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From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from Brown to Grutter

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**FROM MASSIVE RESISTANCE, TO PASSIVE
RESISTANCE, TO RIGHTEOUS RESISTANCE:
UNDERSTANDING THE CULTURE WARS FROM
BROWN TO GRUTTER**

*Sumi Cho**

INTRODUCTION

On this fiftieth anniversary of *Brown v. Board of Education*,¹ arriving on the heels of the recent University of Michigan affirmative action cases,² I propose taking an “extra-doctrinal” moment to contemplate how the cultural politics of race have likely shaped dominant legal framings regarding society’s regulation of access to quality education. This Essay seeks to explain affirmative action jurisprudence as a distinctly cultural phenomenon. My hope is that such a framing will underscore the need for more effective, proactive strategies and broad-based coalitions of diversity advocates. I believe that only such strategies and coalitions can achieve social justice objectives generally, and increase the representation of people of color specifically in university admissions and employment.

Although civil rights advocates and critical race theorists hail the *Grutter* decision as a legal victory for affirmative action and diversity, *Grutter* is at best a “split decision.” The case is most important not as legal doctrine, but rather in its meaning for the cultural politics of race and educational access.³ Justice O’Connor’s opinion upholds

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¹ 347 U.S. 483 (1954) (“*Brown I*”).

² *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

³ Legal commentators may view the pair of University of Michigan affirmative action cases as representing a “split decision,” since the University “won” in *Grutter* (at the law school level), but “lost” in *Gratz* (at the undergraduate admissions level). Compare *Grutter*, 539 U.S. 306 (2003)

"diversity" and the search for a "critical mass" as a suitable basis for finding a compelling state interest,⁴ while at the same time continuing the doctrinal denouement that began in *Regents of the University of California v. Bakke*⁵: affirmative action is ultimately dangerous and subject to judicial containment and, eventually, elimination—the opinion's twenty-five-year sunset provision.⁶ Most tellingly, the Court unanimously disqualified the pursuit of "racial balance" in higher education as a sufficiently compelling state interest and declared such an objective to be "patently unconstitutional."⁷ Thus, rather than accepting *Grutter* as a "win," affirmative action proponents must understand that a concerted, cultural campaign will be necessary to maintain diversity policies in higher education, for the near term as well as twenty-five years from now and beyond.

Affirmative action supporters should not lose sight of the ways in which law interacts with a broader cultural apparatus of race that works like the [somewhat] invisible hand of affirmative action doctrine. It may seem a bit sacrilegious to propose that civil rights advocates, and lawyers generally, may have taken the law too seriously (especially on constitutional matters having to do with race) at a symposium on constitutional law. While litigation is necessary, I believe its impact on Supreme Court decision making and legal doctrine is less significant than its impact on the culture that will "enforce" and "enact" the law.

(upholding the Law School's objective of a "critical mass" of diverse student body as an acceptable compelling state interest), *with Gratz*, 539 U.S. 244 (2003) (striking an undergraduate affirmative action program that utilized a "point system" for race, among other factors, as not comporting with "narrow tailoring" requisites of strict scrutiny review). However, I view the *Grutter* case itself to represent a split decision for reasons elaborated below.

⁴ Critical race scholars may acknowledge the Court's "interest convergence" on permitting diversity to serve a compelling state interest; that is, that the benefit of affirmative action to people of color converges with the state's interest in developing a multiracial corporate and military elite. *Grutter*, 539 U.S. at 329–30.

⁵ 438 U.S. 265, 299 (1978) (declaring that governmental classifications that "touch upon an individual's race or ethnic background entitles petitioner to a judicial determination that questions if the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest"); *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (concluding that "[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system").

⁶ *Grutter*, 539 U.S. at 343.

⁷ *Id.* at 329–30 (acknowledging that the Law School did not seek to ensure "some specified percentage of a particular group merely because of its race or ethnic origin" because to do so "would amount to outright racial balancing, which is patently unconstitutional"). O'Connor's majority opinion in *Grutter* is consistent with Justice Powell's determination in *Bakke* that "reducing the historic deficit of traditionally disfavored minorities in medical schools" represents "an unlawful [state] interest in racial balancing." *Grutter*, 539 U.S. at 323 (citing *Bakke*, 438 U.S. at 306–07). For a compelling elaboration of this point, see Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633 (2005).

I, of course, do not mean to suggest a strict "law/culture" opposition. Legal doctrine and political culture are inter-imbricated and, at times, mutually reinforcing, as I discuss below. Indeed, this synthetic understanding of the relationship between law and culture simply seeks to re-establish culture as a significant terrain of contestation that seems to fall by the wayside in the heat of affirmative action litigation battles. In this sense, I seek to correct the overly-positivist belief that law is foundational in the establishment and expansion of "rights" (a belief held explicitly or implicitly by many litigators and civil rights leaders). This belief itself was forged in reaction to the regressive "stateways cannot change folkways" laissez-faire formulation regarding the natural dominance of culture over law that was effectively deployed by southern intellectuals to defeat post-reconstruction civil rights legislation and constitutional protections of the First Reconstruction.

In developing this argument, I will examine the "culture wars" that have raged around access for communities of color to quality education. I will first discuss the cultural response, known as "massive resistance," to the *Brown* decision. I will then contrast this with what I call "passive resistance" to the *Bakke* decision. Finally, I will conclude with a call for "righteous resistance" to the *Gratz* and *Grutter* decisions, and consider specific ways that advocates of affirmative action may more proactively shape a culture of resistance to retrenchment on racial justice that will measure its effectiveness not only by partial victories in court, but also by success in the court of public opinion.

I. THE CULTURE WARS FROM *BROWN* TO *BAKKE*

A. *Massive Resistance and the Lesson from Brown: A Racialized "Call-and-Response"*

The 1954 *Brown v. Board of Education* decision ("*Brown I*") is popularly understood as the watershed case in which a unanimous Supreme Court invalidated segregated schools as a violation of constitu-

⁸ See WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPACT OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* (1907), cited in RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 37-51 (Beacon Press 1992) (1944) (emphasizing Sumner's belief that "folkways" were products of evolutionary growths and not artifacts of human purpose or wit); see also Roscoe Pound, *The Limits of Effective Legal Action*, 27 INT'L J. ETHICS 150, 151 (1917) (arguing that legal mores are governed by deep-seated social mores and practices, and that law accordingly should codify, not modify, existing practices). I note the irony of my argument's consistency with Sumnerian sociology. However, I distinguish myself by advocating for greater consideration of and coordination between the cultural apparatus that impacts the law and the litigation strategies by affirmative action advocates rather than arguing for laissez-faire constitutionalism.

tional equal protection guarantees.⁹ Writing for the Court, newly-installed Chief Justice Earl Warren identified the centrality of public education to the Court's analysis, stating that "[i]n the field of public education, the doctrine of 'separate but equal' has no place."¹⁰ Although *Brown I* has been hailed as courageous and transformative, it should be noted that the Court's position against segregation was hardly counter-majoritarian. More than half of the American population supported the *Brown I* decision when the Court handed it down.¹¹ Without the cultural opposition to the Jim Crow laws, it is unclear whether the Court would have forged ahead to take a counter-majoritarian position on such a polarizing issue. Justice Frankfurter commented that he would have upheld school segregation a decade earlier as "public opinion had not then crystallized against it."¹²

While *Brown I* was a clear victory for plaintiff-petitioners and the NAACP, the Court refused to order an immediate remedy, and instead postponed arguments for the implementation of *Brown I* until the next term. In the subsequent decision,¹³ decided in 1955, the Court opted for an indeterminate and gradualist approach to desegregation that subordinated implementation to "local conditions":

School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.¹⁴

As for the timeline for desegregation, the Court rejected the plaintiff-petitioners' proposed deadline of the fall of 1956, opting instead for the indeterminate and contradictory standard of admitting plaintiffs to public schools on a nondiscriminatory basis "with all deliberate speed."¹⁵

Legal scholars and commentators have observed how *Brown II* represented a "solid victory for white southerners."¹⁶ "[B]y almost any measure," one commentator declared, "it gave the South a great deal more of what it had asked at the final round of arguments than it

⁹ 347 U.S. 483, 495 (1954).

¹⁰ *Id.*

¹¹ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 310 (2003).

¹² *Id.*

¹³ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) ("*Brown II*").

¹⁴ *Id.* at 299.

¹⁵ *Id.* at 301; see also KLARMAN, *supra* note 11, at 313 ("The [J]ustices chose vagueness and gradualism."); RICHARD KLUGER, SIMPLE JUSTICE 746 (1975).

¹⁶ KLARMAN, *supra* note 11, at 316.

gave to the Negro."¹⁷ NAACP General Counsel and litigator in *Brown*, Robert L. Carter, wryly observed that the "all deliberate speed" formula represented "compliance on terms that the white South could accept."¹⁸

What *Brown I* giveth to civil rights activists, *Brown II* taketh away. As legal historian Loren Miller observed, "[t]he harsh truth is that the first *Brown* decision was a great decision; the second *Brown* decision was a great mistake."¹⁹ The Justices had hoped to strike a conciliatory tone in *Brown II* that would spur compliance with *Brown I*—a sort of "peace offering" that served as an "invitation to moderates to meet them halfway."²⁰ *Brown II* instead invited defiance and resistance, if not open mockery of the Court's naiveté. As Professor Klarman detailed, "the same people who acknowledged the Court's conciliatory gesture often emphasized their undiminished commitment to preserving segregation."²¹

A Florida segregationist thought the Court had "realized it made a mistake in May and is getting out of it the best way it can." A Texas legislator declared that the "Court got hold of a hot potato and didn't know what to do with it." A Virginia politician announced that "the court has not the courage of its previously avowed convictions." Some southern observers believed that the threats of school closures and violence had intimidated the justices, and they deduced that further pressure might persuade the Court to abandon *Brown* altogether. Over the following months, some white southerners predicted that patient determination on their part would convince the Court and nation to abandon southern Blacks as they had during Reconstruction.²²

Segregationist culture constrained judicial decisionmaking in *Brown II*, and that constraint reinforced a culture of open resistance to racial justice. "Perhaps the most the Justices could do," one scholar noted, "was to say that segregation was wrong and then rely on the best instincts of the American people to figure out how to eradicate the practice."²³

In short, the Court catered to the southern resisters' racist timeline for when and how they would desegregate. Instead of fostering compliance with the *Brown I* order to desegregate, *Brown II* promoted resistance. This resistance took many forms throughout the years, and effectively frustrated the *Brown I* order to provide quality educa-

¹⁷ KLUGER, *supra* note 15, at 745.

¹⁸ Robert Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968), cited in DERRICK BELL, *RACE, RACISM & AMERICAN LAW* 167–68 n.10 (5th ed. 2004).

¹⁹ LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 351 (Pantheon Books 1966), cited in BELL, *supra* note 18, at 166 n.7.

²⁰ KLARMAN, *supra* note 11, at 319.

²¹ *Id.*

²² *Id.* at 319–20.

²³ KLUGER, *supra* note 15, at 746.

tion for students of color through integration.²⁴ The impact of *Brown I* should be remembered not for its lofty pronouncement that segregation has no place in education, but for the racialized “call-and-response” that the Court engaged in with southern segregationists in crafting *Brown II*.

For example, in the five years immediately following the *Brown* decision, southern resistors developed various strategies to subvert desegregation²⁵ in the era of Massive Resistance or “absolute defiance.”²⁶ In the 1955 *Briggs v. Elliot* decision, Judge Parker of the Eastern District of South Carolina innovated what came to be known as the “Parker Doctrine.”²⁷ He interpreted *Brown* to say that the Court doesn’t require integration, but merely forbids segregation, thereby endorsing the status quo and requiring little from white school districts.²⁸ The Parker doctrine of judicial resistance inspired many

²⁴ See, e.g., National Association for the Advancement of Colored People (“NAACP”), *Introduction to the Court Opinion of Brown v. Board of Education Case* (illustrating the resistance to the *Brown* decision in its many forms), at http://www.naacp.org/departments/education/brown_index.html (last visited Nov. 30, 2004).

²⁵ See KLARMAN, *supra* note 11, at 321–43 (describing post-*Brown* judicial decisions in southern courts that sought to undermine civil rights by upholding antimiscegenation laws and non-anonymous jury selection decisions); see also KLUGER, *supra* note 15, at 748–78 (describing the South’s judicial and legislative response to the *Brown* decision); FRANCES WILHOIT, *THE POLITICS OF MASSIVE RESISTANCE* 136–50 (1973) (describing the efficacious strategies of the South’s governors, attorneys general, state legislators, and councilmen in transforming Massive Resistance into a counter-revolutionary policy). See generally NUMAN BARTLEY, *THE RISE OF MASSIVE RESISTANCE* (1969) (framing the ultimate failure of the South’s revolt against anti-segregationist policies as the successful stabilization of southern political parties); CHARLES OGLETREE, *ALL DELIBERATE SPEED* (2004) (chronicling the effect *Brown*’s mixed message had upon the southern resistance and civil rights attorneys and activists); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 87 (2001) (describing the increased acts of white violence in response to desegregation as the “ultimate weapon in an arsenal that extremist southern whites wielded to preserve their supremacy”); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 72–156 (1991) (attributing the lack of social change after the *Brown I* decision to the Supreme Court’s lack of political and cultural support of civil rights).

²⁶ J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978*, at 78 (1979). Wilkinson identified five stages to southern school desegregation post-*Brown*: (1) absolute defiance (i.e., massive resistance) from 1955 to 1959; (2) token compliance from 1959 to 1964; (3) modest integration from 1964 to 1968; (4) massive integration beginning in 1968 with *Green v. County School Board*, 391 U.S. 430, 441 (1968) (holding that a school district’s adoption of a “freedom-of-choice” plan to implement *Brown I* was unacceptable, concluding that the plan merely shifted the burden of desegregation from the board to children and their parents); and (5) resegregation.

²⁷ 132 F. Supp. 776, 777 (E.D.S.C. 1955).

²⁸ *Id.* (holding that the Supreme Court did not require the state to actually desegregate schools, but to simply open the schools to children of all races, even though the children of different races attended different schools); see also KLUGER, *supra* note 15, at 751–52 (“This so-called ‘Parker doctrine’ was widely seized upon by southern courts to approve a variety of maneuvers designed to deflect the impact of *Brown*.”); OGLETREE, *supra* note 25, at 130 (explaining how *Briggs* gave the states a clue on how to maintain segregation: different races could voluntarily attend different schools, just as they chose different churches); WILHOIT, *supra* note 25, at

other southern judges and courts to defy *Brown*.²⁹ Perhaps this analysis was not surprising for a judge who believed that the "participation of the Negro in politics is a source of evil and danger."³⁰

A telling example of political resistance to *Brown* was a 1956 declaration that came to be known as the Southern Manifesto, drafted and signed by 19 of 22 southern senators and 77 of 105 House representatives from the states comprising the Old Confederacy.³¹ The members of Congress pledged to use "all lawful means to bring about a reversal of th[e *Brown*] decision which is contrary to the Constitution,"³² and declared that the *Brown* decision constituted "a clear abuse of judicial power."³³ In support of the South's post-*Brown* credo, "as long as we can legislate, we can segregate," southern and border state legislators enacted 126 new laws and state constitutional amendments designed to preserve segregation by 1957.³⁴ South Carolina's "Committee of 52" acted to enshrine the theory of "interposition" as state policy, which asserted a state's right to "interpose [its] sovereignty . . . between Federal Courts and local school officials."³⁵ By mid-1957, southern states rapidly adopted interposition measures.³⁶ With the exception of North Carolina, all southern states enacted anti-NAACP laws.³⁷

Creative and common forms of administrative defiance of *Brown* that garnered the state of Virginia recognition as the "showplace for

164-65 ("Parker's fine distinction (a question-begging one) between integration and non-discrimination or desegregation was a highly restrictive exegesis of *Brown*.").

²⁹ See, e.g., *Boson v. Rippy*, 285 F.2d 43, 48 (5th Cir. 1960) (adopting the reasoning in *Briggs* and noting that the Sixth Circuit had also relied on *Briggs*); *Jackson v. Sch. Bd.*, 203 F. Supp. 701, 704-05 (W.D. Va. 1962) (citing the Parker dictum); see also KLARMAN, *supra* note 11, at 358 ("[T]he remedial obligation of school districts was to dismantle state-sponsored segregation, not to produce racial balance in the schools.").

³⁰ Richard A. Baker, *Historical Minute Essays: Judicial Tempest*, May 14, 2003, at http://www.senate.gov/artandhistory/history/minute/Judicial_Tempest.htm.

³¹ The three refusers included Senator Lyndon Johnson from Texas and both senators from Tennessee, Albert Gore and Estes Kefauver. James Patterson notes that all three had presidential or vice-presidential ambitions that dictated a distancing from southern racist opinion. PATTERSON, *supra* note 25, at 98-99.

³² *Declaration of Constitutional Principles*, 102 CONG. REC. 4515, 4516 (1956).

³³ *Id.* at 4515.

³⁴ ROSENBERG, *supra* note 25, at 79.

³⁵ BARTLEY, *supra* note 25, at 129. Editor James Kilpatrick of the *Richmond News Leader* has also been credited with the formulation of "interposition" as theory and tactic. *Id.*

³⁶ The states adopting interposition measures included Alabama (April 1956 and April 1957), Arkansas (June and December, 1956), Florida (June 1957), Georgia (April 1956), Louisiana (August 1956), Mississippi (April 1956), South Carolina (April 1956), Tennessee (April 1957), and Virginia (April 1956). BARTLEY, *supra* note 25, at 131 n.20.

³⁷ See ROSENBERG, *supra* note 25, at 79, 350 (chronicling laws that ranged from forbidding NAACP members from holding local or state government jobs, to requiring disclosure of membership lists, and pursuing nuisance criminal prosecutions of champerty, barratry, and maintenance).

segregation devices"³⁸ included closing schools altogether rather than desegregating,³⁹ cutting off funding for schools under integration orders,⁴⁰ and providing tuition grants for white children to attend "private," i.e., white schools.⁴¹

Civil coercion in the form of widespread harassment, intimidation, and violence directed at black community efforts to desegregate represented yet another type of popular southern resistance to *Brown*.⁴² As Michael Belknap has chronicled, between 1955 and 1959 in the eleven states of the Old Confederacy, there were 210 incidents of intimidation (ranging from Klan rallies to cross burnings and death threats) attributable to the racial polarization that followed *Brown*, as well as 225 anti-civil rights acts of violence, including six murders in which all the victims were black, twenty-nine armed assaults, and forty-four beatings.⁴³ The violence ignited by *Brown* in the South was foreseeable, in light of previous reactions to even the mildest challenges to the order of white supremacy.⁴⁴ While some southern officials acted effectively to prevent and contain such violence, others permitted it and southern criminal justice systems generally failed to sanction such violence.⁴⁵ The federal government's inade-

³⁸ *Id.* at 79.

³⁹ See WILKINSON, *supra* note 26, at 82–83 (dividing southern legal resistance to *Brown* into two categories, the most extreme of which included school-closing and fund-cutoff laws).

⁴⁰ See WILHOIT, *supra* note 25, at 139–40 (outlining four lines of defense against school desegregation passed by Virginia's general assembly in its strategy of Massive Resistance); see also WILKINSON, *supra* note 26, at 82 (characterizing Virginia's fund-cutoff law as the most dramatic instance of this southern strategy of legal resistance to desegregation, and noting that funds withheld from schools attempting integration were distributed as tuition grants for private school pupils); Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 781 (2000) (describing a Michigan federal court's refusal to authorize funding for a proposed charter school based on requirements of the desegregation decree).

⁴¹ See PATTERSON, *supra* note 25, at 99 (describing Virginia's strategy of Massive Resistance, which included establishment of white private schools rather than desegregation of existing public schools); see also WILHOIT, *supra* note 25, at 139–40 (counting state-funding tuition grants for private school pupils among Virginia's lines of defense to desegregation); Brown-Nagin, *supra* note 40, at 774 (drawing "parallels between charter schools and school choice programs that allow students to opt out of conventional attendance zones, and the segregation academies of the 1950s and 1960s"). The closing of schools post-*Brown*, instead of desegregating, combined with the offer of tuition grants for alternative "private" schools, provides a key historical context for understanding the widespread civil rights community's opposition to the Republican party's policy on school vouchers that subsidize private schools and effectively undermine quality public education. PATTERSON, *supra* note 25, at 99–100; see also JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 11–12, 206 (1990) (describing the political groups with a vested interest in the closure of schools as well as the popularity of school choice and the privatization of education).

⁴² KLARMAN, *supra* note 11, at 411–13, 421–42.

⁴³ MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 28–29 (1987).

⁴⁴ *Id.* at 51–52.

⁴⁵ *Id.* at 27, 52.

quate response, which “showed little inclination to protect [African] Americans,”⁴⁶ troubles any characterization of this violence as “private.”

Much of the violence that occurred during the time of Massive Resistance was directly related to desegregation efforts.⁴⁷ Even the token integration of one African American student was enough to incite violent desegregation riots that resulted in death.⁴⁸ James Meredith’s admission to the University of Mississippi provoked a “desegregation riot” in the fall of 1962 that required 123 deputy federal marshals, 316 U.S. border guards, and 97 federal prison guards to protect him.⁴⁹ After a violent mob of whites opposing Meredith’s admission—armed with guns, bricks, and Molotov cocktails—grew to 2,000, President Kennedy sent 16,000 federal troops to quell the segregationists’ uprising.⁵⁰ The riot left two people dead and 160 injured, including 28 federal marshals who were shot and had been ordered not to shoot back and only to use tear gas.⁵¹

Autherine Lucy, the first African American graduate student admitted to the University of Alabama in February of 1956, was greeted by a mob numbering over a thousand hostile whites “throwing rocks and eggs and threatening a lynching.”⁵² Following a three-day riot, the University indefinitely suspended Lucy on “safety grounds” which was made permanent after she accused university officials of conspiring with the rioters.⁵³ On the first day of Dorothy Count’s admission to the all-white Harding High School in Charlotte, North Carolina in the fall of 1957, she was met by young whites jeering, spitting, and throwing pebbles, sticks, and paper balls.⁵⁴ After one week of such a reception, she withdrew from Harding for an integrated school in the Philadelphia suburbs.⁵⁵

While much of the civil coercion is often reduced to “vigilante violence” of private groups such as the Ku Klux Klan or White Citizens’ Councils that proliferated after *Brown*,⁵⁶ it should be noted that public officials and the state often incited, contributed to, or permitted such

⁴⁶ *Id.* at 27.

⁴⁷ *Id.* at 29.

⁴⁸ KLARMAN, *supra* note 11, at 433.

⁴⁹ CNN, *Mississippi and Meredith Remember* (Oct. 1, 2002), at <http://archives.cnn.com/2002/US/South/09/30/meredith>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² KLARMAN, *supra* note 11, at 423.

⁵³ WILHOIT, *supra* note 25, at 46.

⁵⁴ WILKINSON, *supra* note 26, at 87.

⁵⁵ *Id.*; see also PATTERSON, *supra* note 25, at 105–07 (detailing the abuses that Dorothy Counts and her family endured during her attendance at Harding which led her to enroll in an integrated school).

⁵⁶ WILHOIT, *supra* note 25, at 104, 111.

violence.⁵⁷ For example, one Mississippi legislator declared that “a few killings” now could “save a lot of bloodshed later on.”⁵⁸ Even officials seeking to discourage violence often normalized it. “God knows what the results will be,” admonished South Carolina’s attorney general, when “our patience may become exhausted.”⁵⁹ For these reasons, the category of “extra-legal” violence should be approached with skepticism.

Even after the Massive Resistance era ended in 1959, cultural and political resistance to *Brown* thwarted desegregation efforts for decades. Massive Resistance was replaced by what one scholar has termed “token compliance” between 1959 and 1964,⁶⁰ marked by superficial desegregation by localities, such as deploying “pupil-placement boards”⁶¹ to admit the smallest number of African Americans possible into white schools.⁶² The passage of the 1964 Civil Rights Act began the next period, known as “modest integration,” that effected limited compliance in parts of the rural South and urban North, leaving most areas in the nation virtually untouched.⁶³

What can we learn from the lesson of the two *Brown* decisions and the massive legal, political, administrative, and civil resistance that followed? Today, we should soberly acknowledge the success of Massive Resistance and the subsequent stages of resistance in terms of the state of desegregation today. Though almost universally praised as a watershed decision, *Brown*’s promise of desegregating America’s

⁵⁷ See KLARMAN, *supra* note 11, at 426–42 (articulating the ways in which state and local politicians directly and indirectly fomented “vigilante violence”).

⁵⁸ *Id.* at 427.

⁵⁹ *Id.*

⁶⁰ See WILKINSON, *supra* note 26, at 78, and accompanying text (describing the five stages of southern school desegregation).

⁶¹ KLARMAN, *supra* note 11, at 330–33.

⁶² See *Holt v. Raleigh City Bd. of Educ.*, 265 F.2d 95 (4th Cir. 1959) (requiring adherence to pupil placement laws); see also *Covington v. Edwards*, 264 F.2d 780 (4th Cir. 1959) (upholding pupil placement laws and establishing procedures to be followed); BELL, *supra* note 18, at 168 n.12 (identifying sources of general discussion on pupil placement laws and their effects); KLARMAN, *supra* note 11, at 358–59 (offering reasons why pupil placement and freedom of choice became the most popular methods of resisting desegregation); WILKINSON, *supra* note 26, at 83–86 (describing the effects of pupil placement laws enacted in ten southern states as enjoying greater popularity, ingenuity, and success than school closing laws).

⁶³ Two subsequent periods of resistance to *Brown* include the “massive integration” stage that began with *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), in which the Supreme Court ordered busing to desegregate Charlotte’s public schools, and the period of resegregation beginning with the Reagan administration in the 1980s that continues today. WILKINSON, *supra* note 26, at 78; see also Richard J. Altenbaugh, *Liberation and Frustration: Fifty Years After Brown*, 44 HIST. OF EDUC. Q. 1 (Spring 2004) (noting that “modest integration” produced some progress, but that progress toward desegregation remained nominal in the South and nearly non-existent in the North), available at <http://www.historycooperative.org/journals/heq/44.1/altenbaugh.html>.

schools has yet to be fulfilled.⁶⁴ In the eleven states that comprised the Old Confederacy, only 1.17% of African American students were attending desegregated schools by the 1963–64 school year.⁶⁵

Gary Orfield and Chungmei Lee at the Harvard Civil Rights Project have demonstrated that, some fifty years after the *Brown* decision, we are still at least two nations—if not three or more—in terms of ongoing, entrenched racial segregation which makes a mockery of any claims to meritocracy in college or graduate school admissions.⁶⁶ Today, American schools are resegregating African American and Latino students. According to the Harvard Civil Rights Project report, the nation has been moving “backward toward greater segregation for Black students” since the high point for desegregation in the late 1980s.⁶⁷ Segregation for Latinos has been “steadily increasing” since the first national data was collected in the late 1960s.⁶⁸ African American and Latino students tend to be segregated in tangibly and “deeply unequal” high poverty schools.⁶⁹ Furthermore, most white students have negligible contact with students of color.⁷⁰

Professor Klarman argues that *Brown*’s impact was not its legal pronouncement or doctrine, but rather its cultural and political import in fomenting a new level of southern white opposition to racial change and equality. According to Klarman, the Court-ordered school desegregation galvanized the southern resisters and radicalized southern politics, leading to the installation of hard-liner politicians who violently suppressed burgeoning civil rights movements and protests.⁷¹ Not until the media captured this violent backlash by the southern states did national opinion on race become transformed into a “counter-backlash,” thereby leading to the passage of key civil rights laws in Congress in the mid-1960s.⁷²

While I may not completely agree with Professor Klarman’s revisionist interpretation of *Brown*, I fully agree with his insight that “liti-

⁶⁴ GARY ORFIELD & CHUNGMEI LEE, *BROWN AT FIFTY: KING’S DREAM OR PLESSY’S NIGHTMARE?* (2004) (examining a decade of resegregation beginning with the *Board of Education v. Dowell*, 498 U.S. 237 (1991), in which the Court authorized a return to neighborhood schools even if that would create segregation), available at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf>; see also Brown-Nagin, *supra* note 40, at 789–90 (citing cases that relieve school systems from desegregation orders even if they have not fulfilled them).

⁶⁵ BELL, *supra* note 18, at 148; see also ORFIELD & LEE, *supra* note 64, at 17 (noting that ten years after *Brown*, ninety-eight percent of southern Black students remained in all-Black schools).

⁶⁶ ORFIELD & LEE, *supra* note 64, at 9.

⁶⁷ *Id.* at 4.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 16 (concluding that the average white student goes to a school that is seventy-nine percent white, while the average Black student attends a school that is thirty-one percent white).

⁷¹ KLARMAN, *supra* note 11, at 385–442.

⁷² *Id.* at 441–42.

gation without a social movement to support it c[an]not produce significant social change.”⁷³ Having sketched how my argument is illustrated by the history of massive resistance to *Brown*, I would now turn to *Bakke* and what I refer to as the “passive resistance” response to the opinion.

*B. “Passive Resistance” and the Lesson from Bakke:
A “Smirk and a Wink?”*

After *Brown*, *Regents of the University of California v. Bakke*⁷⁴ is often considered the next landmark case in the area of educational equity. In this fractured decision, no single opinion garnered a majority.⁷⁵ Justice Powell and four other justices held that a University of California at Davis Medical School affirmative action policy setting aside sixteen out of one hundred slots for disadvantaged and minority applicants was an impermissible “quota.”⁷⁶ However, in an opinion authored by Justice Brennan, four other Justices agreed with Justice Powell and declared that race could be used in college admissions as a “plus factor” consistent with the Harvard model of admissions.⁷⁷ The Brennan four applied a more relaxed level of scrutiny, below strict scrutiny, and approved of even non-remedial/non-societal discrimination rationales for affirmative action.⁷⁸

In the last decade, the *Bakke* case has been hailed by diversity advocates, especially in litigation, as the hallmark of a just, reasoned decision. Justice Powell has even been referred to as “Solomonic” by civil rights observers and scholars in terms of how fairly he balanced the various interests at stake in crafting racial remedies.⁷⁹ In the face of recent challenges to affirmative action in courts and in state initiatives, *Bakke* seems to represent the normative ideal for educational

⁷³ *Id.* at 381.

⁷⁴ 438 U.S. 265 (1978).

⁷⁵ Under *Marks v. United States*, 430 U.S. 188, 193 (1976), where no single rationale garnered a majority, the Court determined that “the holding . . . may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.”

⁷⁶ *Bakke*, 438 U.S. at 319–20 (plurality opinion).

⁷⁷ *Id.* at 297.

⁷⁸ In upholding the U.C. Davis policy in *Bakke*, the “Brennan four” noted that “its purpose is to overcome the effects of segregation by bringing the races together.” *Id.* at 374 (Brennan, J., concurring in part); see also Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 597–99 (2002) (concluding that Brennan’s partial dissent could be understood to endorse diversity, thus permitting affirmative action programs even when they are “neither a remedial consideration, nor one that rests on societal discrimination.”).

⁷⁹ See, e.g., JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 496–98 (1994) (recalling how Powell’s *Bakke* opinion was praised as “Solomonic” and an act of “judicial statesmanship” at the time); Roger Parloff, *Bakke to the Future*, AM. LAW., Feb. 2002, at 122 (referring to Powell’s decision as “Solomonic” and a “pragmatic triumph”).

equality. Addressing this "time-warp" irony, Professor Michael Olivas wrote in a 1996 editorial, "[w]ho knew in 1978, that we were at the high point of affirmative action, that its wave had crested, that the *Bakke* decision is what we must fight to protect nearly 20 years later?"⁸⁰

For the generation of law students born after 1978, it may come as a surprise that at the time *Bakke* was decided, it was seen as a crushing defeat for advocates of affirmative action:

Civil rights activists . . . foresaw negative consequences for minorities and disapproved of the ruling. The NAACP called the ruling "a major disappointment." A Black newspaper, the *Amsterdam News*, headlined the story, "*Bakke*. We Lose!" Kenneth Clark, a Black psychologist whose research had been cited in the *Brown* opinion, wrote, "The effect of the *Bakke* decision psychologically, legally, socially, and morally is devastating." Jesse Jackson likened the decision to the withdrawal of federal troops from the South after Reconstruction and argued, "Black people will again be unprotected . . . we must not greet this decision with a conspiracy of silence . . . we must rebel." And Stephen Carter, in his 1991 essay on affirmative action, recalls that African-American student protesters at Yale wore buttons reading "Fight Racism, Overturn *Bakke*."⁸¹

More than 10,000 people marched before the Supreme Court prior to oral arguments in *Bakke* to express support for U.C. Davis's Medical School affirmative action plan.⁸² These supporters, and many others nationwide, were devastated by the *Bakke* opinion; this is ironic today because diversity advocates now enshrine *Bakke* as a baseline example of racial justice jurisprudence.⁸³

Despite the deep sense of loss felt by most affirmative action supporters at the time of the decision, some advocates soon discovered a silver lining to the *Bakke* decision. A Mexican American Legal Defense and Educational Fund representative pointed out that the legacy of *Bakke*'s individual victory may be much more symbolic than systemic, and that most affirmative action programs would survive under

⁸⁰ Michael A. Olivas, *The Decision is Flatly, Unequivocally Wrong*, CHRON. HIGHER EDUC., March 29, 1996, at 33 (arguing that the decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which states that the contemplation of race and ethnicity to achieve diversity in admissions is not a compelling interest, is erroneous).

⁸¹ See WELCH & GRUHL, *supra* note 79 at 29–30 (1998) (citations omitted) (describing civil rights activists' response to *Bakke*).

⁸² See Lawrence Feinberg, *Demonstration on Bakke Suit*, WASH. POST, April 16, 1978, at C1, C6 (describing hundreds of demonstrators protesting the *Bakke* case in Washington, D.C.). The U.S. Capitol Police estimated the crowd at 10,000, the U.S. Park Police estimated it at 15,000, while the march organizers estimated it at 50,000 attendees. See also JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 204 (1979) ("Student groups had organized "Anti-Bakke" demonstrations all over the country, including a march by some 10,000 people past the Supreme Court building.").

⁸³ See, e.g., Greenberg, *supra* note 78, at 614 (maintaining that "Justice Powell's opinion in *Bakke* is a sound justification of affirmative action in higher education").

the legal standard set forth by Justice Powell.⁸⁴ The Congressional Black Caucus similarly advocated that, because the Court upheld the use of race as a legitimate factor in admissions decisions, this aspect of the opinion be emphasized to support affirmative action programs and policies.⁸⁵

For the most part, the silver-lining advocates were correct in suggesting that the legal pronouncement in *Bakke*—"race—yes, quotas—no"—would have little impact on existing affirmative action programs. In their 1997 book, *Affirmative Action and Minority Enrollments in Medical and Law Schools*, political scientists Susan Welch and John Gruhl conclude that *Bakke*'s effect on minority enrollment was far less than either supporters or opponents predicted.⁸⁶ Its impact was "minimal in affecting the number of minority applicants or enrollees."⁸⁷ Gruhl and Welch found that, in surveying medical and law school admissions officers about the perceived impact of the *Bakke* case upon their admissions policies, over three-quarters of medical school officials and sixty-three percent of law school officials claimed it affected their policies "not at all"⁸⁸ and "only a minority of schools reported that *Bakke* changed rather than reaffirmed their admissions policies."⁸⁹ Instead, the authors identify the Civil Rights Act of 1964, the growing affluence in the African American community, and the large increase of college educated students of color in the 1980s and 1990s, as well as the dramatic growth of higher education generally, as more determinative factors that affect diversity applications and enrollments.⁹⁰

Given the above, what can we learn from the cultural response to the *Bakke* case? My own analysis of this post-*Bakke*, pre-*Hopwood v. Texas*⁹¹ period of admissions is that affirmative action opponents, dispirited and demoralized by the *Bakke* ruling, eventually embraced the "silver lining" to the *Bakke* decision in the "race plus" language, and worked behind the scenes with college administrators and officials to mount what I refer to as a sort of "passive resistance" to the decision.

On the one hand, it was clear that quotas were forbidden by *Bakke*. However, few schools maintained set-aside quotas that reserved a

⁸⁴ See WELCH & GRUHL, *supra* note 79, at 30 (describing the response of civil rights groups to the *Bakke* decision).

⁸⁵ *Id.*

⁸⁶ *Id.* at 133 (discussing the "chilling effect" on minority enrollments that many commentators predicted in the wake of the *Bakke* decision).

⁸⁷ *Id.* at 134–35.

⁸⁸ *Id.* at 74.

⁸⁹ *Id.* at 75.

⁹⁰ *Id.* at 141–44.

⁹¹ 78 F.3d 932 (5th Cir. 1996) (striking down the use of race as a factor in law school admissions under the Equal Protection Clause, finding that encouraging diversity was not a compelling state interest), *overruled by* Grutter v. Bollinger, 539 U.S. 306 (2003).

fixed number of seats for affirmative action admits. So most admissions officials could assert that they were in compliance with *Bakke*.⁹² When the *Bakke* decision was handed down, the president of the Association of Medical Colleges issued a news release declaring that "since most of the medical schools are using admissions procedures which we feel fall within the views of the [C]ourt, we see little effect of the [C]ourt's ruling on the schools' affirmative action programs."⁹³ A reporter assessing the prevalence of quotas at the time of the *Bakke* decision concluded that "quotas have all but disappeared" between the filing of Alan Bakke's suit and the Supreme Court's ruling, estimating that "not more than a dozen" institutions still used the set-aside quotas struck down in *Bakke*.⁹⁴

On the other hand, while set-aside quotas and "two-track" dual admissions committees were clearly impermissible under *Bakke*, it was unclear exactly what was permissible. To interpret the ambiguity of Powell's "race-plus" formulation, university lawyers, civil rights advocates, and admissions officers participated in numerous seminars, conferences, and symposia dissecting the *Bakke* case and its meaning for higher education. One widespread report sponsored by the American Council on Education and the Association of American Law Schools concluded that "the Supreme Court has recognized the authority of institutions of higher education to continue under certain circumstances their affirmative action programs" and emphasized Justice Powell's idealization of the "Harvard Plan."⁹⁵

At the same time, experts noted how the distinction between the Harvard plan and the U.C. Davis plan "was easier to state than to apply."⁹⁶ One commentator candidly noted that the distinction was "nothing more than a smirk and a wink."⁹⁷ Even Justice Powell's former clerk and biographer John Jeffries dismissed the Harvard-U.C. Davis goals-quotas distinction as "pure sophistry,"⁹⁸ understanding that Powell's vaunted Harvard plan was simply a more "genteel way"⁹⁹ of accomplishing the same results as the U.C. Davis plan. In other words, Harvard's plan afforded race a central role in its admissions decisions, but was less transparent (and accountable) than U.C.

⁹² See WELCH & GRUHL, *supra* note 79, at 70-71 (concluding that only seven percent of medical students and five percent of law students believed their schools had a quota for minority admissions).

⁹³ *Id.* at 66.

⁹⁴ *Id.* at 71.

⁹⁵ *Id.* at 62.

⁹⁶ *Id.*

⁹⁷ *Id.* at 63.

⁹⁸ See JEFFRIES, *supra* note 79, at 484.

⁹⁹ Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1875 (1995).

Davis's plan. In this sense, Powell penalized U.C. Davis's candor. Or as Professor Jeffries acknowledged, "[s]tripped of legalisms, the message amounted to this: 'You can do whatever you like in preferring racial minorities, so long as you do not say so.'"¹⁰⁰

This seeming hypocrisy may have left university admissions officers with a degree of cynicism, as well as wide latitude to chart a diversity course. Some schools even enacted admissions policies akin to U.C. Davis's stricken plan that did not consider all applicants against one another individually, but instead had different committees and policies to assess white and minority applicants.¹⁰¹ Perhaps they did so out of confusion, cynicism, or the widespread belief that courts would allow "extremely broad discretion" in their implementation of "race as a positive factor" admissions.¹⁰² One law school dean conjectured that Powell's imprecision on the goals-quotas distinction may have been purposeful, in order to allow institutions discretion.¹⁰³

While I take no issue with the "resistance" portion of this strategy (which is morally distinct from massive resistance as I will describe below), I do take issue with the "passive" part, which I believe laid the foundation for the rise of right-wing organizations and campaigns to reclaim the moral high ground.¹⁰⁴ What I mean specifically is that instead of mounting a more public cultural campaign to contest the portions of the *Bakke* opinion that are problematic and unworkable,¹⁰⁵ affirmative action advocates instead mounted a quiet, behind-the-scenes resistance to the parts of the decision they did not like, with ample room to maneuver given the vagueness of the opinion and the high degree of discretion vested to admissions officers á la Harvard plan.¹⁰⁶

Granted, much of the "smirk and wink" approach to administrative passive resistance was a judicial "set-up" of sorts that inhered in the hypocrisy of elevating the formalism of the Harvard plan over the

¹⁰⁰ See JEFFRIES, *supra* note 79, at 484.

¹⁰¹ Gabriel Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 938 (1996) ("In 1992, the . . . [University of Texas] [L]aw [S]chool had one admissions committee for African-Americans and Mexican-Americans and a separate committee for Native Americans, Asian-Americans, non-Mexican-American Latinos and Latinas, and whites.").

¹⁰² See WELCH & GRUHL, *supra* note 79, at 63.

¹⁰³ *Id.* ("The courts have a long history of deferring to the judgments of an administrative officer so long as [it] . . . is within the range of discretion vested in his or her office.").

¹⁰⁴ See, e.g., The Center for Individual Rights ("CIR"), *Hopwood Ends Affirmative Action* in 5th Circuit ("CIR's landmark 1996 victory against the University of Texas School of Law was the first successful legal challenge to racial preferences in student admissions since *Bakke*"), at <http://www.cir-usa.org/cases/hopwood.html> (last visited Jan. 27, 2005).

¹⁰⁵ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Brennan, J., dissenting in part).

¹⁰⁶ WELCH & GRUHL, *supra* note 79 and accompanying text.

efficiency and transparency of the U.C. Davis plan.¹⁰⁷ But affirmative action proponents should have openly criticized, rather than simply operationalized, *Bakke's* dysfunction. If diversity may be considered a legitimate, compelling state interest, then it should be quantifiable. Universities should be able to state forthrightly what bottom-line "critical mass" is considered, at minimum, to be necessary. As Jeffries analogized, if state legislators can freely calibrate the percentage of in-state students they want at a state-funded university or school, then why could university officials not openly determine their goals for minority enrollments?¹⁰⁸

The problem with passive resistance is that, while it preserved enrollments and did not jeopardize outright legal prohibition of race-based affirmative action, the Right discovered a way to repackage and rearticulate backlash as moral indignation, affirmative action as discrimination, and whites (and now Asians) as victims and Blacks as perpetrators.¹⁰⁹ One critical way they were able to reclaim the moral high ground was by unearthing and bringing to light the actual policies used by admissions officers that had successfully diversified some of the most elite and multicultural colleges, universities, and graduate schools in the nation.¹¹⁰ Because these policies had existed on the "down-low" in the era of passive resistance, and because there had been no vigorous public debate or campaign contesting *Bakke's* prohibitions, many of these policies appeared to the public to be unfair and illegitimate in their furtiveness.

As civil rights advocates had accepted the whittling down of affirmative action legal precedents in the hopes of hanging onto whatever portions that remained, affirmative action advocates were ill-prepared to counter the Right's audacious rearticulations of civil rights and claims of injustice on behalf of white applicants—the Jennifer Gratzes,¹¹¹ Barbara Grutters,¹¹² and Katuria Smiths¹¹³ of the

¹⁰⁷ Justice Powell was well aware of the hypocrisy critique, which he addressed in his opinion:

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in [Davis's] preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process.

Bakke, 438 U.S. at 318 (plurality opinion).

¹⁰⁸ JEFFRIES, *supra* note 79, at 476.

¹⁰⁹ See, e.g., Press Release, CIR, Federal Appeals Court Hears Key Affirmative Action Challenge (Dec. 6, 2001) (describing how minorities are "evaluated under lower admissions standards, regardless of whether they suffer from any demonstrable disadvantage," and how universities "defen[d] the resulting discrimination against white and Asian applicants as necessary to attain a diverse student body."), available at <http://www.cir-usa.org/releases/26.html>.

¹¹⁰ *Id.* (listing CIR's challenges to the use of race in admissions decisions at various schools).

¹¹¹ Jennifer Gratz was the white female plaintiff in *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹¹² Barbara Grutter was the white female plaintiff in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

world. Countering them effectively would mean revisiting debates that had been tried, but lost in litigation (i.e., societal versus individualized findings of discrimination,¹¹⁴ invidious versus benign distinctions,¹¹⁵ and compensatory versus diversity rationales¹¹⁶). Up until the filing of the University of Michigan cases, most affirmative action advocates were still playing to the courts of law, rather than to the courts of public opinion.

II. A CALL FOR RIGHTEOUS RESISTANCE IN RESPONSE TO *GRATZ* AND *GRUTTER*

A. *The Center for Individual Rights' 2003 "Hearts and Minds" Campaign*

The historical analysis of the culture wars from *Brown* to *Bakke* should make clear that, especially in the matter of the Court's school desegregation and affirmative action cases, the cases matter far less as law than as culture. The primacy of culture to litigation and social change is not lost on the opponents of affirmative action. Indeed, the Center for Individual Rights ("CIR"), which provided the litigation support for many of the high-profile white plaintiffs challenging affirmative action plans, knows full well the need for its own "hearts and minds" campaign to make culturally acceptable a retreat from racial justice.

In the 1960s Vietnam era, President Lyndon B. Johnson acknowledged that prevailing against Communism in Southeast Asia for the long-term required more than sheer military force: "The ultimate victory will depend upon the hearts and minds of the people who actu-

¹¹³ Katuria Smith was the white female plaintiff in *Smith v. University of Washington Law School*, 233 F.3d 1188, 1201 (9th Cir. 2000) ("[T]he Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures.").

¹¹⁴ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (holding that federal racial classifications must serve a compelling government interest and be narrowly tailored to meet that interest); *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (holding that school district boundaries may be set aside if it can be shown that there has been a constitutional violation via racially discriminatory acts on behalf of the school board and that this has been a substantial cause of interdistrict segregation).

¹¹⁵ *Adarand*, 515 U.S. at 228 (countering the dissent's differentiation between "invidious" and "benign" discrimination); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 (1978) (stating that the "benign" discriminatory purpose of helping others still leads to a perception of invidious discrimination by those denied equal protection).

¹¹⁶ *Adarand*, 515 U.S. at 221-22 (discussing the Court's difficulty in coming to a consensus on the level of scrutiny required for a "remedial" or "compensatory" racial classification); *Bakke*, 438 U.S. at 358 ("[The] recitation of a benign, compensatory purpose is not an automatic shield.").

ally live out there."¹¹⁷ In this sense, the war had two fronts—one, the actual “ground war” or active military combat; the other a propaganda war designed to win over Vietnamese citizens to rally against the Viet Cong.¹¹⁸

In the affirmative action culture wars, there is another battle for the “hearts and minds” of a generation, and that is the current generation. Make no mistake that this cultural campaign is the primary aim of CIR, the Pacific Legal Foundation (“PLF”), and similar organizations that appear to be legal organizations.¹¹⁹ These organizations use high-profile litigation as one front, in tandem with a coordinated media and cultural campaign as the second front, designed to undo civil rights protections gained over the past half century.

In his book, *The Assault on Diversity: An Organized Challenge to Racial and Gender Justice*, author Lee Cokorinos quotes CIR attorney and strategist Michael Rosman as saying that the battle against affirmative action cannot be won “if . . . the [PLF] and [CIR] and the Fifth Circuit are out there on their own.”¹²⁰ Rosman explains that “[o]ne of the primary functions of a lawsuit is public education,”¹²¹ and “[l]awsuits without the political will to enforce the results will often end up only changing the form of race conscious decision-making . . . making them less conspicuous.”¹²² What Michael Rosman, CIR, PLF, American Civil Rights Coalition,¹²³ Independent Women’s

¹¹⁷ HEARTS AND MINDS (Touchstone Pictures 1974).

¹¹⁸ *Id.* Later, the documentary, “Hearts and Minds” rendered the slogan as satire by capturing on film the ways in which the U.S. military was decidedly not in Southeast Asia for such altruistic reasons, especially from the vantage point of Southeast Asians. *Id.*

¹¹⁹ See Terry Carter, *On a Roll(back)*, A.B.A. J., Feb. 1998, at 54 (discussing the Center for Individual Rights’ win in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), and its plan to file five more suits against universities); see also Pacific Legal Foundation (“PLF”), About Us (“PLF is renowned for battling those who would tread on individual liberty . . . for opposing government programs that grant special preferences on the basis of race and sex . . .”), at <http://www.pacificlegal.org/PLFProfile.asp> (last visited Dec. 5, 2004).

¹²⁰ LEE COKORINOS, *THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE* 127–28 (2003).

¹²¹ *Id.* at 128.

¹²² *Id.* Rosman further elaborates on the role of political leadership to this culture war posing as legal battle:

To ultimately eliminate race conscious decision-making what we need are political leaders who are willing to harness the dissatisfaction in this country over preferences and turn it into action. And it will take political courage to do so, because the political minority, as I’ve said before, has a strong intensity of preference on this issue.

Id.

¹²³ The American Civil Rights Coalition (“ACRC”) is a national organization created by Ward Connerly in the wake of California’s Proposition 209 anti-affirmative action campaign to ban affirmative action across the country. ACRC is supported by the extensive financial networks of the Right. COKORINOS, *supra* note 120, at 32.

Forum,¹²⁴ Center for New Black Leadership,¹²⁵ and other conservative think tanks and strategists understand is that only by convincing the current generation of students that affirmative action is a violation of civil rights, and a racial remedy run amok, can they successfully prevail in realizing their right-wing agenda.

Affirmative action proponents must give them their due. Conservatives have been amazingly productive and successful given their numbers and the normative claim they have been undertaking. They are trying to render as positive, a retreat from full inclusion and a return to segregation of higher education. Their strategies have worked with a good segment of the American population, including many among the current generation, and not limited to young whites. Through their litigation narratives, they have been reaching out to the public on a campaign to make exclusion morally upright by transposing whites, almost always white women, as the victims of undeserving African American sinecurists.¹²⁶

The progressive community must reject these cynical attempts and reclaim the moral high ground. We must expose the broad appeal of the attempt to re-enshrine whiteness as victimhood, thereby restoring whiteness to its full pre-civil rights, Jim Crow value.¹²⁷

B. Why Righteous Resistance is Distinct from Massive Resistance

Affirmative action opponents have already been characterizing university responses to Proposition 209 and *Hopwood v. Texas*¹²⁸ as new forms of "Massive Resistance," ironically saving moral approbrium that escaped segregationists for those currently seeking to maintain a modicum of integration in higher education. The consistency question may legitimately be raised: how can one promote resistance to the current law (of affirmative action) while, at the same time, cri-

¹²⁴ The Independent Women's Forum was formed by loosely-affiliated conservative women to promote Clarence Thomas's nomination to the Supreme Court and has established itself as the "the premier antifeminist women's group in Washington." COKORINOS, *supra* note 120, at 56.

¹²⁵ The mission of the Center for New Black Leadership is to "promote a new vision of leadership on public policy questions having a racial dimension." *Id.*

¹²⁶ See, e.g., *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting) (discussing the adverse effect of people feeling cheated by the government's use of race with respect to affirmative action); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (holding that Caucasians' claims for injunctive and declaratory relief regarding the University of Washington Law School's use of race as a consideration in its admissions policy were moot).

¹²⁷ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (discussing the interrelation of racial identity and property with regard to American law); see also Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998) (discussing a "racial redemption" theory, an ideological and psycho-social process, by which whiteness maintains its reputational existence).

¹²⁸ 78 F.3d 932 (5th Cir. 1996) (holding that the contemplation of race and ethnicity to achieve diversity in admissions is not a compelling interest).

tique resistance to prior law (of desegregation)? Is the moral force of a call for righteous resistance not undermined by this inconsistency and hypocrisy?

My answer to this charge is that as a society, we should be able to assess the moral claims of those seeking to promote white supremacy and racial exclusion from the moral claims of those seeking to promote affirmative action and racial inclusion. What distinguishes Massive Resistance from Righteous Resistance is the moral decrepitude of the former. And if Professor Klarman is correct, then the cultural resistance to the "rule of law" is not so much undermining the law as it is informing the law. In other words, law and culture are mutually constitutive. I am simply arguing for a culture of resistance to white supremacy and white normativity to inform the judicial decision-making on affirmative action that will "find" the law in the next twenty-five years and thereafter.

C. *Why Righteous Resistance is Preferable to Passive Resistance*

Although we "won" *Grutter* legally-speaking, insofar as the University of Michigan Law School affirmative action program was upheld, I still advocate for a "righteous resistance" response to the University of Michigan cases in light of understanding affirmative action jurisprudence as a larger "culture war." Seen this way, *Grutter*, while a legal "win," is consistent with the long line of Supreme Court cases since *Bakke* attempting to "wean" the public off of racial remedies, and affirmative action in particular. An outright prohibition on the use of "diversity" as a compelling state interest likely would have provoked outright resistance not only from diversity activists, but also from the Fortune 500 corporate elite, and the military elite which weighed in favor of Michigan's admissions policies in their respective amicus curiae briefs.¹²⁹ Such a ruling would not have served the interests of maintaining racial hegemony through law. Prohibiting the use of race in affirmative action would have been read widely among diversity proponents as serving white interests.

Instead, the Court upheld only one of the Michigan admissions policies, using a multinational, multicultural capitalism-global policeman rationale,¹³⁰ and limiting even that interest-convergence approach to racial remedy to a twenty-five-year window.¹³¹ It should be noted that the divided *Grutter* Court was unanimous in the following

¹²⁹ *Grutter*, 539 U.S. at 330–31 (discussing the benefits of affirmative action as evidenced by the various briefs filed with the Court).

¹³⁰ *Id.* at 308 ("[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.").

¹³¹ *Id.* at 391 (Kennedy, J., dissenting) (discussing the Law School's burden of proving that race was not used in an unconstitutional way).

regard: all members of the Court disparaged the goal of seeking racial balance as unconstitutional.¹³² All nine Justices agreed that requiring proportions for racial balancing is unconstitutional. The five-Justice majority referred to "racial balancing" as "patently unconstitutional"¹³³ and found the University of Michigan Law School admissions program to be a vague and permissible search for a "critical mass" of diverse students that was individualized and *not* a proportional system.¹³⁴ The O'Connor majority made clear that one of the reasons for the opinion's twenty-five-year "sunset" provision is for the very purpose of prohibiting affirmative action from fulfilling the goal of racial balance. In emphasizing the need for a termination point for race-conscious admissions, the majority cites as authority a quote from a 1977 legal newspaper article entitled *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, which stated that "[i]t would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life."¹³⁵

The four dissenting Justices found the Michigan Law School's admissions plan and "critical mass" approach to be "precisely the type of racial balancing that the Court itself calls 'patently unconstitutional.'"¹³⁶ The Rehnquist dissent also laments that, "[s]tripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing."¹³⁷ In a separate dissent, Justice Scalia, joined by Justice Thomas, similarly remarked that "[t]he admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions."¹³⁸

While diversity advocates should take the limited "win" and convert whatever cultural capital it conveys, we must also understand that in order to make the legal win "real," we must maintain vigilance and state more forthrightly and publicly why the quest for racial justice and equality is just beginning. In other words, we must make clear that America is at the *sunrise* of racial equality, not the sunset. We must undertake a well-crafted political, legal, and cultural campaign on the issues of affirmative action and racial equality and social justice generally if we hope to maintain *Grutter* in the "win" column as opposed to having *Grutter* serve as the legal "landbridge" from Jim Crow to the end of affirmative action and racial remedies.

¹³² For a general discussion of this argument, see Spann, *supra* note 7, at 641–46.

¹³³ *Grutter*, 539 U.S. at 330 (plurality opinion).

¹³⁴ *Id.* at 335 (finding that the admissions program did not act as a quota).

¹³⁵ *Id.* at 343 (citing Nathanson & Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 CHI. BAR. ASS'N. REC. 282, 293 (1977)).

¹³⁶ *Id.* at 386 (Rehnquist J., dissenting).

¹³⁷ *Id.* at 379.

¹³⁸ *Id.* at 346–47 (Scalia, J., dissenting in part).

In this regard, I argue that affirmative action proponents must not allow what is perceived to be a legal victory to lull ourselves yet again into a "Bakkean" state of complacency. We must reject the strategy of massive resistance to *Brown* and its moral decrepitude of defending white supremacy, as well as the morally vulnerable and ineffective-in-the-long-run passive resistance to *Bakke* that has embraced administrative activism, as a substitute for political activism and cultural contestation.

III. WHERE DO WE GO FROM HERE?

Although affirmative action advocates can claim a partial win in *Grutter*, that win will be preserved and hopefully expanded only with the hard work to provide society with a more compelling vision of racial and social justice than the other side's rearticulation. If one takes seriously my call for righteous resistance, what would a proactive approach to *Grutter* be like? How would a righteous resistance movement accomplish this? I have only a few suggestions to share today, but call upon all diversity advocates to make this our positive mission in the wake of *Grutter*.

A. *Resisting Internalization of the Law and Understanding Its Limits (or Understanding Law as Culture)*

Historically, academics seeking to justify Jim Crow segregation coined the phrase "[s]tateways cannot change folkways" to rationalize the Court's retreat from the Fourteenth Amendment and failure to apply the Equal Protection Clause in the post-Reconstruction era. We can revive the core insight absent the moral decrepitude by adopting a Foucauldian understanding of power as diffuse, and not simply disseminated from top-down (state-citizenry), and use that understanding to our advantage. In short, the power is everywhere. In other words, let us not be too cowed as lawyers, law professors, and law students, by the law!

On a related point, we must broaden the discussion beyond what have been the legally acceptable and respectable terms of the debate.¹³⁹ We cannot abandon the salience of "societal" discrimination merely because the Court has deemed most forms of institutionalized racism to exist beyond the reach of racial remedies. We must revisit *Bakke's* dissent. We need a discussion of not only the broader social conditions that make affirmative action necessary, but a broader discussion of how we need to act as a society to "do right" by those who have been historically and contemporarily mistreated. On affirmative

¹³⁹ See Greenberg, *supra* note 78, at 521 for further discussion on these approaches.

action, we need to ask whether we are comfortable as a society where predominantly whites and Asians have access to the most prestigious institutions of higher learning. If not, what is the solution for the inability of existing meritocratic standards to deliver diverse classes?

B. Pursuing Racial Balance Unapologetically

On a substantive basis, we must embrace and advocate for the goal of racial balance and power-sharing in the country's most important educational institutions and employment opportunities. Perhaps we are too vested in our own professionalism and struggle as outsiders for respectability to comprehend fully what it would mean to step outside of the norms of affirmative action constitutional jurisprudence. When I say we, I include myself, lawyers generally, and the Critical Race Theory community as well. Let me illustrate this point more concretely: Who is willing to go on the record in favor of "quotas"? Understandably, very few people, if any. But we must acknowledge that the "no man's land" of what is called "quotas" has been legally and culturally constructed. We need look no further than post-apartheid South Africa to understand this cultural construction of the "patent unconstitutionality" of the goal of racial balance. In that country, which has struggled with the legacy of white supremacy and the continuing underrepresentation of people of color in the best schools and jobs, the goal of racial balance is not only permitted, but also required.¹⁴⁰

We should remember that what was legally discredited in *Bakke* as a quota at the U.C. Davis Medical School was an affirmative action program based on race and class that "set aside" sixteen slots out of 100 at this highly competitive school for persons from underprivileged and underrepresented groups who wanted to serve underprivileged and underrepresented communities. Thus, had Powell "gone the other way" in upholding the U.C. Davis policy, diversity advocates would not only be in support of the Davis "quota" policy today, we probably would not refer to it as a "quota," but merely as affirmative action. The real irony post-*Bakke* is that under the era of passive resistance, administrators and activists were able to achieve gains far exceeding sixteen percent of affirmative action slots for students of

¹⁴⁰ See Carmen Morris Twyman, Note, *Finding Justice in South African Labor Law: The Use of Arbitration to Evaluate Affirmative Action*, 33 CASE W. RES. J. INT'L L. 307, 311 (2001) ("The Employment Equity Act is a clear attempt by the South African government to use law to steer social and economic life towards the values of racial equality."). For a related argument in the U.S. context, see Luke Charles Harris & Uma Narayan, *Affirmative Action as Equalizing Opportunity: Challenging the Myth of Preferential Treatment*, in ETHICS IN PRACTICE: AN ANTHOLOGY 451 (Hugh LaFollette ed., 1st ed. 1997), and LUKE CHARLES HARRIS, THE MEANING OF EQUALITY IN POST-APARTHEID AMERICA (forthcoming 2005).

color, and this was absent consideration of class status and desire to practice in underserved communities (two competing reforms often disingenuously proposed to undermine current race-based affirmative action policies).

*C. Talking to Each Other and to Our Natural Base of Supporters
Instead of Primarily to the Courts and to Our Opponents*

Perhaps the cold war analogy applies here: the Soviet Union was so busy fighting the external threat of the arms race with the United States that it lost its ability to provide the fundamentals of government—economic stability for its citizens. In this sense, Reagan's cold war strategy may have been successful in diverting Soviet attention from its fundamental base in a similar way that CIR has been diverting diversity advocates' attention from their fundamental base. We cannot take the current generation for granted. We have not passed down basic information to our own communities' youth and young adults, perhaps because we have been so busy fighting the Right. But we cannot expect busloads of students to come to Washington, D.C. for a *Grutter* march when they are constantly having to respond or dodge fellow students who question their right to be in law school. We have to take time to discuss the history and what is at stake and the arguments and strategies deployed. We must hear and respond to concerns. It is an organic process that requires more interaction between progressive students and faculty or other "experienced" people in a coordinated fashion. The civil rights movement came about in this way. This new orientation of focus should not be construed as merely "preaching to the converted," but providing ammunition to the converted.

D. Adopting an Interracial, Intergroup Justice Approach

We must resist the narrowing of affirmative action via the "narrow tailoring" requirement to binary white-over-Black discussions of race. We must discuss why affirmative action's beneficiaries generally (though perhaps not always specifically) must be multiracial given the multiple injuries imposed by white supremacy. We must strengthen ties among communities of color through our advocacy work on affirmative action.

The defense of affirmative action and broader vision of racial justice must be linked to other forms of social justice, whether it is to gay marriage or to critiques of racial profiling under the USA PATRIOT

Act¹⁴¹ and national security regime. It is not a coincidence, for example, that the No Child Left Behind Act of 2001¹⁴² includes provisions that allow military recruiters to have access to student lists at underperforming schools,¹⁴³ and thereby conveniently prepare them for an easy transition into the military.

We should note that the other side clearly draws the conceptual links between various backlash objectives to create a powerful right-wing agenda. For example, Ann Coulter of the Independent Women's Forum, a right-wing organization posing as a feminist think tank, handily made the connection between affirmative action and national security in her editorial, *Affirmative Action for Osama*, decrying the affirmative action program in *Adarand Constructors, Inc. v. Peña*¹⁴⁴ that would permit the 12,000 boys in Pakistan named "Osama" to be "granted preferential treatment over American-born whites."¹⁴⁵

While developing a multi-issue, intergroup justice approach to racial justice and support of affirmative action, we cannot be afraid to address the controversial issues that arise in the forging of multi-issue coalitions. We must acknowledge the gap between what we would like to believe and what is really true. We cannot afford to retreat into slogans or dogmas, no matter how reassuring they may be. We must continue to search for answers and ask the hard questions, such as why not even a simple majority of white women support affirmative action.¹⁴⁶ We need to interrogate, and white women need to interrogate, the ways in which the racialization of the family and entrenched patterns of segregation may dictate even feminist perspectives on affirmative action.

CONCLUSION

Twenty-five years from now, where will we be? We have only begun to realize *Brown I*'s promise of equality, and we have only begun to administer in earnest, if rather messily, the challenge of equality since *Bakke*. It is my hope that affirmative action advocates will not become complacent with *Grutter*, but will commit to undertaking a

¹⁴¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of U.S.C.).

¹⁴² Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

¹⁴³ Pub. L. No. 107-110, § 901, 115 Stat. 1983 (2001) (codified at 20 U.S.C. § 7908 (a) (3)).

¹⁴⁴ 515 U.S. 200 (1995) (holding that federal racial classifications must serve a compelling governmental interest and be narrowly tailored to meet that interest).

¹⁴⁵ Ann Coulter, Editorial, *Affirmative Action for Osama*, Oct. 11, 2001, available at <http://frontpagemag.com/articles/ReadArticle.asp?ID=109>.

¹⁴⁶ See Sumi Cho, *Understanding White Women's Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions*, 71 UMKC L. REV. 399 (2002) (discussing possible reasons for why white women oppose affirmative action).

cultural campaign necessary to redefine a broader meaning of equality that goes beyond “Bakkean” compromises and *Grutter’s* (“multicultural elite”) interest convergences. Otherwise, our dreams for a better society may be “eclipsed” by the Court’s termination of racial remedies while we are still at the sunrise of racial equality.

