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Keith R. Walsh

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COLOR-BLIND RACISM IN *GRUTTER* AND *GRATZ*

KEITH R. WALSH*


Abstract: In *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States*, Eduardo Bonilla-Silva examines how whites use color-blindness as a tool to perpetuate racial inequality without themselves sounding racist. He asserts that white America’s justifications for the continued second-class status of African Americans stem from a new, post-Civil Rights racial ideology that he calls color-blind racism. Bonilla-Silva argues that color-blind racism, which is founded upon the belief that race no longer matters, is currently the dominant racial ideology in the United States. This Book Review ratifies Bonilla-Silva’s argument through an examination of the recent Supreme Court decisions on affirmative action in higher education, which demonstrably undervalue the persistence of racial inequality in the United States. Through the use of a color-blind ideology, the Justices mask the seriousness of racial inequality in the United States and may be hastening an end to racial progress before its time.

INTRODUCTION

On June 23, 2003, the United States Supreme Court in *Grutter v. Bollinger* reaffirmed the constitutionality of race-targeted admissions policies that intend to foster diversity in higher education.1 Read together with its companion case, *Gratz v. Bollinger*, however, it is clear that only the most limited use of race in admissions will withstand the Court’s application of strict scrutiny to racial classifications.2 These

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rulings come at a time when black Americans continue to face daunting barriers in their attempt to attain an education equal to that of most white Americans. Although the Court upheld a narrow use of race-conscious admission policies, it employed a color-blind ideology that severely minimizes the scope of racial inequality in higher education. The Court’s recent undervaluation of the persistence of racial inequality in higher education should raise concern about the continuation of racial progress in the United States.

In his recent book, *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in the United States*, Eduardo Bonilla-Silva analyzes the use of color-blind ideology as a tool to perpetuate the second-class status of blacks. Although Bonilla-Silva’s book focuses on the use of color-blind ideology by the average, white American citizen, the application of his framework to the recent Supreme Court decisions on affirmative action demonstrates that the ideology is so pervasive that it is utilized even by the nation’s highest court. *Racism Without Racists* examines the ways white America justifies the continued second-class status of African Americans without actually sounding or appearing racist. Bonilla-Silva contends that these justifications stem from a new racial ideology, which he calls color-

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5 See *Gratz*, 123 S. Ct. at 2428-30; *Grutter*, 123 S. Ct. at 2339-40, 2343-44, 2346-47; Johnson, *supra* note 3, at 440. Racial inequality in education continues to have a disparate impact on the lives of African Americans; as Professor Johnson stated, “disparities in educational opportunities at the secondary and higher educational levels are among the societal conditions that limit the social advancement of many in the African American community.” Johnson, *supra* note 3, at 440.

6 See *Bonilla-Silva, Racism Without Racists*, *supra* note 4, at 4.


blind racism. He argues that ongoing racial inequality in the United States is perpetuated by “new racism” practices that are not as overt as Jim Crow racism. During the Jim Crow era, the racial status quo was justified as the result of the alleged biological and moral inferiority of blacks. Color-blind racism, however, does not rely on these same simplistic and overtly racist arguments. Bonilla-Silva asserts that, today, whites justify the continued second-class status of minorities as the product of market dynamics, naturally occurring phenomena, and blacks’ cultural limitations. These arguments, which appear even in Supreme Court opinions, mask the true status of blacks in the United States and support the fallacy that race no longer matters.

This Book Review accepts Bonilla-Silva’s argument that in the post-Civil Rights era, color-blind racism perpetuates the second-class status of blacks, and finds in the Supreme Court’s recent decisions on affirmative action in higher education a disturbing manifestation of this new trend. In Grutter and Gratz, the Justices refuse to argue that affirmative action policies are still necessary because blacks lag far behind whites in education, a reality that runs afoul of the principle of equality upon which the Fourteenth Amendment was drafted. Instead, the Justices hide behind color-blind doctrine. By adhering

9 See Bonilla-Silva, Racism Without Racists, supra note 4, at 2. Color-blind racism, “which acquired cohesiveness and dominance in the late 1960s, explains contemporary racial inequality as the outcome of nonracial dynamics.” Id. at 2. Bonilla-Silva defines racial ideology as: “[T]he racially based frameworks used by actors to explain and justify . . . or challenge . . . the racial status quo.” Id. at 9.

10 Id. at 2–3.

11 Id. at 2. For example, the belief that minorities were placed on this earth by God in a servile position, or that minorities do not have the mental capacity to vote are no longer as prevalent as during Jim Crow. Id.

12 Id. at 2–3.

13 Id. at 2, 3. See generally Stephan Thernstrom & Abigail Thernstrom, America in Black & White 493–529 (1997) (asserting that while whites’ racial attitudes have come a long way, racial inequality has persisted in a climate where changing public norms have forced racism to become more subtle); Keith N. Hylton, A Framework for Reparations Claims, 24 B.C. THIRD WORLD L.J. 31, 34–36 (2004) (stating that the social welfare of black families remains well below that of white families, as illustrated by the disparity in poverty rates between the two groups).


15 See discussion infra Parts III, IV.

16 See discussion infra Parts III, IV.

17 See discussion infra Parts III, IV.
to the standard of strict scrutiny—in particular, the requirements that there be a “compelling government interest” behind the use of racial classifications and that the program be “narrowly-tailored” to that interest—the Court corroborates Bonilla-Silva’s assertion that color-blind racism is prevalent in the debate over the worth of race-based government programs. How can we as a nation expect to narrow the gap between blacks and whites if our highest court’s constitutional analysis does not properly account for racial inequality to the extent necessary to continue racial progress? If it is not a grave enough problem to warrant factoring into the Court’s constitutional analysis of affirmative action, why should Congress or state legislatures worry about racial discrimination when enacting laws?

Part I of this Book Review gives a brief overview of Bonilla-Silva’s exposition of the ideology he calls color-blind racism. Part II establishes the urgent need for the Court to recognize racial inequality in higher education. By drawing on empirical data, this part of the analysis illustrates that racial inequality in higher education still is a serious problem. Parts III and IV of this Book Review argue that even the Supreme Court employs color-blind racism in its two most recent opinions on the constitutionality of affirmative action in higher education. These sections analyze the Court’s reliance on color-blind doctrine, and their utilization of what Bonilla-Silva calls the “central frames,” “main stylistic components,” and the “major story lines” of color-blind racism in America today. This Book Review concludes that, discouragingly, adherence to color-blind racism in America’s highest court may already be stunting the growth of racial progress in the United States at a time when racial equality is still an unrealized dream.  

I. COLOR-BLIND RACISM

Bonilla-Silva intends Racism Without Racists to be a “wake-up call” to whites about the importance race plays in shaping the lives of blacks. Relying on interview data, Bonilla-Silva analyzes the various manifestations of color-blind racism with the goal of revealing their remarkably color-conscious result.

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18 See discussion infra Parts III, IV.
19 See discussion infra Conclusion.
20 BONILLA-SILVA, RACISM WITHOUT RACISTS, supra note 4, at 13, Bonilla-Silva asserts that his book is “a challenge to post-Civil Rights white common sense.” Id.
21 Id. at 12–13. Bonilla-Silva relies primarily on interview data because of his belief that survey results do not accurately depict the racial attitudes of the respondents. Id. The interview data for Bonilla-Silva’s book is derived from two projects, the 1997 Survey of Social
Bonilla-Silva first discusses the central themes, or "frames," of color-blind racism: abstract liberalism, naturalization, cultural racism and minimization of racism. Bonilla-Silva argues that the frame of abstract liberalism relies on ill-formed notions of "equal opportunity" and economic liberalism to explain the racial status quo. The use of the "language of liberalism," exemplified by the assertion, "I am all for equal opportunity, that's why I oppose affirmative action," allows whites to argue against all measures to eradicate de facto racial inequality, while seeming reasonable and moral. Naturalization, captured by the idea that the current state of racial inequality is "just the way things are," is a frame that whites utilize to explain phenomena such as segregation as a natural, and thus nonracial, occurrence. The cultural racism frame, illustrated in the comment, "blacks have too many babies," explains the status of racial minorities as a product of cultural deficiencies. Finally, the frame of minimization, reflected in comments such as, "It's better now than in the past," or, "There is discrimination, but there are plenty of jobs out there," downplays the significance that race plays in the progress of minorities in the United States. Bonilla-Silva contends that whites utilize these frames both independently and collectively to argue against measures to improve the status of blacks, while turning a blind eye to the reality of racial inequality. As the analysis below demonstrates, the Supreme Court uses two of these frames in particular, abstract liberalism and minimization, when it analyzes the constitutionality of race-conscious admissions policies.

Attitudes of College Students (SSACS) and the 1998 Detroit Area Survey (DAS). Id. SSACS surveyed 627 college students (including 451 white students) from three universities in different regions of the country. Of the 451 white students who participated, forty-one were interviewed. Id. at 12. The DAS is a "probabilistic survey of 400 black and white Detroit metropolitan area residents (323 whites and 67 blacks)." Id. at 13. Of the 400 surveyed, 67.5% responded, and eighty-four of these respondents participated in interviews. Id. at 13. The interview data from these two projects is utilized throughout Bonilla-Silva's book to exemplify the various manifestations of color-blind racism. Id. at 12.

22 Id. 28–29.
23 Id. at 28, 47.
24 Bonilla-Silva, Racism Without Racists, supra note 4, at 28.
25 Id.
26 Id.
27 Id. at 29.
28 Id. at 47.
Bonilla-Silva also discusses the style of color-blindness.\textsuperscript{30} In the post-Civil Rights era, public norms have changed.\textsuperscript{31} The linguistic manners of racism, Bonilla-Silva argues, have adapted to this change in a way that permits whites to justify white privilege in an age when overtly expressing such views would be unacceptable in most social circles.\textsuperscript{32} He argues that color-blind racism, like all other ideologies, has created a group of “stylistic parameters,” which provide it with a means of expression to the public.\textsuperscript{33} Thus, Bonilla-Silva describes the style of an ideology as the “linguistic manners and rhetorical strategies (or race talk)” that are used to express its frames and story lines.\textsuperscript{34} The style of color-blind race talk allows whites to adopt arguments that explain racial inequality without using racial epithets.\textsuperscript{35}

Bonilla-Silva focuses on five specific elements of the style of color-blind racism.\textsuperscript{36} First, he points out that whites avoid using offensive racial language when engaging in color-blind race talk.\textsuperscript{37} Second, Bonilla-Silva provides an analysis of the “semantic moves” whites rely on as “verbal parachutes” to remove any risk of sounding racist.\textsuperscript{38} Third, Bonilla-Silva explains the role that diminutives play in whites’ racial discourse.\textsuperscript{39} Fourth, he illustrates how discussion of racially sensitive topics often produces incoherence in many whites.\textsuperscript{40} Finally, Bonilla-Silva ex-

\textsuperscript{30} Bonilla-Silva, Racism Without Racists, supra note 4, at 53–73. Bonilla-Silva argues that whites rely on the style of color-blindness to “[t]alk [n]asty about [m]inorities without [s]ounding [r]acist.” Id. at 53.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id. at 16.
\textsuperscript{34} Id. at 53.
\textsuperscript{35} Bonilla-Silva, Racism Without Racists, supra note 4, at 53–54.
\textsuperscript{36} Id. at 54.
\textsuperscript{37} Id. Today, whites generally avoid using terms such as “colored,” “nigger,” or “Negroes” to describe blacks. Id. at 55.
\textsuperscript{38} Id. at 54. For example, most whites provide disclaimers when stating their racial views. Id. at 57. These disclaimers often take the form of apparent denials (“I don’t believe that, but . . .”), or claims of ignorance “I don’t know”). Id. The disclaimers allow whites to save face if they say something construed as racist because they will have the ability to fall back on these rhetorical shields (“I didn’t mean that because, as I told you, I am not a racist”). Id.
\textsuperscript{39} Id. at 54. Whites utilize diminutives to mitigate their racially biased opinions. Id. at 66. For example, seldom do whites who oppose interracial marriage state point-blank, “I am against interracial marriage.” Id. Instead, many whites that are against interracial marriage assert, “I am just a bit concerned about the welfare of the children.” Id.
\textsuperscript{40} Bonilla-Silva, Racism Without Racists, supra note 4, at 54. Bonilla-Silva explains that this rhetorical incoherence (e.g., grammatical mistakes, long pauses, or repetition) is the “result of talking about racially sensitive matters in a period in which certain things cannot be uttered in public.” Id. at 54, 68.
plores the role of projection in the articulation of the frames and story lines of color-blind racism. This final element of color-blind race talk, exemplified by Justice Thomas’s opinion in Grutter v. Bollinger, plays a significant role in the debate over the use of affirmative action.

Finally, Bonilla-Silva examines the story lines of color-blind racism. He asserts that with the advent of color-blind racism, new anecdotes and personal experiences have developed that perpetuate minorities’ new, but still second-class status. Bonilla-Silva argues that during discussions about race-related issues, whites often insert these stories, such as “I Did Not Get a Job (or a Promotion), or Was Not Admitted to a College, Because of a Minority,” to “provide the emotional glue and seal of authenticity needed to validate strong racial claims.” Indeed, in his majority opinion to Gratz v. Bollinger, Chief Justice Rehnquist relies on similar story lines to invalidate the University of Michigan’s race-conscious admission’s policy. Color-blind racism, in all of its forms, is particularly important in an area such as higher education, which, as the next section demonstrates, continues to suffer from racial inequality.

II. THE PERSISTENCE OF RACIAL INEQUALITY IN HIGHER EDUCATION

An examination of empirical data reveals that racial inequality in higher education is still a serious problem, and thus it is urgent for the Supreme Court expressly to recognize racial inequality in higher education. Although many in white America may believe that the

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41 Id. at 63–64. Whites often project racism or racial motivations onto minorities to avoid responsibility for the persistence of racial inequality. Id. at 64. For instance, when explaining residential segregation, whites often state that blacks prefer the company of other blacks, and thus do not want to live in a neighborhood comprised mostly of whites. Id.

42 See Grutter, 123 S. Ct. at 2352, 2362 (Thomas, J., concurring in part and dissenting in part); Bonilla-Silva, Racism Without Racists, supra note 4, at 65; Greenberg, supra note 3, at 582–83.

43 Bonilla-Silva, Racism Without Racists, supra note 4, at 75–101.

44 Id. at 77.

45 Id. at 72, 83. Bonilla-Silva proclaims that “[w]ithout these stories, venting racial animosity would be untenable.” Id.

46 See Gratz, 123 S. Ct. at 2428–29. As part of his argument against the University of Michigan’s race-conscious admissions policy, Chief Justice Rehnquist explains that under the policy, person C, a highly qualified white student whose “extraordinary artistic talent’ rival[s] that of Monet or Picasso,” would likely be denied admission to the University of Michigan in favor of person B, “a black who grew up in an inner-city ghetto . . . [and] whose academic achievement was lower . . . .” Id. at 2428, 2429.

47 See Greenberg, supra note 3, at 538–46. At law schools that have eliminated race-conscious admissions policies there has been a predictable drop in minority enrollment.
gap between whites and blacks in higher education has all but closed during the recent era of court-sanctioned affirmative action, the numbers continue to show a gap in access to colleges and universities between these two racial groups.  

According to the Department of Education, despite the fact that almost one-half of all whites believe that blacks have attained education levels equal to that of whites, only 16% of all black adults are college-educated as opposed to 28% of adult whites. The United States is still a nation where the number of incarcerated black men substantially outweighs the number of black men in colleges and universities.

Part of the reason for the continuation of the racial gap in education is the disparity between whites and blacks on test scores that claim to measure scholastic aptitude and intelligence. For instance, the average black student scores lower than 75% of white students on most standardized tests for admission into college, law school, medical school, and business school. In some instances, blacks score below more than 85% of whites. Blacks make up less than 1% of the top scoring group on the SAT and ACT, two of the most frequently-used college admissions exams, and are similarly underrepresented as high-scorers on admissions tests for professional schools. The Journal of Blacks in Higher Education reported in a study that if scores on standardized tests became the decisive factor for all students in gaining admis-


Johnson, supra note 3, at 441; see also Lani Guinier & Gerald Torres, The Miner’s Canary 47 (2002) (concluding that there is still a significant gap in educational attainment among the races); Glenn C. Loury, Affirmed ... for Now, Boston Globe, June 29, 2003, at D1 (arguing that there is still a dramatic under-representation of blacks and Hispanics among top academic performers).

Johnson, supra note 3, at 441. As of 2000, only 17.8% of African Americans over the age of twenty-five had completed four or more years of college, while 34% of their white counterparts could say the same. Vital Signs: Statistics that Measure the State of Racial Inequality, 36 J. Blacks Higher Educ. 81, 83 (2002), available at http://www jbhe.com/vital/36_index.html (last visited Nov. 20, 2003).

Vital Signs: Statistics That Measure the State of Racial Inequality, 40 J. Blacks Higher Educ. 75, 77 (2003), available at http://www jbhe.com/vital/40_index.html (last visited Nov. 20, 2003). In 1999, the total number of black men enrolled in higher education was 603,000, while the total number of that same class incarcerated in federal, state, or local prisons was 757,000. Id.

See Greenberg, supra note 3, at 525–30.


Id.

See Greenberg, supra note 3, at 526–27.
sion to America's leading universities, black enrollment would drop by as much as 80%.

An examination of the disparity in scores on standardized tests provides strong evidence that the elimination of race-conscious admissions policies would seriously diminish the numbers of blacks enrolled in higher education. This conclusion is strengthened by the disastrous effect that the removal of affirmative action has actually had on black enrollment.

Recent statistics on student enrollment in public colleges and universities in states that have eliminated the use of race as a factor in admissions put to rest any debate over whether race-conscious admissions policies are still necessary to ensure that blacks attain educational levels commensurate with those of whites. States such as Texas, Florida, and California have found it difficult to maintain a significant black presence in their public institutions of higher learning in the wake of court decisions, referenda, and executive orders banning affirmative action. For example, after Texas stopped using race-conscious admissions policies, the University of Texas experienced a precipitous drop in black enrollment. In 1996, the university enrolled 266 black students, while in 1997, the first year of race-neutral admissions, black enrollment decreased to 190. As a result of the passage of Proposition 209, a legislative measure in California prohibiting race-conscious admissions, black enrollment at the University of California in the years 2000 and 2001 was about twenty percent below the level of black enrollment during the era of affirmative action.


56 See Greenberg, supra note 3, at 526–27, 538–46; Johnson, supra note 3, at 445; Simmons, supra note 3, at 35 n.28; Roach, supra note 47, at 19.

57 See Greenberg, supra note 3, at 538–46; Johnson, supra note 3, at 444–45; Simmons, supra note 3, at 35 n.28; Roach, supra note 47, at 19.

58 See Greenberg, supra note 3, at 538–46; Johnson, supra note 3, at 444–45; Simmons, supra note 3, at 35 n.28; Roach, supra note 47, at 19.

59 Greenberg, supra note 3, at 538.

60 Id. at 539. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the United States Court of Appeals for the Fifth Circuit's ruling that *Regents of the University of California v. Bakke*, 438 U.S. 265 (1977), which held that schools have a compelling interest in achieving a diverse student body and that race may be one of a number of factors considered by a school in reviewing applications, was no longer valid precedent and that the promotion of student body diversity was not a compelling interest, forced Texas to end its use of race-conscious admissions policies. Simmons, supra note 3, at 34 n.20.

61 Greenberg, supra note 3, at 539.

62 See id. at 541. These statistics mask the greater decline of black enrollment at more prestigious colleges and the rise in less selective ones. *Id.* 542–43. For example, at U.C.
In an attempt to remedy this situation, some state universities have decided to institute so-called percentage plans.\(^{63}\) Percentage plans increase minority enrollment at state universities by guaranteeing admission to all high school students who graduate in the top percentages of their respective high school classes.\(^{64}\) Thus, the policy results in the automatic admission to state universities of students from the top percentages of inner-city schools despite low standardized test scores.\(^{65}\) This admissions policy has increased black enrollment in these states to levels commensurate with those while affirmative action policies were in place.\(^{66}\) There are several glaring problems with these plans, however, including their dependence on high school segregation to achieve the desired effect of increasing black enrollment.\(^{67}\) Percentage plans seek to solve one problem, low black enrollment, by relying on the existence of another problem, residential segregation.\(^{68}\)

Furthermore, despite state efforts to institute percentage plans to increase black enrollment in the post-affirmative action era, these plans have not been used in professional school admissions policies.\(^{69}\) The application of a percentage plan to professional schools is difficult to envision because these schools admit students from all over the country and abroad, and colleges and universities are much more integrated than high schools where the student body composition is impacted greatly by residential segregation.\(^{70}\) As a result, black law school enrollment in these states still remains well below levels when affirmative action policies were in place.\(^{71}\)

\(^{63}\) Id. at 538–46.
\(^{64}\) Id. at 538–39, 546.
\(^{65}\) Id.
\(^{66}\) Greenberg, supra note 3, at 539–40, 545.
\(^{67}\) See id. at 546–47.
\(^{68}\) Id. According to Greenberg, in desegregated cities where high schools are integrated, a top percentage plan would not increase minority enrollment at state colleges and universities because well-qualified minorities would generally fall outside the top percentages of the class, which will predominately consist of white students. Id. at 546.
\(^{69}\) Id. at 540, 545.
\(^{70}\) Id. at 540.
\(^{71}\) See Greenberg, supra note 3, at 541, 544; Johnson, supra note 3, at 444–45; Simmons, supra note 3, at 35 n.28; Roach, supra note 47, at 19.
For example, one year after the Fifth Circuit Court of Appeal's *Hopwood v. Texas* ruling, which forced Texas universities to end their use of affirmative action polices on constitutional grounds, the University of Texas School of Law enrolled only four black students, whereas before, it consistently enrolled twenty to forty blacks each year.\footnote{Greenberg, *supra* note 3, at 541; Roach, *supra* note 47, at 19; see *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).} By 2001, black enrollment at the law school had increased to sixteen, but still remained below the pre-*Hopwood* levels.\footnote{Greenberg, *supra* note 3, at 541.} Similarly, the School of Law at the University of California at Berkeley enrolled only one black student in 1997, which was the first academic year after affirmative action had been banned at the school.\footnote{Id. at 544. This one black student who enrolled at Boalt Hall in 1997 actually had been admitted one year earlier while affirmative action was still in place, but deferred enrolling. *Id.* The ACLU Newsletter of January 28, 2000, stated that "[a]t the Berkeley School of Law, since the elimination of affirmative action . . . . The new students averaged only one point higher on the LSAT than the students admitted in 1996. The cost of one LSAT point was a 76% drop in admissions of African Americans . . . ." Simmons, *supra* note 3, at 35 n.28.} Also, while black enrollment increased at U.C. Berkeley Law School in 2001 to fourteen, this was still well below the level in the years immediately preceding the abolition of race-conscious admissions, which was consistently in the twenties and thirties.\footnote{Greenberg, *supra* note 3, at 620 app. B.}

National statistics on black educational attainment and the results of the elimination of affirmative action policies at select schools provide irrefutable evidence that a racial gap still exists in American higher education.\footnote{See id. at 538–46; Johnson, *supra* note 3, at 444–45; Simmons, *supra* note 3, at 35 n.28; Roach, *supra* note 47, at 19.} These statistics also provide compelling support for the argument that the Supreme Court must recognize this gap in its constitutional analysis on race-based admissions policies.\footnote{See Greenberg, *supra* note 3, at 538–46; Johnson, *supra* note 3, at 444–45; Simmons, *supra* note 3, at 35 n.28.}

**III. The Supreme Court's Reliance on Color-Blindness in *Grutter* and *Gratz***

Given the troublesome existence of a racial gap in higher education, it is particularly worrying that the Supreme Court uses color-blind doctrine to down-play the seriousness of the problem, which may ultimately contribute to educational inequality by bringing an
end to affirmative action before its time. In the summer of 2003, the Supreme Court handed down its latest opinions on the constitutionality of race-conscious admissions policies. This marked the first time that the Court had critically examined the use of race as a factor in student admissions under the Equal Protection Clause of the Fourteenth Amendment since its 1978 landmark decision in Regents of the University of California v. Bakke. Since the Court’s splintered ruling in Bakke, Justice Powell’s plurality opinion in that case has functioned as the model for constitutional analysis of race-targeted admissions policies. In a five-to-four decision in Grutter v. Bollinger, the Court, drawing on Justice Powell’s decision in Bakke, upheld the University of Michigan Law School admissions policy and declared that student body diversity is a compelling governmental interest that can validate the use of race as a “plus” factor in admissions. In Gratz v. Bollinger, however, the Court limited the scope of the holding in Grutter by striking down the University of Michigan’s undergraduate admissions policy because it was not narrowly tailored enough to advance an interest in diversity. In a six-to-three decision, the Court ruled that the undergraduate admissions policy was unconstitutional because it did not provide individualized consideration of each applicant.

Even more discouraging than the Court’s decision narrowly to limit affirmative action in higher education was the Court’s utilization of color-blind ideology in reaching its conclusion. An examination of

79 See Gratz, 123 S. Ct. at 2430; Grutter, 123 S. Ct. at 2347.
80 438 U.S. 265, 320 (1977) (holding that schools have a compelling interest in achieving a diverse student body and that race may be one of a number of factors considered by a school in reviewing applications, but that an affirmative action program may not, in effect, function as a quota).
81 See Grutter, 123 S. Ct. at 2336.
82 Id. at 2347; Joint Statement of Constitutional Law Scholars, supra note 1, at 1.
83 Gratz, 123 S. Ct. at 2430.
84 Id. at 2427–30.
85 See id. at 2428–30; Grutter, 123 S. Ct. at 2339–40, 2343–44, 2346–47; Bonilla-Silva, Racism Without Racists, supra note 4, at 2, 3, 9. It is important to note at the outset that, when advancing the opinion that the Supreme Court utilizes a color-blind ideology, there is a distinction between the “color-blind ideology” depicted by Bonilla-Silva and referred to in this Book Review and the “race-blind approach” discussed elsewhere. See Bonilla-Silva, Racism Without Racists, supra note 4, at 2, 3, 9. The “color-blind ideology” discussed in this Book Review is a subconscious means of accounting for race in a way that appears to be race-neutral. See id. By contrast, the absolute race-blind approach holds that classifications based on race violate the mandates of the Constitution and actually hinder the quest
the Court's reasoning in both Grutter and Gratz illustrates that the Justices rely strongly on color-blind doctrine by adhering to the standard of strict scrutiny and by using, in varying degrees, Bonilla-Silva's central frames, main stylistic components, and major story lines of color-blind racism to determine the constitutionality of affirmative action.\textsuperscript{86} In Grutter and Gratz, the Court applied its strict scrutiny standard of review to the question of whether the respective schools' admissions policies were unconstitutional.\textsuperscript{87} The Court had previously held that the strict scrutiny standard of review applies to all racial classifications irrespective of the race of those burdened or benefited by the classification.\textsuperscript{88} Moreover, the Court has described strict scrutiny as a standard that can be satisfied only by narrowly tailored means that further compelling governmental interests.\textsuperscript{89} The Court's use of race-neutral criteria, such as diversity and individualization, in the analysis of "compelling government interest" and "narrowly tailored" in its recent decisions on affirmative action allow the Justices to sidestep a larger

\textsuperscript{86} See Gratz, 123 S. Ct. at 2428-30; Grutter, 123 S. Ct. at 2339-40, 2343-44, 2346-47; Bonilla-Silva, Racism Without Racists, supra note 4, at 15-16. In arguing that the Supreme Court Justices depend on color-blind doctrine and use, in varying degrees, the various forms of color-blind racism in their opinions on the constitutionality of affirmative action, this Book Review in no way intends to suggest that any particular Justice is a racist, or that any Justice believes that race accounts for differences in human character or ability. See Bonilla-Silva, Racism Without Racists, supra note 4, at 172-73. Rather, this Book Review argues that these Justices utilize—perhaps even unwittingly—a currently dominant racial ideology, color-blind racism, that perpetuates racial inequality. See id.

\textsuperscript{87} See Gratz, 123 S. Ct. at 2427; Grutter, 123 S. Ct. at 2337-38; Joint Statement of Constitutional Law Scholars, supra note 1, at 1.


\textsuperscript{89} Id. at 227; Girardeau A. Spann, The Law of Affirmative Action: Twenty-Five Years of Supreme Court Decisions on Race and Remedies 55 (2000).
social problem—namely, the ongoing need for race-conscious admissions policies because of the persistence of a racial gap in education.90

A. Compelling Interest

The Court's holding in Grutter, that student body diversity is a compelling interest, resolved the debate among the lower federal courts as to whether Bakke was still valid precedent.91 Justice O'Connor's majority opinion affirms Justice Powell's holding in Bakke that institutions of higher education have a compelling interest in obtaining diverse student bodies.92 The Court's opinion stresses the benefits of student body diversity for all students.93 The Court's reliance on diversity as the compelling interest that justifies the race-conscious admissions policies, however, is a convenient way for the Justices to couch their holding in race-neutral terms.94

As evidenced by the majority opinion in Grutter, the Court's decision minimizes the scope of racial inequality in this country, specifically in the area of education, and takes a race-neutral approach to the compelling interest question in an effort to gain white accep-

90 See Gratz, 123 S. Ct. at 2427; Grutter, 123 S. Ct. at 2337–38; Greenberg, supra note 3, at 538–46.

91 Joint Statement of Constitutional Law Scholars, supra note 1, at 1. The challenges to the admissions policies in Grutter and Gratz as well as the challenges to similar policies at other state universities resulted in significantly different outcomes in the lower federal courts. Id. at 1 n.4. The United States Court of Appeals for the Ninth Circuit in Smith v. University of Washington Law School, 233 F.3d 1188 (9th Cir. 2000), the United States Court of Appeals for the Sixth Circuit in Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), and the United States District Court in Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000), declared that Bakke was still good law and that promoting diversity is a compelling governmental interest. Id. The Court of Appeals for the Fifth Circuit in Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) ruled that Bakke was no longer valid precedent and that the promotion of student body diversity was not a compelling interest. Id. In Johnson v. Board of Regents of University of Georgia, 263 F.3d 1234 (11th Cir. 2001), the Court of Appeals for the Eleventh Circuit ruled that although promoting diversity may be a compelling interest, the University of Georgia's race-conscious admissions policy was invalid because it was not narrowly tailored to advance that interest. Id.

92 Grutter, 123 S. Ct. at 2339.

93 Id. at 2340. These benefits include training for an increasingly diverse workforce and society, increased cross-racial understanding, and more well-rounded classroom discussion. Joint Statement of Constitutional Law Scholars, supra note 1, at 5.

94 See Grutter, 123 S. Ct. at 2339; Guinier & Torres, supra note 48, at 40; see also Gratz, 123 S. Ct. at 2427–28 (holding implicitly that student body diversity is a compelling interest); Emmanuel O. Iheukwumere & Philip C. Aka, Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence, 11 Temp. Pol. & Civ. Rts. L. Rev. 1, 54 (2001) (arguing that "color-blind jurisprudence, although couched in neutral terms, is nothing more than an ideology employed . . . to maintain the [racial] status quo").
tance. Although Justice O'Connor does acknowledge that "race unfortunately still matters" and that "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity[,]" these statements seem to be dicta and are not crucial to the holding that obtaining student body diversity is a compelling interest for an institution of higher learning. The Court could have simply stated that blacks still lag far behind whites in all areas of higher education, and that colleges and universities therefore have a compelling interest in ensuring equal access to public education. Instead, as to the compelling interest question, the Court consciously invited Americans to view affirmative action as a benefit for all, not just for blacks. The Court, as it did in its decision in Brown v. Board of Education, should have ignored whether or not its decision would enjoy broad acceptance among whites. The Court should have made a clear and unequivocal declaration that, until equality among the races is truly a reality in the area of education, institutions of higher learning have a compelling interest in implementing race-conscious admissions policies.

B. Narrowly Tailored

After holding that the University of Michigan's undergraduate college and its law school had a compelling interest in obtaining a diverse student body, the Court determined whether the respective race-conscious admissions policies were narrowly tailored to further

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95 See Grutter, 123 S. Ct. at 2339; Guinier & Torres, supra note 48, at 40–41; Ihekwumere & Aka, supra note 94, at 54. "[P]opular animosity toward programs that are regarded as 'special' to black people means that [race] targeted programs will increasingly fail .... [T]here is evidence [however] that Americans as a general matter would support programs aimed at helping all people . . . ." Guinier & Torres, supra note 48, at 40–41.

96 See Grutter, 123 S. Ct. at 2340, 2341.

97 See Greenberg, supra note 3, at 522, 572, 575. The Supreme Court should uphold affirmative action by declaring that it is a necessary means of improving the social conditions of blacks rather than couch its decisions on the constitutionality of race-conscious admissions policies in abstract terms that mask the social reality of blacks in America. Id.

98 See Grutter, 123 S. Ct. at 2340.

99 See 347 U.S. 483, 495 (1954); Bonilla-Silva, Racism Without Racists, supra note 4, at 182–85; Greenberg, supra note 3, at 522, 572, 575. The Supreme Court's ruling in Brown focused on the importance of a quality education for children of all races, and ignored the fact that most whites disagreed with the Court about the importance of integration in public schools. See Sharon Elizabeth Rush, The Heart of Equal Protection: Education and Race, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 2–5 (1997).

100 See Bonilla-Silva, Racism Without Racists, supra note 4, at 182–85; Greenberg, supra note 3, at 522, 572, 575.
that interest.\textsuperscript{101} An examination of both \textit{Grutter} and \textit{Gratz} reveals that the most important aspect of a race-conscious admissions policy in constitutional analysis is the policy's ability to provide sufficient individualized review.\textsuperscript{102} In evaluating whether the specific programs were narrowly tailored, the Court once again took a predominantly race-blind approach to its analysis.\textsuperscript{103} The Court in \textit{Grutter} approved the admissions policy at the University of Michigan Law School in large part because it provides individualized review by seriously weighing other diversity factors besides race that benefit non-minority applicants.\textsuperscript{104} By the same token, the Court in \textit{Gratz} struck down the admissions policy employed by the University's undergraduate program because it utilized a mechanistic assignment of points based on race, and thus was not sufficiently individualized or flexible to satisfy the narrowly tailored requirement.\textsuperscript{105} The Court's framing of the narrowly tailored issue as an inquiry into whether the specific admissions policy provides individualized review is a distressing example of the color-blind frame of abstract liberalism discussed by Bonilla-Silva.\textsuperscript{106}

In particular, the Court utilizes the frame of abstract liberalism to make its narrowly tailored analysis sound reasonable and moral even when the outcome of the analysis may serve to perpetuate de facto racial inequality.\textsuperscript{107} One of the foundations of liberal thinking is a focus on individual rights.\textsuperscript{108} Through the lens of liberalism, group-based goals, pursued through means such as race-conscious programs,

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\textsuperscript{101} \textit{Gratz}, 123 S. Ct. at 2427; \textit{Grutter}, 123 S. Ct. at 2342.
\textsuperscript{102} See \textit{Gratz}, 123 S. Ct. at 2428–30; \textit{Grutter}, 123 S. Ct. at 2343–44 (stating that "[t]he importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount"). Taking the two decisions together, "the most important inquiry into whether race-conscious admissions policy is narrowly tailored is whether it is flexible and provides sufficient consideration of all applicants." \textit{Joint Statement of Constitutional Law Scholars, supra} note 1, at 9. Opponents of affirmative action believe that "[t]he principle of racial equality reflects the need to treat people as individuals rather than as mere members of racial groups." \textit{Spann, supra} note 89, at 8.
\textsuperscript{103} See \textit{Gratz}, 123 S. Ct. at 2428–30; \textit{Grutter}, 123 S. Ct. at 2343–44; \textit{Bonilla-Silva, Racism Without Racists, supra} note 4, at 28.
\textsuperscript{104} \textit{Grutter}, 123 S. Ct. at 2344.
\textsuperscript{105} \textit{Gratz}, 123 S. Ct. at 2427–30; \textit{Joint Statement of Constitutional Law Scholars, supra} note 1, at 9.
\textsuperscript{106} See \textit{Gratz}, 123 S. Ct. at 2428–30; \textit{Grutter}, 123 S. Ct. at 2343–44; \textit{Bonilla-Silva, Racism Without Racists, supra} note 4, at 28.
\textsuperscript{107} See \textit{Gratz}, 123 S. Ct. at 2428–30; \textit{Grutter}, 123 S. Ct. at 2343–44; \textit{Bonilla-Silva, Racism Without Racists, supra} note 4, at 28.
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are viewed as detrimental to the pursuit of individual autonomy.\(^{109}\) The abstract liberalism frame can be seen in the Court's insistence, in *Grutter* and *Gratz*, on individual review of all applicants.\(^{110}\) For example, Chief Justice Rehnquist utilizes this frame and its focus on individualism in the major opinion in *Gratz* to rule against the race-conscious admissions policy employed by the University of Michigan's undergraduate program.\(^{111}\) Under that policy, according to Chief Justice Rehnquist, virtually every underrepresented minority who applied was granted admission solely on account of his or her race.\(^{112}\) Thus, the university did not provide its applicants comprehensive individualized review, but instead, made race rather than individual merit the focus of the admissions process.\(^{113}\) The application of abstract liberalism to the affirmative action debate erroneously presupposes that minorities are on equal ground with whites, and that minorities would therefore be able to compete in a system that only recognizes individual merit.\(^{114}\)

The Court's application of strict scrutiny is a glaring example of the Justices' predominantly color-blind approach to the issue of race-conscious admissions.\(^{115}\) In effect, the Justices do not place enough emphasis on the persistence of racial inequality in America's institutions of higher learning.\(^{116}\)

\(^{109}\) See id. at 183, 190, 191; see also Greenberg, supra note 3, at 580. Opposition to affirmative action often stems from the belief that the policy is erroneously based upon a theory of "group rights," whereas relief under the Fourteenth Amendment's Equal Protection Clause is only afforded to those who are personally injured. Greenberg, supra note 3, at 580.


\(^{111}\) See *Gratz*, 123 S. Ct. at 2428–30; Bonilla-Silva, *Racism Without Racists*, supra note 4, at 28.

\(^{112}\) *Gratz*, 123 S. Ct. at 2428–30.

\(^{113}\) See id. at 2428; Cummings, supra note 108, at 190. Hostility towards race-targeted government programs, such as affirmative action, often originates from the mistaken belief that the programs devalue merit. See Greenberg, supra note 3, at 582.

\(^{114}\) See Bonilla-Silva, *Racism Without Racists*, supra note 4, at 28. Abstract liberalism is an "[a]bstract and decontextualized extension of principles of liberalism to racial matters in ways that preserve racially unfair situations." Bonilla-Silva, *White Supremacy*, supra note 8, at 142.

\(^{115}\) See *Gratz*, 123 S. Ct. at 2428–30; *Grutter*, 123 S. Ct. at 2337–47; Bonilla-Silva, *Racism Without Racists*, supra note 4, at 28; Guinier & Torres, supra note 48, at 40–41.

\(^{116}\) See *Gratz*, 123 S. Ct. at 2428–30; *Grutter*, 123 S. Ct. at 2337–47; Greenberg, supra note 3, at 538–46. Greenberg illustrates the continued gap in the area of higher education by reference to statistics on enrollment from states that have eliminated the use of race-conscious admissions policies from their public institutions of higher learning. Greenberg, supra note 3, at 538–46.
IV. OTHER EVIDENCE OF THE COURT'S COMPLICITY IN COLOR-BLIND RACISM

In her majority opinion in Grutter v. Bollinger, Justice O'Connor employs another frame of color-blind ideology by "minimizing" racism.\textsuperscript{117} Bonilla-Silva contends that color-blind ideologists minimize racism when they argue against affirmative action because they believe that race is no longer an important factor affecting minorities' educational opportunities.\textsuperscript{118} Opponents of affirmative action rely on this frame, for instance, to argue that racial discrimination does not affect the chances of admission for blacks applying to schools and universities.\textsuperscript{119} Although Justice O'Connor does not contend that race no longer affects the chances of blacks in the area of education, she minimizes the significance of racial inequality in this country.\textsuperscript{120} In her opinion, Justice O'Connor asserts: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."\textsuperscript{121} It is true that minorities' positions in higher education have improved since race-conscious admissions policies were first validated by the Court twenty-five years ago, but to suggest that fifty years of affirmative action can repair the damages arising from centuries of slavery and Jim Crow oppression grossly underestimates the struggles that blacks still face in their march towards equality.\textsuperscript{122} Although her opinion upholds the race-conscious admissions policy at the University of Michigan Law School, Justice O'Connor relies, in part, on the color-blind frame of minimization to mask the true scope of racial inequality in higher education, and in so doing, gives credence to

\textsuperscript{117} See Grutter v. Bollinger, 123 S. Ct. 2325, 2346–47 (2003); Bonilla-Silva, Racism Without Racists, supra note 4, at 29, 43–47.

\textsuperscript{118} See Bonilla-Silva, Racism Without Racists, supra note 4, at 29. Many whites mistakenly believe that being white is not a socio-economic advantage. See Bonilla-Silva, White Supremacy, supra note 8, at 151–53.

\textsuperscript{119} See Bonilla-Silva, Racism Without Racists, supra note 4, at 43. According to Gallup, "eighty-five percent of whites believe that black children had the same chance as white children to get a quality education." Johnson, supra note 3, at 441.

\textsuperscript{120} See Grutter, 123 S. Ct. at 2346–47.

\textsuperscript{121} Id. at 2347.

\textsuperscript{122} See Simmons, supra note 3, at 38. Terrence A. Taylor, chairperson of the Commission on Racism, Justice, and Reconciliation of the Episcopal Diocese of Southeast Florida, stated: "Sure African Americans are doing better today in many respects than in previous generations. Yet we have not begun to scratch the surface of the damage caused by over 300 years of slavery and nearly a century of Jim Crow." Id.
the argument that there is no longer a substantial impediment to blacks' chances to compete in the admissions process. 123

Notably, the Justices use these frames of color-blind racism in a non-mutually exclusive manner. 124 For instance, Justice O'Connor would find it difficult explaining racial matters through the abstract liberalism frame without also utilizing the minimization frame. 125 Justice O'Connor's insistence that all admissions policies be highly individualized without allowing race to play a significant role seems reasonable only if one overlooks the fact that, under any system based solely on individual merit, blacks will be at a serious disadvantage to whites in the admissions process. 126 Bonilla-Silva contends that, by using these frames in a manner similar to "the way children use building blocks," opponents of affirmative action feel justified in saying, "I am all for equal opportunity, that's why I oppose affirmative action" because they can subsequently say, "Everyone has almost the same opportunities to succeed in this country because discrimination and racism are all but gone." 127 As demonstrated by the seamlessness and strength of the Supreme Court's opinion in Grutter; when these frames are bundled together, they form an "impregnable yet elastic wall that barricades" the nation from the unpleasant reality of racial inequality. 128

Justice Thomas also utilizes the "style" of color-blindness in his recent opinion in Grutter. 129 Bonilla-Silva argues that color-blind racism, like all other ideologies, has created a group of "stylistic parameters" that provide a means of expressing its ideas to the public. 130 Projection, on such parameter, is a linguistic tool that people use to shield themselves from guilt. 131 For instance, critics of affirmative action often couch their opposition to the policy in terms of a concern over how

123 See Grutter, 123 S. Ct. at 2346–47; Bonilla-Silva, Racism Without Racists, supra note 4, at 43–47.
124 See Grutter, 123 S. Ct. at 2428–30, 2346–47; Bonilla-Silva, Racism Without Racists, supra note 4, at 47.
125 See Grutter, 123 S. Ct. at 2428–30, 2346–47; Bonilla-Silva, Racism Without Racists, supra note 4, at 47.
126 See Grutter, 123 S. Ct. at 2428–30, 2346–47; Greenberg, supra note 3, at 538–46; Johnson, supra note 3, at 445; Simmons, supra note 3, at 35 n.28; Roach, supra note 47, at 19.
127 Bonilla-Silva, Racism Without Racists, supra note 4, at 47.
128 See Grutter, 123 S. Ct. at 2428–30, 2346–47; Bonilla-Silva, Racism Without Racists, supra note 4, at 47.
129 See Grutter, 123 S. Ct. at 2352, 2362 (Thomas, J., concurring in part and dissenting in part); Bonilla-Silva, Racism Without Racists, supra note 4, at 63–66.
130 Bonilla-Silva, Racism Without Racists, supra note 4, at 16.
131 Id. at 64.
affirmative action makes blacks feel about themselves.\textsuperscript{132} The style of color-blind racism, and in particular, the linguistic tool of projection, is illustrated by various of Justice Thomas's assertions in \textit{Grutter}.\textsuperscript{133} For instance, Justice Thomas states, "[Race-conscious] programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."\textsuperscript{134} In addition, Justice Thomas argues that race-conscious admissions policies are objectionable because they set up under-qualified black students for failure.\textsuperscript{135} Justice Thomas's approach demonstrates that those who argue against affirmative action by adopting a color-blind ideology can make themselves feel less guilty about their role in the perpetuation of racial inequality.\textsuperscript{136} They accomplish this self-justification by stating that race-targeted policies stigmatize minorities by making people feel that the minority student must only have been admitted because of affirmative action.\textsuperscript{137} Thus, the argument goes, minorities are left feeling inferior to whites, even if they were admitted or hired because they were equally qualified for the school or the position.\textsuperscript{138}

Indeed, by embracing this inferiority argument in his own words, Justice Thomas adopts color-blind racism.\textsuperscript{139} He states in \textit{Grutter}:

\begin{quote}
When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case
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\item \textsuperscript{132} See id.; Greenberg, \textit{supra} note 3, at 582.
\item \textsuperscript{133} See \textit{Grutter}, 123 S. Ct. at 2362 (Thomas, J., concurring in part and dissenting in part); \textit{Bonilla-Silva, Racism Without Racists}, \textit{supra} note 4, at 16, 63–66.
\item \textsuperscript{134} \textit{Grutter}, 123 S. Ct. at 2362 (Thomas, J., concurring in part and dissenting in part).
\item \textsuperscript{135} Id.
\item \textsuperscript{136} See id.; Greenberg, \textit{supra} note 3, at 582–83. The inferiority argument is even more unfounded because generalizations about the stigmatizing or stereotyping effect of affirmative action policies are supported by little or no empirical data. See Greenberg, \textit{supra} note 3, at 583–87.
\item \textsuperscript{137} See id. at 582–83; see also Cummings, \textit{supra} note 108, at 238–39 (declaring that it is a social good for race always to be important in state decision-making because it promotes the value of race and thus diminishes any stigmatizing effect affirmative action may produce).
\item \textsuperscript{138} See Cummings, \textit{supra} note 108, at 238–39; Greenberg, \textit{supra} note 3, at 582–83.
\item \textsuperscript{139} See \textit{Grutter}, 123 S. Ct. at 2362 (Thomas, J., concurring in part and dissenting in part); \textit{Bonilla-Silva, Racism Without Racists}, \textit{supra} note 4, at 16, 63–66.
\end{itemize}
asking the question itself unfairly marks those blacks who would succeed without discrimination.\textsuperscript{140}

As Justice Thomas’s opinion demonstrates, the style of color-blind racism allows individuals to maintain a color-blind image as they advance positions that perpetuate racial inequality and white privilege.\textsuperscript{141} In reality, however, whites are the ones who receive preference based upon their race because of their history of comparative wealth and social privilege, and thus should feel inferior because the market is so heavily tilted in their favor.\textsuperscript{142}

Furthermore, the Supreme Court perpetuates color-blind racism by utilizing the ideology’s major “story lines” to invoke sympathy that affirmative action hurts innocent people who merit being admitted.\textsuperscript{143} When making points on race-related issues, individuals who utilize color-blind racism often insert these stories, which validate strong racial claims.\textsuperscript{144} Similar to the common story of, “I Did Not Get a Job (or a Promotion), or Was Not Admitted to a College, Because of a Minority,” Chief Justice Rehnquist, in his majority opinion in \textit{Gratz v. Bollinger}, emphasizes that highly qualified whites are hurt by the race-conscious admissions policy utilized by the University of Michigan.\textsuperscript{145} In a hypothetical, Chief Justice Rehnquist explains that person C, a highly qualified white student whose “extraordinary artistic talent rival[s] that of Monet or Picasso,” would likely be denied admissions to the University of Michigan in favor of person B, “a black who grew up in an inner-city ghetto . . . [and] whose academic achievement was lower . . . .”\textsuperscript{146} The Chief Justice stresses that this example illustrates what is wrong with the admissions system at issue in \textit{Gratz.}\textsuperscript{147}

\textsuperscript{140} \textit{Grutter}, 123 S. Ct. at 2362 (Thomas, J., concurring in part and dissenting in part).

\textsuperscript{141} \textit{See id.} at 2352, 2362 (Thomas, J., concurring in part and dissenting in part); \textit{Bonilla-Silva, Racism Without Racists, supra} note 4, at 70.

\textsuperscript{142} \textit{Bonilla-Silva, Racism Without Racists, supra} note 4, at 65. “Justice Thomas’ ridiculous stigma argument conveniently overlook[s] the fact that stigma to African-Americans did not start with affirmative action, but has been part of the history of our obsession with the color of a person’s skin.” Ihekwumere & Aka, \textit{supra} note 94, at 34.

\textsuperscript{143} \textit{See Gratz v. Bollinger}, 123 S. Ct. 2411, 2428–29 (2003); \textit{Bonilla-Silva, Racism Without Racists, supra} note 4, at 77, 83. Opponents to affirmative action view race-conscious programs as “punishing innocent whites who were not the perpetrators of pre-Brown racial discrimination . . . .” \textit{Spann, supra} note 89, at 8 (citing \textit{Brown v. Bd. of Educ.}, 347 U.S. 483 (1954)).

\textsuperscript{144} \textit{Bonilla-Silva, Racism Without Racists, supra} note 4, at 72.

\textsuperscript{145} \textit{See Gratz}, 123 S. Ct. at 2428–29; \textit{Bonilla-Silva, Racism Without Racists, supra} note 4, at 83.

\textsuperscript{146} \textit{Gratz}, 123 S. Ct. at 2428, 2429 (internal quotations omitted).

\textsuperscript{147} \textit{Id.} at 2429.
The sympathy that Chief Justice Rehnquist attempts to invoke for "innocent" whites who are allegedly hurt by affirmative action policies is undeserved.\textsuperscript{148} For example, in the context of college admissions, a study of five highly selective schools concluded that if whites filled all the open seats created by eliminating each school's respective affirmative action policy, "the overall white probability of admission would rise by only one and one-half percentage points . . . ."\textsuperscript{149} Statistics such as these led one commentator to compare bitterness toward race-targeted government programs to resentment against setting aside parking spaces for the handicapped.\textsuperscript{150} According to the analogy, eliminating a reserved space would have only a minuscule effect on parking options for non-disabled drivers, but the sight of the open space would frustrate many passing motorists looking for a space to park.\textsuperscript{151} Many are likely to believe, mistakenly, that they would have parked in the space had it not been reserved.\textsuperscript{152} Thus, empirical data reveals that the anti-affirmative action argument advanced by the "I Did Not Get a Job (or a Promotion), or Was Not Admitted to a College, Because of a Minority" story line is flawed and contributes to masking the racial reality in the United States.\textsuperscript{153}

In the Court's recent opinions on affirmative action, the use of the story lines of color-blind racism, like the use of color-blind frames and style, undervalue the breadth and depth of racism.\textsuperscript{154} The opinions place a color-blind blanket over a constitutional debate that demands acknowledgement that the ideal of equality among the races is still a distant dream.\textsuperscript{155} The Court's adoption of a color-blind ideology not only masks the irrefutable existence of a stark racial gap in higher

\textsuperscript{148} See id. at 2428–29; Bonilla-Silva, Racism Without Racists, supra note 4, at 83–84.

\textsuperscript{149} Greenberg, supra note 3, at 589; see also Simmons, supra note 3, at 39 (arguing that the myth that whites have been hurt and displaced by affirmative action policies is also unsupported in the context of employment).

\textsuperscript{150} Thomas J. Kane, Racial and Ethnic Preferences in College Admissions, in The Black-White Test Score Gap, supra note 52, at 431, 453; see also Greenberg, supra note 3, at 589.

\textsuperscript{151} Kane, supra note 150, at 453; see also Greenberg, supra note 3, at 589.

\textsuperscript{152} Kane, supra note 150, at 453; see also Greenberg, supra note 3, at 589.

\textsuperscript{153} See Bonilla-Silva, Racism Without Racists, supra note 4, at 83–84; Greenberg, supra note 3, at 589.


\textsuperscript{155} See Gratz, 123 S. Ct. at 2428–30; Grutter, 123 S. Ct. at 2339–40, 2343–44, 2346–47; Greenberg, supra note 3, at 538–46; Johnson, supra note 3, at 444–45; Simmons, supra note 3, at 35 n.28.
education, but it may also ultimately worsen this gap by bringing a premature end to affirmative action.  

**Conclusion**


The mechanisms of color-blind racism allow whites to advance positions that assure the perpetuation of white privilege. Under this color-blind guise, the arguments opposing affirmative action sound reasonable and moral. Yet individuals employ the frames, style, and story lines of color-blind racism to mask the fact that blacks still hold a second-class status in America. Thus, color-blind racism facilitates the perpetuation of racial inequality by obscuring the fact that there is even a problem to fix.

Although Bonilla-Silva only examines the use of color-blindness by the average white American citizen, an examination of the two recent Supreme Court decisions on affirmative action reveals that even the Court at times employs a color-blind ideology and minimizes the seriousness of the racial gap that still exists in the United States. Throughout the Court's opinions in *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Justices refuse to discuss race at a time when a discussion of racial inequality is imperative to highlight the continued importance of affirmative action to the black community. The Court's reluctance to

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158 Id.

159 Id. at 28.

160 Id. at 28–29, 53–54, 77.

161 Id. at 13–14.


163 See Johnson, supra note 3, at 442. Johnson calls upon the Court to include a discussion of racial inequality in its recent opinions on affirmative action. Id. The only Justice whose recent opinions stress the importance of closing the racial gap in higher education is Justice Ginsburg. See *Gratz*, 123 S. Ct. at 2442–46 (Ginsburg, J., dissenting); *Grutter*, 123 S. Ct. at 2347–49 (Ginsburg, J., concurring). Justice Ginsburg's opinions, and in particular, her dissenting opinion in *Gratz*, should be used by the Court as a foundation for a more color-conscious analysis of the constitutionality of affirmative action. See *Gratz*, 123 S. Ct. at 2442–46 (Ginsburg, J., dissenting); *Grutter*, 123 S. Ct. at 2347–49 (Ginsburg, J., concurring). Furthermore, in her dissent to *Adarand Constructors, Inc. v. Pena*, Justice Ginsburg
recognize the scope of racial inequality, and its insistence on couching its decisions in race-blind terms, assures wide-spread public approval and, unfortunately, assures blacks a second-class status.¹⁶⁴

The Court seems to have forgotten that the purpose of affirmative action is to remedy historic wrongs that have been committed against African Americans.¹⁶⁵ Make no mistake about it: centuries of slavery, oppression, and discrimination cannot be erased by twenty-five years of Court-sanctioned affirmative action.¹⁶⁶ Although the Court in Grutter approves of a limited use of race-conscious admissions policies, the Court's undervaluation of the African-American community's continued need for affirmative action—especially in higher education, where it is so vital to improving the community's social conditions—mislleads one into believing that affirmative action need not be around for long.¹⁶⁷

When race-talk is taken out of the affirmative action debate, the most important reasons for the program are lost.¹⁶⁸ While diversity is certainly an important goal, it should not come before the goal of assuring that each individual in this country is guaranteed equal opportunity irrespective of race.¹⁶⁹ The Court's use of color-blindness guts its recent opinions on affirmative action of the most compelling reason for the continuation of race-targeted programs: racial inequality.¹⁷⁰ As a result, Justice O'Connor's forecast, that affirmative action will end in

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¹⁶⁴ See Gratz, 123 S. Ct. at 2428–30; Grutter, 123 S. Ct. at 2339–40, 2343–44, 2346–47; Guinier & Torres, supra note 48, at 40–41.

¹⁶⁵ See Gratz, 123 S. Ct. at 2428–30; Grutter, 123 S. Ct. at 2339–40, 2343–44, 2346–47; Simmons, supra note 3, at 32–33. Americans "have forgotten the intent of affirmative action is to correct and to remedy historic wrongs and [seem] to believe the right-wing rhetoric against the policies and [are] supporting a return to the pre-civil-rights status quo, which upholds white skin privilege." Simmons, supra note 3, at 32–33.

¹⁶⁶ See id. at 38.

¹⁶⁷ See Grutter, 123 S. Ct. at 2347; Greenberg, supra note 3, at 607–08. Professor Greenberg contends that affirmative action in higher education aids blacks in improving their overall social conditions. Greenberg, supra note 3, at 607–08.

¹⁶⁸ See Bonilla-Silva, Racism Without Racists, supra note 4, at 182–85; Greenberg, supra note 3, at 604–08. Affirmative action can be defended as constitutional by viewing the policy as a means of improving the social standing of blacks. See Greenberg, supra note 3, at 607–08.

¹⁶⁹ See Bonilla-Silva, Racism Without Racists, supra note 4, 182–85; Greenberg, supra note 3, at 604–08.

¹⁷⁰ See Gratz, 123 S. Ct. at 2428–30; Grutter, 123 S. Ct. at 2339–40, 2343–44, 2346–47; Bonilla-Silva, Racism Without Racists, supra note 4, at 2, 3.
another twenty-five years, is likely to come true long before our country has made the gains necessary to ensure racial equality.\footnote{See Grutter, 123 S. Ct. 2346–47; Loury, \textit{supra} note 48, at D1. As Professor Loury noted in reference to Justice O'Conor's "twenty-five years" prediction:}

\begin{quote}
Although the legal significance of \ldots [Justice O'Connor's] speculation is uncertain, the fact that this statement appears in the opinion should serve as a clear warning to supporters of affirmative action. We must not rest on our laurels. This recent victory may well be our last, and its benefits may be short-lived. Unless over the course of the next generation the dramatic underrepresentation of blacks and Hispanics among top academic performers is remedied, their access to selective institutions of higher education may one day be severely curtailed.
\end{quote}

Loury, \textit{supra} note 48, at D1.