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ARTICLE

**“TO SPEAK OPENLY AND CANDIDLY ON
THE SUBJECT OF RACE”
MUSINGS ON *SCHUETTE V.
COALITION TO DEFEND
AFFIRMATIVE ACTION, ET AL.***

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Reflecting our seemingly endless debate over questions surrounding “race,” two current United States Supreme Court justices offer differing views on the way to stop racial discrimination. Both are documented in the Court’s 2014 decision in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary, et al.*¹ The first comes from the Court’s Chief Justice, John Roberts. Several years ago he wrote, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²

More recently in *Schuette*, Associate Justice Sonia Sotomayor, who once described herself in explicitly ethnic terms as a “wise Latina,”³ expanded on the Chief Justice’s view thusly: “The way to stop dis-

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1. 572 U.S. ___, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014) [hereinafter *Schuette v. Coalition to Defend Affirmative Action*]. All subsequent citations to *Schuette* are to 134 S. Ct. 1623, et seq.

2. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (“*Parents Involved*”). The Chief Justice’s language is cited by Justice Sonia Sotomayor in *Schuette*, 134 S. Ct. at 1675, which she patronizingly describes as “a sentiment out of touch with reality.”

3. In 2001, then-Second Circuit U.S. Court of Appeals Judge Sonia Sotomayor gave a speech provocatively declaring that the ethnicity and sex of a judge “may and will make a difference in our judging.” Charlie Savage, *A Judge’s View of Judging Is on the Record*, N.Y. TIMES (May 14, 2009), http://www.nytimes.com/2009/05/15/us/15judge.html?_r=0. Disputing the view invoked by her female colleague, Justice Ruth Bader Ginsburg (who observed that “a wise old man and a wise old woman would reach the same conclusion when deciding cases,” *id.*), Sotomayor famously quipped: “I would hope that a wise Latina woman with the richness of her

crimination on the basis of race,” she writes, “is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”⁴

The Chief Justice’s approach is straightforward and, in the eyes of the vast majority of Americans,⁵ eminently fair. His observation is short, to the point, and rests on an easily understood premise: if a person or an institution refuses to discriminate on the basis of race, such discrimination will not occur.

And yet, while the Chief Justice’s and Justice Sotomayor’s respective philosophies diverge when it comes to approving government-sanctioned race-based decision-making (with the Chief Justice largely opposed, and Justice Sotomayor unquestionably in favor),⁶ it can be argued that their views, in at least one important way, are consistent with one another. For example, nothing in the Chief Justice’s formula is inconsistent with Justice Sotomayor’s suggestion that issues surrounding race be subjected to open

experiences *would more often than not reach a better conclusion than a white male* who hasn’t lived that life.” *Id.* (emphasis added).

4. *Schuetz*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting). In fact, however, Supreme Court precedents reject the notion that race-based decision-making may be used to remedy “the effects of [centuries of] societal discrimination.” *See, e.g., Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978) (internal quotes omitted) (rejecting Justice Sotomayor’s argument). In *Bakke*, Justice Lewis F. Powell, Jr. criticized such an argument as “an amorphous concept of injury that may be ageless in its reach into the past.” *Id.*; *see also Grutter v. Bollinger*, 539 U.S. 306, 323–24 (2003) (“[In *Bakke*] Justice Powell rejected an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.” (internal quotes omitted)).

5. For example, a recent MTV Strategic Insights study on racially sensitive issues shows that among “Millennials,” 89 percent of respondents “believe that everyone should be treated the same no matter their race.” In addition, 73 percent “believe never considering race would improve society.” *See Music Television Strategic Insights & David Binder Research, DBR MTV Bias Survey Summary, LOOK DIFFERENT 1* (Apr. 2014), http://cdn.lookdifferent.org/content/studies/000/000/001/DBR_MTV_Bias_Survey_Executive_Summary.pdf?1398858309. Older studies show similar results. A Zogby International poll conducted in January 2000 found that over 77 percent of students across all racial and political lines (including almost half of black students polled) believed schools should not give minority students preferences in admissions. For this and other findings, see the Brief for *Amicus Curie* National Association of Scholars in Support of Affirmance at 8–9, *Grutter v. Bollinger*, No. 01–1447 (6th Cir. June 22, 2001) and the Brief for *Amicus Curie* National Association of Scholars in Support of Petitioner at 7–11, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02–241), 2003 WL 144938 (citing additional studies).

6. Compare their respective views in *Schuetz* where the Chief Justice notes that Justice Sotomayor “devotes 11 pages to expounding [her] own policy preferences *in favor of taking race into account in college admissions.*” *Schuetz*, 134 S. Ct. at 1638 (Roberts, C.J., concurring) (emphasis added).

and candid debate⁷ including consideration of the lingering effects, if any, of “centuries of racial discrimination.”⁸

INTRODUCTION: A SIMPLE THOUGHT EXPERIMENT

To test Justice Sotomayor’s theory in *Schuetz*, let’s begin with some *openness* and *candor* upon which, one would hope, both the Chief Justice and she might agree.

First, Justice Sotomayor’s observation that the United States has a “long and lamentable” history of discriminating against racial minorities, including efforts to restrict their ability to participate in the political process,⁹ cannot be questioned. Tragically, the United States at its founding and for many decades thereafter was a land where the enslavement of innocent men, women, and children based solely on the color of their skin was legally sanctioned; and where, for the better part of a century after slavery was abolished,¹⁰ a person’s skin color continued to restrict the fullness of opportunity for many Americans (in particular for black Americans).

At the same time, openness and candor require acknowledgement that the institution of slavery was brought to an end in the United States because of the ultimate sacrifice made by hundreds of thousands of, mainly, *free* white men during our Nation’s Civil War.¹¹ Openness and candor also require us to acknowledge the terribly mislabeled “separate but equal” doctrine of *Plessy v. Ferguson*¹²—which persisted for almost 60 years—and the patently racist Jim Crow laws, as well as related anti-miscegenation

7. Before testing Justice Sotomayor’s theory, it is worth observing that a recent United States Attorney General seemed convinced that Americans are incapable of engaging in a candid conversation about race, even though that is precisely what Justice Sotomayor implores us to do. U.S. Attorney General Eric Holder declared in 2009 that the United States is a “nation of cowards” when it comes to the subject of race. When asked during a January 23, 2014, interview at the University of Virginia’s Miller Center whether he would take back his 2009 remarks, he replied, “I would not . . .” Neil Munro, *Eric Holder: U.S. Still a Nation of Cowards on Race*, THE DAILY CALLER (Jan. 24, 2014), <http://dailycaller.com/2014/01/24/eric-holder-us-still-a-nation-of-cowards-on-race/#ixzz3BnXCGwHK>.

8. *Schuetz*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting).

9. *Id.* at 1651.

10. A portion of Article IV, section 2, of the U.S. Constitution was superseded by the Thirteenth Amendment (passed by Congress on Jan. 31, 1865 and ratified by the States on Dec. 6, 1865): “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

11. See THOMAS SOWELL, *BLACK REDNECKS AND WHITE LIBERALS* 115 (2005) (“No other nation ended slavery in the same way as the United States did and few ended it after so short a struggle, as history is measured.”). Dr. Sowell goes on to observe that “[s]lavery was destroyed within the United States at staggering costs in blood and treasure, but the struggle was over within a few ghastly years of warfare. Nevertheless, the Civil War was the bloodiest war ever fought in the Western Hemisphere, and more Americans were killed in that war than in any other war in the country’s history,” a fact Sowell described as “a highly atypical—indeed, unique—way to end slavery.” *Id.* at 122.

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

laws that co-existed during these same decades in many parts of our Nation.¹³ Yet this same openness and candor demand that we recognize the unanimous decision in *Brown v. Board of Education*¹⁴ in 1954, reversing *Plessy*,¹⁵ and establishing the bedrock principle that “racial discrimination in public education is unconstitutional.”¹⁶ Openness and candor also require us to acknowledge that following *Brown*, the United States experienced an almost unbroken trajectory of civil rights advances beginning with the historic language adopted ten years after *Brown* in Title VI of the Civil Rights Act of 1964.¹⁷

And finally, if we are to be thoroughly open and candid, we cannot ignore the trillions of federal and state dollars spent since 1964,¹⁸ largely devoted to the task of raising the educational and economic status of the one group, black Americans, which, more than any other, bore the brunt of past societal racial discrimination.

Consistent with her demand for openness and candor, one would expect Justice Sotomayor to encourage open and candid debate as to whether, and to what extent, the “effects of centuries of [past] racial discrimination” continue to play a role in the present conditions facing many minority communities. While no rational person will deny the contemporaneous, often horrific adverse effects on black (and other minority) Americans caused by early laws condoning overt discrimination, the question is this: What effects *today*, in the second decade of the twenty-first century, can be tied directly, or even indirectly, to the racial discrimination practiced in centuries past? In other words, while the end of legally sanctioned racial discrimination did not instantly, or even quickly, bring to an end its adverse effects, is there no room for the argument that the passage of time coupled with the enforcement of a remedial and more just system of laws have effectively erased the

13. “Jim Crow” laws often led to facilities being segregated by race and created other circumstances where black citizens received unequal treatment under the law resulting in economic, educational, and social disadvantages being imposed on black citizens. See *List of Jim Crow Law Examples by State*, WIKIPEDIA (Mar. 24, 2015, 7:14 PM), http://en.wikipedia.org/wiki/List_of_Jim_Crow_law_examples_by_State. Most “Jim Crow” laws were generally outlawed following the passage of the Civil Rights Act of 1964. However, anti-miscegenation laws remained unaffected until they were declared unconstitutional in 1967. See *Loving v. Virginia*, 388 U.S. 1 (1967).

14. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

15. *Id.* at 495 (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”).

16. *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955) (“*Brown II*”).

17. 42 U.S.C. § 2000d (1964) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

18. See Brochure for Cato Institute January 2015 Conference, *Can We End Poverty?* (estimating that federal and state governments alone have spent “more than \$19 trillion” fighting poverty since President Lyndon B. Johnson declared an “unconditional war on poverty in America” in January 1964).

effects of past injustices? Whatever the answers to these questions may be, should not the issues they raise be subjected to full, open, and honest debate?

To take just one example, what evidence links formerly legally *sanctioned*, but long ago legally *extinguished* racial discrimination (including state-sanctioned school segregation) with the persistent academic underachievement of far too many black students today;¹⁹ the latter being the very scourge that precipitated the adoption of arguably well-intentioned but patently discriminatory policies of the sort upheld by the Court in *Grutter v. Bollinger*?²⁰

And, finally, whatever one's definition may be of "social justice," should an innocent white descendant of a Union soldier who gave his life during the Civil War to end the practice of Southern slavery be denied a seat in a law school class 150 years later while a more affluent but objectively less qualified descendant of a black African (whose immediate ancestors never experienced slavery) is awarded the seat solely because of *his* skin color? Or, to take an even more perverse example, is "social justice" served in the year 2015 when a Native American descendent of an American Indian Tribe (e.g., the Cherokee), which undeniably owned black slaves,²¹ and whose members fought against the Union in an effort to preserve the Confederacy, is granted a preference in admissions (as he or she would under the race preference policy approved in *Grutter*) while denying admission to a descendent of white abolitionists?

The question answers itself. As Thomas Sowell has written:

[I]t remains painfully clear that those people who were torn from their homes in Africa in centuries past and forcibly brought across the Atlantic in chains suffered not only horribly, but unjustly. Were they and their captors still alive, the reparations and the retribution owed would be staggering. Time and death, however, cheat us of such opportunities for justice, however galling that may be. *We can, of course, create new injustices among our*

19. Thomas Sowell has documented that academic underachievement by black students has not always been the case, even in schools that were officially segregated before the decision in *Brown v. Bd. of Educ.* in 1954. See, e.g., Thomas Sowell, *The Education of Minority Children*, HOOVER INST. (2001), http://www.hoover.org/sites/default/files/uploads/documents/0817928928_79.pdf (sharing his discussion of the history of public, all-black Dunbar High School in Washington, D.C., noting that from 1870 to 1955, Dunbar's black students repeatedly equaled or exceeded national norms on standardized tests. Over the 85-year history of academic success of the school, most of its 12,000 graduates went on to higher education. "This was very unusual for either black or white high-school graduates during this era."). In addition, compare Frank T. Manheim & Eckhard Hellmuth, *Black High Schools Summer and Lincoln Dominated Science Awards in Kansas City in the 1950s. So Why Doesn't Anyone Know About This?*, U.S. BLACK ENGINEER & INFO. TECH. 70 (June/July 2006), with Justice Steven Breyer's discussion of how "low educational achievement continues to be correlated with income and race" in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1649 (2014) (Breyer, J., concurring).

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

21. See Treaty with the Cherokee arts. 4, 9, July 19, 1866, 14 Stat. 799.

*flesh-and-blood contemporaries for the sake of symbolic expiation, so that the son or daughter of a black doctor or executive can get into an elite college ahead of a son or daughter of a white factory worker or farmer, but only believers in the vision of cosmic justice are likely to take moral solace from that.*²²

It is true—as many critics assert—that racial discrimination is still with us. We find it in the admissions policies once practiced by the University of Michigan,²³ and in the policies practiced by many other flagship universities across the Nation.²⁴ We find it in the hiring and promotion policies used by many government-funded institutions, including our military. While it is not the sort of invidious racial discrimination from centuries past so properly decried by Justice Sotomayor, it is racial discrimination nonetheless; and it is destructive to our social compact.

By all means, we should never forget the sad chapter in our Nation’s history when race most definitely mattered in terms of how a citizen was treated, or mistreated, by her government. However, must we willfully ignore that *the past* is (thankfully) just that? Which brings us to a discussion of *Schuette*.

I. *SCHUETTE V. COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY, ET AL.*

A. *The Issue in Schuette*

“This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it.”²⁵

B. *The Factual Background of Schuette*

In 2003, the Supreme Court reviewed the constitutionality of two admissions systems at the University of Michigan, one for the undergraduate college of Literature, Arts, and the Sciences,²⁶ and one for the law school²⁷ (collectively, “the Michigan cases”). While dramatically different in their description and operation,²⁸ both policies permitted the explicit considera-

22. Thomas Sowell, *THE QUEST FOR COSMIC JUSTICE* 32 (1999) (emphasis added).

23. Notwithstanding its 2003 decision in *Grutter*, the Court’s decision in *Schuette* to uphold the 2006 Michigan state referendum banning race preferences in public university admissions means the University of Michigan is no longer permitted to use race as a factor in admissions.

24. The University of Texas at Austin continues to use race as a factor in admissions. See *Fisher v. University of Texas at Austin*, 758 F.3d 633, 644 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888, 192 L. Ed. 2d 923 (2015).

25. *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014).

26. See *Gratz v. Bollinger*, 539 U.S. 244 (2003).

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

28. See R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEX. REV. L. & POL. 313, 319–23 (Spring 2003) (discussing the Law School Admissions Policy in *Grutter*); *Grutter*, 539 U.S. at 337 n.122 (discussing the undergraduate policy at issue in *Gratz*).

tion of an applicant's race. Eventually the Court invalidated the undergraduate policy as a violation of the Equal Protection Clause²⁹ but upheld the law school's plan³⁰ even though the use of race under the law school's policy was demonstrably more heavily reliant on an applicant's race than was the undergraduate program.³¹ The main distinction between the two policies, as several justices who supported the University's use of race cynically observed, was that the use of race under the law school policy was less obvious.³²

Following the Court's decision in *Gratz*, the University modified the unlawful aspects of its undergraduate program by dismantling the automatic award of a specific number of points based solely on race. However, like the law school's admissions policy upheld in *Grutter*, the undergraduate admissions policy continued to use race-based preferences.³³

In direct response to these two decisions, the question of whether racial preferences should be allowed in the context of governmental decision-making was submitted to Michigan's voters in 2006. In response, the voters adopted an amendment to Michigan's Constitution expressly prohibiting state and other governmental entities from granting race-based preferences as part of the admissions process for its state universities.³⁴

This constitutional ban on the use of race preferences was promptly challenged by several plaintiffs including the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), students, faculty, and prospective applicants to Michigan public universities.³⁵

The specific language challenged by the plaintiffs in *Schuette* is found in Article I, § 26 of the Michigan Constitution. It provides in relevant part that Michigan's public universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin"³⁶ Apart from expanding the protections for every individual regardless of race, there is no meaningful distinc-

29. See *Gratz*, 539 U.S. at 270.

30. See *Grutter*, 539 U.S. at 343.

31. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 404 (Nov. 2004).

32. Dissenting from the Court's decision to strike down the University of Michigan's undergraduate "points" program at issue in *Gratz*, which automatically awarded a large number of points to each underrepresented minority applicant based on race, Justice David Souter wrote that "Equal protection cannot become an exercise in which the winners [referring to the law school whose "holistic" policy the Court upheld in *Grutter*] are the ones who hide the ball." *Gratz*, 539 U.S. at 298 (2003) (Souter, J., dissenting). Justice Ginsburg added that without the ability to use a system like the one struck down in *Gratz*, "institutions of higher education may resort to camouflage," which, she accurately described as, "achieving similar numbers through winks, nods, and disguises." *Id.* at 304–05 (Ginsburg, J., dissenting).

33. *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1629 (2014).

34. *Id.*

35. *Id.* at 1629–30.

36. *Id.* at 1629.

tion between the protections against racial discrimination provided by § 26 and those encompassed within the language of both the Fourteenth Amendment³⁷ and, on the federal level, by Title VI of the Civil Rights Act of 1964.³⁸ As a consequence, the question before the Court prompted this response from Associate Justice Antonin Scalia:

[W]e confront a frighteningly bizarre question: Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*? Needless to say (except this case obliges us to say it), the question answers itself. “The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”³⁹

Justice Scalia concluded with this:

As Justice Harlan observed over a century ago, “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) (dissenting opinion). The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in their way.⁴⁰

C. *The Decision in Schuette*

“There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination [banning ‘race-defined and race-based preferences’] to the voters.”⁴¹

“What is at stake here is . . . whether government can be instructed *not* to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others.”⁴²

Having reached a decision that should surprise no one (though, sadly, it apparently surprised Justices Sotomayor and Ginsburg), Associate Justice Anthony Kennedy—who announced the judgment of the Court and delivered an opinion in which the Chief Justice and Justice Alito joined—concluded that voters have the power to instruct government *not* to allow such policies.

37. U.S. CONST. amend. XIV, § 1 (“No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); *see also* Justice Breyer’s concurring opinion in *Schuette*: “I agree with the plurality that [§ 26] is consistent with the Federal Equal Protection Clause, U.S. Const., Amdt. 14.” 134 S. Ct. at 1648.

38. *See supra* note 17.

39. *Schuette*, 134 S. Ct. at 1639 (Scalia, J., concurring) (emphasis in original) (citations omitted).

40. *Id.* at 1648.

41. *Id.* at 1638 (citation omitted).

42. *Id.* (emphasis added). Of course, one wonders how it could be otherwise given the plain language of the Fourteenth Amendment as well as Title VI of the Civil Rights Act of 1964.

He could have stopped there. But instead, Justice Kennedy added several surprising, and potentially unsettling, observations:

Perhaps, when enacting policies as an exercise of democratic self-government, voters will determine that race-based preferences should be adopted.⁴³

* * *

The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise,⁴⁴ on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate. Voters might likewise consider after debate and reflection that programs designed to increase [racial and ethnic] diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.⁴⁵

With these words, is Justice Kennedy suggesting that voters could, long-standing precedents notwithstanding, adopt racially discriminatory programs to remedy the effects of past societal discrimination; or that voters legitimately could adopt such programs as a form of symbolic reparations to make up for nothing more than “the stigma of past racism”—irrespective of whether any recipient of such a preference had experienced an injury on the basis of race, much less been victimized by “past racism”?⁴⁶

Whatever he had in mind, Justice Kennedy's concluding phrase is bizarre inasmuch as the Court, time and again (with Justice Kennedy's concurrence), has rejected the government's effort to use race to remedy the effects of general societal discrimination.⁴⁷ Paraphrasing Justice Powell in

43. *Id.* at 1635.

44. Consider a hypothetical situation where voters deemed a school *integration* plan to be “unwise” based on data purporting to show that academic outcomes—for students of all races—improved in classes where there is little or no racial or ethnic diversity. A not-so-hypothetical example can be seen in Chicago's (and soon-to-be Washington, D.C.'s) Urban Prep Academies. These all-male and essentially all African-American charter high schools boast a 100 percent high school graduation and college acceptance rate. See URBAN PREP ACADEMIES, <http://www.urban-prep.org> (last visited Mar. 30, 2015). Thus, would these allegedly improved academic outcomes constitute a “compelling governmental interest” justifying the use of race to re-segregate schools into single-race ethnic enclaves notwithstanding the clear language of the Equal Protection Clause of the Fourteenth Amendment as well as the language in Title VI of the Civil Rights Act of 1964? Borrowing from Justice Scalia, one would hope these questions, too, would answer themselves. See *supra* note 39 and accompanying text.

45. *Schuetz*, 134 S. Ct. at 1638.

46. *Id.*; see also discussion, *infra* note 48.

47. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978); see also *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276 (1986) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518–20 (1989) (a case in which Justice Kennedy concurred).

Bakke, absent findings of “identified discrimination”⁴⁸ where the legal rights of the actual victims of such discrimination must be vindicated, “the government has [no] greater interest in helping one [innocent] individual than in refraining from harming another [innocent individual].”⁴⁹

Earlier in that same paragraph from *Bakke*, Justice Powell wrote, “We have never approved a classification that *aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals* in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”⁵⁰ Yet, notwithstanding the absence of any findings of “constitutional or statutory violations” by the University of Michigan, the Court in *Grutter* approved a race-conscious program that was expressly intended to aid perceived members of relatively victimized groups⁵¹ without requiring any showing by any recipient of a racial preference that he or she actually had been subjected to, much less victimized by, racial discrimination.⁵² Moreover, this was being accomplished at the ex-

48. *Schuetz*, 134 S. Ct. at 1632 (noting that in both *Reitman v. Mulkey*, 387 U.S. 369 (1967) and *Hunter v. Erickson*, 393 U.S. 385 (1969), there were “*demonstrated injuries on the basis of race*” (emphasis added)). *But see Schuetz*, 134 S. Ct. at 1632–33 (noting that the Seattle “school board’s purported remedial action [at issue in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982)] would not be permissible today absent a showing of *de jure* segregation.” (emphasis added)). Note: The continued viability of the so-called “political process doctrine” derived from the Court’s opinions in *Hunter* and *Seattle*—rejected but not quite overruled in *Schuetz*—is beyond the scope of this article. However, it is worth noting that on several occasions Justice Kennedy cast doubt on the doctrine’s continued viability: “The expansive reading [by the Court of Appeals in] *Seattle* has no principled limitation and raises serious questions of compatibility with the Court’s settled equal protection jurisprudence The rule that the Court of Appeals elaborated and respondents seek to establish here would contradict central equal protection principles.” *Id.* at 1634. And this: “Racial division would be validated, not discouraged, were the *Seattle* formulation . . . to remain in force.” *Id.* at 1635. Justices Scalia and Thomas would entirely “repudiate” the doctrine. *Id.* at 1640 (Scalia, J., concurring).

49. *Bakke*, 438 U.S. at 309. *But cf.*, Justice Ginsburg’s unwavering view that nothing in the Constitution should prevent our flagship institutions from adopting race-conscious policies in order to address “the lingering effects of ‘an overtly discriminatory past’ [and] the legacy of ‘centuries of law-sanctioned inequality.’” *Fisher v. University of Texas at Austin*, 570 U.S. ___, 133 S. Ct. 2411, 2433, 186 L. Ed. 2d 474 (2013) (Ginsburg, J., dissenting) (citing her dissenting opinion in *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003)).

50. *Bakke*, 438 U.S. at 307 (emphasis added).

51. The policy upheld in *Grutter* expressly referenced a “commitment to racial and ethnic diversity with special reference to the inclusion of students from groups *which have been historically discriminated against*, like African-Americans, Hispanics and Native Americans” *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 827–28 (E.D. Mich. 2001) (emphasis added).

52. Compounding *Grutter*’s deviation from the Court’s decisions since its landmark decision in *Brown* (*supra* notes 14–16, and accompanying text), there was no showing in *Grutter* of (a) past discrimination on the part of the University (the University expressly denied any history of past discrimination), or (b) even so much as a claim of “victimization” by any recipient of the preferences being given to under-represented minority applicants. Indeed, Justice Sandra Day O’Connor, who authored the opinion for the narrow majority in *Grutter* observed (ironically quoting her own language from prior cases) that “[i]t is true that some language in [previous] opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action.” She even highlighted the reasoning that justified her previous holdings, noting that “unless classifications based on race are *strictly reserved for remedial*

pense of individuals innocent of any act of discrimination on their part. In other words, it is impossible to deny that the Court in *Grutter* anointed a policy that directly violated Justice Powell's cautionary language in *Bakke* and did so for an entirely non-remedial purpose.⁵³

As a result, Justice Kennedy—who vigorously dissented in *Grutter* based in part on his recognition in *Grutter* that Justice Powell's admonition was being directly violated⁵⁴—clearly struggled to square his pronouncements in *Schuetz* with the obvious conflict presented by his powerful dissent in *Grutter*. In the end, Justice Kennedy's words in *Schuetz* run headlong into his earlier impassioned argument in *Grutter* in such a way as to make the observations in his dicta in *Schuetz* all but incoherent.

To cite just one example, if the question of whether or not to allow racial preferences is one that should be left up to the voters, what prevents voters in any particular region, “after debate and reflection,” from adopting a race-conscious program, even one which conceivably inures to the benefit of members of the *majority* in that area?

Consider, for example, a case where members of a particular racial or ethnic *minority* are demonstrably enrolling in the top schools and entering the top professional jobs in numbers far exceeding their demographic presence in that particular state.⁵⁵ Might the voters in that state, after “debate

settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (emphasis added) (citations omitted) (internal quotation marks omitted).

53. *Id.* at 328 (“Today, we hold that the Law School has a compelling interest in attaining a diverse student body.”); see also *infra* note 84.

54. “[N]either petitioner nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell will be suspended for a full quarter of a century,” *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting), a reference to the “Court’s pronouncement [in *Grutter*] that race-conscious admissions programs will be unnecessary 25 years from now.” *Id.* In this context it also is worth noting that over a half century ago, in 1963, both President John F. Kennedy and Dr. Martin Luther King, Jr. similarly observed, as President Kennedy said in a June 11, 1963 address to the nation: “[Our Nation] was founded on the principle that all men are created equal, and that *the rights of every man are diminished when the rights of one man are threatened.*” John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=9271>) (emphasis added). Earlier that same year, Dr. King expressed a similar sentiment in his famous April 16, 1963 “Letter from a Birmingham Jail”: “Injustice anywhere is a threat to justice everywhere Whatever affects one directly, affects all indirectly.” Martin Luther King, Jr., Letter From a Birmingham Jail 2 (1963) <https://kinginstitute.stanford.edu/king-papers/documents/letter-birmingham-jail>.

55. The historical overrepresentation of Jewish students at the most prestigious colleges and universities has long been understood. This led to the adoption by Harvard College of a so-called “diversity” (but, in fact, subtly anti-Semitic) admissions policy beginning in the early 1960s. This policy, extolled by Justice Powell in *Bakke* as the “Harvard Plan,” *Regents of the University of California v. Bakke*, 438 U.S. 265, 316–17, 321–24 (1978), was in fact instituted in part to reduce, surreptitiously, the number of Jewish students being admitted. See, e.g., Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379, 387–95 (1979); Antonin Scalia, *Commentary: The Disease as Cure*, 1979 WASH. U. L. Q. 147, 147–48 (1979). A similar phenomenon has been seen in more recent years with the dramatic overrepresentation of Asian-American students at many of the

and reflection,” reasonably conclude that “resentments and hostilities” would be reduced if a policy of race preferences were adopted to ensure, say, the representation of members of the majority in numbers commensurate with the majority’s demographic presence? Indeed, would “resentments and hostilities” arguably be reduced, if not entirely eliminated, by the adoption of a pure quota system wherein *every* racial and ethnic group is guaranteed representation in accordance with its demographic presence within a particular community?⁵⁶

But what then happens to every individual’s Fourteenth Amendment guarantee of equal treatment under the law? And of equal importance is whether the concept of a meritocracy based on individual achievement, irrespective of one’s race or ethnicity, would be fundamentally undermined to the detriment of individuals and society as a whole?⁵⁷

D. *The Right Result for the Wrong Reason?*

In *Schuetz*, to provide justification for leaving to voters the question of whether or not to employ race-based policies, Justice Kennedy cites to a 1967 case in which the Court held, “unless the state, county, or municipal government runs afoul of a *federally protected right*, it has vast leeway in the management of its internal affairs.”⁵⁸ This, of course, begs yet another question: Does not every citizen enjoy a *federally protected right* under both the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 *not* to be discriminated against because of his or her race?⁵⁹ And if that is the case, why should the decision of whether or not to employ race-based policies be any more flexible or acceptable—or conceivably subjected to a lower level of scrutiny or given a greater degree of deference—if

Nation’s top schools including, most notably, the two flagship campuses of the University of California system (UC-Berkeley and UCLA). Most recently it has led to a lawsuit against Harvard University based on Harvard’s alleged discrimination (and use of unlawful quotas) against Asian American applicants. *See, e.g., Harvard’s Asian Problem*, WALL STREET JOURNAL ASIA (NOV. 24, 2014), http://online.wsj.com/articles/harvards-asian-problem-1416615041?tesla=y&mod=djemMER_h&mg=reno64-wsj.

56. Of course, the problem of establishing one’s “race” or “ethnicity” would remain and will become increasingly difficult given the rapidly expanding numbers of persons with multi-racial and/or multi-ethnic backgrounds. Such a system would also require constant recalibration to accommodate the inevitable changes within the demographic mix in every state. *See also* Purdy, *supra* note 28, at 377 n.306 (and accompanying text).

57. For example, consider the voluminous data on “intergroup disparities” in various contexts and how meritocracies can be adversely impacted by the use of quotas based on race or ethnic background. Thomas Sowell, *The Vision of the Anointed: The Left and Social Policy*, NATIONAL REVIEW, July 31, 1995, at 34–37 (citing examples as diverse as the overwhelming presence of black athletes in the National Basketball Association to the number of university engineering degrees earned by the Chinese minority in Malaysia in the 1960s when compared to the Malaysian majority).

58. *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (citing *Sailors v. Board of Ed. of County of Kent*, 387 U.S. 105, 109 (1967)) (emphasis added).

59. *See, e.g., Title VI of the Civil Rights Act of 1964, supra* note 17.

left in the hands of voters as opposed to unelected faculty members and/or university administrators?

The language of the Civil Rights Act is now a half-century old. Yet the Court in *Grutter* held that in the case of the University of Michigan, law school faculty members and law school administrators—none of whom face election by the voters in Michigan—have the power to nullify this federally protected right against racial discrimination; and to do so for the flimsiest of reasons having nothing at all to do with remedying past, much less present, discrimination.

One would hope that every jurist would agree that such policies make no judicial, much less constitutional, sense. However, that day has yet to arrive as a review of Justice Sotomayor's dissenting opinion in *Schuetz* makes clear.

E. An Emerging Sotomayor Doctrine on Race?

Perhaps nothing is more disturbing than the fact that throughout her lengthy dissent in *Schuetz*, Justice Sotomayor consistently conflates minority status with an unfounded assumption that all members of the minority in question share identical race-based goals. In other words, her view is that minority interests are predominantly based on their skin color and not on any guaranteed application of the principles of equal opportunity and equal treatment under the law.

By way of example, she writes that “minority members of our society [do not expect] to obtain every single result *they* seek through the political process,”⁶⁰ as if the results “they” seek are dictated by race and are somehow distinct from the results sought by Americans of a different race. She goes on to write about situations in which “[the minority’s] views conflict with those of the majority,”⁶¹ again implying that the views of minorities, as well as those of the majority, are predominantly race-based. Indeed, her invidious stereotyping of minorities, as well as the majority, suffuses Justice Sotomayor’s opinion from beginning to end.

Her opinion quite literally commences with a paragraph suggesting she has little faith in the democratic process. She begins with this: “We are fortunate to live in a democratic society. *But without checks, democratically approved legislation can oppress minority groups.*”⁶² Of course, in the context of race-based discrimination, what “check” is more powerful than the language of the Fourteenth Amendment? Its language bears repeating: “No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

60. *Schuetz*, 134 S. Ct. at 1668 (Sotomayor, J. joined by Ginsburg, J., dissenting) (emphasis added).

61. *Id.*

62. *Id.* at 1651 (emphasis added).

the equal protection of the law.”⁶³ In fact, protecting against *race-based discrimination* by the states or, to put it somewhat differently, protecting against *oppression based on one’s skin color*, was the reason why the Fourteenth Amendment was passed and ratified in the first instance.⁶⁴ Yet Justice Sotomayor seems willing to abandon these protections so long as the victims of such discrimination are not members of her favored groups.

In her dissent, Justice Sotomayor predictably wastes no time before resurrecting our Nation’s racial history and its “long and lamentable record of stymieing the right of racial minorities to participate in the political process.”⁶⁵ She devotes several pages to it.⁶⁶ To repeat a critical point made earlier in this article, openness and candor require us to acknowledge this history; and never to forget it. But to dwell on this history in 2015 and beyond wrongly suggests that the “lamentable” conditions of the past remain static and unchanged.

Moreover, her approach throughout her dissent is filled with classic *strawman* arguments having little or nothing to do with “race,” much less supported by any evidence that minorities will be subjected to oppression under the language upheld by the Court in *Schuette*.

For example, she writes that “[a]s a result of § 26, there are now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State’s universities: one for persons interested in race-sensitive admission policies and one for everyone else.”⁶⁷ She then proceeds to recite exclusively non-race-based examples of a hypothetical Michigan alumnus who “[wants to] advocate for an admissions policy that considers an applicant’s legacy status . . . [or others] who want[] the Board to adopt admissions policies that consider athleticism, geography, area of study, and so on.”⁶⁸ For a sitting Supreme Court justice not to immediately grasp the obvious distinction between these sorts of non-racial preferences⁶⁹ and a preference that directly calls for the consideration of race (a highly suspect class) is dismaying.

63. U.S. CONST. amend. XIV, § 1.

64. “[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.” *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

65. *Schuette*, 134 S. Ct. at 1651 (Sotomayor, J. joined by Ginsburg, J., dissenting).

66. *See id.* at 1654 *et seq.*

67. *Id.* at 1653. Justice Sotomayor’s statement makes little sense. In fact, contrary to her assertion, it is precisely because members of the *majority and minority* alike constitute “persons interested in race-sensitive admissions policies” that the issue resulted in a statewide referendum. And, as she does throughout her opinion, she wrongly implies that a person’s particular “interest[] in race-sensitive admissions” is dictated by his or her skin color. *See id.*

68. *Id.*

69. For example, so-called “legacy” and “athletic” preferences are held in high favor by virtually all schools, including the elite Ivy League Universities. *See, e.g.*, WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 286–87 n.12 (1998). And, in a bit of irony completely lost on Justice Sotomayor, the “athletic preferences” awarded by Michigan’s flagship public universities likely benefit minority athletes to a degree vastly exceeding their presence in the general

Justice Sotomayor's dissent also includes a bizarre discussion on the history of race preference policies at the University of Michigan: "After over a century of being shut out of Michigan's institutions of higher education, racial minorities in Michigan had succeeded in persuading the elected board representatives to adopt admissions policies that took into account the benefits of racial diversity."⁷⁰

Her rendition is largely if not entirely a fictional account of how and why the University of Michigan's race-preference policies were first conceived and adopted. In fact, the first use of race preferences at Michigan's law school, which began in 1966, resulted from decisions made by unelected law school faculty and administrators.⁷¹ The specific policy at issue in *Grutter*, adopted in 1992, was also the work product of the law school faculty, the overwhelming majority of which was white.⁷² The point is a small but important one if openness and candor are to be our guides: race preference policies were not adopted at the University due to "elected board members" being persuaded by "racial minorities."⁷³ These policies were instituted mainly at the behest of "unelected actors," i.e., administrators and law school faculty, the majority of whom were white.⁷⁴

Undeterred, Justice Sotomayor continues with her consistent "we" (the minority) versus "them" (the majority) theme: "In the wake of *Grutter*, some voters in Michigan set out to eliminate the use of race-sensitive ad-

student body population. Similarly, "geographic" preferences and preferences based on socioeconomic status (i.e. "class-based preferences") also can inordinately benefit minority applicants without directly implicating race.

70. *Schuetz*, 134 S. Ct. at 1652 (Sotomayor, J. joined by Ginsburg, J., dissenting).

71. Nothing in the trial court record in *Grutter* suggests that these policies were adopted because of pressure exerted by "racial minorities in Michigan" on "elected board representatives" to "adopt admissions policies that took into account the benefits of racial diversity." *Id.* The facts suggest something quite different. For example, trial exhibit 53 in *Grutter* was a lengthy document entitled "The History of Special Admissions at the University of Michigan Law School, 1966-1981." See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 830-31 n.8 (E.D. Mich. 2001). As the trial court noted in connection with its review of this document, the effort to take race into account in law school admissions was undertaken because "the law school faculty was concerned about the low numbers of black students." *Id.*

72. *Id.* at 825, 834; see also Purdy, *supra* note 28, at 316 (documenting that only one out of approximately forty full-time tenured law school faculty members at the University of Michigan Law School in the mid-1990s was a racial minority).

73. In fact, the University's Board of Regents had adopted a policy that "no person on the basis of race, color . . . [or] national origin . . . shall be discriminated against in . . . admissions," a policy thoroughly at odds with the idea of using race as a factor in admissions. See Purdy, *supra* note 28, at 315 (citing Univ. of Michigan Law School Faculty Handbook 16 (1991)).

74. *Cf.* the position taken by Justice Sotomayor (*Schuetz*, 134 S. Ct. at 1664-65) in which she accuses Associate Justice Steven Breyer of being "incorrect" when he asserts in his separate opinion (*id.* at 1650 (Breyer, J., concurring)) that "admissions-related decision-making" was delegated "to unelected university faculty members and administrators." Justice Breyer noted that "[a]lthough the [elected] boards unquestionably retained the *power* to set policy regarding race-conscious admissions . . . in *fact* [unelected] faculty members and administrators set the race-conscious admissions policies in question." *Id.* (emphasis in original).

missions policies.”⁷⁵ Her all-but-explicit implication is that it was only “majority” (i.e., white) voters who desired to eliminate the race preference programs at the University. Nothing could be further from the truth.⁷⁶ Her entire opinion goes on to suggest that no voter, majority or otherwise, could possibly disagree with her view that race preference policies constitute a “victory” for minorities notwithstanding the fact that the effort to place the referendum on the ballot in Michigan was co-led by noted African-American and former University of California regent, Ward Connerly.⁷⁷ Not only does Justice Sotomayor seem unfamiliar with the facts surrounding the diverse racial and ethnic makeup of many who supported the passage of § 26, she seems oblivious to the pleas of her only black colleague on the Court, Justice Clarence Thomas, who, in case after case, has pointed out that race preference policies, however well intended,⁷⁸ can do immeasurable harm to the very minorities who are the recipients of these preferences.⁷⁹ And Justice Thomas is not alone.

For example, in his response to Justice Sotomayor’s surprisingly personal attack against the plurality in *Schuetz*, Chief Justice Roberts writes that “it is ‘not out of touch with reality’ to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely [the sorts of hurtful judgments outlined by Justice Sotomayor in her dissent] and—if so—that the preferences do more harm than good.”⁸⁰

Justice Sotomayor compounds her “we” versus “them” theme by asserting that the “majority” won the battle to end race preference policies “by stacking the political process against minority groups permanently, *forcing the minority alone to surmount unique obstacles in pursuit of its goals—here, educational diversity* that cannot reasonably be accomplished through race-neutral measures.”⁸¹

Her argument here, again, is puzzling on many levels. First, she seems to insist, rather incomprehensibly, that the voters’ decision to pass a state constitutional amendment that *bans* discrimination based on race is in some sense “stacking the political process against minority groups.” The argu-

75. *Schuetz*, 134 S. Ct. at 1653 (Sotomayor, J. joined by Ginsburg, J., dissenting). Of course, as Justice Kennedy notes, it was not merely “some” voters who desired to see an end to race preferences in admissions. It was a substantial majority (58 percent) of the electorate who put an end to these policies. *Id.* at 1629.

76. See, e.g., various polls and studies cited in *supra* note 5.

77. Mr. Connerly was also one of the principal supporters of a virtually identical ballot measure—the first of its kind—that passed in the State of California in 1996 (known as “Prop 209”).

78. “. . . I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School.” *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J. joined by Scalia, J., concurring in part and dissenting in part).

79. See, e.g., *id.* at 373; see also BOWEN & BOK, *supra* note 69, at 258–68.

80. *Schuetz*, 134 S. Ct. at 1638–39 (Roberts, C.J., concurring); see also discussion *infra* note 86.

81. *Schuetz*, 134 S. Ct. at 1654 (Sotomayor, J. joined by Ginsburg, J., dissenting) (emphasis added).

ment is ludicrous on its face. If banning racial discrimination has somehow evolved into a *defeat* for racial minorities, then the Nation has turned its founding principles on their head.

Second, it boggles the mind to read her assertion that “the minority” sought to implement race preference policies in order to achieve “educational diversity.” In fact, there can be little question that the fundamental goal of those (majority and minority alike) who in good faith supported the use of race-preference admissions policies was simply to expand access of underrepresented minority applicants⁸² to seats in the University’s prestigious law school, seats that otherwise would not be filled with these applicants were race not a dominant factor in admissions. “Educational diversity” as the justification for using race as a factor in admissions was merely the contrived constitutional excuse⁸³ derived from Justice Powell’s “diversity rationale” in *Bakke*⁸⁴ and eventually accepted by the Court in *Grutter*.⁸⁵ It is simply wrong for Justice Sotomayor to suggest that “the minority” sought race preferences to achieve the *educational benefits*⁸⁶ of enrolling a diverse class. Her assertion is nowhere supported in the record before the Court in either *Bakke* or *Grutter*. Indeed, it bears repeating that if anyone was pursuing “educational diversity” as a purported “goal,” it was the administrators and academics at the University—and they were largely white.

82. See discussion *supra* note 71.

83. As noted linguistics Professor John McWhorter once observed, “[T]he ‘diversity’ argument in college admissions . . . has been, from the start, an argument shot through with duplicity and bad faith. It is a craven, disingenuous, and destructive canard, antithetical to interracial harmony and black excellence—and racist besides.” John H. McWhorter, *The Campus Diversity Fraud*, CITY J. 74 (Winter 2002), http://www.city-journal.org/html/12_1_the_campus.html.

84. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 311–20 (1978) (including discussion of the so-called “Harvard College Admissions Program,” appended to Justice Powell’s opinion, *id.* at 321–24).

85. See, e.g., Justice Breyer’s observation in *Schuette*: “[The Court in *Grutter* approved] programs that . . . rest upon ‘one justification’: using ‘race in the admissions process’ *solely* in order to ‘obtai[n] the educational benefits that flow from a diverse student body,’” *Schuette*, 134 S. Ct. at 1649 (Breyer, J., concurring) (emphasis added) (citing *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003)).

86. The proposition that there are demonstrable “educational benefits” derived from enrolling a racially diverse class has proven elusive. This is not to say that there are no educational benefits derived from “diversity,” a point which the plaintiff in *Grutter* willingly conceded (see *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E.D. Mich. 2001)). However, numerous studies suggest that racial diversity in and of itself has little or no meaningful impact on a student’s college or university experience. See, e.g., STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY 344 n.25 (2003) (“In our opinion so far there is no clear-cut evidence demonstrating that [racial] diversity . . . has any meaningful influence on the other students attending the university The data we present . . . show that race sensitive admissions policies likely have at least some negative educational consequences on those they are intended to help.”); see also ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED 363 (1997); Mitchell J. Chang, Racial Diversity in Higher Education: Does a Racially Mixed Student Population Affect Educational Outcomes? 150–51 (1996) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with University of California, Los Angeles). For additional resources and discussion, see Purdy, *supra* note 28, at 342 n.144.

In short, Sotomayor is at best an inaccurate chronicler. What is not in question is this: Justice Sotomayor is a jurist who continues to view the law through a prism of race and ethnicity.

F. Justice Breyer's Expanded Interpretation of *Grutter*

Grutter, for better or worse, eschewed the use of race as a factor in university admissions *save and except* for the effort to achieve the alleged *educational benefits* of enrolling a diverse student body. Yet in *Schuette*, Justice Breyer seems subtly to stretch *Grutter*'s holding beyond that specific limitation.

While Justice Breyer, on the one hand, expressly acknowledges this limitation,⁸⁷ three paragraphs later he writes that “[t]he Constitution allows local, state, and national communities to adopt narrowly tailored race-conscious programs *designed to bring about greater inclusion . . .*”⁸⁸ Of course, his argument flies in the face of *Grutter*'s admonition that using race simply to achieve greater numbers of minorities (or as Justice Breyer phrases it, “greater inclusion”) would be “patently unconstitutional.”⁸⁹

Justice Breyer's concurring opinion in *Schuette* also highlights, albeit unintentionally, the absurdity of the “diversity” doctrine. For example, Justice Breyer “continue[s] to believe that the Constitution permits, though,” he writes, “it does not require, the use of the kind of race-conscious programs that are now barred by the Michigan Constitution.”⁹⁰ But if the alleged educational benefits that flow from a diverse student body constitute a compelling governmental interest (as the *Grutter* Court found with Justice Breyer concurring), and if, according to the University of Michigan (or any university), these so-called educational benefits can never be achieved without resorting to race-conscious programs, by what rationale does the Court ever strike down their use?⁹¹

Indeed, if the educational value of enrolling a diverse class truly constitutes a compelling state interest that requires the use of racially discriminatory policies in public school admissions in order to obtain these benefits, should not all states be required to adopt such policies? The upshot is that Justice Breyer seems to view the “diversity rationale” as something that a state may put forth to justify a program of racial preferences; or, conversely, a state is equally free to ignore this same rationale and thereby

87. *Schuette*, 134 S. Ct. at 1649 (Breyer, J., concurring).

88. *Id.*

89. “The Law School’s interest is not simply ‘to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.’ That would amount to outright racial balancing, which is patently unconstitutional.” *Grutter*, 539 U.S. at 329–30 (citations omitted).

90. *Schuette*, 134 S. Ct. at 1649 (Breyer, J., concurring).

91. Alternatively, would each such school be awarded a fresh 25-year time limit (as judicially legislated in *Grutter*) within which to justify its use of racial preferences in admissions? See discussion *infra* note 92.

prohibit such programs, their purported educational value notwithstanding. Either way seems perfectly acceptable to Justice Breyer and (in a troubling way) also to Justice Kennedy. But is not their view more akin to a “reasonableness” standard when it comes to the adoption, or rejection, of race-based preferences rather than one of strict scrutiny when it comes to assessing the use of suspect racial classifications?

There are, of course, many other practical difficulties surrounding the diversity rationale, not least of which is that *Grutter* held that this particular compelling “interest” would expire twenty-five years after *Grutter* was decided (i.e., circa 2028).⁹² But, again, the Court’s action in *Grutter*, in *Fisher* and, more recently, in *Schuette*, begs this question: If the educational benefits of enrolling a diverse student body are truly “compelling” and if, for whatever reason, any school is still claiming in 2028 and beyond an inability to achieve sufficient diversity to obtain those educational benefits without continuing to use race as a factor in admissions, upon what basis would that school’s permission to do so expire? Indeed, upon what basis would this rationale ever expire?

So the question going forward is this: Do *Grutter*, *Fisher*, and *Schuette* suggest the only certain means of ending race preference admissions programs is state-by-state via referenda that mirror the constitutional changes wrought in Michigan by § 26?⁹³ If nothing else, *Schuette* seems clearly to uphold the right of the citizens in each state to do just that.

On the other hand, the converse also seems true, viz., under Justice Kennedy’s dicta in *Schuette*, a state seemingly could decide to institute, via voter referendum, an admissions program that expressly includes the use of race preferences.⁹⁴ Of course, whether such a program, established in the same democratic fashion as § 26, would survive constitutional challenge would depend upon its specific features.⁹⁵

92. “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” *Grutter*, 539 U.S. at 343. An interesting coalition was formed in *Grutter* to insist that the Court’s reference to a 25-year limit was not mere surplusage. In order to accomplish that, both Justice Scalia and Justice Thomas joined in that portion—and only that portion—of the Court’s opinion. See *id.* at 378 (Thomas, J., joined by Scalia J. as to Parts I–VII, concurring in part and dissenting in part).

93. See *infra* note 102.

94. “Perhaps, when enacting policies as an exercise of democratic self-government, voters will determine that race-based preferences should be adopted. The constitutional validity of some of those choices regarding racial preferences is not at issue here.” *Schuette*, 134 S. Ct. at 1635 (emphasis added).

95. *Id.*

II. DOES THE EVOLUTION OF RACE-PREFERENCE ADMISSIONS
 JURISPRUDENCE SIGNAL THE EFFECTIVE OVERRULING
 OF *BROWN V. BD. OF EDUCATION*?

The opinions of [May 17, 1954], declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle.⁹⁶

Brown's edict was clear. Or so it seemed until *Grutter* was decided. However, the questions going forward are many, including why *Brown's* unanimously announced "fundamental principle" did not summarily dictate the outcome in each public school admissions case decided since 1954, including *Bakke*, *Grutter*, *Gratz*, *Parents Involved*, *Fisher*, and now *Schuetze*. Why, for example, did *Brown's* principle not result in summarily striking down the use of race as a factor in admissions in both *Grutter* and *Fisher*? Indeed, why does *Brown's* fundamental principle not dictate that in every case involving public school admissions—except where *de jure* discrimination and demonstrable injury have been shown—racial discrimination will not be tolerated?⁹⁷

In the meantime, here is one final question worth pondering: If the Court, consistent with *Brown*, had reached outcomes striking down each instance where race was being used in public school admissions for a non-remedial purpose (as buttressed by the language of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964⁹⁸), then would the state of race relations—not to mention the academic achievement of black students—in the United States be better or worse as we approach the third decade of the twenty-first century?

CONCLUSION

On June 11, 1963, just a few short months before he was assassinated, President John F. Kennedy told the American people that "race has no place in American life or law."⁹⁹ We should never forget his memorable words. Nor should we shy from comparing them with the dispiriting words of Jus-

96. *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955).

97. It is a subject the author has briefly addressed in previous law review articles. See R. Lawrence Purdy, *Fisher v. University of Texas at Austin: Grutter (Not) Revisited*, 79 U. Mo. L. REV. 1, 21–26 (Winter 2014); see also Purdy, *supra* note 28, at 343–44 and accompanying notes.

98. Cf. Justice John Paul Stevens's opinion in *Bakke*, wherein he wrote: "The University [of California—Davis]'s special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding [Allan] Bakke from the Medical School because of his race. It is therefore our duty to affirm the judgment ordering Bakke admitted to the University." *Regents of the University of California v. Bakke*, 438 U.S. 265, 421 (1978) (Stevens, J. joined by Stewart, C.J. and Rehnquist, J., concurring in part and dissenting in part) (noting that "It is . . . perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.").

99. John F. Kennedy, *supra* note 54.

tice Sotomayor, who—over fifty years later—ironically affirms the opposite proposition, one advanced by old-time segregationists, that “race matters.”¹⁰⁰

While President Kennedy understood the importance of passing legislation to outlaw racial discrimination, he also understood that racial animosity itself was “primarily a moral issue” and that “law alone cannot make men see right.”¹⁰¹ President Kennedy recognized that no governmental act or court ruling can perfectly cleanse the human heart. To the extent caution, if not outright bias, based on race or ethnicity may be hard-wired into a human being’s DNA, no government fiat can convert *imperfect* man into a *perfect* model of inclusiveness and camaraderie. But that is no excuse for condoning laws or policies that accommodate man’s imperfections by enabling racial discrimination to continue; or for failing vigorously to pass and enforce laws, such as Article I, § 26 of the Michigan State Constitution, that ban such discrimination.

In order to move the nation forward when it comes to race, it is respectfully submitted that there would be no more fitting act than for every state to pass—and be bound by—legislation containing the language newly enshrined in Michigan’s Constitution¹⁰² and, in the process, take the final step towards achieving Dr. Martin Luther King, Jr.’s dream.¹⁰³ It will not happen, however, so long as justices sitting on our highest Court continue to promote the destructive mantra that “race matters.”¹⁰⁴

100. *Schuetz*, 134 S. Ct. at 1676 (Sotomayor, J. joined by Ginsburg, J., dissenting).

101. John F. Kennedy, *supra* note 54.

102. As of this writing, six states have passed referenda banning the use of race as a factor in public education admissions (California, Washington, Michigan, Nebraska, Arizona, and Oklahoma). Two other states have instituted similar bans via executive action or through state court decisions (Florida and New Hampshire, respectively).

103. MARTIN LUTHER KING, JR., *THE WORDS OF MARTIN LUTHER KING, JR.* 95 (Jean Highland ed., 1983): “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”

104. *Schuetz*, 134 S. Ct. at 1676 (Sotomayor, J. joined by Ginsburg, J., dissenting).