine Jackson, of Fairness and Accuracy in Reporting, Devon Carbado, Eva Paterson, Luke Charles Harris, Sumi Cho, Frank Gilliam and all of the other participants who informed my analysis. Rasheeda Kilpatrick, Erika Woods, and Anthony Solana, UCLAW students who participated in the conference, were also a great inspiration, as were all the UCLAW students who worked so diligently in preparing an *amicus* brief in *Grutter* that so eloquently articulated the costs of eliminating affirmative action. This piece is dedicated to you and all the student interveners in *Grutter* who have demonstrated such tremendous tenacity and courage in speaking back to power.

Historians have also engaged a debate about the concept of counterhistory. Broadly speaking, counterhistory offers that it is possible and sometimes, indeed, important to examine history from the perspective of things that did *not* happen.[1] That is, counterhistory invites us to think about what would have happened if some important historical battle had turned out differently than it did. For example, what would have happened if the United States had not struck the compromise that it did with regard to slavery? What would have happened if there had been full compliance with *Brown*? Perhaps we would not be here having this discussion today.

This counterhistorical impulse has a correlate in law—the counterfactual, which, like the question I just posed about *Brown*, asks "What if . . . ?" The counterfactual is an oft-used device in legal argument by which one reasons from the supposition that the facts are other than what they were presumed to be.

Of course, neither counterhistories nor counterfactuals necessarily lead to compelling reasoning or logic. One of the most glaring examples of counterfactual illogic in legal reasoning is *Plessy*.[2] There, Plessy argued that de jure segregation was unlawful under the Constitution because it marked a group as inferior. The Court rejected the claim in the following terms:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.[3]

Here we have the Court saying, in effect, since whites would not view segregation enacted by black dominated legislatures as evidence of white

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1. The counterhistorical impulse has been described by Robert Gordon as follows:

> [A]ny approach to the past that produces disturbances in the field—that inverts or scrambles familiar narratives of stasis, recovery, or progress; anything that advances rival perspectives (such as those [of] the losers rather than the winners) for surveying developments, or that posits alternative trajectories that might have produced a very different present—in short any approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present.

Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1024 (1997).

2. Plessy v. Ferguson, 163 U.S. 537 (1896).

3. *Id.* at 551.

inferiority, the only reason that segregation amounted to a system that enacted racial inferiority is because black people chose to view it that way. This is the mobilization of a counterfactual in service of the absurd. As Justice Harlan's famous dissent in that case noted, however, the very purpose of Jim Crow was to enact a system of racial caste.[4] The genesis of America's version of apartheid, then, lay in slavery. Segregation was formulated in direct response to the end of slavery, resolving the social crisis produced by the formal destruction of the master-slave relationship.

So my point is that the use of the counter-factual does not guarantee sound or logical reasoning. So why am I going to do it? Because I think it is important to think about what the Supreme Court didn't hear in this most important case and critical historical moment in order to consider how that might change how we view it. I want to take the risk of the counterhistorical turn—to focus on what the Court didn't hear in *Grutter*—as a way of shifting the frame through which we understand the case and the issues involved. Without doing so we might remain mired in a narrow perspective, continuing to view a complex landscape—that being the entangled, enmeshed, and historically vexed issue of race and racial subordination in this country—as if it were a portrait. Without this other perspective, we would be using the wrong lens, the telescopic instead of the big picture. As one scholar of communication points out, we have to think about these questions because in reality, "we define first and then see."[5]

The advocates for Grutter and Gratz, hand-picked poster children, carefully screened for their media appeal by the right wing legal foundations that have financed these lawsuits, hope that if they say "quota" and "preference" enough

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4. As Harlan stated:

> It was said in argument that the statute of the Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored persons from coaches occupied by or assigned to white persons . . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches.

Id. at 557 (Harlan, J., dissenting).

5. The entire quote is: "We do not first see, and then define, we define first and then see." WALTER LIPPMANN, PUBLIC OPINION 54-55 (1949). My thanks to Professor Franklin Gilliam, Director of the Center for Communications and Community at UCLA, and author of important research on the relationship between media coverage, race, and policy judgments, for bringing this quote to my attention.

people will stop thinking and simply default to the preexisting frame.[6] And what is the frame through which affirmative action and discrimination have been defined? What is the frame through which we have come to understand the issue? I contend that in the prevailing frame racial inequality is treated as an unfortunate and distant fact, resolved ultimately and finally by *Brown*.

Racial discrimination recurs and reappears now only as disaggregated and episodic moments brought about by the misguided decisions of bigoted individuals. This is discrimination understood as an intentional tort requiring the identification of perps, victims, and motives. We are invested in this model and in this frame for several reasons. The first is that it adheres most closely to the world as we might want it to be. That is, if discrimination and racial inequality were this and only this—the discrete actions of identifiable bigoted people—then eradicating it would be a far simpler task. Discrimination would be the result of actions taken by individual actors, always somebody other than ourselves, and would be easily identifiable and easily rooted out.

But we have not simply come to this view because it is the world as we want it to be, nor have we simply constructed this frame on our own. Most of the major institutions that shape public opinion function within and reinforce this frame. Take, for example, the media. Here we might say that much of the mainstream media has been embedded (a word that we hear frequently lately), within this frame. Journalists tend to favor human interest stories about individuals over those that study institutional practices, their origins, and consequences.

A recent study by a media watchdog group took a look at the print media coverage of affirmative action in the major media over a six-month period in 1998 and found several interesting things.[7] For the most part, the media has abandoned coverage of affirmative action as an institutional practice. It is now almost exclusively covered as an issue or a set of competing opinions subject to claims and counterclaims within a polarized framework. So instead of stories that cover how affirmative action is practiced within an institution that has a specific history and a specific line of reasoning or development, what we get is "Affirmative Action: Pro or Con."[8] It is reported entirely, outside of the context of discrimination past or present. In fact only fifteen percent of the stories make

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6. Framing, according to Franklin Gilliam, refers to the "lens through which people interpret issues." Franklin Gilliam, *Communications and Community*, *available at* http://www.sscnet.ucla.edu/issr/ccc/Context_Magazine/frank.html (last visited May 1, 2003).

7. The report by Janine Jackson, issued in early 1999, surveyed news media coverage of affirmative action in the first 6 months of 1998. Janine Jackson, Report for Fairness and Accuracy in Reporting, *Affirmative Action Coverage Ignores Women—and Discrimination*, *available at* http://www.fair.org/extra/9901/affirmative-action.html (last visited May 1, 2003).

8. *Id.*

any reference at all to discrimination.[9] That is, what is absent from the vast majority of articles is that the policies that are under contention have been developed in direct response to complaints or perceptions of discrimination.

Another interesting finding in this report (this issue was raised by one of the questioners) is that white women, who by all accounts have been major beneficiaries of affirmative action policies adopted over the past two decades, were almost totally absent from the stories. One concrete example of how affirmative action has benefited white women is rates of enrollment of women in professional schools. The school that I attended, Northwestern Law School, now has over fifty percent women in the entering class, as do many of the leading law schools. That was not the case thirty years ago. But white women are almost virtually absent from these stories. This produces a distorted picture of affirmative action and its beneficiaries.

Moreover, the articles deploy distorted language while claiming to provide unbiased reporting. A significant percentage, nearly twenty-five percent of the articles, used the term affirmative action and preference interchangeably.[10] I am sure you caught that in the earlier presentation by Grutter's lawyer; affirmative action is described as racial preference. Another phrase of choice was "reverse discrimination." The mainstream press has thus framed affirmative action as a hot issue about race in which opinion is polarized over whether racial preferences are fair or not. But of course such terminology is hardly neutral. It assumes the position or conclusion regarding the very thing that is under debate: Is a particular policy reverse discrimination or a racial preference, or is it a justifiable measure to eliminate the effects of past and current discrimination. According to the report, one notable exception to the biased reporting was a piece in the Seattle Times entitled *Equality on the Job: Are We There Yet?* That is an example of how one might frame the question without assuming the conclusion.

So, to a great extent the reason that the Supreme Court did not, or at least did not clearly, hear a number of important arguments in *Grutter*, is because we began the conversation with an already tilted frame. The frame is tilted to understanding racial discrimination as an episodic, as distinct from structural phenomenon.

Now what do I mean by structural? A structural frame would mean that we have to begin by looking at how our institutional practices structure racial inequality. How do the normal and routine rules of the game function to prefer and disfavor certain people? So instead of seeing this issue through the given and received frame, let me suggest some other key words instead of preference

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9. *Id.* at 5.
10. *Id.* at 4.

and reverse discrimination that I would like to use to frame the discussion of the issue: inclusion and isolation, privilege and equalizing treatment.

In looking at affirmative action through a different lens and asking what the Supreme Court did not hear, the first thing we might notice is who was it that got to speak before the Court. The litigation in *Grutter* has been in the lower courts for many years, six I believe now, and for most of that time the case has included not only the plaintiffs, Barbara Grutter and Jennifer Gratz, and the defendant University of Michigan; it has also included the group of student interveners. This is a group of underrepresented minority students, some of whom became involved in this case as high school students seeking admission to the University of Michigan. These were students who, like Grutter and Gratz, had a serious stake in the outcome of the litigation. From the perspective of these students, if the policy was upheld they might be afforded actual educational opportunities. If it was stricken, the door would be closed, not only for them, but for thousands like them who sought to attend the University. After initially being excluded from the case in the lower courts, the court of appeals ruled that the students' interest was such that they should be allowed to intervene; that is, to have separate counsel, to be allowed to speak, to present evidence, et cetera. After almost six years in the case in which they have offered testimony and argued the case in every court in which it has been heard, the Supreme Court, on April 1, 2003, heard arguments from the plaintiffs, the University, and even the Solicitor General on behalf of the United States as an *amicus*—everyone except these students. They did not get to speak and be heard.[11]

In some ways, history is repeating itself. As the fact that the student interveners did not argue before the court replicates the very framing and the problem and the silencing in *Bakke* itself.[12] In *Bakke*, the groups that arguably had the most at stake in the outcome did not have a direct voice in the case when it was heard. There were not, in fact, even a group of student interveners; there was only Alan Bakke on one side and the University of California at Davis, the institution, on the other. Of course, a reasonable question might be what difference does this make? If there are competent lawyers for both parties, as there were here, why should it matter that the student interveners did not argue before the Supreme Court? The institution and the student interveners, after all, do share an interest in upholding the policy. But I contend, however, the interest

11. *See Students for 'U': 'U' Should Yield Time to Student Interveners*, THE MICHIGAN DAILY ONLINE, Mar. 12, 2003, *at* http://www.michigandaily.com/vnews/display.v/ART/2003/03/12/3e6eac0f2d666?in_archive=1 (reporting that student interveners' request that one of them be allowed ten minutes to address the Supreme Court during oral argument in *Grutter* was denied and that the views of the students were being excluded).

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

and perspective of the students and the university are not always coextensive and should not be conflated.

This difference in interest and perspective was most evident in *Bakke* where the University made little effort to develop a whole record on its admissions policy in the lower court. Most significantly, the University initially contested, and then conceded, in the lower courts that Bakke would have been admitted but for the special admissions program. An essential element of Bakke's case (and for that matter an essential element of *Grutter* and *Gratz*) is proof that he would have been admitted but for the special admissions program.

Though race was undoubtedly a factor that was weighed in connection with the admission of minority students, that did not mean that race was the reason that Bakke was rejected. I think that was what Dennis Shields was trying to explain in talking about Ms. Grutter's file. You have to back up the lens a little bit to see what else was going on with Bakke—Bakke had been rejected by at least twelve other medical schools, some explicitly citing his age as the reason. Moreover, whites with lower grades and test scores were admitted to the medical school just as there were whites with lower profiles than Grutter who were admitted to the law school in this case. This suggests that there may have been a number of reasons not related to race that explained the decision rejecting his application. Fortunately, the University of Michigan did not replicate the University's error in *Bakke*; as I understand it, the University of Michigan has not conceded in this case that the plaintiffs would have been admitted but for the policy, nor did it go forward on a record that was not fully developed with regard to its admissions policies. If anything, both *Grutter* and *Gratz* have provided an abundance of information about the University's admissions policies in both the undergraduate college and the law school.

Nevertheless, I still contend that without the voice of the student interveners, the case has been reduced to a claim between the plaintiff and the University; the most affected communities are left to watch from the sidelines at the point the case was heard. Now the University has ably asserted the interest of diversity and the benefits of an increased number of minority students into the profession, all of which are crucial, but I contend that the interests of the student interveners cannot simply be reduced to that. The direct consequence of the absence of the student interveners in the argument before the Supreme Court on April 1, 2003 was that the argument was tilted away from some of the core issues and the students were denied a national platform before the Supreme Court in one of the most watched cases of our time. The demonstrations and rallies outside the Court became the platform for the communities of students who would be directly affected by the outcome.

So what was missing? What didn't the Supreme Court hear or heard only faintly? To put it as the students did, in the absence of policies that consider race as an offset to the exclusionary institutional practices that favor whites, these

institutions will resegregate with respect to black and Latino students, returning to the days when, like Herman Sweatt in the landmark case *Sweatt v. Painter*[13] that proceeded *Brown*, there was but one black student in the entire class. This is not a hypothetical supposition. Indeed, it was a question that Justice O'Connor wanted answered. She asked what happened in the State of California after the adoption of Proposition 209 eliminating affirmative action. Well, I can tell you. Since the elimination of affirmative action at the University of California, more than twenty-four thousand applications submitted by black and Latino applicants have been rejected, and there has been a significant decrease in the acceptance rate for both groups.[14] There are nine campuses of the University of California, with Berkeley and UCLA being the most highly selective. The arguments that the opponents make is that there is no real harm here since black, Latino, and other representative students are simply resorted to other, less competitive campuses. This is the phenomenon euphemistically called "cascading." Cascading, as you know, however, is something that goes down, never up.

As Eva Patterson, Executive Director of the Lawyers' Committee for Civil Rights in the Bay area recently put it, this is an argument that is tantamount to saying you can ride on the bus, but only if you stay in the back. Moreover, it assumes that there are an infinite number of spots in these institutions, when in fact nothing could be further from the truth. Cascading downward means that those that are already below are displaced by those who filter down from the higher ranked UC school, to Cal State, to the community colleges. So if a student doesn't get to UCLA, they may in fact be able to get into UC-Riverside, but because Riverside doesn't have infinite capacity, the student who might want to attend Riverside is pushed out into another institution, and so on. What is the end point here? Somebody gets pushed out of higher education completely.

Ward Connerly, the principal proponent of Proposition 209, the California voters initiative that banned racial "preferences" in government contracting, hiring, or admissions policies, recently debated Professor Christopher Edley, a professor at Harvard Law School, on the issue of affirmative action.[15] In response to a similar argument that in the absence of affirmative action many black and Latino children would simply not be able to attend college, Connerly said, "Well, who said they all have to go to college?" Of course, this was perhaps an unintentionally candid description of his vision of the world. It is a vision in which racial stratification in educational opportunity is normalized.

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13. Sweatt v. Painter, 339 U.S. 629 (1950).

14. *See* THE TOMÁS RIVERA POLICY INST., THE REALITY OF RACE NEUTRAL ADMISSIONS FOR MINORITY STUDENTS AT THE UNIV. OF CAL.: TURNING THE TIDE OR TURNING THEM AWAY?, *available at* http://www.trpi.org/mid_publications.html#education (last visited May 7, 2003).

15. The debate, "Affirmative Action: Save It? End It? Or Mend It?," was broadcast on C-SPAN on March 5, 2002.

You get elite education for whites and some groups of Asians and the rest get what you can.

And if you can't get into college, and given the economy you can't find a job, where do you go? Where do you go? To prison. Where is the other choice? The military. There is, of course, no dishonor in joining our armed forces. To the contrary, for many it reflects a high sense of purpose and commitment to serve. However, under these circumstances what we have in place is an economic draft. This is an unofficial draft that produces a military that is disproportionately poor and working class, black and brown. And at least at some inner city high schools in East L.A. there are few, if any, visits from college recruiters, but there is a highly visible and very effective military recruitment presence. So the effect of pushing students out of more highly competitive campuses is not benign. In fact, it could be said to have life and death consequences.

And of course, even if cascading were okay, the fact remains, as Paul Brest pointed out, it simply does not operate at the level of graduate education. There are insufficient numbers of slots at public law or medical schools to accommodate any cascading. To the extent there are private schools, the differential in cost effectively works as another form of exclusion.

Let me tell you about what happened at UCLA Law School, since that was Sandra Day O'Connor's question. [For those of you that don't know prior to the adoption of Proposition 209, there was a Regents' resolution that banned affirmative action in education; Proposition 209 expanded the ban to government contracting, employment, and admissions decisions, and embedded it into the California Constitution.] In 1994, before the adoption of the Regents' resolution, there were 458 black applicants to the law school, 117 admitted students, and 46 enrolled. There were 653 Latino students, 113 admitted, and 57 enrolled. Asian and Pacific Islanders constituted approximately 21% of the class and whites 46.9% of the class.[16] This effectively meant that there was no racial majority in this law school. Plurality yes, but no majority. I began teaching at UCLA Law School in the fall of 1995, and in a class of 40 there was no racial majority in my class as between whites, blacks, Asians, and Latinos. I have to tell you it was a stunning and absolutely rich educational environment in which to teach. In fact, it was one in which students of the same race felt free not only to speak openly, but to disagree with one another. There was no black view or Latino view or Asian view. Rather, there was a set of cross-cutting perspectives that were informed by, but not determined by, race.

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16. For detailed data on the admissions of underrepresented minorities at UCLA School of Law see, Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, App. A (2002) (reproducing charts on admissions between 1993-2001).

Contrast this with the class of 1999 several years after the adoption of Proposition 209, which banned all racial "preferences" in government decision making. This was also the year, I might add, just to speak to the question of race-neutral alternatives, that the Law School enacted a policy in which economic disadvantage was specifically taken into account. This was an experiment on whether or not class disadvantage can in fact be a substitute for race. Let me tell you what happened. There were 234 black applicants, 19 admitted, and 2 enrolled. Two out of a class of 300. There were 437 Latino applicants, 58 admissions, and 18 enrolled. There were thus 2 black students and 18 Latino students out of 300 in the most racially diverse state, in the most populated part of the state, at a public institution in the year 1999. Because these 2 black students were assigned to another section of Constitutional Law in their first year, I had the unique experience in the spring of 2000 of teaching *Brown* to a Constitutional Law class that had no black students. None. I have experienced few things more disheartening or surreal in my lifetime. It was so astonishing that there were white students who commented to me that the class seemed strange. Small wonder. What irony that the promise of *Brown*'s inclusion is mocked by de facto exclusion 45 years later.

One of the two black students at UCLA Law School, Chrystal James, became a student intervener in the Michigan case and testified what it is like to be one of two black students in a class. I think if you stop to think about what it would be like to be the only woman in a class of three hundred men, or the only white person in a class of three hundred black people (which would require an even greater counterfactual leap), you might be able to imagine how deeply isolating an experience this could be.

Now, the following year we are told there is good news. There was an increase in black enrollment of over 200%. So this year's graduating class has five black students out of a class of three hundred. One of the five is a black man who for two years was the only black male in the Law School. This is out of a school of one thousand people. This earned him the honor of being questioned by the campus police as he sat eating lunch with his classmates in the courtyard of the Law School. Now, of course, had there been more than one black man in the Law School, the police would have had to do a little more than go forward with the description that the suspect was a black male.

The following class has 10 black students. That is where we are at now. Latino enrollment has hovered at around 26, that is between 8% and 9% of the class in the past 2 years. But consider *where* this is occurring. This is Southern California. This is Los Angeles, a majority-minority city. The Los Angeles Unified School District is estimated to have over 65% Latino enrollment. 65% Latino enrollment. Now the point, of course, is more than the numbers. The issue is the impact on the school, the impact on the environment, on the students that are admitted, and the severe isolation they experience and its consequences

on their academic performance. I want to tell you there are consequences on academic performance when you have this level of racial isolation.

I urge those of you who haven't, to read the *amicus* brief filed by the students of UCLA Law School.[17] It also includes affidavits from students at Boalt and other UC law schools where the numbers of black and Latino students have dwindled. In response to Justice O'Conner's question, these institutions effectively resegregate. And in case one might want to know what a critical mass does not look like, take a look at what happened to the black and Latino students at these institutions.

As student interveners then, what is the argument that was missing? Simply put, desegregation is a compelling governmental interest. This is particularly so for public institutions whose obligation is to educate students from all communities in the state, not just some. The University of California is a public institution supported by public tax dollars that has as part of its mission serving the residents of the state. Now as advocates for Grutter framed the case, the consideration of race in the process has shortchanged her and implicitly short changed the institution by selecting less qualified, or as Justice Scalia put it during oral argument, students who are "visibly less qualified"; thus, both Grutter and the institution are harmed. Now, one can only speculate as to what Justice Scalia meant by "visibly less qualified," since we do not commonly go about with our GPAs and LSAT scores tattooed to our foreheads or imprinted on our student IDs. I don't know what he means by "visibly less qualified." I have an idea, but I will leave that alone. From the perspective of a student intervener, however, the issue has everything to do with the question of inclusion, and whether or not entrenched institutional practices that systematically exclude black and Latino students can be offset by considerations of race.

Now, of course, one might still argue, as regrettable as it would be to effectively and persistently exclude more than token numbers of black and Latino students from the premier state institutions, the addition of points to the applications submitted by underrepresented students in the University of Michigan case amounts to an impermissible racial preference. I know you all have seen a lot about these points. There has been a lot of discussion about the points. Of course, determining whether something is or is not a preference depends upon whether one assumes that the candidates are at the outset similarly situated and whether the so-called preference operates to boost a person, candidate A over candidate B. The question is what is the common baseline from which we measure whether somebody has been afforded a preference? In asking this question, what is revealed is that the discussion about points has

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17. *See* Brief of Amici Curiae UCLA School of Law Students of Color, Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2000), *cert. granted*, 123 S. Ct. 617 (2002) (No. 02-241).

omitted consideration of the invisible points. This is what Tim Wise calls the "sea of racial preferences" in which whites swim.[18]

As Wise points out, the plaintiffs in the case attack the 20 points that are awarded to blacks, Latinos, and American Indians as clear evidence of a racial preference. What do we call the 20 points awarded to students from a low income background regardless of race? Under the Michigan policy, the 20 points awarded for socio-economic disadvantage cannot be added to the points awarded for minority status. That is, a poor black person could not get 40 points. You can only get 20 points for race or 20 points for economic preference. So what does the 20 points for economic preference amount to? A preference for poor whites. I don't hear that being attacked. And then of course we have the 16 points awarded for students who reside in the Upper Peninsula of Michigan. Guess who lives in the Upper Peninsula of Michigan? We also have the 10 points for students who attend excellent high schools. We also have 8 points for those who take AP courses. We actually have a lawsuit now going in the State of California about the fact that AP courses are not available at predominantly minority high schools. They simply are not there. So it is impossible for children attending those schools to attain the kind of academic record that is deemed essential for being admitted to elite universities. You have 4 points, of course, if your parent was an alum.

The net effect, Wise tells us, is that there are varying combinations of points, up to 58, awarded for ostensibly race-neutral criteria that in effect overwhelmingly benefit whites. We don't call them white preferences, but that is what they are. Now, of course, not all whites will benefit from all the points awarded for the various categories. That is absolutely true. But even if they do not, the criteria are defined in such a way as to confer a preference based on one's racial background. Now except for a brief discussion about the alternative means by which diversity is measured, for example the use of the alumni preference, the Court did not hear how the invisible points that favor whites are already built into the system in a way that makes them appear to be neutral and routine. White preferences have resulted in gross inequity in many, many areas.

One of the important areas has to do with net worth. One member of the audience previously raised a question about class and race. It is a complex question. There are some very important studies by Mel Oliver in a book entitled *Black Wealth, White Wealth*,[19] and Dalton Conley, in a book entitled *Being Black, Living in the Red*[20] that shed some light on this issue. I see some

18. Tim Wise, *Whites Swim in Racial Preference*, *available at* http://www.alternet.org/story.html?StoryID=15223 (last visited May 1, 2003).

19. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/ WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).

20. DALTON CONLEY, BEING BLACK, LIVING IN THE RED (1999).

eyebrows raised in recognition of that phrase. The studies are talking about the fact that even among black and white families with the same income, even controlling for education and family size, whites have significantly more net worth than blacks. In fact, in some instances, white families of lower income have a significantly higher level of net assets than blacks. So what is going on here? Are black and brown people just profligate spenders? What is happening? It turns out that the racial exclusion in housing, education, employment, both de jure and de facto, have a cumulative and intergenerational effect. What these studies identify is equity inequality. Most Americans accumulate wealth through home ownership. Your house is generally the most valuable asset. Equity inequality describes the racialized difference in wealth that has its origins in slavery in the historic exclusion from owning property, exclusion from certain employment, and exclusion from elite education. Even more currently and more specifically, between the 1930s and the 1960s, the federal government's own racially restrictive housing policies helped over fifteen million white families own their own homes at a time when blacks were pretty much effectively excluded from those programs.

Discrimination in the residential lending market has been so pervasive that blacks, even with similar economic profiles as whites, procure a loan on less favorable terms, with the results that equity accrues in ways that map racial inequality overall. Comparable housing in black neighborhoods, or neighborhoods where whites do not predominate, has a lower market value, with the results that blacks accrue equity at a lower rate. I recently had a sort of concrete example of this. I live in an area of L.A. that is one of the few that is actually racially integrated, but it is gentrifying. A broker knocked on the door and asked if I wanted to sell my house. I said "no," and she said, "Well you know it would be really a great house and I know just how to market it. You would have to take down some of these pictures, though." I knew exactly what she meant. The market value of the house would increase if it were not owned by a black person. I guess I would have to vacate and go to a motel.

My point here is that this equity inequality has direct consequences in terms of the assets—the equity—that is available to pass on to the next generation. This does not just have an impact in material terms, but it affects access to what the economists call social capital. Social capital refers to who you know, the networks to which you have access, as well as the intangible resources that prepare one for success, particularly in education. My article, *Whiteness as Property*, endeavored to look at the way in which whiteness was ideologically treated as property under law, effectively entrenching racial inequality by sedimenting white privilege. But now I guess, given these studies, I would have to update it to talk not just about the ideological nature of that property, but the material nature of that privilege in terms of access to wealth.

Of course, what would have been said in *Grutter* about the standards of merit had the students been allowed to speak? Grutter and Gratz both argue that race must have been a reason that they were not admitted since they were more qualified on the basis of test scores and GPA. But the consideration of race is only an unfair preference if the underlying system is fair and does not enact a set of preferences for particular groups. It turns out that the underlying metric that is principally relied upon by selective institutions, including my own, is a test that is not fair for a number of reasons. Deviations from test scores do not prove a claim under the Equal Protection Clause. As Justice Powell pointed out in *Bakke*, "In fact, to the extent that race and ethnic background were considered to cure established inaccuracies in predicting academic performance, it might be argued that there is no preference at all."[21] That goes to my point. What we call a preference depends on where we mark a baseline.

So why isn't a test like the SAT or LSAT a fair metric for measurement of ability? It correlates with academic performance in the first year at a relatively low level, predicting between sixteen to twenty percent of the variance in grade. That means that other factors account for the variance of the grades at about the eighty percent level. It turns out that it is not only an imperfect measure with respect to all students. It has even more problems predicting the academic performance of black students.

Professor Claude Steele, twin brother of Shelby Steele, a well known black conservative, sought to figure out why, even among black students with relatively high academic profiles, there was still a gap in academic performance. Claude Steele wanted to look at not just those students who came inadequately prepared because of disadvantage in K-12; he wanted to look at those students that were high performing black students and try to figure out why they were still dropping out at a higher rate and still having difficulty in academic performance. What is going on with these students? What he discovered through a number of tests that have been replicated for various groups (including women), is that when groups have been subjected to pervasive stereotypes about their intellectual ability, their performance on the test is negatively affected by fear that performance will confirm the negative stereotype. This fear often operates at a level below consciousness. This does not necessarily mean that these students consciously think, "Oh, my god, what I do on this test is either going to confirm or disconfirm the prevailing belief that blacks are stupid." "Stereotype threat,"[22] as he calls it, operates at a level beneath consciousness. If you think about it, any factor that is going to increase your anxiety level when you sit down to take a

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21. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978).

22. *See* Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, THE ATLANTIC MONTHLY, Aug. 1999, at 44, 46.

high-stakes exam is going to negatively affect your performance. Time and time again tests confirm that stereotype threat suppresses performance. Steele used challenging sections from the Graduate Record Exam. He "activated" the threat for black students by telling them that it is an ability test and that their performance is going to be compared with other groups. He then compared their performance to their performance under conditions where the threat is "deactivated." That is, he tells them that the test results are not going to be used that way. He tells them things like, well, we are just going to use the results to figure out the kinks of the test. We are not trying to figure out where you are deficient. We are trying to figure out whether or not something in the test is deficient. And lo and behold, he finds that performance rises once the threat is removed.

This result has been replicated even for white men vis-à-vis Asian men on math performance. What is the prevailing mythology about Asian men? They are very good at math. White men placed in competition with Asian men find that their performance is actually suppressed by activating that stereotype and is elevated once the stereotype threat is removed. Now what this tells us is that stereotype threat constitutes an actual burden on the performance of black and Latino students. I'm not talking about societal discrimination. We are talking about an institution using a particular practice that is known to have a particular burden upon a particular group. It is a burden that is not experienced by whites because they are not as a group subject to such negative stereotypes.

In a sense then, in this context, taking race into account is equalizing treatment. It is mitigating the effect of racial stereotypes on highly qualified black and Latino students. Moreover (in case we need to go further), the tests are constructed in a way to favor whites. The creators of the tests spend a lot of time collecting questions. There has been a lot of criticism about whether or not the tests are culturally biased. They have spent a lot of money and time trying to figure out how to design these tests. It turns out that the test creators also look at whether or not the results for a particular test question produce disparate results. Jay Rosner of the *Princeton Review* testified in the court below in *Grutter* that the test makers routinely throw out questions on which minorities outperform whites, but utilize questions where the reverse is true. He took a look at the SAT in 1988 and 1989, and out of 580 SAT questions, 574 preferred white test takers, 1 preferred black test takers, and 5 were neutral. What do you think are the foreseeable consequences of this practice? Whites will score higher than blacks, men will score higher than women, and wealthy students will score higher than poor students. Why do we describe this as race neutral and fair?

Affirmative action then is not a correction for societal discrimination, but a correction for the use of admissions criteria in which racial preferences are embedded. White racial preferences. So the Court has said that we must examine race-conscious remedies under the standard of strict scrutiny. Of

course, the frame of this doctrinal role is that race-conscious measures are disfavored. They are abhorrent. They are to be avoided. They are justifiable only if there is no other way. The effect of this rule is to assert that the effect of race cannot be acknowledged except under extraordinary circumstances. What we know is that the effects of race are pervasive, not exceptional, and yet we function within a doctrinal frame that seeks to pretend that race is not important; it is exceptional.

There was an interesting exchange about the doctrinal framework during the argument in *Grutter*, during which Justice O'Connor reminded plaintiff's counsel that it is incorrect to say that it is always impermissible to use race because of the constitutional command of equal protection. If I recall correctly, Justice O'Conner said the Court has never said that race can never be used. The Court has not spoken in absolutes. We might think and ask ourselves when has the Court said that race can be used. Remedying past discrimination is one category of cases where the Court has upheld the use of race. The school desegregation cases are another category where race has been used. In the voting rights arena, race can, under certain circumstances be taken into consideration in redistricting. The most recent case arising from the challenge to the creation of the majority/minority districts in the South, which had previously been invalidated by the Court in *Shaw v. Reno*. After several times up and down, the Supreme Court now finally says, well, you know, race can be a proxy for political affiliation.[23] That is, it turns out that blacks are more heavily Democratic than any other group, and if you are trying to draw a Democratic district, put some black people in it.

Now race, it turns out, can also be used in law enforcement to identify, to stop, and to arrest suspects. As Rich Banks of Stanford Law School has argued, every police department has forms which identify a suspect by race and every police department takes certain actions against people based on that designation, even though we recognize the imprecision of racial categories.[24] The police are acting on race every day and the Court has said, pretty much, fine. Racial profiling, in fact, is now considered to be good police practice; the interest of national security is paramount such that racial profiling is not only okay, but what we must do in order to be safe. It turns out we have had a long standing practice of using race in assigning both prisoners and guards in correctional institutions. These practices have for the most part never been subject to strict

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23. *See* Easley v. Cromartie, 532 U.S. 234 (2001) (holding that where voting district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no violation of equal protection).

24. *See* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001).

scrutiny reviews. The Court doesn't even run them through that filter. They are considered to be normal, routine, and okay.

So we see that in effect, in what the Court has done, it has only partially embraced strict scrutiny, and while some advance color blindness, in actuality color blindness has not been enacted as a constitutional standard. The plaintiffs here want the Court to take that last step off the precipice and leave only one viable Supreme Court opinion upholding the use of race under strict scrutiny. If *Bakke* is overturned, there will be only one. What case would that be? *Korematsu*.[25] The only case to demonstrate that strict scrutiny review is not fatal in fact would be a case in which people were rounded up, detained, and sent to concentration camps on the basis of race. We can only hope that the Court will resist leaving the law in such a cynical and unfortunate place.

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25. Korematsu v. United States, 323 U.S. 214 (1944).


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