

Should the Supreme Court Take Note of “Th’ Iliction Returns” Next Time It Addresses Race-Preferential Admissions Policies?

By Gail Heriot & Alexander Heideman

Civil Rights Practice Group

“[N]o matter whether th’ constitution follows th’ flag or not, th’ Supreme Court follows th’ illiction returns.”

– Mr. Dooley¹

About the Authors:

Gail Heriot is Professor of Law at the University of San Diego, a member of the U.S. Commission on Civil Rights, and Co-Chair of the Californians for Equal Rights/NO on Proposition 16 Campaign. Alexander Heideman is Special Assistant and Counsel to Commissioner Heriot at the U.S. Commission on Civil Rights.

Mr. Dooley—the fictional creation of early 20th-century journalist Finley Peter Dunne—was at times too cynical. It was unfair for him to suggest that the Supreme Court simply follows the election returns—though, alas, over its long history, there have certainly been occasions when the Court unjustifiably bowed to public opinion.² On the whole, however, had members of the Court taken a bit of umbrage at Mr. Dooley’s cynicism, it would have been understandable.

Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

On the other hand, no less a Supreme Court authority than Justice Sandra Day O’Connor, in her 2003 book *The Majesty of the Law*, has taken the position that sometimes popular sentiments really should make a difference to courts:

Other Views:

- Amaka Okechukwu, *Prop 16’s Defeat and the Future of Affirmative Action*, INSIDE HIGHER ED, Nov. 30, 2020, <https://www.insidehighered.com/admissions/views/2020/11/30/despise-defeat-prop-16-affirmative-action-remains-important-tool-society>.
- Editorial, *Californians, Vote Yes on Prop 16*, N.Y. TIMES, Oct. 27, 2020, <https://www.nytimes.com/2020/10/27/opinion/california-prop-16-affirmative-action.html>.
- Eric Hoover, *Failure of California’s Prop. 16 Underscores Complexity of Affirmative-Action Debate*, CHRONICLE, Nov. 4, 2020, <https://www.chronicle.com/article/failure-of-californias-prop-16-underscores-complexity-of-affirmative-action-debate>.
- Abbygail de Castro, *Students and faculty voice concerns after Prop. 16 was rejected*, THE COLLEGIAN, Dec. 1, 2020, <https://collegian.csufresno.edu/2020/12/students-and-faculty-voice-concerns-after-prop-16-was-rejected/#.YE-dLZ1KjD4>.

[R]eal change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not the careful byproduct of an emerging social consensus.”³

Justice O’Connor did not fully elaborate on her point, and we won’t try to put words in her mouth. Obviously, the Constitution and popular sentiments are two different things. Sometimes they conflict. When they do, it’s the Court’s job to stand firmly with the Constitution. That’s why we have a Constitution. Still, that doesn’t rule out the possibility that there may be occasions on which the Supreme Court should take public sentiment into account.

Legal philosophers could probably write treatises on this topic: Under what circumstances should courts consider public opinion? When should they not? This short essay is not such a treatise. Instead, it will focus on how Justice O’Connor’s statement was interpreted at the time her book was published and why that may have relevance to future cases coming before the Court, perhaps even as soon as the spring of 2021.

The Majesty of the Law was arriving at bookstores just about the time of oral argument in *Grutter v. Bollinger* (2003).⁴ Two months later, when the Court announced its decision upholding the University of Michigan Law School’s race-preferential

1 ELMER ELLIS, MR. DOOLEY’S AMERICA: A LIFE OF FINLEY PETER DUNNE 162 (1941).

2 See, e.g., *Giles v. Harris*, 189 U.S. 475 (1903); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

3 SANDRA DAY O’CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 166 (2003).

4 539 U.S. 306 (2003). Oral argument in *Grutter* was held on April 1, 2003. *Grutter v. Bollinger*, OYEZ, <https://www.oyez.org/cases/2002/02-241>. See Publisher’s Weekly, Book Notice: The Majesty of the Law: Reflections of a Supreme Court Justice, <https://www.publishersweekly.com/9780375509254> (giving publication date as April 1, 2003).

admissions policy, O'Connor turned out to be the opinion's author, and commentators naturally looked to her book to help explain that result.

The best example is the *New York Times*. Two days after the *Grutter* decision, reporter Linda Greenhouse cited O'Connor's words in *The Majesty of the Law* and drew the following inference:

For Justice O'Connor, the *broad societal consensus in favor of affirmative action in higher education* as reflected in an outpouring of briefs on Michigan's behalf from many of the country's most prominent institutions was clearly critical to her conclusion⁵

We will raise four points in response to Greenhouse's inference:

- I. There was no such "broad societal consensus" in favor of race-preferential admissions policies in 2003. Indeed, public opinion was—and remains—opposed to such policies. Thus, if Greenhouse was correct about O'Connor's reasoning, O'Connor was mistaken.
- II. Even if there had been such a "broad societal consensus," it should not have excused the Court from its obligation to strictly scrutinize the University of Michigan's racially discriminatory admissions policy. Unfortunately, by purporting to "defer" to the university's judgment on whether the need for racial diversity in education is "compelling," Justice O'Connor essentially admitted that the Court was not scrutinizing the policy with the level of care that had become customary in racial discrimination cases up to that point.⁶
- III. With the overwhelming rejection of California's Proposition 16 in the November 2020 elections, it has become all the more clear that a broad societal consensus really does exist on race-preferential admissions policies, but it's against such policies, not in favor. Certainly, therefore, if Justice O'Connor based her opinion in *Grutter* in part on the belief that Americans were favorably disposed toward race-preferential admissions (at least for the short term), that reasoning can be safely dismissed now. With *Students for Fair Admissions v. President and Fellows of Harvard College* likely to come before the Court in the near future, the lesson of

Proposition 16's defeat should be (and likely will be) drawn to the Court's attention.⁷

- IV. Unlike a broad agreement *in favor* of a racial preferential admissions policies, a broad agreement *against* them is something courts arguably *should* take into account. How can a governmental interest be compelling (as it is required to be under the applicable legal standard of strict scrutiny) if most Americans don't find it even persuasive?

I. RACE-PREFERENTIAL ADMISSIONS POLICIES HAVE NEVER BEEN POPULAR

Greenhouse noted that the amicus curiae briefs filed in *Grutter v. Bollinger* were strongly on the side of the University of Michigan.⁸ True enough. By our count, there were 69 such briefs submitted in support of Michigan, while only 19 (four of which were filed at the petition stage) supported plaintiff Barbara Grutter. That understates the number of "persons" submitting briefs. One brief supporting the university was submitted on behalf of 13,922 law students;⁹ another was submitted on behalf of 28 private colleges and universities.¹⁰ None of the briefs in support of the plaintiff was submitted on behalf of that many individuals or institutions.¹¹

But that's a silly way to gauge "societal consensus." It should go without saying that those motivated to file amicus curiae briefs in the Supreme Court are not a cross-section of American opinion on the topic being litigated. Many of the amici supporting the university were either themselves colleges or universities or administrators at a college or university. Many others were government entities or government officials. Many of both sets of amici were practitioners of race preferences themselves. It hardly makes sense to view them as representative of the public at large. Many of the rest were students, alumni, or associations of students or alumni. A large number of those likely perceived themselves to be beneficiaries of the admissions policies at issue. Again, it makes no sense to view them as a cross-section of the general public.

A better—though admittedly imperfect—way to gauge public opinion is through public opinion polls. Here the evidence is consistent: In the decades before and after *Grutter*, polls showed, over and over again, that Americans oppose race-preferential admissions. For example, a Gallup poll asked the following question in 2003, the same year that *Grutter* was decided:

5 Linda Greenhouse, *The Supreme Court: The Justices: Context and the Court*, N.Y. TIMES, June 25, 2003, at A1 (italics supplied). The passage referring to Justice O'Connor's book read:

In her new book "The Majesty of the Law," a collection of essays published the week after the Michigan cases were argued in April, Justice O'Connor wrote that "courts, in particular, are mainly reactive institutions." Noting that "change comes principally from attitudinal shifts in the population at large," she said that "rare indeed is the legal victory—in court or legislature—that is not a careful byproduct of an emerging social consensus."

6 Compare Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243 (2010) with 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) (calling the strict scrutiny standard "strict' in theory and fatal in fact").

7 *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, No. 19-2005, 2020 WL 6604313, at *1 (1st Cir. Nov. 12, 2020); e-mail from Edward Blum, President, Students for Fair Admissions (Nov. 12, 2020, 06:37 PST) (on file with authors).

8 Greenhouse, *supra* note 5.

9 Brief of 13,922 Current Law Students at Accredited American Law Schools as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241).

10 Brief of Carnegie Mellon University and 37 Fellow Private Colleges and Universities as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241).

11 On the other hand, one of the briefs supporting Ms. Grutter was submitted by the Solicitor General on behalf of the United States, which could be viewed as constructively speaking for 290 million Americans.

Which comes closer to your view about evaluating students for admission into a college or university—applicants should be admitted solely on the basis of merit, even if that results in few minority students being admitted (or) an applicant’s racial or ethnic background should be considered to help promote diversity on college campuses, even if that means admitting some minority students who otherwise would not be admitted?¹²

In responding to that question, 69% of Americans choose “solely on the basis of merit”; only 27% thought race and ethnicity should be considered. That result was no fluke. Gallup asked precisely the same question in 2007, 2013, and 2016.¹³ Each time, the result was the same: Americans rejected the consideration of race or ethnicity by a margin of at least 2 to 1. Earlier polls are consistent with that result.¹⁴ An even more recent poll by the Pew Research Center is also consistent. According to that poll, 73% of Americans said colleges and universities should not consider race or ethnicity when making decisions about student admissions.¹⁵

This is why supporters prefer to talk about the issue in terms of euphemisms—like “affirmative action”—which mean different things to different people.¹⁶ As one jurist put it:

The term “affirmative action” has entered our common parlance Although the frequent topic of discussion, the term is rarely defined in advance so as to form a common

base for intelligent discourse. This lack of definition (sometimes perhaps deliberate . . .) is responsible for much of the confusion, misunderstanding, and disagreement regarding the subject.¹⁷

Under the circumstances, it is unsurprising that “affirmative action” polls better for supporters of race-preferential admissions than does any more clarifying description of race-preferential admissions policies.¹⁸

Voter behavior does not always track opinion polls, but in this case it does. In 1996, seven years before *Grutter*, Californians demonstrated their opposition to race-preferential admissions by passing Proposition 209. In doing so, they amended their state constitution to include the following prohibition:

and that employees are treated during employment, without regard to their race, creed, color, or national origin.

Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 8, 1961) (emphasis added). In context, this refers to training supervisors, posting signs guaranteeing nondiscrimination, supervising hiring officials to ensure that they are not discriminating. The point was to *prevent* preferential treatment, not to promote it. This remains an important meaning of affirmative action. In 1965, President Lyndon Johnson repeated the term “affirmative action” in Executive Order 11,246. 30 Fed. Reg. 12,319 (Sept. 28, 1965). By this time, various kinds of “outreach” were also being talked about as an “affirmative action” that employers could take to ensure opportunity. Outreach, however, is qualitatively different from the kind of preferential treatment practiced by colleges and universities like the University of Michigan.

In *Lungren v. Superior Court*, a California court pointed out that the term “affirmative action” encompasses much that is neither discrimination nor preferential treatment (as prohibited by Proposition 209). 48 Cal. App. 4th 435, 55 Cal. Rptr. 2d 690 (Cal. Ct. App. 1996) The opinion concludes that “any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence ‘false and misleading.’” As proof, it provides the following string citation of definitions:

(See, e.g., Random House Dict. of the English Language (2d ed. 1987) p. 34, c. 1 [“the encouragement of increased representation of women and minority-group members, especially in employment.”]; American Heritage Dict., New College Ed. (1976) p. 22, cl. 1 [“Action taken to provide equal opportunity, as in hiring or admissions, for members of previously disadvantaged groups, such as women or minorities, often involving specific goals and timetables.”]; Black’s Law Dict. (5th ed. 1983) p. 29, col. 2 [“Employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e. designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination. . . .”]; Garner, Bryan A., Dict. of Modern Legal Usage (2d ed. 1995) p. 36, c. 1 [“The phrase is sometimes used generically to denote ‘a positive step taken,’ as well as more specifically to denote ‘an attempt to reverse or mitigate past racial discrimination”]; see also 59 Ops. Cal. Atty. Gen. 87, 90-91.)

Lungren, 48 Cal. App. 4th at 442.

- 17 Dawn v. State Personnel Board, 91 Cal. App. 3d 588, 593, 154 Cal Rptr. 186 (Cal. Ct. App. 1979) (Paras, J. concurring).
- 18 Jim Norman, Americans’ Support for “Affirmative Action” Programs Rises, GALLUP, Feb. 27, 2019, <https://news.gallup.com/poll/247046/americans-support-affirmative-action-programs-rises.aspx>.

12 Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, GALLUP, July 8, 2016, <https://news.gallup.com/poll/193508/oppose-colleges-considering-race-admissions.aspx>.

13 *Id.*

14 See WASH. POST ET AL., RACE AND ETHNICITY IN 2001: ATTITUDES, PERSPECTIVES, AND EXPERIENCES 22 (2001), <https://www.kff.org/other/poll-finding/race-and-ethnicity-in-2001-attitudes-perceptions/> (“In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired, promoted, or admitted to college, or that hiring, promotions, and college admissions should be based strictly on merit and qualifications other than race or ethnicity?” Of the 1,709 adults polled, 5 percent responded that “race or ethnicity should be a factor,” 3 percent said “don’t know,” and 92 percent said “should be based strictly on merit and qualifications other than race/ethnicity.”); Larry D. Hatfield, *Prop 209 Leads by 14% in Poll*, S.F. EXAMINER, Nov. 4, 1996, <https://www.sfgate.com/news/article/Prop-209-leads-by-14-in-poll-3116305.php>; PAUL SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (1993) (citing a number of polls indicating that race-preferential admissions have little support among members of the public).

15 *Most Americans Say Colleges Should Not Consider Race Or Ethnicity In Admissions*, PEW RES. CTR. (Feb. 25, 2019), <https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/>; see also RACE AND ETHNICITY IN 2001, *supra* note 14 at 22 (finding that 94 percent of whites and 86 percent of African Americans said hiring, promotions, and college admissions should be based “strictly on merit and qualifications other than race/ethnicity”).

16 The term “affirmative action” in this context is traceable back to President John F. Kennedy’s Executive Order 10,925. That order states in relevant part:

The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take *affirmative action to ensure that applicants are employed,*

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.¹⁹

Significantly, California was not alone in rejecting racial preferences. Voters in Washington State and Michigan passed similar initiatives in 1998 and 2006, respectively.²⁰ Voters followed suit in Nebraska in 2008,²¹ Arizona in 2010,²² and Oklahoma in 2012.²³ Only in Colorado in 2008 did such a statewide initiative fail.²⁴

No wonder public opinion experts Paul Sniderman and Thomas Piazza were able to write even as early as 1993 that the race-preferential policy agenda “is controversial precisely because most Americans do *not* disagree about it.”²⁵ As these scholars demonstrated, opposition has always been strong.²⁶

Far from being a consensus policy, race-preferential admissions have been imposed from the top down. Where voters

have had access to an initiative process, it has been possible to overturn it. But in those states in which a popular initiative along the lines of Proposition 209 is not an option, elected officials have often left the policies alone. This, of course, could mean that they favor government institutions having the discretion to discriminate. Alternatively, it could mean that they subscribe to the traditional attitude that legislators should maintain a hands-off position toward institutions of higher learning. But it could also be—and we believe it is—in part the result of the more modern reticence of elected officials to speak out on issues of race, sex, or ethnicity, and instead to leave such matters to the courts. Elected officials are fearful of providing fodder to those eager to tar them as racists.²⁷ That fear sometimes prevents them from acting in the best interests of the country.

The one group that is reliably in strong support of race-preferential admissions policies is college and university administrators. But why wouldn't they approve of policies that give them nearly unfettered discretion? Interestingly, at least as of 2003, when the *Grutter* decision came down, the evidence called into question whether even university faculty members supported racial preferences.²⁸

II. *GRUTTER V. BOLLINGER'S* “STRICT SCRUTINY LITE”

Even if there had been a “broad societal consensus in favor of affirmative action in higher education,” that would not have been cause for the Court to dispense with the application of strict scrutiny to the University of Michigan's discriminatory policies. Among the Court's most important roles is its duty to pull the nation back from the brink when it is tempted by the path of race discrimination. That obligation is what the strict scrutiny standard is all about. But did the Court fulfill that role in *Grutter*? We believe it did not. Indeed, Justice O'Connor's opinion makes that plain.

Grutter and its companion case, *Gratz v. Bollinger*,²⁹ were arguably the most important cases before the Court in the

19 CAL. CONST. art. I § 31.

20 See generally Carl Cohen, *The Michigan Civil Rights Initiative and the Civil Rights Act of 1964*, 105 MICH. L. REV. FIRST IMPRESSIONS 117 (2006). See also Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 572 U.S. 291 (2014).

21 *Official Results of Nebraska General Election – November 4, 2008*, NEB. SEC'Y OF STATE (2008), <https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2008/2008%20General%20Canvass%20Book.pdf>; Melissa Lee, *Affirmative Action Ban Passes*, LINCOLN J. STAR, Nov. 5, 2008, at 7A.

22 *State of Arizona Official Canvass: 2010 General Election – November 2, 2010*, ARIZ. SEC'Y OF STATE (2010), <https://apps.azsos.gov/election/2010/General/Canvass2010GE.pdf>; *Affirmative-Action Ban is a Winner at Ballot Box*, ARIZ. DAILY STAR, Nov. 3, 2010, at A10.

23 *Federal, State, Legislative and Judicial Races General Election – November 6, 2012*, OKLA. STATE ELECTION BD., https://www.ok.gov/elections/support/12gen_seb.html (last visited Feb. 9, 2021); Silas Allen, *State Colleges Prepare for Affirmative Action Ban*, OKLAHOMAN, Nov. 8, 2012, at 7A.

24 Tim Hoover, *Amendment 46 Fizzling Out*, DENVER POST, Nov. 6, 2008, <https://www.denverpost.com/2008/11/06/amendment-46-fizzling-out/>.

25 Sniderman & Piazza, *supra* note 14. Later, Dr. Sniderman partnered with Edward G. Carmines to study the correlation between opposition to racial preferences and racial intolerance. Lo and behold, it turns out the accusations that preference opponents are motivated by racism are untrue. Among the group found to be in the top one percent in racial tolerance, opposition to preferential treatment was very high. Approximately 80 percent opposed preferential treatment in hiring, and more than 60 percent opposed quotas in college admissions. Sniderman and Carmines wrote that “the fundamental fact is that race prejudice, far from dominating and orchestrating the opposition to affirmative action, makes only a slight contribution to it.” PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* 20-22 (1997).

26 At the same time, Sniderman and Piazza found this opposition tended to be firmer and less malleable than the positions taken by poll respondents on other issues. For example, they asked white poll respondents who opposed racial quotas in higher education if their views would change “if it mean[t] that hardly any blacks would be able to go to the best colleges and universities.” They found opinions changed less on this issue than on what they called “more traditional forms of governmental assistance for the disadvantaged.” SNIDERMAN & PIAZZA, *supra* note 14, at 142.

27 See, e.g., Brent Budowsky, *Newt Gingrich's Racist Campaign is Dying*, THE HILL, Mar. 22, 2012, <https://thehill.com/blogs/pundits-blog/presidential-campaign/217563-newt-gingrichs-racist-campaign-is-dying>; Mehdi Hasan, *The Ignored Legacy of George H.W. Bush: War Crimes, Racism, and Obstruction of Justice*, THE INTERCEPT, Dec. 1, 2018, <https://theintercept.com/2018/12/01/the-ignored-legacy-of-george-h-w-bush-war-crimes-racism-and-obstruction-of-justice/>; Joan McCarter, *Mitch McConnell is Really Letting His Racism Show These Days*, DAILY KOS, May 15, 2020, <https://www.dailykos.com/stories/2020/5/15/1945362/-McConnell-s-really-letting-his-racism-show-these-days>; Robert Moore, *Frist for the Mill? Senate Majority Leader Aspirant Has Race-Related Controversy in His Past*, CTR. FOR PUB. INTEGRITY, Dec. 20, 2002, <https://publicintegrity.org/accountability/frist-for-the-mill-senate-majority-leader-aspirant-has-race-related-controversy-in-his-past/>.

28 See, e.g., Thomas Wood, *Who Speaks for Higher Education on Group Preferences?*, 14 ACADEMIC QUESTIONS 31 (Spring 2001); Robert A. Frahm, *Debate Erupts Over UConn Survey Poll: Professors Oppose Racial “Preferences”*, HARTFORD COURANT, April 19, 2000; Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 MINN. L. REV. 1233 (1988). We are unaware of any polling data that contradicts the data in these sources, but to our knowledge there have been no additional polls of academics on the subject.

29 539 U.S. 244 (2003).

2002-03 term. They received considerable media attention.³⁰ *Grutter* focused on the admissions policy at University of Michigan's law school, whereas *Gratz* focused on the admissions policy at University of Michigan's College of Literature, Science, and the Arts.

In neither case was the university able to deny that it was giving preferential treatment in admissions based on race. It obviously was, and it was just as obvious that that racial preference was not merely a tiny thumb on the scale. The level of preferential treatment was very high in both cases. For example, in *Gratz*, African American applicants with a B average (3.0) were treated the same as Asian American or white applicants with an A average (4.0) all other things being equal.³¹

Instead of denying that it was discriminating, the university argued that having racially diverse classes was, for pedagogical reasons, a compelling purpose and that its admissions policies were narrowly tailored to achieve that end. Hence, it argued, even if the strict scrutiny standard is applicable, its admittedly discriminatory policies should survive that scrutiny.³²

Unsurprisingly, the Court held that the strict scrutiny standard did apply (just as it would to any other racially discriminatory state action). But ultimately, the Court held that the law school's admissions policy satisfied the high bar set by that standard. (The *Gratz* case was ultimately decided on a tangential issue and hence was a far less important decision than *Grutter*.)³³

Rather than closely scrutinizing the university's argument that the pedagogical need for diversity among its students is compelling, the Court announced that it would "defer" to the university's academic judgment on that matter.³⁴ That allowed the Court to avoid the uncomfortable job of closely analyzing

the university's claim. Deference, however, is the opposite of strict scrutiny. The whole point of strict scrutiny is to ensure that race discrimination is only engaged in when the need for it is compelling (and even then only when it is narrowly tailored to serve that compelling need). It is the Court's job to conduct "a most searching examination."³⁵

Imagine if the Court had deferred to the academic judgment of the Topeka Board of Education in *Brown v. Board of Education* (1954). We might still be in the throes of Jim Crow. At the time, there was no shortage of educational experts willing to testify that racially segregated education was pedagogically sound.³⁶

If the erroneous belief that there was a broad societal consensus that race-preferential admissions policies are desirable had anything to do with the result in *Grutter*, it was a serious error. But even if it didn't, the result was still a serious error. One can imagine the Court declining to grant a petition for certiorari in a case that it views as too hot to handle. But watering down the strict scrutiny standard by deferring to the discriminating party on the question of whether the argument for such discrimination is compelling is inexcusable.

III. THE DEFEAT OF PROPOSITION 16

Here's some news: On November 3, 2020, California voters shocked the state's political establishment by rejecting Proposition 16. It wasn't close: 57.2% voted against; only 42.8% in favor.³⁷

Proposition 16 would have stripped the state constitution of the words put there by Proposition 209 in 1996. It would thus have *permitted* the government and public institutions to discriminate against or grant preferential treatment to persons on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting.³⁸

The final tally suggests that racial preferences are less popular than they were in 1996.³⁹ Proposition 209 itself had passed with 54.55% of the vote, though its clones in other states tended to

30 See, e.g., Karen Branch-Brioso, *Top Court Backs Affirmative Action*, ST. LOUIS POST-DISPATCH, June 24, 2003, at A1; James M. O'Neill, *Court Upholds Use of Race in Admissions*, PHILA. INQUIRER, June 24, 2003, at A1; David G. Savage, *Court Affirms Use of Race in University Admissions*, L.A. TIMES, June 24, 2003, at A1.

31 *Gratz*, 539 U.S. 244; Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment on Liability, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-CV-75231-DT), available at <https://www.yumpu.com/en/document/read/7622869/barbara-grutter-plaintiff-vs-lee-bollinger-jeffrey->. See also Gail Heriot & Carissa Mulder, *The Sausage Factory, in A DUBIOUS EXPEDIENCY: HOW RACE PREFERENCES DAMAGE HIGHER EDUCATION* (Gail Heriot & Maimon Schwarzschild eds., 2021).

32 No legal doctrine is more familiar to students of constitutional law than the strict scrutiny test. Its requirements of a "compelling purpose" and "narrow tailoring" are the stuff of which multiple choice questions on the bar examination can be made. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 639 (6th ed. 2000). See also Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 HARV. J. LEGIS. 217 (2003).

33 Jennifer Gratz won her case, but only because the admissions policy in that case was considered by the Court to be overly formulaic. The *Gratz* decision has had little to no effect on race-preferential admissions policies, since that aspect of any policy could be easily eliminated without reducing the level of racial discrimination in the least.

34 *Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.")

35 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1984) (plurality opinion)).

36 In *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013), Justice Thomas stated,

Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950s, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, see *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the alleged educational benefits of diversity cannot justify racial discrimination today.

570 U.S. at 320 (Thomas, J. concurring).

37 *Official Declaration of the Vote Results on November 3, 2020, State Ballot Measures*, CAL. SEC'Y OF STATE, <https://elections.cdn.sos.ca.gov/sov/2020-general/sov/official-dec-vote-results-bm.pdf> (last visited Feb. 9, 2021).

38 *Prop 16*, CAL. SEC'Y OF STATE, <https://voterguide.sos.ca.gov/propositions/16/> (last visited Feb. 9, 2021).

39 See Conor Friedersdorf, *Why Californians Rejected Racial Preferences, Again*, THE ATLANTIC (Nov. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/why-california-rejected-affirmative-action-again/617049/>.

do better. For example, Washington State's passed with 58.22% of the vote, Michigan's with 57.92%, Nebraska's with 57.56%, Arizona's with 59.5%, and Oklahoma's with 59.2%.⁴⁰

It wasn't always obvious—even to its most dedicated opponents—that Proposition 16 was doomed to failure. For a while, Proposition 16 had looked like a train coming downgrade. It flew out of the state's legislature, garnering more than two thirds of the vote in each house. A plethora of influential government officials, businesses, newspapers, and advocacy organizations endorsed it, including now-Vice President Kamala Harris, U.S. Senators Dianne Feinstein and Bernie Sanders, Governor Gavin Newsom, and the mayors of Los Angeles and San Francisco.⁴¹

Supporters of Proposition 16, buoyed by the protests of racial injustice following the death of George Floyd earlier in the year, urged Californians to “cast their ballots for a simple measure advancing that cause: undoing two decades of educational and economic setbacks for Black and Latino Californians.”⁴² They “dwarfed their opponents in fundraising by nearly a 14-1 margin.”⁴³ Big businesses and big labor unions showered money on the “Yes on 16” campaign. Among those donating were Pacific Gas & Electric (\$250,000), Kaiser Foundation Health Plan, Inc. (\$1,500,000), United Domestic Workers of America Issues PAC (\$100,000), Salesforce.com, Inc. (\$375,000), SEIU Local 2015 Issues PAC (\$50,000), and Genentech USA (\$100,000).⁴⁴

40 California Proposition 209, Affirmative Action Initiative (1996), https://ballotpedia.org/California_Proposition_209_Affirmative_Action_Initiative (1996); Washington Initiative 200, Affirmative Action Initiative (1998), https://ballotpedia.org/Washington_Initiative_200_Affirmative_Action_Initiative (1998); Michigan Proposal 2, Affirmative Action Initiative (2006), https://ballotpedia.org/Michigan_Proposal_2_Affirmative_Action_Initiative (2006); Nebraska Measure 424, Affirmative Action Initiative (2008), https://ballotpedia.org/Nebraska_Measure_424_Affirmative_Action_Initiative (2008); Arizona Proposition 107, Affirmative Action Amendment (2010), https://ballotpedia.org/Arizona_Proposition_107_Affirmative_Action_Amendment (2010); Oklahoma State Question 759, Affirmative Action Amendment (2012), https://ballotpedia.org/Oklahoma_State_Question_759_Affirmative_Action_Amendment (2012).

41 *Endorsements*, VOTEYESONPROP16, <https://voteyesonprop16.org/endorsements/> (last visited Feb. 9, 2021) (listing many other prominent endorsers, including U.S. Rep. Karen Bass, California Secretary of State Alex Padilla, Pete Buttigieg, Tom Steyer, several local governments, the *New York Times*, the *Los Angeles Times*, the *San Francisco Chronicle*, two co-founders of Black Lives Matter, the AFL-CIO, the Anti-Defamation League, the California Democratic Party, the California Teachers Association, Natural Resources Defense Council, Sierra Club California, the ACLU of California, several chambers of commerce, the San Francisco 49ers, the San Francisco Giants, Twitter, Uber, Facebook, United Airlines, Wells Fargo, Yelp, and Instacart).

42 Editorial, *Californians, Vote Yes on Prop 16*, N.Y. TIMES, Oct. 27, 2020, <https://www.nytimes.com/2020/10/27/opinion/california-prop-16-affirmative-action.html>; see also Friedersdorf, *supra* note 39, (“In 2020, in the heat of the George Floyd protests, the California legislature finally succeeded in putting a new affirmative-action proposition on the ballot.”).

43 *Yes on Prop. 16 Has Big Fundraising Lead in Effort to Restore Affirmative Action in California*, EDSOURCE, <https://edsources.org/2020/yes-on-prop-16-has-big-fundraising-lead-in-effort-to-restore-affirmative-action-in-california/642647> (last visited Feb. 9, 2021).

44 CAL-ACCESS, <http://cal-access.sos.ca.gov/> (search Cal-Access search field for “YES ON 16, OPPORTUNITY FOR ALL COALITION,

By contrast, the opposition to Proposition 16 had to operate on a shoestring. Unlike the Yes on 16 campaign, however, the opposition had an astonishing number of reliable volunteers. They organized car rallies during the pandemic; they distributed yard signs. They were active on Facebook, Twitter, Instagram, WeChat, YouTube, and TikTok. A large number of these volunteers were Asian American, more often than not Chinese immigrants or the children of Chinese immigrants. Proposition 16 and *Students for Fair Admissions v. Harvard University* were a political awakening for many of these volunteers. They correctly understood the impact that Proposition 16 could have on their children. They got the word out.

Consequently, despite the overwhelming advantage in cash and endorsements by political officials that Proposition 16's proponents had, they still failed to convince California voters of their cause; it showed at the ballot box. Voters in this haven of progressive politics soundly rejected the state's effort to repeal the words added to the state constitution by Proposition 209.

Since the vote, apologists have attributed the loss to a distracting election cycle, voters' inability to keep track of issues, and “abundant misinformation concerning affirmative action.”⁴⁵ But the data show that racial preferences are disliked by Californians of almost every stripe. About one-third of voters who supported Joe Biden for president also rejected Proposition 16.⁴⁶

A post-election poll conducted by Strategies 360 showed that the notion that voters just didn't understand is a fantasy. In that poll, respondents were first asked whether they thought Proposition 16, which was described as “the proposal to permit government decision making policies to consider race, sex, color, ethnicity, or national origin in order to address diversity by repealing constitutional provision prohibiting such policies,” was a good or a bad idea. Only 33% thought it was a good idea, with 44% responding that it was a bad idea and 22% not sure. Respondents were next told the following:

Sometimes the language on the ballot can be confusing, so here is a little more information about Proposition 16.

California law currently bans the use of policies and practices within government that seek to include particular groups based on their race, gender, ethnicity, and national

SPONSORED BY CIVIL RIGHTS ORGANIZATIONS,” then select “Historical,” then select “2019 through 2020,” then select “Late and \$5000+ Contributions Received”).

45 Jeremy Bauer-Wolf, *California Vote Signals Affirmative Action Remains Divisive*, EDUCATION DIVE, Nov. 4, 2020, <https://www.educationdive.com/news/california-vote-signals-affirmative-action-remains-divisive/588433/>.

46 Althea Nagai, *Race, Ethnicity, and California Prop 16*, Center for Equal Opportunity, at 13 (2020), <https://www.ceousa.org/attachments/article/1380/California%20Proposition%2016.pdf>. Opposition wasn't just bipartisan; while certainty would require a thorough quantitative analysis, there is evidence to suggest that Proposition 16 was rejected by majorities of California's Latino/Hispanic voters. For example, in California's Imperial County, which, according to the U.S. Census, is 84.2% Hispanic, 57.9% of voters opposed Proposition 16. State Ballot Measures By County, CAL. SEC'Y STATE, <https://elections.cdn.sos.ca.gov/sov/2020-general/sov/58-ballot-measures.pdf>; *Imperial County, California*, UNITED STATES CENSUS BUREAU, <https://data.census.gov/cedsci/profile?g=0500000US06025> (last visited Feb. 9, 2021).

origin in areas in which they were underrepresented in the past such as education and employment. In order to address issues of diversity and representation, Prop 16 would have removed this ban and allowed state and local governments to optionally consider factors like race, gender, ethnicity, and national origin in college admissions, public employment, and public contracting. These programs would still be subject to federal laws, meaning that any quota systems would have remained illegal.

Now that you have a little more information, do you think Proposition 16 was a good idea or a bad idea?⁴⁷

The gap between those who viewed it as a good idea and those who viewed it as a bad idea barely changed: 37% viewed it as good idea to 47% who considered it a bad idea. Interestingly, support for the idea dropped slightly among African Americans, while opposition increased markedly. Support edged up slightly for Asian/Pacific Islander Americans, but opposition increased much more.⁴⁸

Why is it so hard to understand why Californians would vote to retain Proposition 209? The answer to that question is that it isn't hard at all for anyone who doesn't insist on interpreting the world through the lens of identity politics. Most California voters—including many who consider themselves left of center—have long known and understood how racial preferences work, and they find them distasteful. They agree with the *Argument Against Proposition 16*, which all voters received in the mail as part of the Official Voter Information Guide. The ballot argument described the kind of discrimination that Proposition 16 would have legalized as “poisonous.” “The only way to stop discrimination,” it stated, “is to stop discriminating.”⁴⁹

California voters know there is a better way. The ballot argument pointed out that “[n]ot every Asian American or white is advantaged,” just as “[n]ot every Latino or black is disadvantaged.”⁵⁰ Pretending otherwise only “perpetuate[s] the stereotype that minorities and women can't make it unless they get special preferences.”⁵¹ On the other hand, the ballot argument went on the state:

[O]ur state also has men and women—of all races and ethnicities—who could use a little extra break. Current law allows for “affirmative action” of this kind so long as it doesn't discriminate or give preferential treatment based on

race, sex, color, ethnicity or national origin. For example, state universities can give a leg-up for students from low-income families or students who would be the first in their family to attend college. The state can help small businesses started by low-income individuals or favor low-income individuals for job opportunities.⁵²

In view of all this, no one should be surprised at the outcome of the Proposition 16 vote.

Just as California voters were not alone in adopting Proposition 209 more than two decades ago, they are not alone today in rejecting an effort by their legislature to repeal. In 2019, voters in Washington State rejected an effort by the state legislature to effectively repeal that state's version of Proposition 209 (known there as Initiative 200).⁵³ This has not stopped some state legislators from threatening to start the process all over in 2021.⁵⁴

In contrast to the overwhelming rejection of racial preferences by American voters, the Supreme Court has equivocated on the issue. The Court allowed for racial preferences in higher education in 1978,⁵⁵ 2003,⁵⁶ and most recently in 2016.⁵⁷

IV. CAN THE ARGUMENT FOR RACIAL PREFERENCES EVER BE CONSIDERED COMPELLING IF MOST AMERICANS REJECT IT?

It would be one thing for the Court to ignore public opinion when that opinion *favors* discrimination. That's what the courts are supposed to do: Exercise their independent judgment to ensure that the need for a discriminatory law or policy is truly compelling.

But we are in the opposite position: Americans aren't just *unconvinced* that the argument for race-preferential admissions is compelling; they find it unpersuasive altogether. That puts the Court in the extremely awkward position of being more willing

⁵² *Id.*

⁵³ *Referendum Measure No. 88*, WASH. SEC'Y OF STATE (Nov. 26, 2019), <https://results.vote.wa.gov/results/20191105/state-measures-referendum-measure-no-88.html>; Joseph O'Sullivan, *With Nearly All Ballots Counted, Voters Reject Washington's Affirmative-Action Measure*, SEATTLE TIMES, Nov. 12, 2019, <https://www.seattletimes.com/seattle-news/politics/with-nearly-all-ballots-counted-voters-reject-washingtons-affirmative-action-measure/>.

Private citizens who advocate repeal had tried to gather the signatures necessary to *force* the legislature to repeal Initiative 200 or to put the matter on the ballot again in 2021. As of the December 30, 2020 deadline, however, that effort appears to have failed since its supporters did not turn over to the Washington Secretary of State the number of signatures needed. Jackie Mitchell, *Washington Initiative Signature Passes with No Campaigns Submitting Signatures*, *BALLOTEDIA NEWS*, Jan. 5, 2021, <https://news.ballotpedia.org/2021/01/05/washington-initiative-signature-deadline-passes-with-no-campaigns-submitting-signatures-2/>.

⁵⁴ E-mail from WA Asians for Equality to Gail Heriot (Jan. 20, 2021) (on file with authors). If the legislature does put the repeal process in motion again and passes a repeal, opponents of repeal will have to gather signatures again to place the issue on the ballot. The number of signatures required will be based on the number of voters who voted in the most recent election (November 2020).

⁵⁵ *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

⁵⁶ *Grutter*, 539 U.S. at 306.

⁵⁷ *Fisher*, 136 S. Ct. 2198.

⁴⁷ *California Statewide Adults, Ages 18+, Conducted November 4–15, 2020*, STRATEGIES 360 (2020), <https://www.strategies360.com/wp-content/uploads/2020/11/20-665-Nov-CA-Community-Post-Elect-Survey-Toplines.pdf>.

⁴⁸ *Id.*

⁴⁹ Ward Connerly, Gail Heriot, & Betty Tom Chu, *Argument Against Proposition 16, Official Voter Information Guide: California General Election: Tuesday, November 3, 2020 29* (2020), <https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf>. See also *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162, 1222 (9th Cir. 2005)(en banc)(Bea, J. dissenting), rev'd and remanded, 551 U.S. 701 (2007).

⁵⁰ *Id.*

⁵¹ *Id.*

