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Grutter v. Bollinger: Weak Foundations?

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This Article argues that Grutter v. Bollinger places educational affirmative action policies on a weak foundation because the decision is based on claims about the expected social outcomes of race conscious admissions policies, rather than on the legal rights of groups, individuals, or institutions. Social outcomes are never easily predictable, and those that the Court has taken as forming a legal rationale for affirmative action range from highly debatable to highly implausible. The expectation that racial and ethnic group differences in educational performance will have disappeared within a quarter of a century is especially unrealistic given current trends.

Is the United States Supreme Court's decision in *Grutter v. Bollinger*¹ a challenge to achieve a society without group differences in achievement, so that diversity in higher education will simply happen without any special efforts by institutions to enroll members of any particular group? Or is it a mandate, requiring an end both to all group variations in educational preparation and to affirmative action policies? If it is a challenge, it is a remarkably unrealistic one. Neither trends nor logic support the belief that we will have a society without marked differences in school performance across groups, either in twenty-five years or in fifty years. If it is a mandate, then the Supreme Court can enforce only part of it. The Court can do away with affirmative action at a future date; it cannot do away with the conditions seen by its majority as making affirmative action temporarily necessary.

Justice Sandra Day O'Connor's opinion resolves none of the issues in the debate over affirmative action. It simply indulges in social science fiction by positing an urgent need to use special means to achieve some unspecified level of diversity, and then claims that in a little over two decades that level of diversity, whatever it is, will simply happen by itself.

Part of the problem is that the Court received a difficult heritage from its main precedent, *Regents of the University of California v. Bakke*. In her opinion, Justice O'Connor recalls *Bakke* and points out that four Justices in that decision supported the use of race in admissions programs in order to "remedy disadvantages cast on minorities by past racial prejudice."² However, the Court as a whole did not take this position; the holding of the

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

2 *Id.* at 322 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

Court was that a “[s]tate has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”³ O’Connor’s recounting of the earlier decision reminds us that affirmative action programs, from the perspective of the Court, do not derive their justification from their compensatory character or from any benefits to individuals admitted to programs. Instead, affirmative action programs are justified because they serve the interest of the state. Moreover, Justice O’Connor cites Justice Powell’s claim that treating individuals differently on the basis of race requires a compelling state interest.⁴ The only compelling state interest seen as legitimate in the earlier decision was the achievement of a heterogeneous student body.⁵ She then goes on to look at the idea of a compelling interest in other decisions.⁶ Turning to the question of whether the University of Michigan Law School’s admission policy met the criterion of the compelling interest of heterogeneity or diversity, she found that it did.⁷

Justice O’Connor makes two major points in arguing why the admissions policy met the compelling interest of diversity. First, she indicates that a diverse student body has educational benefits.⁸ Students who come from different backgrounds theoretically bring different qualities to an institution, and this has benefits for the education of all.⁹ The idea of a “critical mass” is introduced here,¹⁰ since there must be some undetermined proportion of a student body from a group in order to yield educational benefits.¹¹ Second, she maintains that a diverse student body has benefits for a society beyond a specific educational program. Law schools, and other forms of professional training, provide a society with its future leaders. By providing leaders from

3 *Id.* at 322–23 (quoting *Bakke*, 438 U.S. at 320).

4 *Id.* at 323 (quoting *Bakke*, 438 U.S. at 299).

5 *Id.* at 324 (quoting *Bakke*, 438 U.S. at 311). For a discussion of how affirmative action came to rest so completely on the diversity argument, see Marcia G. Synott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463 (2005); and Colin S. Diver, *From Equality to Diversity: The Detour from Brown to Grutter*, 2004 U. ILL. L. REV. 691 (2004). Douglas Laycock maintains that *Grutter* broadened Justice Powell’s concept of diversity to wider social outcomes. See Douglas Laycock, *The Broader Case for Affirmative Action*, 78 TUL. L. REV. 1767 (2004). One could reasonably argue, though, that the broadening has simply made an ambiguous concept even more ambiguous.

6 *Grutter*, 539 U.S. at 324.

7 *Id.* at 327–28.

8 *Id.* at 328.

9 See *id.* at 328–30.

10 *Id.* at 329.

11 *Id.*

a variety of backgrounds, professional schools can help maintain the legitimacy of a society.¹²

Even for a compelling interest, though, race may not be used as the strict or sole basis of admission. Rather, following *Bakke*, it can only be taken into consideration as one of a variety of factors.¹³ Here, Justice O'Connor is reiterating the problematic nature of race-related admissions. Not only must they be justified by a compelling state interest, they also must be part of a complex and competitive admissions process.¹⁴ Race-conscious programs are portrayed as being on the defensive. Each program must justify itself.

The problematic character of race-conscious programs leads Justice O'Connor to one of her most interesting assertions: they must be limited in time.¹⁵ The business of race-related admissions programs is, apparently, to put themselves out of business.¹⁶ Justice O'Connor seems to be optimistic that this is precisely what is happening.¹⁷ She expects that the use of racial preferences will no longer be needed in twenty-five years.¹⁸ Justice Ginsburg emphasizes this last point, dwelling largely on the need for affirmative action to reach its own sunset.¹⁹

Approaching this decision from the back forward, the time limitation renders its realism and practicality extremely questionable.²⁰ Whether the educational gap among racial and ethnic groups will disappear in twenty-five years or in fifty years is not a question of desirability, value, or intent. It is an empirical question. Further, it is an empirical question in which the facts do not seem to support Justice O'Connor's or Justice Ginsburg's opinions. The results of LSAT tests, as well as other forms of educational tests, did show some narrowing of the educational gap around the time of *Bakke* and in the years just following. Since the mid-1980s, though, race gaps in most standardized test results have not narrowed. If anything, these gaps have widened slightly in recent years. For example, in 1990–1991, the average verbal SAT scores were 518 for whites and 427 for African Americans, a difference of 91 points.²¹ A decade later, average SAT scores were 529 for

12 *Grutter v. Bollinger*, 539 U.S. 306, 331–33 (2003).

13 *Id.* at 334 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315–16 (1978)).

14 *Id.* at 336–37.

15 *Id.* at 342.

16 *Id.* at 342.

17 *See id.*

18 *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

19 *Id.* at 346 (Ginsburg, J., concurring).

20 *Cf.* Christopher J. Schmidt, *Caught in a Paradox: Problems with Grutter's Expectation that Race-Conscious Admissions Programs Will End in Twenty-Five Years*, 24 N. ILL. U. L. REV. 753, 783 (2004) (arguing that the time limitation is arbitrary).

21 COLLEGE ENTRANCE EXAMINATION BOARD, COLLEGE-BOUND SENIORS: A

whites and 433 for African Americans, a difference of 96 points. In math, average SAT scores were 513 for whites and 419 for African Americans at the beginning of the 1990s, a difference of 94 points.²² By the beginning of the twenty-first century, the difference had increased to 105 points, with whites scoring an average of 531 and blacks scoring an average of 426.²³

As honest stockbrokers warn their clients, past performance is no guarantee of the future. It is possible that test scores will begin to narrow again. It is even conceivable that by 2028 there will no longer be much of a black-white average difference in testing, although the disappearance of all racial and ethnic variations is highly implausible. As Bryan K. Fair points out, the educational inequalities we have today are due to the system of “cumulative educational caste” deeply rooted in American history.²⁴ If affirmative action rests on the expectation that the race gap in the LSAT, SAT, GRE, or MCAT will evaporate at any foreseeable point in the future, it rests on a self-deluding piety.

The changing demographic composition of American society raises a serious problem for the expectation that group differences will disappear and, therefore, for a defense of affirmative action based on this expectation.²⁵ Much of the American population growth over recent decades has come from immigration. The two largest categories of immigrants have been Latinos, who make up about one-half of those entering the United States,²⁶ and

PROFILE OF SAT PROGRAM TEST TAKERS 6 (2001).

22 *Id.*

23 *Id.*

24 Bryan K. Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 TUL. L. REV. 1843, 1860 (2004). I agree with Fair’s observations about the deeply rooted nature of educational inequalities, but I am skeptical about his suggestions that the Court should require that the “government dismantle educational caste.” *Id.* For an argument that an attempt to “dismantle” hundreds of years of history and restructure American society is beyond the power of the federal government and likely to entail a host of unintended negative consequences, see generally CARL L. BANKSTON III & STEPHEN J. CALDAS, *A TROUBLED DREAM: THE PROMISE AND FAILURE OF SCHOOL DESEGREGATION IN LOUISIANA* (2002); and STEPHEN J. CALDAS & CARL L. BANKSTON III, *FORCED TO FAIL: THE PARADOX OF SCHOOL DESEGREGATION* (2005) [hereinafter *FORCED TO FAIL*].

25 For a discussion of how changing American demographics are increasing group differences in school performance, see *FORCED TO FAIL*, *supra* note 24, at ch. 4.

26 Writing before *Grutter*, Antonia Hernandez noted that decisions about affirmative action have great relevance for Hispanics, who are vastly underrepresented in elite positions in American society. See Antonia Hernandez, *The Future of Hispanics is at Stake*, *HISPANIC*, Feb. 2003, at 76. Hernandez also observes that the number of working age Hispanics is expected to increase by eighteen million between 2000 and 2025, while the white non-Hispanic population is expected to decrease both in absolute numbers and

Asians, who make up about one-quarter of new arrivals. These groups have added a new dimension of inequality in educational competition. Asians and Hispanics are made up of a variety of national origins, although Mexicans comprise the majority of Hispanics.²⁷ Still, despite their heterogeneity, they display some average trends. On most standardized educational tests, Asians score at levels comparable to non-Hispanic whites, or higher.²⁸ Also, on most standardized educational tests, the average scores of Asians have been rising in recent years.²⁹ By contrast, the average scores of Hispanics on most standardized tests have been lower than those of whites, but higher than those of African Americans.³⁰ The test score gap between Hispanics and African Americans is one gap that has been narrowing. It has been narrowing, though, because most average Hispanic scores have been going down.³¹ Whatever the source of these trends, it does appear that as American society is growing more diverse, average group differences in indicators of educational preparation are growing greater, not narrower.³²

The increase in group differences among minority groups means that high-achieving minority groups tend to be admitted to elite institutions in greater numbers, absent race-conscious admission policies. By 2002, for example, Asians made up one-quarter of all students admitted to the University of California system.³³ At the two top campuses of the U.C. system, Berkeley and UCLA, Asians constituted 32.8% and 35.0%, respectively, of newly admitted students not counting Filipinos, and 36.5%

as a percentage of the American population. *Id.*

27 CHARMAINE LLAGAS, U.S. DEP'T OF EDUC., INST. OF EDUC. SCIENCES, NAT'L CTR. FOR EDUC. STATISTICS STATUS AND TRENDS IN THE EDUCATION OF HISPANICS 6 (2003), available at <http://nces.ed.gov/pubs2003/2003008.pdf>.

28 U.S. DEPT. OF EDUC., INST. OF EDUC. SCIENCES, NAT'L CTR. FOR EDUC. STATISTICS., NAT'L ASSESSMENT OF EDUC. PROGRESS (NAEP), 2004 LONG TERM TREND ASSESSMENT RESULTS, available at <http://nces.gov/nationsreportcard/ltr/results2004.pdf>.

29 *Id.*

30 MARIANNE PERIE ET AL., U.S. DEPT. OF EDUC., INST. OF EDUC. SCIENCES, NAT'L CTR. FOR EDUC. STATISTICS., NAT'L ASSESSMENT OF EDUC. PROGRESS (NAEP), 2004 TRENDS IN ACADEMIC PROGRESS 27-35, available at <http://nces.ed.gov/nationsreportcard/pdf/main2005/2005464.pdf>.

31 U.S. DEPT. OF EDUC., INST. OF EDUC. SCIENCES, NAT'L CTR. FOR EDUC. STATISTICS., NAT'L ASSESSMENT OF EDUC. PROGRESS (NAEP), 2004 LONG TERM TREND ASSESSMENT RESULTS, available at <http://nces.gov/nationsreportcard/ltr/results2004.pdf>.

32 *Id.*

33 University of California Office of the President, University of California Application, Admission and Enrollment of California Resident Freshman for Fall 1995 Through 2002, at 1 (2003), available at <http://www.ucop.edu/news/factsheets/flowfrc9502.pdf>.

and 38.3%, respectively, with Filipinos included in the Asian category.³⁴ Asians were the largest ethnic category of new admissions at UCLA and were almost equal to whites as the two largest ethnic categories at Berkeley.³⁵ A recent study of elite universities has concluded that without affirmative action policies, Asian, not white, admissions would increase in institutions of higher education.³⁶ Certainly, this raises questions about the nature of diversity promoted by affirmative action, since one may wonder why Hispanic American or African American students enhance the desired diversity of a classroom, while Asian students are implicitly assumed to lessen it.³⁷ Why would African Americans and Mexican Americans (who make up the overwhelming majority of American Hispanics) make a greater contribution to the diversity of a classroom than students of Indian, Pakistani, Chinese, Japanese, and Vietnamese backgrounds? Is there a way to measure the diversity value of people from different minority groups? However one answers these questions, the gap among groups that are increasing as percentages of American society also means that group level differences in achievement will be an increasingly prominent part of the American educational landscape over the course of this century.³⁸

Changing demographics as a result of immigration are also reflected in achievement gaps within groups that are probable beneficiaries of current affirmative action practices. Among people in the United States classified as black, immigrants and children of immigrants enjoy higher levels of achievement and higher test scores than do children of native-born African Americans. As a consequence, the minority group members who are admitted to elite schools through race-conscious processes are disproportionately from immigrant groups. In a study of twenty-eight elite and selective colleges, Douglas Massey and his fellow researchers found that many of their black students were actually immigrants, children of immigrants, or people of mixed race.³⁹ They may indeed contribute to the

³⁴ *Id.* at 1, 2.

³⁵ *Id.*

³⁶ Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. 293, 303–04 (2005).

³⁷ On the tendency to ignore the role of Asian Americans in the affirmative action debate, see Victoria Choy, Note, *Perpetuating the Exclusion of Asian Americans from the Affirmative Action Debate: An Oversight of the Diversity Rationale in Grutter v. Bollinger*, 38 U.C. DAVIS L. REV. 545, 569 (2005).

³⁸ Geoffrey Jacques observes that inequalities based on both race and social class are likely to continue long after Judge O'Connor's sunset, even if affirmative action ends before the sunset. Geoffrey Jacques, *Thinking About Affirmative Action*, THE BLACK SCHOLAR 38, 41 (Summer 2004). I agree with Jacques on this, although I also think there is little the judiciary can do about either racial or class inequality.

³⁹ Douglas S. Massey, THE SOURCE OF THE RIVER 40 (2003) (“[B]oth immigrant and

diversity of institutions, although skeptics may legitimately question why one category of immigrants would make a classroom more diverse than other categories. At the same time, though, the high achievement of black immigrants adds another layer to group variations in performance, presenting one more gap emerging in America's complex and persistent system of racial and ethnic stratification.

In addition, if the justification for affirmative action is that it is putting itself out of business, we need to ask how affirmative action is doing this. It seems difficult to see how admitting some individuals of a given racial or ethnic background to a professional school will better prepare others of the same background for admission.⁴⁰ This is an issue concerning what happens prior to entry into a field of study. Claims about the "sunset" nature of affirmative action therefore appear strangely inconsistent with the earlier portions of the Court's decision that concentrate entirely on putative benefits during or after a time in law school or other professional training.⁴¹

One may speculate that an increase in minority attorneys or minority members of other professions will have a generational effect. The children of professionals will be better prepared to follow professional careers than their parents were. One difficulty with this suggestion is that most researchers have found that the test score gap among groups persists even when we control for social class.⁴²

Supporters of affirmative action may be discomfited by the fact that the Supreme Court does seem to suggest, in Justice O'Connor's sunset remarks, that race-conscious programs should be ended. In her words, "[e]nshrining a permanent justification for racial preferences would offend [the] fundamental equal protection principle."⁴³ The only question here seems to be when they should be ended. Supposedly, race-conscious decisions will be indefensible twenty-five years from the decision,⁴⁴ or about twenty-two years from the

racially mixed origins are substantially overrepresented among black freshman at elite institutions.").

40 Thus, some researchers have argued that educational policies designed to address early childhood skill gaps are more important than affirmative action for achieving a more racially egalitarian society. See Pedro Carneiro et al., *Labor Market Discrimination and Racial Differences in Pre-market Factors*, 48 J.L. & ECON. 1, 36 (2005). Since race conscious admissions to institutions of higher education come long after basic skills have been developed, the former contribute little to achieving the type of society in which there are few racial differences in achievement. *Id.*

41 *Grutter v. Bollinger*, 539 U.S. 306, 342, 330–33 (2003).

42 Abigail Thernstrom, *The Racial Gap in Educational Achievement*, in *BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA* 259, 263–64 (Abigail Thernstrom & Stephan Thernstrom eds., 2002).

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

44 See *id.* at 343.

present. The idea of a time limitation implies that the use of affirmative action should be diminishing as we approach the limit. Thus, schools should be making less use of race-conscious admissions today than they were at the time of *Grutter* and consideration of race should be reduced steadily over the next two decades.

The “sunset” portion of the decision, then, raises serious questions about the practical future of affirmative action. It is based on an assertion that is unsupported by evidence. It does not identify how affirmative action is moving toward its end point. It suggests that affirmative action is becoming steadily less defensible with each passing year that we move toward the expected sunset.

If race is to be taken into consideration less in each passing year, this suggests a problem with the Court’s view of how race is to be taken into consideration. If applicants do not receive any specific number of points based on race, and no other rigorous means are used to include race in admissions decisions, it is extremely difficult to say how heavily race is weighted. Even if the test score gap were narrowing, then, it would be extremely difficult to tell whether race-conscious admissions were diminishing accordingly. On a practical level, one might interpret *Grutter* (and, indeed, *Bakke*) as saying that institutions may engage in race-conscious admissions, as long as they do so in a manner that is too convoluted for anyone to figure out just how race is being counted. If race or ethnicity are simply included in a complex mix of factors, then one may never be able to say if these are taken into consideration too little or too much.

Most social scientists would agree with Justice O’Connor’s remarks on the desirability of a diverse leadership. People who feel that they are a part of a political society are more likely to believe in the legitimacy of that society than those who believe that their lives are being run by members of groups to which they do not belong.⁴⁵ Moreover, universities and professional schools do shape the social and political future of a nation by deciding who will be able to enter which occupations.⁴⁶ At the same time, though, the Court’s use of the diversity rationale, inherited from *Bakke*, places affirmative action on a much weaker foundation than these policies would have had if the compensatory rationale had been adopted.⁴⁷ A compensatory approach would have justified placing racial or ethnic group membership at the center of

45 See *id.* at 331–32.

46 *Id.* at 332.

47 However, as *Grutter* approached, Carl Cohen pointed out that actually it is widely agreed that the compensatory rationale is the weaker of the two. See Carl Cohen, *Race Preference and the Universities—A Final Reckoning*, COMMENTARY, Sept. 2001, at 31. The University of Michigan turned to the diversity defense, in his view, because the University knew that it would lose with a compensatory argument, given *Bakke*. *Id.* at 34.

affirmative action policies. It is difficult to justify race-conscious policies if historical discrimination on the basis of race cannot be taken into consideration.⁴⁸

Some participants in the present discussion suggested that focusing on diversity is simply a strategy for affirmative action proponents, that the real issue is the provision of opportunities to categories of people who have largely been denied those opportunities. In doing so, they leave themselves open to charges that support for race-conscious policies is based on misrepresentation. *Grutter* re-emphasized the Court's earlier rejection of the compensatory argument.⁴⁹ In doing so, it made it clear that the relatively weak ground of diversity is the only ground on which affirmative action can be defended. The issue of racial discrimination has been removed from the debate over race-conscious university admissions.

"Diversity" is an inherently fuzzy concept, and its fuzziness is the source of another set of problems with *Grutter*. There are at least two questions about the realism of the Court's contention that any particular race-conscious admissions policy will result in a leadership that represents some sort of "critical mass" for that group. The first comes from the changing nature of the American population, mentioned previously. Asians, only about 3% of the American population, made up nearly 11% of those receiving first-professional degrees in 2001–2002, according to the National Center for Educational Statistics.⁵⁰ This was a larger proportion than African Americans, who were just under 7% of degree recipients.⁵¹ Latinos made up under 5% of degree recipients.⁵² The race or ethnicity of the leadership may not need to be precisely proportional to the population. Indeed, the decision suggests that tailoring admissions to strict proportions in the population would be unconstitutional.⁵³ Still, these percentages indicate that it will be difficult for law schools to ensure that their graduates roughly resemble the American population. They also suggest that any attempt to ensure such a

48 See Girardeau A. Spann, *Just Do It*, 67 LAW & CONTEMP. PROBS. 11, 20 (2004).

49 *Grutter v. Bollinger*, 539 U.S. 306, 323–24 (2003) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978)).

50 Laura G. Knapp et al., *Postsecondary Institutions in the United States: Fall 2002 and Degrees and Other Awards Conferred: 2001–2002*, 5 EDUC. STATISTICS Q. 97 (2003) ("First-professional degrees" are those degrees awarded after completion of the academic requirements to begin practice in the following professions: chiropractic (D.C. or D.C.M.); dentistry (D.D.S. or D.M.D.); law (L.L.B. or J.D.); medicine (M.D.); optometry (O.D.); osteopathic medicine (D.O.); pharmacy (Pharm.D.); podiatry (D.P.M., D.P., or Pod.D.); theology (M.Div., M.H.L., B.D., or Ordination); or veterinary medicine (D.V.M.)).

51 *Id.*

52 *Id.*

53 *Grutter*, 539 U.S. at 329–30.

thing will put race- or ethnicity-conscious admissions in conflict with the idea of the time limit.

A second question concerns the connection between admissions and graduation. Admitting students may be a necessary condition for producing graduates, but not all students admitted graduate, and many of those who do graduate do not go on to successfully practice their professions. In an article that was controversial for its conclusions, but not its basic statistics, Richard H. Sander pointed out that 19.3% of black law school students fail to graduate, compared to 8.2% of white students.⁵⁴ Moreover, 38.6% of black law school graduates fail the bar exam on the first try, compared to 8.1% of white graduates.⁵⁵ Whether or not one accepts Sander's argument that affirmative action is setting black law students up for failure, this clearly indicates that we cannot draw a direct line between admissions for the sake of diversity at the present and a similarly diverse law profession in the future.⁵⁶

The benefits of race- or ethnicity-conscious admissions to the educational process are difficult to determine and therefore also may be difficult to deny. Most selective educational institutions do assert that diverse student bodies improve education. However, there is little agreement on precisely how much the educational experience of all students is enhanced by admissions aimed at diversity. Even within the Court, there is disagreement on this question.⁵⁷ Moreover, the "critical mass" of any particular group for the best education remains unknown, and this is probably what led Justice Scalia to refer to the concept as "mystical."⁵⁸ This portion of the Court's decision seems to rest on acceptance of the University of Michigan Law School's assertions. These assertions are not statements of the a priori value of affirmative action, but questionable claims about factual consequences. If we cannot say what number or percentage of students from a particular group constitutes a critical mass, then we cannot say when the critical mass is or is

⁵⁴ Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 437 (2004).

⁵⁵ *Id.* at 443.

⁵⁶ In addition to questioning the extent to which admissions to elite postgraduate institutions produce elites, one may also ask the extent to which being a graduate of an elite institution is necessary to become part of an elite. Stacy Berg Dale & Alan Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q. J. OF ECON. 1491, 1523 (2002); *Cf. id.* at 1524 (noting some researchers have found that attending an elite institution, as opposed to one a student might attend if not granted admission to a "better" school, provides relatively little benefit to graduates).

⁵⁷ See *Grutter*, 539 U.S. at 332; *id.* at 364 (Thomas, J., dissenting).

⁵⁸ *Id.* at 346-47 (Scalia, J., dissenting).

not reached.⁵⁹ The critical mass of blacks or Hispanics needed to contribute to a diverse classroom may only be one individual per class, in which case the sun should have already set on affirmative action in many institutions. Or, the critical mass may be a number much greater than has ever been achieved at any institution using any approach to admissions.

A substantial body of social scientific evidence suggests that increasing the size of a minority group decreases rather than increases contact of group members with non-group members.⁶⁰ Studies of ethnic intermarriage, for example, show that out-group marriage decreases as the size of a minority group grows.⁶¹ People are more likely to choose partners from backgrounds similar to their own when more such partners are available.⁶² Similarly, a “critical mass” may well lead beneficiaries of affirmative action to associate with other beneficiaries of similar backgrounds.

New research results on affirmative action by sociologists Douglas Massey and Mary J. Fisher, strong supporters of affirmative action programs, raise serious questions about the extent to which professional school admissions actually do promote interracial contact and communication.⁶³ Massey pointed out that the debate on this subject, from both sides, has been driven by rhetoric and unsupported claims, rather than social scientific evidence. Seeking to provide such evidence, Massey analyzed the academic consequences of apparently race-conscious admissions to selective institutions of higher education. Defining affirmative action beneficiaries as members of minority groups with entrance test scores significantly below the institutional average, he did find positive associations between academic achievement and being an individual affirmative action recipient.⁶⁴ However,

59 See Carl Cohen, *Winks, Nods, Disguises—and Racial Preference*, COMMENTARY, Sept. 2003, at 34, 36.

60 Peter M. Blau et al, *Heterogeneity and Intermarriage*, 47 AM. SOC. REV. 45, 54 (1982).

61 Peter M. Blau et al., *Intersecting Social Affiliations and Intermarriage*, 62 SOC. FORCES 585, 600 (1984).

62 *Id.*; see also Sean-Shong Hwang et al., *Structural and Assimilationist Explanations of Asian Americans Intermarriage*, 59 J. MARRIAGE & FAM. 758, 768 (1997).

63 Douglas S. Massey, Presentation to the Tulane University Department of Sociology: The Consequences of Affirmative Action in Selective Colleges and Universities (Jan. 21, 2004); see also Douglas S. Massey & Mary J. Fisher, *Stereotype Threat and Academic Performance: New Findings from a Racially Diverse Sample of College Freshmen*, 2 DU BOIS REV. 45 (2005) (this article was the basis for Massey’s presentation at Tulane University).

64 Douglas S. Massey, Presentation to the Tulane University Department of Sociology: The Consequences of Affirmative Action in Selective Colleges and Universities (Jan. 21, 2004).

this was while controlling for a group effect. Massey found that the greater the gap between entrance test score results of a minority group at an institution and the institutional average, the worse beneficiaries did academically.⁶⁵ He interpreted this in terms of Claude Steele's "stereotype threat,"⁶⁶ and found evidence to support this interpretation. Being a part of a group seen as receiving affirmative action, according to Massey's finding, appears to reinforce negative stereotypes, in particular the internalized stereotypes of group members.⁶⁷ Massey's research does not turn him against affirmative action.⁶⁸ However, it does seem to contradict the Court's placid assumption that having some number of members of a minority group in an institution will automatically break down racial or ethnic stereotypes.⁶⁹

In summary, while the *Grutter* decision does allow some forms of affirmative action in education to continue, it is difficult for me to see that it places race-conscious admissions policies on a solid foundation. There are problems throughout the decision. Instead of basing the decision on the legal rights of groups, individuals, or institutions, the Court has based its decision on claims about the social outcomes of admissions decisions. The question of the extent to which the judiciary should be making social policy is a contentious one. Some authors have argued that the judiciary always makes social policy with every decision it makes or refuses to make, and that it cannot avoid doing so.⁷⁰ If it is going to make social policy, though, it needs to do so on the basis of good social science, with well-defined, measurable indicators and realistic estimations of trends. Social outcomes are never easily predictable, and those that the Court has taken as foundations for affirmative action range from highly debatable to highly implausible. The idea of diversity is vague. One can never know what level or type of diversity educational institutions should be moving toward, and "critical mass" is a term without a definite meaning. The contribution of race-conscious admissions to intergroup contact and intellectual exchange is an open research question, not a factual basis for policy. The most serious difficulty with the social outcomes on which the Court has rested affirmative action is

65 *Id.*

66 Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *THE BLACK-WHITE TEST SCORE GAP* 401, 401 (Christopher Jencks & Meredith Phillips eds., 1998).

67 Douglas S. Massey, Presentation to the Tulane University Department of Sociology: The Consequences of Affirmative Action in Selective Colleges and Universities (Jan. 21, 2004).

68 *Id.*

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

70 See GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION* 192 (2000); Katherine C. Naff, *From Bakke to Grutter and Gratz: The Supreme Court as Policymaking Institution*, 21 *REV. OF POL'Y RES.* 405, 424 (2004).

the one I have dealt with first and at the greatest length: the problem of time limits. Not only is there no reason to believe that all racial and ethnic gaps in educational preparation will disappear between now and 2028, most indications suggest that many of the gaps will increase.

The low probability that racial and ethnic variations will vanish in the first half of the twenty-first century is not a reason for educators and policymakers to give up on improving the educational performance of all students, with particular attention to those most in need. The schooling of all students can become better, regardless of racial and ethnic variations. But improving the quality of schooling is not part of a challenge or a mandate placed before us by the airy assertions of *Grutter*; it is a continual task that has no foreseeable end.

