No. 11-345

In the

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CALIFORNIA ASSOCIATION OF SCHOLARS, CONNECTICUT ASSOCIATION OF SCHOLARS, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, AND AMERICAN CIVIL RIGHTS FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether *Grutter v. Bollinger*, 539 U.S. 306 (2003), can be reconciled with this Court's prior decisions interpreting the Equal Protection Clause of the Fourteenth Amendment and, if not, whether *Grutter* should be overruled.

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INTEREST OF AMICI CURIAE[1]

The California Association of Scholars ("CAS") and the Connecticut Association of Scholars ("CONNAS") are organizations composed of faculty members and other scholars living or working in California and Connecticut, respectively. As National Association of Scholars affiliates, CAS and CONNAS are devoted to higher education reform and believe they are in a special position to inform the Court about the pitfalls of deferring to the judgment of university administrators on the subject of race-preferential admissions policies.

The Center for Constitutional Jurisprudence ("CCJ") is the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American Founding to their rightful and preeminent position of authority in our national life. The CCJ advances that mission by conducting litigation and by filing amicus curiae briefs in cases of constitutional significance, including cases such as this in which the core principle of individual equality is at stake.

Reason Foundation ("Reason") is a nonpartisan, and nonprofit public policy think tank, founded in

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. To further Reason's commitment to "free minds and free markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

The Individual Rights Foundation ("IRF") was founded in 1993. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

The American Civil Rights Foundation ("ACRF") is a nonprofit legal defense foundation whose mission is to monitor and enforce civil rights laws at all levels of government. ACRF challenges government race and gender preferences, and most recently was named Intervener in the *BAMN v University of California* racial preference case. ACRF has a keen interest in enforcing race neutral laws and policies.

In this brief, *amici* call for *Grutter v. Bollinger*, 539 U.S. 306 (2003) to be overruled. Contrary to the assumption behind that case, race-preferential admissions policies are seldom, if ever, motivated by a desire to reap the educational benefits of student-body diversity. The diversity rationale is a mere pretext masking invidious discrimination.

SUMMARY OF ARGUMENT

The Court's traditional role in applying strict scrutiny has been to pull the American people back from the brink when they are tempted by the path of racial discrimination. *Grutter*'s deferential approach to academic authority, however, does just the oppo-

site. A majority of Americans have consistently found the diversity rationale for race-preferential admissions policies—or indeed any other rationale—to be unconvincing. But in *Grutter* the Court nevertheless held that the diversity rationale was not just convincing, but also compelling. Rather than pulling the American people back from the brink, the Court dragged them kicking and screaming over it. Colleges and universities—institutions that are largely insulated from the mainstream political process—were given permission to continue their pattern of discrimination. The strong presumption in favor of race neutrality that is characteristic of the strict scrutiny doctrine was thus abandoned. See *infra* at Part I.A.

Laws and policies that make distinctions based on an individual's race should be approved only when the need for them is largely uncontroversial. Requiring anything less than substantial consensus is filled with hazard. Rather than take race off the table as the strict scrutiny doctrine is designed to do, a relaxed strict scrutiny standard virtually guarantees that racial politics will thrive. Legislatures, city councils, administrative agencies, college campuses and courts will be the scene of racial controversy and jockeying for position for years to come. *Id.*

Among other things, when the need for racial discrimination is largely uncontroversial, that need is likely to be the real reason for the discrimination. Consider, for example, the perennial law school hypothetical of the prison-yard race riot in which the guards temporarily segregate the prisoners by race. No one need question whether the guards have some sinister reason for doing what they do. Their motives are obvious—to restore order as quickly as pos-

sible and hence prevent injury. The same cannot be said for the diversity rationale for race-preferential admissions. The number of academics who candidly admit that the diversity rationale has nothing to do with their actual reasons for supporting race-preferential admissions is astonishing. Far more commonly they cite the need to compensate minorities for past or present societal discrimination. Even that justification is often pretextual. Unhappily, old-fashioned racial pork-barreling is often the best explanation for actual practice. Only under-represented minorities with political clout get included. See *infra* at Part I.B.

Yet *Grutter* has essentially immunized these race-preferential admissions policies from liability. Given the difficulties of mounting fact-specific litigation against each and every school in the nation that practices these admissions, the diversity rationale has become a convenient fig leaf allowing race-preferential policies to flourish. *Id.*

Additionally, the *Grutter* decision holds out the implicit promise that other controversial racially discriminatory policies instituted by a college or university (or by any institution that believes itself worthy of deference) may be approved as well. *Grutter* thus creates not just the need for litigation to examine universities for pretext, it also increases the number of laws and policies—from race-preferential financial aid to racially segregated dormitories and graduation ceremonies—that should be examined by the courts. *Id.*

Put more simply, "*Grutter*-deference" creates more racially sensitive legal issues than it puts to rest. The only thing that prevents the number of

lawsuits from overwhelming the courts is the unfortunate fact that few victims have the resources needed to mount the fact-intensive institution-by-institution inquiry into pretext that *Grutter* implicitly requires. As a consequence, unconstitutional race discrimination has now sunk its roots deep into higher education.

There is no painless solution to the problem. If the Court follows *Grutter*, rather than reaffirming its prior tradition of non-deferential strict scrutiny, it will either create the need to examine all race-preferential admissions policies for pretext on a case-by-case basis or (more troublingly) it will shelter sham diversity policies from scrutiny on account of the difficulty in financing constitutional litigation that can affect at most only one institution. Regardless of which path is followed, *Grutter* will have raised the profile of racial politics in the law rather than lowered it.

The alternative is for this Court to overrule the *Grutter* decision and to re-establish what for an all-too-brief period in time was taken for granted—that race neutrality is the rule under the Constitution and race discrimination is the rare exception. In the long run, the latter alternative is much to be preferred. *Id.*

No one should imagine that individual universities—many of which have a long history of discrimination themselves—are in a position to solve the problem on their own. This is a collective action problem. By lowering admissions standards for minority students, top-tier schools get somewhat more minority students into their freshman classes than they would otherwise have (and receive rewards from

funding sources for having done so). But second-tier schools must then also lower their standards, since the minority students who would have attended those schools under system-wide race-neutral admissions policies are now likely at a top-tier school. The problem is thus handed down to the next tiers without actually increasing the overall level of diversity. As a result, no school can opt out of this unfortunate system without facing the likelihood that it will have very few minority students. Given the pressure that accrediting agencies, public and private funding sources and student groups apply to encourage race-preferential admissions, opting out is not a practical strategy. See *infra* at Part I.C.

If race-preferential admissions are to be ended, the Court must undertake—in keeping with the highest American ideals of equality—to overrule *Grutter*. *See infra* at Part I.D.

ARGUMENT

I. *GRUTTER v. BOLLINGER* SHOULD BE OVERRULED.

A. Racially Discriminatory Laws and Policies Should Be Upheld as Compelling Only in Cases in which the Need for Them Is Largely Uncontroversial. A More Relaxed Standard of Review Encourages Divisive Racial Politics.

Gerald Gunther may have overstated his case when he famously described the Court's use of the strict scrutiny doctrine as "'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for*

a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). But, if so, he did not err by much. A very high standard of what qualifies as a compelling purpose was indeed the state of the law at the time.[2] More important, continuing to mandate a very high standard is the only way to accomplish the central task of equal protection jurisprudence—to take race off the table. *See* Ozran O. Varol, *Strict in Theory, But Accommodating in Fact*, 75 Missouri L. Rev. 1243 (2010) (criticizing *Grutter* and other recent cases for lowering the bar).

Strict scrutiny in the context of race is a legal doctrine designed to resolve doubts against discrimination and in favor of race neutrality. Public opinion in favor of discrimination should therefore be accorded no weight on judicial decisions made under a strict scrutiny standard. The duty of an independent judiciary is to stand up to such pressure.

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[2] In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), five members of the Court held that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which flatly stated that "[n]o person … shall, on the ground of race, color, or national origin, … be subjected to discrimination under any program or activity receiving federal financial assistance," in reality bans only that portion of race and discrimination already banned by the Fourteenth Amendment. Justice Powell, a member of the majority, pointed to the fact that "[Congressional] supporters of Title VI repeatedly declared that the bill enacted constitutional principles." *Bakke*, 438 U.S. at 285 (Opinion of Powell, J.). But that is only because Congress, like Professor Gunther, understood the objections to race discrimination under the Constitution to be "fatal in fact." *Amici* believe that Title VI was intended to mean what it says. An alternative to overruling *Grutter* would be to overrule *Bakke* on Title VI. Such an approach would have the virtue of avoiding the constitutional issue.

This point ought to go double for the opinions of actual discriminators like the University of Michigan in *Grutter* and the University of Texas in this case. In *Grutter*, however, the Court appeared to endorse the view that courts should afford a "degree of deference to a university's academic decisions, within constitutionally prescribed limits." Such a notion is, of course, quite reasonable—so long as due emphasis is placed on the phrase "within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328. But such deference is jarringly out of place in the context of constitutionally-mandated strict scrutiny. Indeed, it is the opposite of strict scrutiny. A court cannot simultaneously defer to the judgment of a defendant that racially discriminates and put that defendant's discriminatory policies under strict scrutiny.

Public opinion in favor of race neutrality is quite another matter. A strong presumption against racially discriminatory laws and policies necessarily implies a strong presumption in favor of laws and policies that are race neutral. They are two sides of the same coin. Consequently, when the public strongly and consistently prefers race-neutral laws and policies to race-preferential ones, judicial deference really should come into play—deference not to the advocates of race discrimination but to the advocates of race neutrality. A discriminatory purpose can hardly be objectively compelling if it fails even to persuade most Americans. Judges who nevertheless find it to be compelling have acted non-judicially. They have substituted their own will for the Constitution's strong presumption in favor of race neutrality. *See* Gail Heriot, *Strict Scrutiny, Public Opinion and Racial Preferences on Campus: Should the Courts Find a Narrowly Tailored Solution to a Com-*

pelling Need in a Policy Most Americans Oppose?, 40 Harv. J. Legis. 217, 219 (2003) (arguing that deference to a public preference for race neutrality is appropriate, while deference to a public preference for racial discrimination is not, no matter how strong that preference might be).[3]

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[3] It is thus not *Amici*'s position that deference has no place in a constitutional analysis of a racially discriminatory policy. To the contrary, without appropriate deference and presumptions, the task of courts would be impossibly difficult. But strict scrutiny demands that the presumption (and hence the deference) goes to those who challenge racially discriminatory policies, not to the state.

Since *Grutter*, more scholarly research casting doubt on the diversity rationale has been published. Most devastating of all, of course, is the mismatch literature indicating that race-preferential admissions actually hurt the prospects of its supposed beneficiaries. See Gail Heriot, *et al*, Brief *Amici Curiae* in Support of the Petitioner, *Fisher v. University of Texas* (No. 11-345, filed Oct. 19, 2011); Richard Sander, *et al.* Brief *Amici Curiae* in Support of the Petitioner, *Fisher v. University of Texas* (No. 11-345, filed Oct. 19, 2011). But there are other examples. Using data from a structured random sample of over 4000 students, faculty and administrators, one study took an "indirect approach that asked members of the university community non-controversial questions about their perceptions and experiences, and then correlated their responses with an independent empirical measure of diversity." Stanley Rothman, Seymour Martin Lipset, & Neil Nevitte, *Does Enrollment Diversity Improve University Education?*, 15 Int'l J. Pub. Opin. Res. 8 (2003). After controlling for numerous factors, it found that the predicted positive correlation between diversity and student, faculty and administrator evaluations of the educational and racial understanding atmosphere failed to appear. Instead, the clear and consistent pattern was toward negative correlations, especially in evaluating the quality of education offered. *See also* John R. Lott, Jr., *et al.*, *Peer Effects in Affirmative Action: Evidence from Law Student Performance*, 31 Int'l Rev. L. & Econ. 1 (2011) (empirical study demonstrating that black law

Of course, in a democracy, the majority's views are expected to prevail, so at first blush one might be surprised to find unpopular racial discrimination enshrined in policy at all. But politics is complicated, and the majority's views do not always carry the day in all the nooks and crannies of federal and state government. *See generally* Maxwell Stearns & Todd Zywicki, Public Choice Concepts & Applications in Law (2009). Universities, for example, have traditionally been insulated from the political processes; only rarely do they come under broad public scrutiny.

Race-preferential admissions policies are one of those issues where majority sentiment has not prevailed. The evidence that most Americans do not support discrimination in this context is exceedingly persuasive. *See* Paul M. Sniderman & Thomas Piazza, The Scar of Race (1993) (public opinion experts stating that the race-preferential policy agenda "is controversial precisely because most Americans do not disagree about it"). The majority are unpersuaded by the diversity rationale—or any other rationale—for race-preferential admissions. *See* Rasmussen Reports, *32% Favor Affirmative Action, 46% Oppose It* (July 13, 2010); David W. Moore, *Public: Only Merit Should Count in College Decisions*, Gal-

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students do not perform better in classes in which they have "critical mass" and that Hispanic law students possibly perform less well in classes with a "critical mass" of Hispanics).

While *Amici* believe that the weight of the literature shows that race-preferential admissions are bad policy, they fully understand why a court would hesitate to draw such a broad conclusion. Fortunately, there is no need. Indeed, this is the point behind strict scrutiny: *When in doubt, race neutrality must prevail.*

lup Poll Service (June 24, 2003). There is certainly no consensus in favor of race-preferential admissions; indeed the consensus among ordinary Americans is more to the contrary.[4]

Some states have statewide initiative processes that, though cumbersome and expensive, allow citizens to pass their own laws when they believe governmental processes have failed. *See* M. Dane Waters, The Initiative and Referendum Almanac (2003). The voters of California (1996), Washington (1998), Michigan (2006), Nebraska (2008), and Arizona (2010) have taken advantage of those statewide processes to pass by decisive and sometimes overwhelming margins initiatives that, among other things, prohibit race-preferential admissions policies in state universities.[5] Even so, advocates of race-neutral

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[4] There even appears to be a large majority of college professors opposed to the use of racial preferences in admissions. *See, e.g.*, Robert A. Frahm, *Debate Erupts Over UCONN Survey*, The Hartford Courant (Apr. 19, 2000) (describing results of survey commissioned by *amicus* CONNAS that showed professors opposed admissions preferences "by substantial margins").

[5] Only in Colorado (2008) has such an initiative been defeated. In Michigan, however, the voters' action has been overturned. *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary v. Regents of the Univ. of Mich.*, 652 F.3d 607 (6th Cir. 2011) (rehearing en banc petition pending). Unsurprisingly, but misguidedly, *Grutter* was cited to the Sixth Circuit as precedent requiring that the initiative be overturned. *See* Brief for the Plaintiffs-Appellants, *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary v. Regents of the Univ. of Mich.*, 652 F.3d 607 (6th Cir. 2011) (brief filed May 15, 2009). To race-preferential admissions supporters, *Grutter* declared the need for these policies to be compelling, and that should be that.

admissions face on uphill battle even in states that have adopted these initiatives. See Gail Heriot, *University of California Admissions Under Proposition 209: Unheralded Gains Face an Uncertain Future*, 6 Nexus J. Op. 163 (2001). Most states, however, including Texas, lack such a process. *Id*. Petitioner must rely upon courts to vindicate her rights.

A standard that allows a court to find compelling a purpose that most Americans do not find minimally persuasive creates two problems. First, the lack of consensus will greatly increase the likelihood that the cited reason will in fact be a pretext for a purpose that is constitutionally impermissible—like racial pork barreling. Second, allowing controversial reasons to be found compelling will raise the possibility that other controversial policies that discriminate on the basis of race might be held constitutional too—not just on college campuses, but everywhere. *See, e.g.*, Monika Plocienniczak, *Pennsylvania School Experiments With "Segregation,"* CNN (Jan. 27, 2011) (concerning a plan to segregate high school homeroom classes by race and sex); Joe Gettinger, *Ethnic Dorms: A Double Edged Sword*, Stanford Review (Sept. 26, 2010).

A strong and clear presumption in favor of race neutrality, one that resolves doubts in favor of race neutrality, prevents thoroughly unjustifiable discriminatory policies from becoming entrenched. It is precisely for that reason that strict scrutiny was developed to place an exceedingly high presumption against laws and policies that discriminate on the basis of race. That standard requires deference not to university administrators who advocate race dis-

crimination, but to the hundreds of millions of Americans who long for race neutrality.

B. Because Few, If Any, Race-Based Admissions Policies Are Actually Motivated by a Diversity Rationale, *Grutter* Merely Shifted the Issue from Constitutionality to Pretext, Effectively Insulating the Race-Based Policies from Legal Challenge.

It is usually unwise to take the justifications offered for race discrimination at face value. Race-preferential admissions policies are no exception to this rule. Lurking beneath the pretext of concern for the educational value of diversity is usually one or more of the motives explicitly rejected by Justice Powell in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-310 (1978) (Opinion of Powell, J.) (rejecting, among other things, past societal discrimination and a desire to increase the number of minority professionals as justifications for race-preferential admissions); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (also rejecting past societal discrimination as a justification for present discrimination); *see generally*, Brian Fitzpatrick, *The Diversity Lie*, 27 Harv. J.L. & Pub. Pol'y 385 (2003) (pointing out incompatibilities between diversity in theory and race-preferential admissions in practice).[6]

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[6] As Justice Kennedy pointed out, "This is not to suggest the faculty … do not pursue aspirations they consider laudable and consistent with our constitutional traditions." *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting). But law school faculty and this Court have proven themselves to be very far apart on issues of what those traditions mean. *See, e.g.*, *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47 (2006)

Some academics have been candid about this from the beginning. The year after *Bakke*, Columbia law professor Kent Greenawalt, a skeptic of race-preferential admissions, declared, "I have yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity in the student body for the better education of all the students …." Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 Cal. L. Rev. 87, 122 (1979). Similarly, Harvard law professor Alan Dershowitz wrote:

> The raison d'être for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of "diversity"' demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals. In recent years, it has been invoked—especially by professional schools—as a clever post facto justification for increasing the number of minority group students in the student body.

Alan Dershowitz, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 407 (1979).

More recently, Harvard law professor Randall Kennedy, an affirmative action proponent, stated:

> Let's be honest: Many who defend affirmative action for the sake of "diversity" are actually motivated by a concern that is considerably

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(unanimously upholding Solomon Amendment against a concerted challenge by many in the legal academy).

> more compelling. They are not so much animated by a commitment to what is, after all, only a contingent, pedagogical hypothesis. Rather, they are animated by a commitment to social justice. They would rightly defend affirmative action even if social science demonstrated uncontrovertibly that diversity (or its absence) has no effect (or even a negative effect) on the learning environment.

Randall Kennedy, *Affirmative Reaction,* The American Prospect (March 1, 2003); *see also* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 34 (2002) ("[M]any of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds."); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 471-72 (1997) ("The purpose of affirmative action is to bring into our nation's institutions more blacks, more Hispanics, more Native Americans, more women, sometimes more Asians, and so on—period. Pleading diversity of backgrounds merely invites heightened scrutiny into the true objectives behind affirmative action."); Owen Fiss, *Affirmative Action as a Strategy of Justice*, 17 Philosophy & Pub. Pol'y 37 (1997) ("[T]wo defenses of affirmative action—diversity and compensatory justice—emerged in the fierce struggles of the 1970s and are standard today, but I see them as simply rationalizations created to appeal to the broadest constituency.… In my opinion, affirmative action should been seen as a means that seeks to eradicate caste structure by altering the social standing of our country's most subordinated group"); Daniel Golden, *Some Backers of Racial Preferences Take Diversity*

Rationale Further, Wall Street Journal (June 14, 2003) (quoting Columbia law school professor Samuel Issacharoff: "'The commitment to diversity is not real. None of these universities has an affirmative-action program for Christian fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint.'").

If courts wish to identify the motives for race-preferential admissions, they should look beyond the diversity rationale. Professor Erwin Chemerinsky, for example, has identified past discrimination as the "most frequently identified objective for affirmative action." Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 Ohio N.U. L. Rev. 1159, 1161 (1996). Others have cited other arguments that are unlikely to win judicial approval. *See, e.g.*, James D. Anderson, *Past Discrimination and Diversity: A Historical Context for Understanding Race and Affirmative Action*, 76 J. Negro Educ. 204 (2007); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 Cal. L. Rev. 683 (2004); Andrew Valls, *The Libertarian Case for Affirmative Action*, 25 Soc. Theory & Prac. 299 (1999).

Often the reasons are external. For example, some colleges and universities practice discrimination in admissions because their federally-appointed accrediting authorities so require. *See* California Association of Scholars, *et al.*, Brief *Amici Curiae* in Support of the Petitioner, *Fisher v. University of Texas* (No. 11-345, filed Oct. 19, 2011) (arguing that admissions policies adopted in whole or in part to appease accreditors or funding sources are not protected by *Grutter*-deference); Margaret Jackson, *Uni-*

versity of Colorado Medical School Heals Diversity Gap, Denver Post (April 21, 2012) ("The university has made a concerted effort to improve diversity among its students since its accrediting body—the Liaison Committee on Medical Education—cited the school for 'noncompliance' in 2010, when just 106 of 614 students were minorities").

Pressure from state government plays a significant (and non-academic) role too. More than 23% of medical school and 15% of law school admissions officers report that they have felt "significant" or "some" pressure to engage in affirmative action from state and local governments. Susan Welch & John Gruhl, Affirmative Action and Minority Enrollments in Medical and Law Schools 80, Table 3.3 (1998) ("Welch-Gruhl").

The federal government's sticks and carrots are also a major influence. Some schools report threats of legal action and threats to withhold funds; others report that the need to fill out federal paperwork effectively pressures them to engage in affirmative action. Welch-Gruhl at 80, Table 3.3. Recently, the Department of Health and Human Services ("HHS") has been in the process of developing eligibility criteria for the Centers of Excellence program ("COE") in health professions education for under-represented minorities ("URMs"). *See* 76 Fed. Reg. 68770 (Nov. 7, 2011); *see also* Public Health Service Act, Title VII, § 736, 42 U.S.C. § 293 (2011), as amended by the Patient Protection and Affordable Care Act, Public Law 111-148, § 5401 (2010) (establishing COE). HHS proposes to allocate any funds appropriated for COE to schools of medicine, dentistry, pharmacy, and graduate programs in behavioral or mental health

that (1) have a significant number of URM students enrolled, including individuals accepted for enrollment; (2) have been effective in assisting URM students to complete their educational program and receive the degree involved; (3) have been effective in recruiting URM students to enroll in and graduate from the school, including providing scholarships and other financial assistance and encouraging URM students at all levels of the educational pipeline to pursue health professions careers; and (4) have made significant recruitment efforts to increase the number of URM individuals serving in faculty or administrative positions at the school. More specifically, HHS proposes to allocate funds to institutions that are in the top quartile in the proportion of minority graduates.

The pretext issue was not argued in *Grutter* or in *Gratz v. Bollinger*, 539 U.S. 244 (2003). It is likely the *Grutter* and *Gratz* plaintiffs wished for a decisive holding that would resolve the constitutionality of race-preferential admissions policies once and for all, rather than require victims to litigate the issue on a college-by-college basis. Since the latter sort of litigation would raise questions of fact for trial, it would require long-term financing that few high school students applying for admission to college are in a position to provide.

Few public interest law firms or foundations can offer help to these victims. Even if a victim were to prove at trial that a particular university's motives were unconstitutional, permanent relief would be unlikely. Universities are fluid organizations. New faculty members and administrators are constantly being added; old ones are retiring. A university

whose motives have been proven to be unconstitutional at trial would certainly turn around and claim that it has seen the light. Its new faculty members and administrators, in the exercise of whatever rights to academic freedom *Grutter* appears to confer on them, would argue that in the future their reasons for race-preferential admissions will center on the diversity rationale. So long as *Grutter* is the law, even a crow-bar cannot dislodge these policies. Litigants like Petitioner are likely to be rare.

This is one among many reasons that *Grutter* should be overruled. It is not enough to rule that *Grutter* allows future plaintiffs to challenge race-preferential admissions policies for pretext. By employing a deferential standard to a university's policy, *Grutter* forces future plaintiffs either (1) to challenge race-preferential policies in a case-by-case manner that will be, by orders of magnitude, more difficult, more divisive and ultimately more likely to be without long-term effect; or (2) to accept the fact that they do not have the financial resources to mount such a challenge and hence reconcile themselves to race-preferential policies for which the diversity rationale is merely a pretext for other plainly unconstitutional motives.[7]

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[7] *Browder v. Gayle*, 352 U.S. 903 (1956) (per curiam), makes an interesting analogy here. *Browder* came to the Court on the heels of *Brown v. Board of Educ.*, 347 U.S. 483 (1954). *Brown* had relied on Kenneth and Mamie Clark's famous doll studies to demonstrate that separate is unequal in the context of education because it "generates a feeling of inferiority as to [black children's] status in the community." *Id.* at 494. *Browder* concerned laws requiring segregation on buses, not schools. It was not at all clear that *Brown*'s logic would apply. But in an opinion notable for its brevity, the Court held that *Brown* did apply,

Meanwhile, as this case illustrates, race-preferential admissions policies are becoming ever more broad and well-entrenched. *See* Althea Nagai, *Racial and Ethnic Preferences in Undergraduate Admission at the University of Michigan*, Center for Equal Opportunity (Oct. 17, 2006). Recently, in an interview with Columbia University president Lee Bollinger, Attorney General Eric Holder stated, "'Affirmative action has been an issue since segregation practices.'" "'The question is not when does it end, but when does it begin … When do people of color truly get the benefits to which they are entitled?'" Yasmin Gagne, *Holder Talks Financial Crime, Affirmative Action at Low*, Columbia Spectator (Feb. 24, 2012).[8]

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thus signaling that it would not entertain case-by-case litigation over whether "separate but equal" is equal. Case-by-case litigation is as counterproductive in this context as it would have been in the context of Jim Crow. When it comes to race discrimination, strong and simple prohibitions are the best—a lesson the nation has had to learn the hard way. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

[8] There can be little hope that the guidelines interpreting *Grutter* and *Gratz* will work to rein in race-preferential admissions. See U.S. Dep't of Justice and U.S. Dep't of Educ., Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (Dec. 2, 2011). It is worth noting that the federal bureaucracy does not appear to take *Grutter*-deference seriously in any context other than race-preferential admissions. Last year, for example, new Department of Education regulations under Title II of the Americans with Disabilities Act went into effect that cut back on the authority of universities to remove from enrollment students who are threatening suicide. Ordinarily, one might expect that if deference is due to universities that engage in race discrimination, at least as much deference would be due to universities that conclude that a student with a mental illness is interfering with the education of others. But

C. Given Its History of Racial Discrimination, Higher Education Is an Unlikely Recipient of the Court's Deference on Issues of Race.

Education—particularly higher education—differs from more typical enterprises in at least two important ways. First, the quality of its services is difficult to measure. Second, in part because its benefits are believed to extend beyond students, it is heavily subsidized by government and charitable foundations. This makes it somewhat insulated from both competition and criticism and vulnerable to demands for various kinds of patronage.

As a consequence of these structural factors, education is prone to fads—some of which can become deeply rooted. Some are relatively harmless. *See* William R. Daggett, et al., *Color in an Optimum Learning Environment* (2008) (recommending that mathematics classrooms be painted indigo or blue and that social studies classrooms be painted orange, green or brown). Sometimes, however, they can have seriously harmful effects. *See* Paul A. Kirschner, *et al.*, *Why Minimal Guidance During Instruction Does Not Work: An Analysis of the Failure of Constructivist, Discovery, Problem-Based, Experiential, and In-*

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that would be incorrect. 28 C.F.R. 35.139. Instead, when an extension of *Grutter*-deference is argued for, it tends to be for an expansion of race-preferential treatment into non-academic contexts. *See, e.g.*, Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. Rev. 937 (2008) (expressing disappointment that *Grutter*'s "deferential form of strict scrutiny review" had not yet led to a re-examination of the law concerning racial-preferential public contracting).

quiry-Based Teaching, 41 Educ. Psychologist 75 (2006) (recounting the extreme popularity over the last half century of pedagogical methods that emphasize unguided or minimally-guided student learning and discussing the evidence that, at least for students without considerable prior knowledge, these methods are less effective than more guided learning).

Over their history, colleges and universities have often fallen prey to fashionable race discrimination. See *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (per curiam). Consequently, they are unlikely candidates to receive special deference on matters of race. *Cf.* Gary Becker, The Economics of Discrimination (1971) (arguing that institutions that are protected from competition, like government and government-protected monopolies, are more likely to engage in racial discrimination than institutions that are subject to direct market pressure).

Sometimes the pressure for race discrimination has come from the outside. For example, before 1950, the University of Texas was subject to the Texas Constitution's racial segregation requirement in education, and probably could not have integrated its classrooms had it wanted to. *See* Tex. Const. art. VII, §§ 7, 14 (1948); *Sweatt v. Painter*, 339 U.S. 629, 631, n.1 (1950); *see also* C. Vann Woodward, The Strange Career of Jim Crow 50 (3d rev. ed. 1974) (suggesting that the push for Jim Crow segregation came largely from poor Southern whites who used their political clout to disadvantage their black economic and social competitors); Welch-Gruhl at 80 (demonstrating that modern law and medical schools

often view themselves as pressured to engage in race-preferential admissions).

Just as often, however, the pressure for racial discrimination has come from within the elite academy, its students and alumni. Consider, for example, the Jewish quotas that swept the Ivy League beginning in the 1920s. There is no definitive evidence that requires the conclusion that these quotas derived their support mainly from the well-educated. But what evidence there is strongly suggests that they did indeed reflect the prejudices and resentments of elites rather than of ordinary Americans. Boston Mayor James Curley, an official certainly known for his common touch, vehemently opposed Jewish quotas. Referring specifically to the case of Harvard, he declared: "If the Jew is barred today, the Italian will be tomorrow, then the Spaniard and the Pole, and at some future date the Irish." *See* Marcia Graham Synnott, A Social History of Admissions Policies at Harvard, Yale, and Princeton, 1900-1930, at 357-58, 365-66 (1974) ("Social History").[9]

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[9] Similarly, Samuel Gompers condemned Jewish quotas on behalf of the American Federation of Labor. Social History at 358. Indeed, newspapers and magazines from as far away as China carried critical stories. As an article in The Nation put it:

> To tell a Cohen, whose average on the college board examination was 90, that he cannot enter because there are too many Jews already, while a grade of 68 will pass a Murphy, or one of 62 a Morgan, hardly seems in line with the real interests of the college.

William T. Ham, *Harvard Student Opinion on the Jewish Question*, The Nation 226-27 (Sept. 6, 1922); *see also Harvard Faces Problem of Cutting Down Number of Students Attending By Refusing Admission to Jews*, North China Star 6 (Aug. 15, 1922);

It was well-educated Americans, not Mayor Curley's boisterous blue-collar supporters, who had the greatest incentive to resent the extraordinary success that Jewish students were having (and continue to have) in higher education. Jews were less than 4% of the American population in 1920. But by that time, Columbia University's entering class may have been as much as 40% Jewish, and the University of Pennsylvania's was similar. Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton 86-88 (2005) ("Karabel"). Within a few years, Harvard's entering class was 27.6% Jewish, and Yale's enrollment was 13.3%. *Id.* at 105, 114. Most of these students were from families that had only recently come to America, making their accomplishment all the more admirable.[10]

Down Hill from Harvard to Lowell, Boston Telegram (June 6, 1922) (cited in Social History at 356-58, 365-66).

[10] The resentment was by no means always subtle. To some Ivy Leaguers, these new immigrants and their offspring were upstarts, grinds or even "greasy grinds," all-too-eager to take the place of the established elite. One Harvard alumnus, writing to Harvard president A. Lawrence Lowell was openly contemptuous:

> Naturally, after twenty-five years, one expects to find many changes but to find that one's University had become so Hebrewized was a fea[r]ful shock. There were Jews to the right of me, Jews to the left of me, in fact they were so obviously everywhere that instead of leaving the Yard with pleasant memories of the past I left with a feeling of utter disgust … and grave doubts about the future of my Alma Mater.

Karabel, *supra,* at 105 (quoting Dec. 17, 1925 letter).

Harvard's president at the time was A. Lawrence Lowell, also the vice president of the Immigration Restriction League, an organization steeped in that era's new scientific racism. He was determined to do something about what he called "the Hebrew problem," and argued it affected both student recruitment and alumni fundraising.[11] As he put it:

> The summer hotel that is ruined by admitting Jews meets its fate, not because the Jews it admits are of bad character, but because they drive away the Gentiles, and then after the Gentiles have left, they leave also. This happened to a friend of mine with a school in New York, who thought, on principle, that he ought to admit Jews, but who discovered in a few years that he had no school at all.

Id. at 88 (quoting May 19, 1922 letter to William Hocking).

At Lowell's behest, Harvard adopted a new exclusionary admissions process in 1926. Shortly thereafter, Yale's Dean Clarence Mendell paid a visit to Harvard's admissions director. He reported that Harvard was "now going to limit the Freshman Class to 1,000 .... They are also going to reduce their 25% Hebrew total to 15% or less by simply rejecting with-

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[11] Lowell originally wanted to deal with the issue by publicly adopting a ceiling on Jewish enrollment. But when the faculty initially balked, he put forth a more subtle plan. "To prevent a dangerous increase in the proportion of Jews," he insisted that future admissions should be based on a "personal estimate of character on the part of the Admission authorities." Marcia Graham Synnott, The Half-Opened Door: Discrimination and Admissions at Harvard, Yale, and Princeton, 1900-1970, at 108 (1979) ("Half-Opened Door").

out detailed explanation. They are giving no details to any candidate any longer." *See id.* at 109.[12]

History repeats itself. Today the "problem" on some campuses is not just "too many whites," but "too many Asians." Asians are perceived as the new "upstarts" at highly competitive universities. One extensive study of admissions at elite private colleges found Asian applicants with perfect SAT scores of 1600 had the same chances of being accepted as white applicants with 1460s and African-American applicants with 1150s. Thomas Espenshade & Alex-

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[12] The situation was not quite the same for blacks. Harvard, for example, takes a measure of pride in its reputation for relative openness to blacks, and all things considered, it did indeed have a better record than most institutions of the period. It was a record that was tarnished by Lowell, who segregated living and dining facilities apparently at the behest of Southern students and over the objections of many alumni. On the other hand, at Princeton, perhaps the least friendly to racial minorities of the Ivies, not a single black attended in the 20th century until 1945, and at least one was actively discouraged from enrolling. Still, even at Princeton, blacks occasionally attended in the 18th and 19th centuries. *See* Half-Opened Door at 47-53, 80-84; Karabel at 228, 232-36.

Ivy Leaguers did not imagine that black students would soon come to dominate business and industry. Even at Harvard, their numbers were small, perhaps as few as 165 total between 1871 and 1941. *Id.* Alumni felt no reason to worry, consciously or unconsciously, that blacks would crowd their children or grandchildren out of elite status. Black students were curiosities. Any "old guard" is likely at its worst when its members perceive that a group of newcomers may come to take a take a disproportionate share of the benefits that its elite institutions can confer. The group that presented that challenge at the time was Jews, not blacks. As a result, Lowell spent far more time attempting to exclude qualified Jewish students than he did attempting to exclude their black counterparts.

andria Walton Radford, No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life (2009). The authors caution that this research does not purport to reveal why this is so, since the data did not include so-called "soft variables" like extracurricular activities and teacher recommendations. But, in part as a response to Espenshade's findings, Asian students are now urged not to list themselves as Asian on their admissions applications to elite institutions. *Some Asians' College Strategy: Don't Check "Asian"*, USA Today (Dec. 3, 2011). There is a clear message being sent to Asian students: America is not the nation it purports to be.

Amici are not arguing that college administrators bear ill-will toward Asians (or towards Scots-Irish, Cajuns or any other under-represented group that is ignored by fashionable diversity policies). While malice against Asians is not as unknown as it should be, *see* G.W. Miller III, *Asian Students Under Assault: Seeking Refuge from School Violence*, Philadelphia Weekly (Sept. 1, 2009), it is thankfully rare as a motivation for college administrators. Instead, there is simply a failure of empathy. As President William Clinton (mistakenly) has put it, "[Without race-preferential admissions], there are universities in California that could fill their entire freshman classes with nothing but Asians." Leo Rennert, *President Embraces Minority Programs*, Sacramento Bee (Apr. 7, 1995).

None of this has any effect on the overall level of diversity in higher education. It creates a frantic competition for under-represented minority students among schools, but it does not increase the overall numbers of such students attending college. Since

most colleges and universities are non-selective, no high school graduate is denied a college education on the ground that his academic credentials are not as good as somebody else's.

Moreover, schools that would prefer not to discriminate are stymied. If they opt out of the racial spoils scramble, they may end up with "not enough" minority students, and hence face the ire of accrediting agencies, public and private funding sources, student organizations and their own internal diversity bureaucracy. Deference to this jerry-rigged structure is unwarranted.

D. When Principles Are Sacrificed for the Sake of Hoped-For Beneficial Consequences, Those Consequences Often Fail to Materialize.

Petitioner and several of her supporting *amici* have focused most of their briefs on distinguishing in small ways this case from *Grutter*. Other supporting *amici* have provided evidence of the unintended consequences of preferential admissions policies. Even this brief is making essentially a prudential argument. While it calls for *Grutter* to be overruled, it does so on the ground that *Grutter*-deference has so altered the doctrine of strict scrutiny as to make it structurally unable to vindicate the rights of future victims of race-preferential policies even in the cases where diversity is merely a pretext.

All of this is in contrast to the many *amicus* briefs in *Grutter* and *Gratz*, including one filed by *amicus* CCJ, that argued from first principles. Those principles should not, however, go wholly unremarked in this case. *Amici* believe that *Grutter*'s willingness to

tolerate race discrimination is a violation of the nation's founding ideals. The fundamental creed upon which the nation was founded is that "all men are created equal." Declaration of Independence ¶ 2. This principle is, in Abraham Lincoln's words, a "great truth, applicable to all men at all times." Letter from Abraham Lincoln to H.L. Pierce (Apr. 6, 1859), in 3 Collected Works 374, 376 (1953). Notwithstanding this Court's subsequent erroneous claim to the contrary in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), "All men" meant all human beings—men as well as women, black as well as white. *See, e.g.*, James Otis, Rights of the British Colonies Asserted and Proved ("The colonists are by the law of nature freeborn, as indeed all men are, white or black"), reprinted in B. Bailyn, ed., Pamphlets of the American Revolution 439 (1965); *id.* ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?"). These sentiments were codified in the first State constitutions established after the American colonies declared their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." Va. Dec. of Rights § 1 (1776), reprinted in 1 The Founders' Constitution 6 (P. Kurland & R. Lerner, eds., 1987). And the Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" Mass. Dec. of Rights (1780), reprinted in 1 The Founders' Constitution at 11.[13]

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[13] Even those founders who owned slaves recognized that slavery was inconsistent with the principle of equality articulated in the Declaration of Independence. "The mass of mankind has not been born with saddles upon their backs," wrote Thomas

The Founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to as equality of opportunity, not equality of result.[14] Indeed, James Madison described the "protection of different and unequal faculties" as "the first object of government." The Federalist No. 10, at 78 (Rossiter ed. 1961) (1788). Alexander Hamilton agreed, writing that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit.... The door ought to be equally open to all." The Federalist No. 36, at 217 (emphasis added).

With the eradication of slavery and the passage of the Fourteenth Amendment, the nation moved closer to its founding ideal of legal equality. Unfortunately, in one of its darkest moments, this Court held in *Plessy v. Ferguson*, 3 U.S. 537, 550 (1896), that when evaluating legal policies which separated Americans by race, "there must necessarily be a large discretion on the part of the legislature." Alone in dissent, Justice John Marshall Harlan rejected such deference and eloquently penned the judicial equivalent of the

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Jefferson, "nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God." Thomas Jefferson, Letter to Roger C. Weightman (June 24, 1826), in Jefferson: Writings 1516, 1517 (M. Peterson, ed., 1984).

[14] The modern distinction is best exemplified by President Lyndon Johnson's speech at Howard University on June 4, 1965: "[I]t is not enough just to open the gates of opportunity.... We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." Lyndon B. Johnson, *Commencement Address at Howard University: To Fulfill These Rights*, in 2 Public Papers of the Presidents 1965, at 635, 636 (1966).

Declaration's creed: "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." *Id.* at 559 (Harlan, J., dissenting).

Fifty-eight years later, in *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court repudiated *Plessy*'s separate but equal doctrine and ultimately renewed America's dedication to what Martin Luther King would later describe as his dream, "that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'" Martin Luther King, Jr., I Have A Dream (1963), reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 217, 219 (James Washington ed. 1986).

There is no need to argue in this case about whether the ideal of racial equality applies to members of a racial majority as it does to members of a racial minority. Texas is now one among the nation's four majority-minority states, see Cameron Joseph, *Census Shows Minorities Outnumber Whites in Texas,* National Journal (Feb. 17, 2011).

But even were the circumstance in Texas otherwise, the constitutional command of equal treatment must apply to each person, as individuals. Unlike the majority in *Grutter*, Justice Douglas took this point to its logical conclusion when he wrote, "A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard*, 416 U.S. 312,

337 (1974) (Douglas, J., dissenting); *see also Bakke*, 438 U.S. at 290 (Opinion of Powell, J.) ("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").[15]

CONCLUSION

A generation ago, when race-preferential admissions policies were new, one of the greatest modern advocates of the passive judicial virtues, Alexander Bickel, wrote:

> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.

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[15] In *United States v. Carolene Products Co.*, 304 U.S. 144, n.4 (1938), the Court acknowledged that discrete and insular minorities may wield little political power and hence find themselves victimized by the majority. But the opposite is also sometimes true: Discrete and insular minorities (whether they are racial or not) can sometimes wield more power than one would expect based on raw numbers. This is especially so when the majority status of those disadvantaged is superficial and illusory. For example, a college that gives race-based preferences to all racial groups except whites and Asians does not disadvantage whites and Asians generally, but only those whites and Asians who may apply and be refused admission on account of their race. *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (concerning a law that disadvantaged not Richmond's white minority generally, but white business owners seeking public contracts).

Alexander Bickel, The Morality of Consent 133 (1975). No one understood the importance the judicial restraint better than Bickel did. But he also recognized that race equality is one of the fundamental issues of our nation's history and that a coherent legal doctrine in this area is indispensable. The Court should return to its traditional strict scrutiny approach by overruling *Grutter* and re-establishing that permissible race discrimination is the rare exception—an exception that cannot apply to race-preferential admissions policies.

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