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Mark K. Moller  
*The Cato Institute*

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# Race, “National Security,” and Unintended Consequences: A Sideways Glance at *Brown v. Board of Education* at Fifty

Mark K. Moller\*

## I. INTRODUCTION

This year is not only the fiftieth anniversary of *Brown v. Board of Education*,<sup>1</sup> it is also the fiftieth anniversary of scholarly *complaints* about *Brown v. Board of Education*. Almost from the date that the Court decided *Brown*, critics—while rightly celebrating the outcome of *Brown*—have excoriated the Warren Court for using *ad hoc* policy rather than neutral legal principles to defend *Brown*'s holding.<sup>2</sup> While *Brown*, the decision, has received a large share of well-founded and appropriate anniversary praise on its fiftieth birthday, the half-century-long scholarly tradition of *Brown* criticism has not received equal time in the spotlight. This article seeks to remedy that oversight.

Rather than rehash all of the formalist arguments against the *Brown* Court's analysis, this article will instead highlight a vein of criticism absent from early commentary on *Brown*: criticism based on the law of unintended consequences. One advantage of traditional legal method is predictability: Disciplined judicial use of analogy, articulation of formal tests, and definition of boundaries help to cabin and guide judicial discretion, and to limit the effects of an opinion to a particular class of cases and/or fact patterns.<sup>3</sup> In *Brown*, however, the Warren Court

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\* Senior Fellow in Constitutional Studies, The Cato Institute. I would like to thank Marla Kanemitsu for helpful comments, and Elizabeth Kreul-Starr, Jacinda Lanum and Henry Thompson for research assistance.

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

2. Herbert Wechsler, for instance, declared *Brown* an abandonment of “neutral principles.” Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26–33 (1959). Wechsler argued that *Brown* should have been decided on freedom of association, rather than equal protection, grounds. *Id.* at 34–35. Learned Hand declared the decision “wrong,” and an illegitimate “*coup de main*.” LEARNED HAND, THE BILL OF RIGHTS 54–55 (1962).

3. See Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1466–70 (1995) (discussing the desirability and utility of judicial opinions that provide guidance for future application by creating rules and explaining the reasoning underlying decisions).

abandoned those traditional tools of legal method.<sup>4</sup> Yet, the *Brown* decision entailed such radically and unassailably *positive* consequences that there seemed to be little room for suggesting that *Brown's* policy-based decision-making could carry any negative, much less unexpected, effects.

The Supreme Court's decision in *Grutter v. Bollinger*,<sup>5</sup> which upheld race-conscious admissions at the University of Michigan Law School under the Equal Protection Clause, suggests that the unintended consequences of policy-based equal protection jurisprudence of *Brown* may merit a second look. *Grutter* is not only among the most policy-oriented equal protection decisions rendered by the Supreme Court since *Brown*, but nearly one year after the *Grutter* decision, it is evident that a creative and unexpected policy rationale advanced by the *Grutter* majority—"national security"—is susceptible to extension in ways that threaten clear and present risks to academic freedom under the First Amendment.<sup>6</sup> *Grutter*, accordingly, provides a timely opportunity for a side-ways look at "*Brown* at Fifty," and suggests that the policy-based methodology that the *Brown* Court employed and legitimated *can* entail tangible, unexpected costs for the rule of law.

Part II begins the analysis by defining *Brown's* "policy"-based method of decision-making. Part III.A examines *Grutter's* policy-based justification for the University of Michigan Law School's race-conscious admissions program. Part III.B examines *Grutter's* "national security" rationale for race-based law school admissions, and how that rationale poses a threat to the scope of university freedom to regulate campus speech. Finally, Part IV briefly suggests that, fifty years after *Brown*, universities and minorities would be better off if the Court devised principled legal rules, rather than unpredictable "policy" rationales, to explain and extend *Brown* and to safeguard individual rights under the Equal Protection Clause.

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4. See *Brown*, 347 U.S. at 494-95 (relying on the detrimental effects segregation imposes upon African-Americans in holding that segregation is unconstitutional). See also Part II *infra*.

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

6. "Academic freedom" has been defined as a "special concern" of the First Amendment by the Court. See *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1997) (discussing academic freedom and the importance of exposing students to diverse ideas in the development of the Nation's future leadership); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (explaining the essentiality of ensuring that free inquiry, study, and discussion in the classroom, without interference, are protected in order to promote a democratic society and the constitutional rights afforded to individuals). In this article, I use "academic freedom" to refer, interchangeably, to both the "independent and uninhibited exchange of ideas among teachers and students," free from external government oversight or regulation, as well as "autonomous decisionmaking by the academy itself." See *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (setting forth dual components of academic freedom).

## II. A DEFINITIONAL NOTE ON "POLICY" IN *BROWN V. BOARD OF EDUCATION*

This article criticizes *Brown v. Board of Education*'s "policy"-based approach to equal protection jurisprudence, and will suggest that the *Grutter* decision provides some evidence that this methodology risks—if does not inevitably lead to—negative unintended consequences for parallel rights regimes.<sup>7</sup> Before discussing *Grutter*, it may be worth briefly sketching what it means to say *Brown* is a "policy"-based decision.

The dichotomy between "law" and "policy" is such a staple of nuts-and-bolts legal thinking, that it may not be much of a stretch to venture that the dichotomy is reflexively and intuitively familiar to many, if not most, practicing lawyers and to judges (or at least, those judges who once *practiced* law). However, the distinction is often criticized as illusory in the academy,<sup>8</sup> and, for some academics, the use of the word "policy" in a pejorative sense may simply be confusing. This short analysis does not intend to venture into the abstruse, metaphysical debate over whether law, at some philosophical level, can be distinguished from "policy." Rather, my analysis uses "policy" in the unsophisticated, meat-and-potatoes, *practitioning* sense of the word: in other words, to refer to a reason for decision based on naked empirical claims—the kind of claims that legislators or administrators without law degrees typically make in support of legislation or rule-making—about the effect of a decision on the outside world, unfiltered by the rigor of the technical, distinctively lawyerly, analysis. By lawyerly analysis, I mean analysis that is filtered through close, fact-sensitive readings of previous, authoritative cases, use of tight analogical justifications, and—where statutes or constitutions are at issue—close *textual* readings, guided by traditional canons of interpretation.

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7. By "parallel rights regimes," I mean constitutional rights that are textually and doctrinally separate from equal protection. Parallel also gestures to the fact that there are some doctrinal similarities in equal protection and free speech—including exceptions based on compelling or substantial state interest and narrow tailoring.

8. See, e.g., Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 99 (1984). Sherry states that:

A brief criticism of the most extreme version of the substance model, the "deconstructionist" approach of some members of the critical legal studies movement, illustrates the defects of the model . . . The basic premise . . . is that texts—including the Constitution—are inherently indeterminate and that any interpretation is therefore as permissible as any other.

*Id.* Cf. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 191 (1987) (explaining that "the rejection of formalism as a method of statutory interpretation doesn't condemn us to universal skepticism about the possibility of interpretation").

A seminal precedent on statutory construction—*Alexander v. Sandoval*<sup>9</sup>—helps to illustrate the meaning of “policy” in this rough-and-ready, lawyerly sense. In *Sandoval*, plaintiffs asked the Court to determine whether a statute—Title VI of the Civil Rights Act of 1964—created a private right of action to enforce certain Department of Justice regulations.<sup>10</sup> Plaintiff contended a private right of action would further the “purpose” of Title VI, by creating more enforcement mechanisms for targeting discrimination.<sup>11</sup> The Court did not accept that rationale. When courts “imply” causes of actions based on speculation about how to advance the “purpose” of legislators, or based on speculation about Congress’s “expectations” and/or the “contemporary legal context” of the statute, stressed *Sandoval*, courts violate the cardinal rule that “courts may not create [a cause of action], no matter how desirable that might be as a *policy matter*, or how compatible with the statute.”<sup>12</sup> Instead, said *Sandoval*, courts must look to concrete legal sources of decision-making, defined at a low level of specificity—i.e., the “text and structure of Title VI.”<sup>13</sup>

*Sandoval*, by equating policy with diffuse, generalized claims about what is desirable, illuminates the meaning of “policy,” as used in this short analysis of *Brown* and *Grutter*: A “policy rationale,” used here, is the broad, diffuse consideration of “desirable” empirical outcomes—defined at a high level of abstraction—as a judicial basis for decision.

*Brown v. Board of Education* is a “policy”-based decision in the humble, practicing sense of the word used by the Court in *Sandoval*. *Brown* eschews traditional legal analysis as a basis for decision. The *Brown* Court engaged in no analysis of the text, structure, or history of the Equal Protection Clause. Indeed, the Court called all of those sources “inconclusive.”<sup>14</sup> The *Brown* Court similarly suggested that governing precedent was inconclusive.<sup>15</sup> Instead—much like the

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9. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

10. *Id.* at 279.

11. *Id.* at 287.

Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted. That understanding is captured by the . . . statement . . . that ‘it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose’ expressed by a statute.

*Id.* (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1955)).

12. *Id.* at 286–88 (emphasis added).

13. *Id.* at 288.

14. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

15. *Id.* at 492.

plaintiffs in *Sandoval*—the *Brown* Court rested its decision almost *entirely* on empirical claims about the real world importance and *effects* of education: including, at the most abstract, reference to the “importance of education to our democratic society” and to “service in the armed forces,” as well as the role of education in “awakening . . . children to cultural values,” and to promoting “later professional training.”<sup>16</sup> Based on social science suggesting that segregated education degrades the self-esteem, and therefore educational performance, of African-American children, the Court concluded that segregation degraded these state interests, and therefore violated the Equal Protection Clause.<sup>17</sup>

In other words, *Brown* does not look very much like a technical, lawyerly opinion. Rather, *Brown* looks very much like an example of the kind of opinion the *Sandoval* Court characterizes as “policy”-based: the decision of a case based *simply* on a set of “desirable” empirical goals (in *Brown*, boosting the educational productivity of African-American children and therefore promoting their participation in our democratic society), without seeking independent support based on the text and structure of the legal authority interpreted (in this case, the Equal Protection Clause).<sup>18</sup>

### III. *GRUTTER V. BOLLINGER* AND THE DANGERS OF POLICY-BASED EQUAL PROTECTION JURISPRUDENCE: A CASE STUDY

The policy-based equal protection analysis of *Brown* carries a risk of unintended consequences for parallel right regimes. I am not claiming this risk arises in *every* case: I am simply claiming that it *can* arise, and that this risk should be taken into account when critically assessing the methodology of *Brown*. Evidence for this proposition is found in *Grutter v. Bollinger*, and, in particular, in the way a policy justification for affirmative action offered in that case (“national security”) has been interpreted and applied since *Grutter* was decided.

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16. *Id.* at 493.

17. *Id.* at 494 & n.11, 495.

18. Note that I do not mean to suggest the outcome in *Brown*—i.e. the end of racial segregation in education—was incorrect as a matter of law: To the contrary, I believe *Brown* was rightly decided. I am criticizing the decision at a technical, lawyerly level, by focusing on the *methodology* of the written opinion, and the way in which the court reasoned to the conclusion—not the ultimate, clearly correct, outcome of the case. The Equal Protection Clause of the United States Constitution, incidentally, provides that no state may “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 2.

### A. Policy in *Grutter v. Bollinger*

*Grutter v. Bollinger*<sup>19</sup> may number among the most policy-based (in the practicing sense of the word) equal protection decisions since the Court decided *Brown v. Board of Education* fifty years ago. *Grutter* involved a challenge to the University of Michigan Law School's admissions program.<sup>20</sup> That program awarded individual minority applicants a "plus" in the competition for admission, based solely on those applicants' membership in a designated racial group.<sup>21</sup> A White student, Barbara Grutter, who had been denied admission to the University of Michigan Law School, sued. She alleged that the Law School's admissions system impermissibly discriminated on the basis of race.<sup>22</sup> In a 5-4 decision eagerly anticipated across the political spectrum, the Supreme Court upheld the Law School's admissions program.<sup>23</sup>

In the course of so holding, Justice O'Connor effectively abandoned prior precedent as a meaningful restraint on judicial discretion.<sup>24</sup> First, Justice O'Connor declared *Regents of the University of California v. Bakke*<sup>25</sup> and the rules governing its interpretation to be inconclusive—or, more precisely, "fractured," "baff[ling]," and "more easily stated than applied."<sup>26</sup> At the same time, Justice O'Connor

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

20. *Id.* at 316–17.

21. *Id.* at 321.

22. *Id.* at 316–17. She alleged that the university violated the Fourteenth Amendment when it used race to give certain minority applicants "a significantly greater chance of admission than students with similar credentials from disfavored racial groups," and "had no compelling interest to justify their use of race in the admission process." *Id.*

23. *Id.* at 343–44.

24. The policy-based method of decision-making on display in the *Grutter* majority opinion has been analyzed, comprehensively and in detail, elsewhere. See generally Roger Pilon, *Principle and Policy in Public University Admissions*, 2002-2003 CATO SUP. CT. REV. 43 (2003) (criticizing *Grutter* as an unprincipled, policy-based departure from the constitutional principle of equality).

25. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, the Court found an admissions program at the university's Medical School unconstitutional, but held that a university could consider race as part of the admissions process if it was factored in as part of the competitive process with other characteristics. *Id.* at 276, 317–18. Bakke was a White male applicant to the Medical School who sued the university after he was denied admission despite the fact that his Medical College Admissions Test ("MCAT") scores, grade point average, and benchmark scores were significantly higher than several applicants whom were admitted. *Id.* at 277.

26. *Grutter*, 539 U.S. at 325 ("In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent"). The Court noted that the test for assessing the "holding" in a fragmented decision should be disregarded because it has "so obviously baffled and divided the lower courts that have considered it." *Id.*

effectively eviscerated “strict scrutiny” as a meaningful, rule-like presumption against racial classifications. Rather than articulate the strict scrutiny standard in a constraining way, Justice O’Connor’s opinion collapsed the legal presumption against racial classification into a diffuse and manipulable investigation of *Sandoval*-like policy concerns: the “context” in which racial classifications are used, and the “purpose” of such classifications.<sup>27</sup>

In particular, the majority opinion purported to canvass the needs and interests of the nation’s grey-flannel American elites, including top corporate executives, national politicians, and perhaps most unexpectedly, top military brass and Pentagon officials in the Reagan, Bush I, and Clinton administrations.<sup>28</sup> Based on the purported recruiting needs of these elites, the majority contended that integrated education advances a distinctly abstract and nationalist set of goals, including the nation’s interest in productive “work” in a “global marketplace”; the nation’s need for persons suited to serve as legislators, executive branch officials, and judges for an increasingly multicultural population; and the nation’s overarching need for top-flight “training” grounds for “our Nation’s leaders.”<sup>29</sup> The Court ruled that the traditional presumption against racial classifications in educational admissions may yield to our “national” interest in furthering

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27. *Id.* at 327 (asserting that “[c]ontext matters. . . . [n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context”). Cf. *Alexander*, 532 U.S. at 287–88 (equating focus on “purpose” and “context” with “policy”).

28. See *Grutter*, 539 U.S. at 330–31 (citing Brief of Amicus Curiae 3M, et al. and Brief of Amicus Curiae General Motors Corp., *Grutter v. Bollinger*, 538 U.S. 306 (2003) (Nos. 02-241, 02-516) (discussing the recruiting needs of large corporate employers)); *id.* at 331 (citing Consolidated Brief of Amici Curiae Lt. Gen. Julius W. Becton, Jr. et al. in Support of Respondents, *Grutter v. Bollinger*, 538 U.S. 306 (2003) (Nos. 02-241, 02-516) (discussing needs of military recruitment)); *id.* at 332 (citing Brief of Amicus Curiae Association of American Law Schools, *Grutter v. Bollinger*, 538 U.S. 306 (2003) (Nos. 02-241, 02-516) (noting that “[i]ndividuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives”).

29. *Id.* at 330–32. See *id.* at 330 (“[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints”). See also *id.* at 331 (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society” (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950))); *id.* at 332 (“[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders”). These interests find exact parallels in *Brown*’s policy discussion. See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (citing the role that education plays in furthering participation in democratic society, “service in the armed forces,” “citizenship,” and “professional training”).



these diffuse goals, at least in cases where race is used “flexibly as a ‘plus’ factor in the context of individualized consideration of each and every applicant.”<sup>30</sup>

### B. *Grutter’s Unintended Consequences*

In the course of articulating the governing policy concerns, the *Grutter* majority lavished attention on an unexpected policy rationale: “national security.” Of all the policy rationales advanced by the *Grutter* majority, this policy rationale may well prove to be the most difficult to cabin. Indeed, in the year since the Court decided *Grutter*, the *Grutter* “national security” rationale has recurred in contexts that are far removed from race-based equal protection, in postures that risk negative effects for academic freedom and, in some cases, equal protection.

#### 1. The *Grutter* “National Security” Rationale

The *Grutter* “national security” rationale has roots in a somewhat improbable amicus brief.<sup>31</sup> Recognizing that the September 11, 2001 terrorist attacks and the Bush Administration’s ongoing war against Iraq<sup>32</sup> rendered appeals to “national security” compelling and salient, the University of Michigan’s legal team tied the Michigan affirmative action program to national defense and military preparedness. Toward that end, the University authorized a host of ex-military and ex-Pentagon officials, including Robert “Bud” McFarlane, the Reagan-era architect of the Iran-Contra scandal, and Norman Schwartzkopf, the commander of U.S. forces in the first Iraq war, to weigh in before the Supreme Court as amici curiae.<sup>33</sup>

The resulting military brief asked the Court to uphold the University’s affirmative action program as an essential prop for an effective and “battle-ready” military.<sup>34</sup> First, the brief rehashed the

30. *Grutter*, 539 U.S. at 334 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315–16 (1978)).

31. Consolidated Brief of Amici Curiae Lt. Gen. Julius W. Becton, Jr., et al. at 1, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) [hereinafter *Military Brief*].

32. Oral arguments in *Grutter* were heard on April 1, 2003—less than two weeks after the commencement of the American march on Baghdad. Oral Argument Tr., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at 2003 U.S. TRANS LEXIS 26. The Court decided *Grutter* on June 23, 2003, eight weeks after President Bush announced the cessation of major combat operations against Saddam Hussein’s regime. *Grutter*, 539 U.S. at 306. President Bush declared an end to major combat operations on May 1, 2003. Michael Tackett, *Bush: Iraq War Won*, CHI. TRIB., May 2, 2003, at 1.

33. *Military Brief*, *supra* note 31, at 1–4. For an account of the genesis of the *Grutter* Military Brief, see Jonathan Groner, *In Grutter v. Bollinger Amicus Avalanche, One Brief Stood Out*, LEGAL TIMES, July 2, 2003, available at <http://www.law.com/jsp/article.jsp?id=1056139919083>.

34. *Military Brief*, *supra* note 31, at 27.

morale problems, leadership problems and unit cohesion problems of the Vietnam-era military:

In the 1960s and 1970s . . . while integration increased the percentage of African-Americans in the enlisted ranks, the percentage of minority officers remained extremely low . . . The danger this created was not theoretical . . . As that war continued, the armed forces suffered increased racial polarization, pervasive disciplinary problems, and racially motivated incidents . . .<sup>35</sup>

Second, the brief emphasized that “national security” is a paramount government interest, transcending even equal protection: “It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.”<sup>36</sup> After detailing the efforts to ensure that elite military service academies are racially inclusive,<sup>37</sup> the brief made a startling leap. The brief concluded that if “national security” requires that service academies must be “diverse,” it is a “small step” to conclude that civilian universities, from which the military draws ROTC recruits and civilian leaders of the military, must guarantee racial and “viewpoint” diversity on campus if the military is to remain effective: “[O]ur country’s other most selective institutions must remain both diverse and selective,” argued the brief,<sup>38</sup> because our “military security,” “economic security,” and “international competitiveness depend upon it.”<sup>39</sup>

To say that the Court found the brief persuasive would be an understatement. Although the *Grutter* Court received more than one hundred different amicus briefs for or against the University of Michigan,<sup>40</sup> including briefs submitted by members of Congress,<sup>41</sup> the

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35. *Id.* at 6.

36. *Id.* at 7 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

37. *Id.* at 10–26.

38. *Id.* at 29–30.

39. *Id.* at 29–30.

40. Brendan I. Koerner, *Do Judges Read Amicus Curiae Briefs?*, at <http://slate.msn.com/id/2081006> (Apr. 1, 2003).

41. *See, e.g.*, Brief of Amici Curiae Rep. Richard A. Gephardt, et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (noting that Congressman Gephardt was a 1965 graduate of the University of Michigan Law School and that there was only one minority graduate that year, namely the Honorable Harry T. Edwards of the United States Court of Appeals for the District of Columbia; and also arguing that diversity in higher education is a compelling governmental interest and that the University’s admissions policies are narrowly tailored to meet that interest); Brief of Amici Curiae John Conyers, Jr., et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (arguing that racial diversity in higher education strengthens American democracy); Brief of Amici Curiae Senators Thomas A. Daschle, et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (supporting adherence to Justice Powell’s opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978)).

NAACP,<sup>42</sup> the United Negro College Fund,<sup>43</sup> the Anti-Defamation League,<sup>44</sup> and the Governors and State Attorneys General of several states,<sup>45</sup> the justices repeatedly singled out the military brief during oral argument.<sup>46</sup> The Court bent over backwards to accommodate the brief. Thus, although counsel for the appellants argued, with some merit, that the military brief raised factual questions outside the scope of the record on appeal,<sup>47</sup> the Court brushed aside the limitations of the factual record in order to incorporate the military brief in the final decision.<sup>48</sup> The Court's ultimate decision upholding the Michigan Law admissions program contained more cites to the military brief than to any other brief submitted to the Court.<sup>49</sup>

42. Brief of Amici Curiae the NAACP, et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (arguing that race-sensitive admissions policies further the goals of diminishing the effects of racial segregation and preserving higher education opportunities for African-Americans).

43. Brief of Amici Curiae the United Negro College Fund and Kappa Alpha Psi, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (arguing that race-conscious admissions combat the historical exclusion of African-Americans from the nation's traditionally White educational institutions).

44. Brief of Amicus Curiae the Anti-Defamation League, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (arguing that the University of Michigan undergraduate and law school admissions systems violate the Equal Protection Clause and Title VI).

45. See, e.g., Brief of Amicus Curiae Michigan Governor Jennifer M. Granholm, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (arguing that the First Amendment affords universities the institutional autonomy to advance their educational missions by achieving a diverse student body); Brief of Amicus Curiae the State of Florida and the Honorable John Ellis "Jeb" Bush, Governor, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (illustrating how Florida's State University system has achieved diversity by race-neutral means); Brief of Amici Curiae the States of Alabama, et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (urging the Court to create uniformity among the states in administering the admissions processes of their institutions of higher education).

46. Oral Argument Tr. at 5-10, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at 2003 U.S. TRANS LEXIS 26.

47. *Id.* at 6-8.

48. See *id.* at 5-7 (quoting from the oral argument). Questioning proceeded as follows:

Question: [M]ay I call your attention . . . to the brief that was filed on behalf of some retired military officers who said that to have an officer corps that includes minority members in any number, there is no way to do it other than to give not an overriding preference, but a plus for race. . . .

Mr. Kolbo: Justice Ginsberg, I don't believe we have an adequate record in this case from which to conclude that we wouldn't have representation of minorities.

Question: [N]onetheless even if it's true that there will be very few, if any, minority members admitted to the military academies, still you cannot use race?

*Id.*

49. *Grutter*, 539 U.S. at 308, 331 (citing the military brief six times). The brief also received significant media attention. See, e.g., Sylvia H. Walbot & Joseph H. Lang, Jr., *Amicus Briefs Revisited*, 33 STETSON L. REV. 171, 173-75 (2003) (discussing media coverage of the military brief).

In the end, the *Grutter* majority took an expansive view of the arguments presented by the military brief, agreeing with the military brief that “national security” is a “real” and “compelling” government interest that justifies race conscious law school admissions.<sup>50</sup> While, during oral argument, questioning focused on the “national security” implications of the admissions criteria used at military service academies,<sup>51</sup> the *Grutter* majority opinion articulated a “national security” rationale for the Court’s decision that reached beyond the narrow province of service academy admissions: “[N]ational security,” concluded Justice O’Connor, requires that not only service academies but *all* of the “most selective institutions [of higher education],” including law schools and other *civilian* “training ground[s]” for leaders, “*must remain*” ethnically diverse if the military is to “fulfill its principle [sic] mission.”<sup>52</sup>

## 2. *The Trouble with “National Security”*

The *Grutter* majority paid lip service to notions of academic freedom.<sup>53</sup> However, scrutiny of Justice O’Connor’s majority decision suggests that *Grutter*’s implications for academic freedom are clouded, at best. In particular, the “national security” policy arguments in *Grutter* may well prove to be a defeat for academic freedom in the long run, by lowering the bar for government assertions of power to *regulate* speech on campus based on “compelling” “national security” interests.

### a. *Grutter*’s Threat to Academic Freedom

To see why *Grutter* poses a threat to academic freedom, three facets of the *Grutter* Court’s basis for upholding the Michigan admissions system bear closer scrutiny: (1) the Court’s focus on speech; (2) the Court’s use of peremptory language to describe the requirements of “national security”; and (3) the attenuated causal nexus between the

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50. *Grutter*, 539 U.S. at 331.

51. Oral Argument Tr. at 6–7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at 2003 U.S. TRANS LEXIS 26.

52. *Grutter*, 539 U.S. at 331–32 (emphasis added). The Court appeared to extend the “national security” rationale to civilian institutions for two reasons: (1) because civilian universities are training grounds for ROTC officers; and (2) because elite universities are most likely to produce civilian commanders of the military (*i.e.*, Department of Defense officials). *Id.* The brief also strongly implied that the role of institutions of higher education are analogous to the role of service academies in the military: just as a diverse officer corps helps to legitimize military officers and promote unit cohesion, said the Court, so too does a diverse civilian elite help to legitimize civilian “leaders” and promote national cohesion in times of crisis. *Id.*

53. *Id.* at 329 (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition”).

asserted “national security” interest and Michigan Law admissions program.

### i. Speech

The *Grutter* majority took pains to emphasize that Michigan’s race-conscious admission system survived “strict scrutiny” under the Equal Protection Clause because that admission system served to regulate the contribution to and distribution of campus speech. Specifically, the *Grutter* majority explained that the Michigan system used race as a proxy for expanding “exposure [of students] to widely diverse . . . cultures, ideas, and viewpoints.”<sup>54</sup> *Grutter* emphasized that this speech-related component of the admissions program helped to make the Michigan admissions system more palatable under the Equal Protection Clause. Citing Justice Powell’s concurrence in *Bakke*, the Court emphasized that equal protection is less offended where the university’s use of race is not an end in itself, but rather is the means for furthering an “institutional mission” that transcends race: namely, the promotion of a “robust exchange of ideas.”<sup>55</sup> In short, the Michigan admissions program survived scrutiny in part because that program is designed to promote “viewpoint” diversity.<sup>56</sup>

The Court’s focus on “viewpoint” diversity renders *Grutter*’s invocation of “national security” troublesome for the protection of academic freedom from arbitrary state incursion. Prior to *Grutter*, the Court suggested that “national security” interests might entitle the government to infringe on academic freedom in some narrow contexts; for instance, imposing publication restraints on university professors who conduct classified scientific research for the government.<sup>57</sup> Until *Grutter*, however, the inviolability of the student *exchange* of ideas within an academic setting from government oversight or regulation seemed sacrosanct.<sup>58</sup> By simultaneously lauding racial diversity as a

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54. *Id.* at 330.

55. *Id.* at 329.

56. *See id.* at 333 (concluding that because “growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own unique experience of being a racial minority”; therefore, a “‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body”) (emphasis added).

57. *See, e.g.,* *Snepp v. United States*, 444 U.S. 507, 509 (1980) (holding that “national security” provides a compelling interest in restraining disclosure of classified information in a published article by an ex-CIA agent).

58. *See* J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 *YALE L.J.* 251, 311 (1989) (arguing that “the Supreme Court’s decisions concerning academic freedom have protected principally and expressly a First Amendment right of the university itself—understood in its corporate capacity—largely to be free from government interference in

means of exposing students to diverse “ideas” and asserting that the government has a compelling “national security” interest in the promotion of racial diversity, the *Grutter* majority opinion could be read to suggest the government has a “national security” interest in both: (1) the distribution of viewpoints on campus; and (2) most alarmingly, in the tools that university administrators use to regulate student exposure to viewpoints on campus.<sup>59</sup>

To be sure, *Grutter*’s national security rationale focuses on the need for a racially diverse officer corps, and so could be read to simply suggest that the military functions better when there are more African-American officers. But the *Grutter* opinion pervasively conflates exposure to diversity with pedagogy by suggesting that diversity has a positive *educational* effect on the minds of *non-minority* students, and by fostering robust exchange of ideas, and therefore sensitivity to different outlooks.<sup>60</sup> Given that acclaim for the *pedagogical* role of diversity pervades the opinion, it is just as plausible that *Grutter*’s suggestion that makes “diversity” a “must” for civilian universities<sup>61</sup> to promote diversity is based, at least in part, on the supposition that diversity in an educational setting where the military recruits officers will also help make *White* officers better commanders of a racially diverse military by making those officers more sensitive to the views and outlook of soldiers from a different ethnic background.

## ii. Peremptory Language

The *Grutter* majority articulated the “national security” rationale using peremptory language that is in tension with any asserted university claims to meaningful administrative independence. That peremptory tone had been set by the military brief. While the University of Michigan Law School cast its argument as a plea for deference to university judgment, the military brief contained little discussion of the degree of deference owed to a university. Instead, the brief emphasized that “national security” is a paramount government interest, external to the goals of the university, that transcends not only the individualized constitutional protections of the Equal Protection

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the performance of core educational functions”); *id.* at 330 (asserting that “[c]onstitutional academic freedom can perhaps best be seen as a principle that regulation should not proceed so far as to deprive the university of control over its academic destiny”).

59. Here, of course, the tool used is an admission program designed to promote a critical mass of minority students, who (so the Court’s reasoning goes) presumptively will help to contribute to a “robust exchange of ideas” on campus. *Grutter*, 539 U.S. at 329.

60. See *supra* notes 54-59 and accompanying text (discussing the policy conclusion that a diverse student body exposes students to a wider range of ideas and viewpoints).

61. *Grutter*, 539 U.S. at 331-32.

Clause, but also all other asserted government interests, including, presumably, the freedom of public universities to self-regulate.<sup>62</sup> Consistent with that premise, the brief framed its argument in mandatory terms, arguing that “diversity in higher education” is “essential to ensuring an effective, battle-ready fighting force,”<sup>63</sup> that the threat posed by racial stratification of the “nation’s . . . leaders” is “unacceptable,”<sup>64</sup> and that the interests of “national security” allow for no alternative to the kind of program adopted by the University of Michigan Law School.<sup>65</sup> Most revealingly, the brief, as a basis for its argument in favor of government power to regulate campus diversity, invoked *Haig v. Agee*<sup>66</sup>—the landmark (and much criticized) First Amendment precedent that upheld the government’s “unarguable” power to regulate speech (not race) based on compelling “national security” interests, in spite of default First Amendment protection against such regulation.<sup>67</sup>

*Grutter*’s discussion of the “national security” rationale echoed the peremptory tones of the military brief. The Court stated that the government’s asserted “national security” interest is “not theoretical but real,”<sup>68</sup> that diversity is “essential” to “national security”<sup>69</sup> and that elite institutions “must remain . . . diverse” if the military is to “fulfill its mission.”<sup>70</sup> The language of the *Grutter* majority opinion is not language of deference to university administrators, but of command.

62. See Military Brief, *supra* note 31, at 27 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981) (“It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.”)).

63. *Id.* at 27.

64. *Id.* at 28 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978) (Powell, J., concurring). “[T]he nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” *Id.* Further noting that the “threat” to military cohesion posed by unintegrated officers corps in the 1960s and 1970s was “so dangerous and unacceptable that it resulted in immediate and dramatic changes” intended to *restore* racial balance.” *Id.*

65. *Id.* at 29 (“There is presently no workable alternative to limited, race-conscious programs to increase the pool of qualified minority officer candidates and establish diverse educational settings for officer candidates.”).

66. *Haig v. Agee*, 453 U.S. 280 (1981).

67. See Military Brief, *supra* note 31, at 27 (quoting *Haig*, 453 U.S. at 307, which states that “[i]t is obvious and unarguable that no governmental interest is more compelling than the security of the Nation”); see also Sanford Levinson, *What is the Constitution’s Role in Wartime?: Why Free Speech and Other Rights Are Not as Safe as You Might Think*, FIND LAW, at [http://writ.news.findlaw.com/commentary/20011017\\_levinson.html](http://writ.news.findlaw.com/commentary/20011017_levinson.html) (Oct. 17, 2001) (criticizing *Haig* in its implication that “all bets are off with regard to the courts offering genuine protection of civil liberties during time of war”).

68. *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003) (emphasis added).

69. *Id.* at 331 (emphasis added).

70. *Id.* at 331 (quoting Military Brief, *supra* note 31, at 29) (emphasis added).

## iii. Attenuated Causal Nexus

Finally, and perhaps most alarmingly, the *Grutter* majority opinion, on one reading, suggests an especially loose and attenuated causal nexus between “national security” and the University of Michigan Law School admissions program. Prior to *Grutter*, the Court had labored to cabin the circumstances in which the government may rely on a “compelling” “national security” interest to regulate protected speech, by requiring a fairly tight causal nexus between the conduct regulated and the asserted security risk. In *New York Times v. United States* (“*The Pentagon Papers Case*”),<sup>71</sup> for instance, Justice Brennan suggested that “only governmental allegation and proof that [speech] must inevitably, directly, and immediately” threaten “national security” could provide a sufficiently “compelling” basis for overcoming the constitutional presumption against state regulation of expression.<sup>72</sup> Since *The Pentagon Papers Case*, the Court has upheld “national security” as a basis for intrusion on speech only in those narrow circumstances, in which the speech poses a direct and proximate threat to security. That nexus has been met in cases involving disclosure of classified information.<sup>73</sup> Similarly, in *Haig v. Agee*,<sup>74</sup> the Court confronted a campaign conducted by a former Central Intelligence Agency (“CIA”) employee “to expose CIA officers and agents,”<sup>75</sup> and held that this particular conduct constituted a sufficiently compelling threat to security to justify government regulation of speech.<sup>76</sup>

*Grutter*, by contrast, is suggestive of a far more attenuated “compelling” “national security” interest in speech. Assuming that the *Grutter* majority viewed diversity as a pedagogical benefit for White officers, the “national security” interest in *Grutter* is not a direct interest in particularized speech, such as publication of a sensitive document or disclosure of classified information, but an indirect interest in the general distribution of viewpoints on campuses where the military may

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71. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

72. *Id.* at 726–27 (Brennan, J., concurring). In the *Pentagon Papers Case*, the Nixon administration attempted to suppress a *New York Times* reporter’s disclosure, in the press, of classified information about the extent of United States involvement in the Vietnam War, based on a putative “national security” interest in the secrecy of that information. *Id.* at 714 (per curiam). The Court held that the interest in keeping that information secret was not sufficiently compelling to justify infringing on the free speech rights of the media. *Id.*

73. See, e.g., *Snepp v. United States*, 444 U.S. 507, 509–13 (1980).

74. *Haig v. Agee*, 453 U.S. 280 (1981).

75. *Id.* at 283.

76. *Id.* at 308–09 (holding employee’s disclosures are “clearly not protected by the Constitution” since they “have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel”).



recruit officers. Second, the link between the distribution of “viewpoint” diversity at the University of Michigan Law School and “national security” interest is itself strained: Given that the vast majority of Michigan Law Students are unlikely to serve in the military or even in ROTC, it is hard to argue with a straight face that the distribution of viewpoints at “elite” civilian law schools and the “national security” interest in an effective military is direct or immediate in the sense illustrated by *Haig*.<sup>77</sup>

In short, *Grutter*: (1) implies the government has an interest in the distribution of academic speech; and (2) expressly states that this government interest is “compelling” in a constitutionally important sense because that interest implicates “national security.”

Given that the causal relationship between speech and “compelling” “national security” interests in *Grutter* is far more attenuated than that recognized as constitutionally important in other cases, *Grutter* has nudged the Court closer to a recognition that “national security” limits university autonomy over the campus marketplace of ideas.

To be sure, *Grutter* is an equal protection—and not a First Amendment—case, and therefore is not a direct First Amendment precedent. Yet, as the military brief’s reliance on the First Amendment case *Haig* illustrates, the recognition of a compelling state interest cuts across the formal doctrinal boundaries that separate equal protection and First Amendment law.<sup>78</sup> An interest that is sufficiently compelling to unravel presumptions against race-based classifications under the Equal Protection Clause may be sufficiently compelling to justify compromising default constitutional protections under the First Amendment. And a precedent in the free speech realm may serve as a precedent in the equal protection realm—and vice versa.

Moreover, the connection between speech and “national security” is a natural implication of an opinion that makes both “national security” and “exchange of ideas” central to its justification for upholding affirmative action. Indeed, regardless of the Court’s intentions, the Court’s facial focus on the role of diversity as an educational tool—*i.e.*, a tool for promoting greater understanding of and tolerance for different

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77. See University of Michigan School of Law, *Class of 2003 Graduate Employment Statistics*, at [www.law.umich.edu/currentstudents/careerservices/prospectivestudents.htm](http://www.law.umich.edu/currentstudents/careerservices/prospectivestudents.htm) (last visited September 12, 2004) (showing that only a small fraction, if any, University of Michigan Law School students obtain military employment). In 2003, sixty-one percent of University of Michigan Law School graduates found employment in private practice, twenty-two percent found employment in judicial clerkships, eleven percent found employment in government/public interest, and six percent found employment in business and other. *Id.*

78. Military Brief, *supra* note 31, at 30.

viewpoints—may color, for casual readers, the Court’s reference to national security. Put another way, by defining the concept of a compelling national security interest downward, *Grutter*’s holding *de-sensitizes* its readers to the notion that the government’s “national security” interests and the university’s interest in promoting a “diverse” marketplace of ideas may overlap or dovetail.<sup>79</sup> Given that the Court has to date struggled to maintain a firewall between national security and education, that juxtaposition cannot be assumed to be benign.

#### b. The Threats Materialize

On the face of the opinion, it is possible to read *Grutter* as precedent that supports—or at least de-sensitizes us toward—the proposition that the state has an interest in the regulation of campus speech. The question is this: Will creative litigants see the opportunity, and, if so, how hard will they push? While it has been slightly over a year since the *Grutter* decision, there is some preliminary evidence that the threat is real and not simply hypothetical. The evidence comes in the form of: (1) a case, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*<sup>80</sup> (“*FAIR v. Rumsfeld*”); and (2) a Congressional initiative—the International Studies in Higher Education Act of 2003—a bill that is designed to use federal funding grants to increase government oversight over the “diversity” of curricula in Middle East studies departments.<sup>81</sup>

##### i. *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*

In *FAIR v. Rumsfeld*, litigants attempted to use *Grutter* as a weapon to restrict, rather than expand, academic freedom. At issue in *FAIR v. Rumsfeld* were the policies of a number of private law schools, which sought to deny military recruiters equal access to on-campus job interview fairs.<sup>82</sup> These law schools believed that military

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79. Cf. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1090 (2003):

Judicial decisions, unlike many statutes, explicitly set forth their justifications, and might therefore have more predictable attitude-altering effects. But people might still interpret a decision as endorsing a certain justification even if that’s not quite what the decision held, partly because many people don’t read court decisions very closely or remember them precisely (again, because of rational ignorance).

*Id.*

80. *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 282–83 (D.N.J. 2003) [hereinafter *FAIR*], *overruled*, 2004 U.S. App. LEXIS 24598 (3d Cir. Nov. 29, 2004); see also Brief for Appellants at 30–34, *Forum for Acad. & Institutional Rights, Inc. v. Rumsfeld*, No. 03-4433 (3d Cir. filed Jan. 5, 2004) [hereinafter *FAIR Brief*].

81. H.R. 3077, 108th Cong. (2003).

82. *FAIR*, 291 F. Supp. 2d at 282–83.

discrimination against gay students offended the schools' voluntarily adopted equal protection guidelines, which barred discriminatory recruiters from access to campus facilities.<sup>83</sup> The government, in turn, threatened to withhold federal funding from law schools that discriminate against the military, sparking litigation by several umbrella organizations, individual law professors, and students, including the Forum for Academic and Institutional Rights ("FAIR"), the Society for American Law Teachers, as well as law professors Erwin Chemerinsky and Sylvia Law.<sup>84</sup>

The *FAIR* plaintiffs argued that the government's coercive use of the purse-string impermissibly infringed on private universities' freedom to adopt voluntary anti-discrimination policies—in particular, "no tolerance" policies against employer discrimination on the basis of sexual orientation.<sup>85</sup> Round one of the litigation went to the government: the trial court, applying an intermediate scrutiny test under the First Amendment, denied a preliminary injunction against the government and held that the government has full power under the Spending Clause to deny funding to schools that refuse equal entry to

83. See *id.* at 281 (stating that "[l]aw schools are loathe to endorse or assist recruiting efforts of the United States military because of its policy against homosexual activity").

84. *Id.* at 282 ("Plaintiffs allege that the DOD threatened law schools with the loss of not only DOD funding, but all federal funding, if the schools did not afford the military full access to career services, the students, and the law schools."). Law and Chemerinsky are among the named plaintiffs in the case. *Id.* at 274. The basis for this threat is 10 U.S.C. § 983(b), also known as the "Solomon Amendment." The Solomon Amendment, in pertinent part, provides:

Denial of funds for preventing military recruiting on campus. No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

the Secretary of a military department or Secretary of Homeland Security from gaining entry to campuses, or access to students . . . on campuses, for purposes of military recruiting; or access by military recruiters for purposes of military recruiting to . . . information pertaining to students . . . enrolled at that institution (or any subelement of that institution).

10 U.S.C. § 983(b) (2000 & West Supp. 2004), amended by Pub. L. No. 107-296, § 1704(B)(1), (9), 116 Stat. 2314, 2316 (making the change effective on date of transfer of the Coast Guard to the Department of Homeland Security, and striking the term "of transportation" and replacing it with "of Homeland Security"). For more on academic criticism of the Solomon Amendment, see American Association of University Professors, *2003-04 Legal Docket*, at <http://www.aaup/Legal/Legal%20materials/legaldoc.htm> (last visited June 15, 2004), and Society of American Law Teachers, *Justice Under Solomon*, available at <http://222.saltlaw.org/justiceundersolomon.pdf> (last visited June 15, 2004).

85. See *FAIR* Brief, *supra* note 80, at 30-34 (arguing government policy violates academic freedom, freedom of speech and freedom of expressive association).

military recruiters.<sup>86</sup>

On appeal, at least one set of interested parties thought that *Grutter* cuts in favor of the government. An amicus brief filed by veteran students<sup>87</sup> (hereinafter “veterans’ brief”) reasoned that under *Grutter*, a university’s autonomy was limited where its assertion of institutional freedom can be characterized as in tension both with “viewpoint” diversity and “national security.” Specifically, the brief argued that by placing university prestige squarely against the military, the law schools degraded the “viewpoint” diversity that *Grutter* held is essential to the academic environment, by chilling speech of law student veterans, who are “guilty by association.”<sup>88</sup> In a nod to the “national security” argument advanced by the *Grutter* majority, the brief further suggested that *Grutter*’s emphasis on the pedagogical value of “viewpoint” diversity may take on special importance where national security is at issue: “Veterans,” argued the brief, “add value to law school classroom discussions, particularly on matters relating to national security, foreign affairs, and other issues connected to America’s armed forces.”<sup>89</sup> “If the plaintiffs succeed . . . law schools will lose part of the vibrancy and diversity of the academic environment” that *Grutter* recognized is “so critical to law school success.”<sup>90</sup>

The brief’s argument, while ultimately unsuccessful, underscored three points: First, the veterans’ brief illustrated that *Grutter*’s analysis of “diversity” is susceptible to an interpretation that focuses on the implications of the case for speech. Second, the veterans’ brief—by attempting to strategically link *Grutter*’s thematic emphasis on viewpoint diversity and national security—suggested that those who challenge university power to control the campus marketplace of ideas may see *Grutter* as a weapon in cases where litigants can convince a court that university autonomy simultaneously is at war with both “viewpoint” diversity and “national security.”<sup>91</sup> Third, by suggesting that student access to veteran insight on “national security” affects the value of “viewpoint” diversity, the veterans’ brief pointed to a more

86. *FAIR*, 291 F. Supp. 2d at 310–14.

87. Brief of Amici Curiae the UCLaw Veterans Soc’y, Forum for Academic & Institutional Rights v. Rumsfeld, 2004 U.S. App. LEXIS 24598 (3d Cir. Nov. 29, 2004) (No. 03-4433). The brief was filed by law students currently serving in the military, military reserves or who have previously served in the military. *Id.* at 1.

88. *Id.* at 26.

89. *Id.* at 25–26 (emphasis added).

90. *Id.* at 26 (citing *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003)).

91. See *Grutter*, 539 U.S. at 331 (quoting the Military Brief’s statement that a “diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security”).

distant, but logical and troubling, implication of *Grutter*—namely, that the government’s interest in safeguarding military recruitment at elite schools may entail a correlate interest in ensuring that elite law schools are not unremittingly hostile to the military or military service. *Grutter*’s logic, after all, implicitly seems to point to the following proposition: that the government has a “national security” interest in “viewpoint” diversity on campus because: (1) the military depends on civilian institutions of higher education for officer recruits; and (2) the degree of recruits’ exposure to race—and therefore “viewpoint diversity”—on campus may affect recruitment effectiveness, by harming the post-recruitment performance of those recruits once they join the military.<sup>92</sup> Assuming the national security rationale in *Grutter* is in part premised on the notion that diversity makes White officers more effective in a multicultural military, by exposing them to diverse viewpoints, then isn’t the distribution of viewpoints that are directly related to the *value* of military service equally, if not more, material to “national security”? Surely exposure to viewpoints that favor service are more directly related to the effectiveness of recruitment than the more general distribution of “diverse” “ideas and viewpoints” for which *Grutter* treats race as a proxy.

The veterans’ brief in *FAIR v. Rumsfeld*, in short, suggested that *Grutter*’s precedential value is not necessarily confined to equal protection—rendering that case’s implications for speech not only tangible, but also potentially troublesome.

ii. H.R. 3077: The International Studies in Higher Education Act

To the extent that academics have noticed the tension between *Grutter*’s “diversity” rationale and academic freedom, they perhaps have been inclined to view the tension as benign. But it will not always be so. Consider a bill currently before Congress, H.R. 3077, introduced not long after *Grutter* was decided.<sup>93</sup> The bill would expand Congressional power to scrutinize university curricula and to use the federal funding power effectively to counterbalance disfavored scholarship in federally funded scholarship programs. It is a nightmare for academic freedom. Yet the bill is arguably on sounder legal and conceptual footing after *Grutter*.

Members of the House of Representatives introduced H.R. 3077 last year in an attempt to bolster recruitment of foreign language speakers

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92. See *supra* notes 28–52 and accompanying text (discussing the arguments in the Military Brief and the Court’s reliance on the Military Brief).

93. H.R. 3077, 108th Cong. (2003). The bill was introduced on September 11, 2003. *Id.*

and Middle East specialists for the security and intelligence services.<sup>94</sup> Specifically, the bill would provide new federal funding to foreign studies programs, which the bill's sponsors believe are needed to train more experts for government service in the diplomatic corps, intelligence corps, and criminal agencies.<sup>95</sup> The stated goal of H.R. 3077 echoes the University of Michigan Law School's diversity-based justifications for its admissions program: the bill states Congressional intention to "increas[e] the participation of underrepresented populations" in the diplomatic and intelligence corps, by strengthening a "diverse network of undergraduate . . . international studies centers."<sup>96</sup> The sponsors of the bill have stated that a key goal is to enhance government recruitment of Arabic-language speakers and Middle East specialists in the wake of September 11, 2001.<sup>97</sup>

As an incident of federal funding, the bill would establish a curriculum "advisory" board tasked with recommending—from a "national security" standpoint—whether grant recipients ensure a proper balance of diverse perspectives in university Middle-Eastern studies programs.<sup>98</sup> Of the seven members of the proposed board, two would represent "[f]ederal agencies that have national security responsibilities" and three would be appointed directly by the majority and minority leaders of the House.<sup>99</sup> Proponents of the board, including the Iraq hawk Martin Kramer and conservative activist and Hoover Institute fellow Stanley Kurtz, argue that Middle East studies programs must include views less "anti-American," less influenced by "post-colonial

94. *Id.*

95. Press Release, Office of Congressman Pete Hoekstra, Hoekstra Bills to Strengthen Graduate Education, International Studies Pass Committee, Head to House (Sept. 25, 2003), available at [http://www.house.gov/hoekstra/092503\\_2.html](http://www.house.gov/hoekstra/092503_2.html) [hereinafter Hoekstra Press Release].

96. H.R. 3077, 108th Cong. §§ 2, 4 (2003).

97. Hoekstra Press Release, *supra* note 95.

98. H.R. 3077, 108th Cong. § 6 (2003). H.R. 3077 creates a new Section 633 and provides in part:

Purpose.—The purpose of the International Advisory Board is—

- (A) to provide expertise in the area of national needs for proficiency in world regions, foreign languages, and international affairs;
- (B) to make recommendations that will promote the excellence of international education programs and result in the growth and development of such programs at the postsecondary education level that will reflect diverse perspectives and the full range of views on world regions, foreign languages, and international affairs; and
- (c) to advise the Secretary and the Congress with respect to needs for expertise in government, the private sector, and education in order to enhance America's understanding of, and engagement in, the world.

*Id.*

99. *Id.* (quoting from proposed § 632(c)(1)).

studies,” and more friendly to American foreign and military policy overseas.<sup>100</sup>

The potential for abuse by such a board is clear, and the proposal has raised a correlate hue and cry among university Middle East programs.<sup>101</sup> University of Michigan Middle-East specialist Juan Cole, for instance, argues that the board is a recipe for politically-motivated harassment: “I could imagine the board making it a criterion that the politics of a faculty are not balanced, so the university must balance things out by hiring pro-Likud scholars, or else funding could be withdrawn.”<sup>102</sup> Lisa Anderson, Dean of The University of Columbia’s School of International and Public Affairs, notes that the “potential for abuse” is all the more salient given that the proposed advisory board would be staffed by political appointees directly answerable either to Congressional party leaders or security agencies.<sup>103</sup>

Congress did not explicitly cite *Grutter* as an authority for its power to authorize political oversight of universities. However, *Grutter*, decided three months before H.R. 3077 was introduced, makes the legal case for Congressional power to do so more conceptually plausible—since Congress justified the proposed advisory board based on the same “viewpoint” diversity arguments that proved so successful in *Grutter*. For example, during debate on the House floor, Rep. Howard Berman (D-CA), a member of the House International Relations Committee, argued that the board does not impinge on academic freedom, because it is designed to expand student exposure to “viewpoint” diversity and to eliminate a monopoly of narrow views “at odds with our national interest.”<sup>104</sup> Similarly, Rep. John Boehner (R-OH) claimed that the bill will “strengthen and renew higher education” by simultaneously expanding diversity of viewpoints and addressing a “critical piece of our national efforts to fulfill national and international

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100. See Michelle Goldberg, *Osama University?*, SALON.COM (Nov. 6, 2003), at [http://www.salon.com/news/feature/2003/11/06/middle\\_east/print.html](http://www.salon.com/news/feature/2003/11/06/middle_east/print.html) (discussing viewpoints on potential government intervention in Middle Eastern studies programs at American Universities from the perspectives of its supporters, in conservative think tanks, and opposition in academia).

101. See Center for International Studies at the University of Chicago, *Title VI Reauthorization Information*, at <http://internationalstudies.uchicago.edu/titleVI.shtml> (last updated Apr. 6, 2004).

102. Goldberg, *supra* note 100, at ¶ 13.

103. See Todd Gitlin, *Culture War, Round 3077*, AMERICAN PROSPECT, Jan. 2004, at 65, available at <http://www.prospect.org/web/printfriendly-view.wv?id=6981> (quoting Anderson on opposing the use of political appointees to direct Middle East studies curriculum). “[W]e who have seen precisely that impulse distort and debilitate scholarship, research and education in the Middle East, know that it will tarnish our image around the world and do serious harm to the enterprise of higher education in the United States.” *Id.* at 67.

104. 149 CONG. REC. H9752 (daily ed. Oct. 21, 2003) (statement of Rep. Berman).

security needs.”<sup>105</sup>

*Grutter* makes that argument more compelling. On one view, *Grutter* suggests that the government’s “national security” interest in military recruitment is speech related and that the government therefore may have a “compelling” interest in regulating contribution to “viewpoint” diversity in a law school—where the vast majority of students will go on to practice civilian law for large corporate clients. If that is true, then surely Congress also has the power to monitor, and indirectly regulate, the “diversity” of viewpoints presented in programs that provide government specialists for the Central Intelligence Agency (CIA), the Pentagon, the National Security Council (NSC) and the Federal Bureau of Investigation (FBI).<sup>106</sup> After all, the connection between diversity, training, and security in the latter context assuredly is no less attenuated than the connection between civilian law school pedagogy and the distribution of “viewpoint” diversity and “security” recognized in *Grutter*.

Even if one takes a narrow view of *Grutter*’s national security rationale, and assumes it is not directly “speech”-related, it is a small step from *Grutter*’s suggestion that *both* national security and educational pedagogy require “diversity” on campus, to the proposition that viewpoint diversity on campus is *of interest* to the government and therefore a subject for legislation.

To be sure, the First Amendment imposes some scrutiny on the government’s attempts to manipulate university curricula through funding restraints.<sup>107</sup> Yet the limits on government use of the federal spending power to regulate speech in the university are ill-defined. In conditional funding cases, while precedents are few, courts have demonstrated a pronounced tendency to defer to asserted government interests and to eschew close scrutiny of the means-end fit between the asserted government interest and the government regulation.<sup>108</sup> In the

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105. 149 CONG. REC. H9752 (daily ed. Oct. 21, 2003) (statement of Rep. Boehner).

106. See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (quoting to Military Brief that a “diverse officer corps . . . is essential to the military’s ability to fulfill its principle [*sic*] mission to provide national security,” and noting that the military cannot achieve a diverse officer corps unless the service academies and the country’s other most selective institutions are diverse).

107. See *FAIR*, 291 F. Supp. 2d 269, 301–10 (D.N.J. 2003) (analyzing conditional funding under the First Amendment).

108. See, e.g., Byron V. Olsen, Note, *Rust in the Laboratory: When Science is Censored*, 58 ALB. L. REV. 299, 332–35 (1994) (noting that courts have proven reticent to apply traditional “prior restraint” analysis in the context of conditional funding restraints). The prior restraint doctrine prohibits the placement of any restraint upon the dissemination of a publication before it has been published. *Id.* at 332.



trial court decision in *FAIR v. Rumsfeld*,<sup>109</sup> for example, a New Jersey district court reasoned that a lesser degree of First Amendment scrutiny applies in cases where (1) the funding restrictions do not serve to exclude a particular viewpoint from campus; and (2) the recipient can avoid the restrictions by rejecting funding.<sup>110</sup> In such circumstances, said the court, intermediate scrutiny, which requires only a showing that the burden imposed on speech is necessary to promote a substantial government interest that would be achieved less effectively absent the regulation, is necessary.<sup>111</sup> When applicable, the intermediate scrutiny test is relatively easy to meet, even in the absence of an asserted government justification based on “national security”: so long as when an interest is identified as substantial, it is not hard to show that a purported legislation would serve that interest more, rather than less, effectively. *Grutter*—by suggesting an asserted nexus between military training and the distribution of “viewpoint” diversity among “elite” civilian students<sup>112</sup>—therefore may help to suggest that government may have a substantial interest in campus speech, and that government attempts to promote campus diversity may achieve that interest “more effectively.” *Grutter* accordingly makes the case for H.R. 3077 more, not less, plausible.

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109. *FAIR*, 291 F. Supp. 2d 269 (D.N.J. 2003). See *supra* Part III.B.2.b.i (discussing the *FAIR* case).

110. See *FAIR*, 291 F. Supp. 2d at 302, 311. The district court noted that the funding restriction did “not silence a particular . . . point of view,” *id.* at 302, and did not even constitute a direct “regulatory restriction” of speech, as when an institution is “required” to accept an unwanted person. *Id.* at 311. Rather, it constituted a mere “exercise of congressional spending power” that left a school with a choice. *Id.* The Court reasoned the amendment is therefore an “indirect” or “incidental” regulation. See *id.* at 311 & n. 9 (stating that because a spending condition is not akin to a “requirement,” it is an “indirect” regulation properly analyzed under intermediate scrutiny). The district court also reasoned that the Solomon Amendment was “indirect” because it burdened expressive conduct—not speech. *Id.* at 312.

111. *Id.* at 311 & n.9 (equating “exercise of the congressional spending power” with “indirect” regulation, and holding intermediate scrutiny, under *United States v. O’Brien*, 391 U.S. 367, 377 (1968), therefore applies. The Third Circuit disagreed with the district court’s analysis, reasoning that (1) that *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), requires deference to an expressive association’s characterization of its expressive interests, and (2) that the Solomon Amendment is a direct restriction of the associational interests articulated by the law schools. *Fair v. Rumsfeld*, 2004 U.S. LEXIS 24598, at 28-29, 61. The dissent, by contrast, argued that the Third Circuit had misapplied *Dale*, and that *O’Brien* provided the proper, intermediate standard of review because non-speech conduct (recruiting) was at issue. *Id.* at 113-15 (Aldisert, J., dissenting). The Third Circuit’s decision has already been criticized by commentators. See, e.g., Michael C. Dorf, *A Federal Appeals Court Rules that Universities Can Bar Military Recruiters Without Losing Grant Money: A Welcome Result Based on Flawed Reasoning*, available at <http://writ.news.findlaw.com/dorf/20041208.html>. (last visited Dec. 10, 2004). At press time, the Department of Justice had not sought certiorari, and the scope of scrutiny in conditional funding cases remains unsettled among the circuits.

112. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

IV. A CONTRARIAN'S POST-*GRUTTER* NOTES ON *BROWN*

What critical conclusions about *Brown*, if any, should we draw from *Grutter*? While *Grutter* is at best suggestive, the case is at least consistent with three propositions about *Brown*'s policy-based method of equal protection analysis: (1) that the Court's use of policy rationales to justify equal protection rulings is expansionary; (2) that equal protection analysis may tend to make policy rationales more salient, and therefore more precedentially powerful; and (3) the expansion of policy rationales in one area of constitutional law may pose unexpected risks to parallel right-regimes.

## A. Policy Expansion

*Grutter* suggests that policy rationales articulated in the realm of "equal protection" may have a tendency to expand from the specific to the general in succeeding decisions. Consider *Brown v. Board of Education*. In *Brown*, the Warren Court focused primarily on the individualized effects of segregation on the educational performance of school children, and relied on extra-legal evidence confined to the realm of academic social science.<sup>113</sup> In particular, the Court noted that segregation degraded the quality of educational performance that individual children received and imposed burdens on individual children's participation as full citizens.<sup>114</sup> Fifty years later in *Grutter*, Justice O'Connor announced a policy rationale that focuses not on the needs of the individual, but on the needs of the nation. Rather than assess the effect of a challenged racial classification on individualized school performance as the Warren Court did in *Brown*, the *Grutter* majority focuses on the effect of the classification on "national security," effective national "leadership," and "productive" competition in a global economy.<sup>115</sup> In the process, *Grutter* has moved from a relatively specific to a relatively diffuse level of abstraction. That move is more favorable to judicial discretion.<sup>116</sup> Each of these asserted

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113. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 & n.11 (1954) (citing a series of social science surveys and studies).

114. *Id.* at 493-94.

A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the education and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

*Id.* (alteration in original).

115. *Grutter*, 539 U.S. at 330-33.

116. Frank H. Easterbrook, *Levels of Generality in Constitutional Interpretation: Abstraction and Authority*, 59 U. CHI. L. REV. 349, 355 (1992) ("Boosting the level of generality . . . can be a method of liberating judges from rules.") (emphasis in original).

national policy benchmarks is so abstract and bears such a complex and causally attenuated relationship to any given educational policy that there is little remaining legal restraint on the discretion of courts in the realm of equal protection and education. Furthermore, the Court has provided very little guidance for educators or, for that matter, individual citizens about the scope of protections afforded by the Equal Protection Clause.

### B. Precedential Salience

The Court's use of *Grutter* as a precedent in First Amendment cases like *FAIR v. Rumsfeld* suggests a second feature of policy-based equal protection decision-making: its precedential salience. *FAIR* is suggestive of what common sense tells us must be true: Important equal protection cases that intersect with race have a unique visibility in the realm of constitutional law. In the case of *Grutter*, the decision warranted nearly 1,200 articles in the popular press in 2003 alone—far more than the other widely reported cases in the October 2002 Term, *State Farm Mutual Automobile Insurance v. Campbell*,<sup>117</sup> a case of great interest to corporate defendants involving due process limits on punitive damages, and *Eldred v. Ashcroft*,<sup>118</sup> a landmark ruling on the scope of the Copyright Clause.<sup>119</sup> At the same time, *Grutter*—the first Court case to uphold affirmative action in twenty-five years—has been fêted, especially by academics, like few Court decisions are fêted.<sup>120</sup>

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117. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

118. *Eldred v. Ashcroft*, 538 U.S. 186 (2003).

119. A LEXIS-NEXIS search of all articles discussing *Grutter v. Bollinger*, in database "News, All (English, Full-Text)," using key words GRUTTER AND "SUPREME COURT" and dates 1/1/03–12/31/03, yields 1182 results. A LEXIS-NEXIS search of all articles discussing *State Farm Mutual Automobile Insurance v. Campbell*, in database "News, All (English, Full-Text)," using key words STATE FARM W/20 CAMPBELL AND SUPREME COURT AND PUNITIVE DAMAGE AND DATE IS 2003, yields 281 results). A LEXIS-NEXIS search of all articles discussing *Eldred v. Ashcroft*, in database "News, All (English, Full-Text)," using key words ELDRED W/20 ASHCROFT AND DATE IS 2003, yields 223 results.

120. See, e.g., Lee C. Bollinger, *On Grutter and Gratz: Examining "Diversity" in Education: A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1590–95 (2003) (discussing the importance of the *Grutter* decision, from the perspective of a litigant, and discussing the impetus for vigorously pursuing this litigation and the legal and publicity strategies employed to defend university practices designed to promote minority participation and diversity); Jack Greenberg, *On Grutter and Gratz: Examining "Diversity" in Education: Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1614–17 (2003) (discussing the social and cultural bases for implementing affirmative action and the need for its continued implementation and lauding the *Grutter* majority for its articulation of the fundamental purposes served by affirmative action policies at prestigious post graduate academic institutions); Cass R. Sunstein, *Affirmative Action in Higher Education: Why Grutter Was Correctly Decided*, J. OF BLACKS IN HIGHER EDUC., Autumn 2003, available at [http://www.jbhe.com/features/41\\_affirmative\\_action\\_highered.html](http://www.jbhe.com/features/41_affirmative_action_highered.html) (last visited June 9, 2004) (criticizing and praising the

All of this is consistent with our gut instincts: In a nation where race is a powerful flashpoint, race-centered equal protection cases have a special resonance, and are debated and discussed far more intensely in the media than the bulk of other Supreme Court cases.

That is one explanation for why *Grutter*—an equal protection case—is cited in *FAIR v. Rumsfeld* as *speech* precedent. Visibility and acclaim translates into precedential power, and precedential power means that diffuse policy rationales—even ones sketched lightly, or simply suggested in an impressionistic manner, in a well-known equal protection case—may take on new life in other contexts far removed from the facts of the case.

### C. *Opportunistic Exploitation by Courts and the Political Branches*

*FAIR v. Rumsfeld* and H.R. 3077 suggest a further dimension of policy-based equal protection analysis: the role that creative litigants and/or envelope-pushing political branches may play in fleshing out and adapting loosely articulated policy rationales, that make a bit appearance in the equal protection realm, to new areas of constitutional law. To be sure, courts may or may not accept the veteran brief in *FAIR* or approve the constitutionality of H.R. 3077, but *Grutter*—because it is precedentially salient—may serve as a muse to creative litigants, and may spark new ideas for ways to justify incursions on academic freedom in an atmosphere where litigants, courts, and political branches can be expected to take an especially broad view of “national security.”

## V. CONCLUSION

*Grutter*, in short, suggests some reason to think the policy-based approach legitimated in *Brown*—which starts by asking what goals or policies a particular racial classification promotes—may be unpredictable, difficult to cabin, and uniquely susceptible to the problem of unintended consequences, especially for parallel constitutional protections. If that is true, then policy rationales in equal protection cases may be a dangerous, volatile quantity. *Grutter* does not prove that another mode of analysis might not carry different, but equally dangerous, risks. But *Grutter*, at the very least, suggests that

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*Grutter* decision and applauding the Court for “allow[ing] the nations colleges and universities to take steps . . . to ensure that the nation’s classrooms are not all White”); Press Release, Joint Statement of Constitutional Law Scholars, Harvard Civil Rights Project, signed by Erwin Chemerinsky, Walter Dellinger, Pamela Karlan, Eric Schnapper, Drew Days III, Richard Fallon, Kenneth L. Karst, Laurence H. Tribe, Lani Guinier, Frank Michelman, and Mark Tushnet, at <http://www.civilrightsproject.harvard.edu/policy/court/michigansc.php> (June 23, 2003) (congratulating the Court on its “ringing endorsement” of affirmative action in higher education).

there may be good reason—now that the battle over segregation is safely behind us—to give *Brown*'s policy-based mode of analysis a hard second look, and to consider anew the virtues of *lawyerly* application of the Equal Protection Clause—that is to say, equal protection analysis that: (1) treats expansive policy arguments as a disfavored basis for decision; and (2) turns to work-a-day rules and guidelines, grounded in the text and structure of the Fourteenth Amendment, articulated at a low level of specificity, designed to cabin discretion, and intended to make outcomes not only just, but also predictable and fairly uniform.

Unfortunately, *Grutter* also suggests that even fifty years after *Brown* revolutionized Equal Protection Clause jurisprudence a lawyerly approach to racial equality is no nearer to realization. As *Brown* passes the fifty-year mark that is one reason not for celebration, but for concern.